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# Justice is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges

Holger Spamann\*      Lars Klöhn<sup>^</sup>

Abstract: We experimentally investigate the determinants of judicial decisions in a setting resembling real-world judicial decision-making. U.S. federal judges ( $N=32$ ) spend 55 minutes judging a real appeals case from an international tribunal, with minor modifications to accommodate the experimental treatments. The fictitious briefs focus on one easily understandable issue of law. Our  $2 \times 2$  between-subject factorial design crosses a weak precedent and legally irrelevant defendant characteristics. In a survey, law professors predicted that the precedent would have a stronger effect than the defendant characteristics. In actuality, the precedent has no detectable effect on the judges' decisions, whereas the two defendants' affirmance rates differ by 45% ( $p < .01$ ). Judges' written reasons, on the other hand, do not mention defendant characteristics at all, focusing instead on the precedent and other legalistic and policy considerations.

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## 1 Introduction

Judges are supposed to decide cases neutrally according to the law. In their written opinions, judges justify their decisions with reference to authoritative legal sources – precedents and statutes – even when these sources are not clear. In such cases, lawyers have long understood that the full explanation of the decision must include other factors, whether or not the judge states or even perceives them explicitly. As Llewellyn (1940) wrote 75 years ago, the real question is *which* other factors come into play, and *how much* they influence the decision (e.g., Kennedy 1998; Simon 1998; Leiter 2003; Epstein et al. 2013). Some factors are almost universally accepted as relevant, particularly moral or policy considerations (which are indeed considered *legal* factors by some writers). By contrast, others are officially shunned. For example, the biography and character of a criminal defendant should not matter for the determination of guilt in the technical legal sense, particularly the definition of the crime, however relevant such factors might be for lay attributions of blame (cf. Nadler 2012; Nadler and McDonnell 2012). We have almost no convincing evidence, however, *to which extent* the legal system achieves this goal.

In this paper, we report findings from an experiment testing the effect of legally relevant and irrelevant factors side by side. Our 2×2 factorial between-subject design preserves key attributes of real-world judicial decision-making. Real judges reviewed a full set of legal briefs and materials for almost one hour before rendering a decision with written reasons. The case was based on a real appeals case from the International Criminal Court for the Former Yugoslavia (ICTY). The judges were randomly assigned one of two defendants and one of two precedents. One of the precedents weakly favored the defendant's position (*obiter dictum*), whereas the other weakly disfavored it (based on distinguishable facts). The precedent was the focus of the briefs and the judges' written reasons but had no detectable effect on the judges' decisions. By contrast, the second, legally irrelevant variation had a strong effect. Of the judges who judged a nationalist, hateful Serb defendant, 87% upheld the conviction, as opposed to only 41% of the judges who judged a conciliatory, regretful Croat defendant. The judges' written reasons show no awareness of this effect. In a survey, law professors had predicted the opposite result, i.e., that even the weak precedent should matter more for the outcome than the defendant.

The key features of our design are its realism, particularly the intensive participation of real judges, and the side-by-side comparison of legally relevant and irrelevant factors. The latter feature is crucial because as noted above, the existence of *some* extra-legal influences on judicial decisions is not in serious dispute. The interesting question is their strength relative to those of the legally relevant factors. In particular, it would hardly be reassuring if one found that a particular irrelevant factor does not matter but neither do the factors that should, in particular those that the judges mention in their written opinions. This is not to say that our experiment is able to test the strength of legally relevant and irrelevant factors in general. We test particular legal factors against particular irrelevant factors. In particular, we test a weak precedent against certain defendant characteristics. We might obtain completely different results if we tested a strong precedent, or if we tested it against the racial or political influences that stir most controversy in the U.S. We put at least one point on the map, however, and this point fits better with some views of the general landscape than with others. We document explicitly that the result is *not* consistent with law professors' prior views: Our results differ strongly from law professors' predictions, which we elicited in a survey.

Realism matters because specificities of judges and the legal process might well have deep effects on legal reasoning as practiced in courts. General psychology furnishes plenty of reasons to be very skeptical of neutral legal reasoning.<sup>1</sup> Indeed, some realist lawyers such as Frank (1930) prominently endorsed such skepticism. As other realist lawyers like Llewellyn (1940) have long pointed out, however, judges are not merely human – they are humans with a particular ability, training, and expertise, and they are embedded in institutions, that might well allow them to do considerably better at objective reasoning tasks than average humans. First, judges are professionals that are highly trained and selected specifically to interpret the legally relevant factors and ignore the irrelevant ones (Spellman and Schauer 2012; Kahan 2015). Second, characteristic features of the judicial process may inoculate judges against the influence of legally irrelevant factors. In particular, accountability induced by the need to give written reasons may reduce the impact of irrelevant factors (Lerner et al. 1998), albeit not always (Norton et al. 2004). Similarly, having time to reflect on the issues presented might eliminate hunches driven by legally irrelevant factors (analogous to Paxton et al. 2012), notwithstanding counterexamples (Schwitzgebel and Cushman 2015). Our results suggest that judges in these conditions ultimately behave much like regular lab participants. It is essential, however, to establish such similarity empirically (Spellman and Schauer 2012; Kahan 2015).

Many experiments have examined heuristics and biases in legal fact finding, damage awards, and sentencing with both judge and lay subjects.<sup>2</sup> By contrast, few experiments examine legal reasoning such as statutory interpretation.<sup>3</sup> The only ones to do so with real judges are Wistrich et al. (2014) and Kahan et al. (2015) (briefly described below). Unlike our study, however, these two studies (1) provided context for the decision only as a vignette, thus creating much less immersion in the case;<sup>4</sup> (2) did not ask for written reasons, thus imposing less accountability and being unable to study the judges' subjective reasons; and (3) did not cross-vary the law, thus being unable to compare the strength of the emotional/political effect to the strength of a legal effect. Kahan (2010) is the only experiment comparing the effects of legal and extra-legal factors (using lay subjects).

With one possible exception, the results of the prior studies are consistent with ours. In particular, Wistrich et al. (2014) also find that judges are affected by litigants' valence in cases ostensibly turning on the interpretation of a statute or similar legal questions. Like us, Wistrich et al. (2014) randomly assigned judges to sympathetic or unsympathetic defendants in otherwise identical cases. By contrast, in Kahan et al. (2015), defendants were not sympathetic or unsympathetic *per se*. Rather, the appeal of the randomly assigned defendants' actions in Kahan et al. (2015)—pro- or anti-immigrant; pro-life or

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<sup>1</sup> We do not purport to differentiate between these reasons, i.e., we remain agnostic about any particular psychological mechanisms. To give just one example, if competing objective standards lead to different outcomes, people may unconsciously choose whatever standard justifies their preferred outcome, creating merely an illusion of objectivity (Norton et al. 2004). Similarly, decision-makers tend to perceive information in a biased manner once they have developed an initial inclination towards one option (DeKay 2015; Russo 2015), as a judge might after initial exposure to the facts. On motivated reasoning in law generally, see Sood (2013).

<sup>2</sup> For example, English et al. (2006); Guthrie et al. (2007); Rachlinski et al. (2009, 2013); Kahan (2010); Kahan et al. (2012); Nadler and McDonnell (2012); Sood and Darley (2012). The latter four articles concern the assessment of legally charged complex facts such as causation or consent, which straddle the boundary between fact and law's application to fact.

<sup>3</sup> Holyoak and Simon (1999); Simon et al. (2001); Braman and Nelson (2007); Furgeson et al. (2008a, 2008b); Wistrich et al. (2014); Kahan et al. (2015).

<sup>4</sup> Presumably, the experiments in Wistrich et al. (2014) and Kahan et al. (2015) were also much shorter.

pro-choice—depended on subjects’ political predisposition. Kahan et al. (2015) found that lay subjects’ and law students’ responses varied in accordance with these predispositions. For example, “liberal” lay subjects were more likely to find a violation by anti-immigrant activists than by pro-immigrant activists. However, judges and lawyers did not exhibit such differential responses. A possible reconciliation of these results with ours and with Wistrich et al. (2014) is that judges and lawyers have been trained to disregard cultural-political but not personal implications. Another possibility that would reconcile the results of Kahan et al. (2015) with ours – but not with Wistrich et al. (2014) – is that the greater cognitive load in our experiment (and, arguably, in reality) interferes with controlled cognition (cf. Greene et al. 2008). The discrepancy remains an important challenge for future research. Finally, we note that differences between judges (as observed on panels or through random assignment to individual cases) demonstrate the importance of factors beyond statutes and precedents (because statutes and precedents are uniform for all judges), but they do not reveal *which* other factors matter (e.g., judicial philosophy vs. racial bias), or how their influence compares to statutes and precedents.

The paper is structured as follows. Section 2 describes the experiment in detail. Section 3 reports law professors’ predictions for the experiment, which we elicited in an online survey. Section 4 presents the results of the actual experiment. Section 5 discusses implications and ecological validity. Section 6 concludes. The main materials used in the experiment and the associated survey of professors are reproduced in the online appendix.

## 2 Experimental Design

### 2.1 General Approach

We briefly outline some high-level design choices before discussing details of the design in the subsequent subsections. We defer a detailed discussion of ecological validity to section 5.2 below.

Our experiment aimed to study the effects of legally relevant and irrelevant factors under conditions that unite the key features of judicial decision-making in the real world. For this purpose, we had real judges decide a real case with briefs and legal materials for one hour in the setting described in subsection 2.2. These conditions correspond roughly to a single judge ruling on a motion without a hearing under severe time constraints. We do not purport to recreate the conditions of high stakes, long duration, multi-judge proceedings such as those at the U.S. Supreme Court.

To study the effect of legal materials, we needed to be able to vary these materials without arousing suspicion by knowledgeable judges. For this reason, we chose the international case described in subsection 2.3 on the assumption – borne out by an exit questionnaire – that the U.S. judges would be unfamiliar with the applicable law. At the same time, the legal question was simple and familiar enough for the judges to understand with ease. We chose an appeals case because appeals cases are limited to legal questions, which are the focus of our study.

The legally relevant factor we study is a *weak* precedent, as described in subsection 2.4. This is a suggestive but not binding decision by another court or panel, which tend to form the basis of appellate opinions (or more generally of opinions in cases where the law is not clear). We did not test the common(-sense) conjecture that a *strong* precedent (or statute, for that matter) would reduce or even eliminate interpretative leeway and hence the effect of legally irrelevant factors. As regards the legally irrelevant factors, our design cumulated three (nationality, political views, remorse) because we did not

know which, if any, might matter, and because their much less prominent position in the written materials might lead them to be overlooked in the experiment (as opposed to a real world courtroom). We did not attempt to disentangle which of the three legally irrelevant factors had an effect, if any, or through which psychological mechanisms they would do so (cf. Spellman 2010). For this reason, our design did not need to address the possibility that small, incidental differences such as the sound of the defendant's name or the layout of the briefs had an effect: from our perspective, all that matters is that these differences are legally irrelevant.

## 2.2 Setting

We conducted the experiment at a three-day workshop for U.S. federal judges organized jointly by Harvard Law School and the Federal Judicial Center in April 2015. All participants were U.S. federal judges including circuit judges, district judges, bankruptcy judges, and magistrates.<sup>5</sup> The experiment was part of a session on “Behavioral Research on Judicial Decision-Making” in the middle of the second morning. Several weeks earlier, the judges had received an invitation to the experiment with all consent-relevant information (online appendix A.1.1) and a reading “assignment”: Guthrie et al. (2007), which discusses biases in judicial fact-finding. The experiment was administered on iPads we provided to the judges.

One of the experimenters (HS) welcomed the judges, reminded them of the experiment as described in the invitation letter, and pointed them to the iPads (online appendix A.1.2). Three student assistants distributed and collected the iPads and were available for help with technical questions; they did not know what the experiment was about.<sup>6</sup> The experimenter stayed in the room but did not interact with the subjects. Participation was voluntary but all the judges present in the room participated in the experiment.<sup>7</sup>

The opening screen of the iPads reminded the participating judges of the invitation letter, which they could click to read. After confirming that they had read the letter and agreed to participate, the judges were shown an instruction page that described their task to them (online appendix A.1.3). 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.<sup>8</sup> The case is described in more detail below. 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 (online appendix A.1.4), briefs for the defendant (appellant) and the prosecution (appellee) (online appendix A.1.5 and A.1.6, respectively), the ICTY statute, the judgment from the ICTY's trial chamber

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<sup>5</sup> At the time of the experiment, no circuit judge may have been present. We refrained from collecting this information out of concern for preserving anonymity.

<sup>6</sup> The student assistants received few requests for help. The judges seemed comfortable with the technology – almost all arrived at the seminar room with their own tablet or laptop computer.

<sup>7</sup> We lost some small number due to technical problems, see footnote 15 below.

<sup>8</sup> Concretely, the instructions asked the participants "to judge whether the defendant is or is not guilty." This language is technically imprecise because the direct determination of guilt is generally considered a question for the trial court, whereas appeals courts decide whether to reverse or affirm. As we discuss in section of 5.2, we believe this distinction to be without consequence for the experiment and its ecological validity.

below (roughly 165,000 words), and one precedent from the ICTY's appeals chamber (roughly 37,000 words) 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 briefs and statement of facts each ran under 1,000 words (2 pages). We created these documents from scratch. The instructions recommended reading the briefs and statement of facts in full, and consulting the other documents (trial judgment, precedent, statute) as necessary. These other documents were obviously much too long to be read in their entirety 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. Some went slightly over time; many finished early. On average, the judges spent 35 minutes (s.d. 10) with the materials before proceeding to judgment.<sup>9</sup> 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 guilty/not-guilty and, in a text field below, brief bullet point reasons for their decisions. Alternatively, the judges could write their reasons on a piece of paper and link it to the rest of their session by noting a randomly generated code on the paper. 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. Several minutes later, the last ones did.

### 2.3 Legal Context

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>10</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>11</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.

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<sup>9</sup> The mean and standard deviations were calculated using only the observations without the technical issue described in footnote 15 below.

<sup>10</sup> *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, judgment of the trial chamber of 9/6/2011.

<sup>11</sup> *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, judgment of the appeals chamber of 2/28/2013.

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, 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.

We wrote the statement of facts and the briefs 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.

## 2.4 Treatments

We randomly assigned judges to one of the four groups formed by crossing two precedents with two defendants. The randomization mechanism was designed to create groups of equal size.<sup>12</sup> The briefs and the statement of facts were adjusted accordingly.

### 2.4.1 Precedents: *Vasiljević* or *Šainović*

The two precedents were the *Vasiljević* or the *Šainović* decisions of the ICTY appeals chamber.

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>13</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.”<sup>14</sup> Moreover, *Šainović* had upheld the defendant’s conviction for aiding and abetting even in the absence of “specific direction.”

These precedents were suggestive but not determinative, as our briefs for the opposing side took pains to point out. *Vasiljević* had defined aiding and abetting only in passing in a discussion of a different mode of liability, the so-called joint criminal enterprise. As such, the definition had not been outcome determinative in *Vasiljević*, i.e., it had been *obiter dictum* in legal terminology. It is widely understood that such passing references are not binding on other courts. In *Šainović*, the rejection of “specific direction” had arguably been determinative for upholding the conviction of the defendant. But *Šainović* had not raised the thorny policy issues of the *Perišić* case because the defendant in *Šainović* had been part of the same chain of command as the immediate perpetrators and physically present in the war zone. Hence *Šainović* had arguably concerned a different question and could thus be distinguished – i.e., qualified as not relevant – by a competent lawyer. Moreover, it is not clear – and we intentionally did

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<sup>12</sup> Actual group sizes differ because some iPads froze as described in footnote 15 below.

<sup>13</sup> *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, at para. 102 (emphasis added).

<sup>14</sup> *Prosecutor v. Šainović*, Case No. IT-05-87-A, at para. 1649.

not specify – if precedents are formally binding or merely guiding authority in the ICTY. Finally, the *Šainović* variant of the prosecution's response brief contained an unintentional typo ("required" instead of "rejected") in its second out of three references to the precedent's holding (online appendix A.1.6, paragraph 4) (according to their written reasons, however, none of the judges were misled by this).

We made some minor modifications to the precedents to fit them into our case. We changed the date of *Vasiljević* from 2004 to 2014 (i.e., after the date of our trial decision) to make it seem natural why the trial court had not referenced the precedent. *Šainović* was decided in 2014 anyway. By contrast, *Šainović's* discussion of specific direction made extensive references to the actual *Perišić* decision of (another panel of) the appeals chamber, thus implying that there must be another important precedent supporting the opposite outcome. To remove this implication, we changed the text such that the arguments from the *Perišić* appeal judgment referenced in *Šainović* were instead put forward by the defendant in that latter case.

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

The two defendants differed in their nationality, biography, and attitude. We chose these attributes and their depiction to be clearly irrelevant from a strictly legal perspective, at least for the decision at hand. In particular, all the defendants' activities and statements (described below) occurred long after the crimes in question (approximately two decades later). They could not reasonably be interpreted to provide any clues about the defendant's mental state at the time of the crime. Even if they did, this would be legally irrelevant because according to the ICTY and our briefs, "specific direction" is an element of the *actus reus* (the defendant's actions) rather than the *mens rea* (the defendant's state of mind). Accordingly, our briefs did not make any reference to the defendant's activities and statements in relation to the question of guilt (nor, for that matter, did the written reasons of the participant judges). Defendants' biographies and attitudes are demonstrably important for lay attributions of blame and perhaps even for sentencing (i.e., the length of criminal sentences), but modern legal systems make a strong point of excluding these factors for the determination of guilt in a technical sense (i.e., whether a punishable crime was committed in the first place) (cf. Nadler 2012; Nadler and McDonnell 2012).

We created two fictitious defendants to avoid the possibility that the judges might recognize a name and be influenced by factors outside of those we provided in the experiment. We named these defendants Borislav Vuković (a fictitious unsympathetic Serb) and Ante Horvat (a fictitious sympathetic Croat).

Vuković's facts and trial judgment were identical to the original *Perišić* facts and trial judgment except for two war crime locations and the name and some biographical information of the main defendant. As noted above, we omitted all passages relating to Zagreb. We also changed all references to Srebrenica to "Vlasenica" because we thought that the (real) Srebrenica massacre was too notorious to find a credible Croat equivalent (see next paragraph). We made only two substantive, fictitious changes to the *Perišić* original. First, we added the following biographical sentence to the statement of facts and the trial judgment facts: "He held this position [as the army's chief of staff] until his mandatory retirement from the [army] in 2004, when he became advisor to the [Yugoslavian] government for 'the rehabilitation of Serb victims of Albanian persecution' and chairman of the United Serbia Party." Second, the fictitious brief for the prosecution noted in its closing passage that the defendant "has publicly mocked this tribunal and repeatedly inflamed lingering tensions with inflammatory public statements showing absolutely no regrets about the horrors of the war in general, and the war crimes he supported

in particular.” This statement was supported by a footnote. See the full documents in the online appendix for details.

Horvat's facts and trial judgment were identical to Vuković's, with the following three exceptions. First, we changed all names of Yugoslav and Bosnian-Serb persons, institutions, and places to their Croat and Bosnian-Croat equivalents. In particular, we changed Vlasenica to Ahmići, and Sarajevo (which was besieged by the Bosnian Serbs) to Mostar (which was besieged by the Bosnian Croats). Second, we tried to exploit the fact that Western audiences generally perceived Croatia's role in the war more positively than Serbia's. To reinforce this association, our (fictitious) facts noted in passing that Horvat had contacts with NATO during the war. Third, we changed the two fictitious bits of information relating to the accused's post-war behavior. After retirement, Horvat “became vice-chairman of the Croatian-Bosnian Reconciliation Commission.” The prosecution does not comment on Horvat's attitude. Instead, the defense notes in closing: “From the very beginning of this case, the defendant has expressed his deep regret at all bloodshed in this tragic war, and in particular at the inexcusable crimes of certain soldiers and officers in the field. He categorically denies, however, that he is personally responsible for those crimes. We urge the Appeals Chamber to affirm that the law is on the side of the defendant and others forced by history to make difficult decisions in times of war, and to overturn the conviction by the Trial Chamber.” See the full documents in the online appendix for details

These descriptions may seem blunt in isolation. It is important to emphasize, however, that they were embedded in longer documents in arguably natural ways. If anything, we were concerned that the judges would overlook these passages.

### 3 Priors: Survey of Law Professors' Expectations

Based on our experience as lawyers and the legal literature, we expected both legally relevant and irrelevant factors to have equally sizeable effects on the decision. The precedents were weak, but the judges had little else to fall back on and little time to develop their own theory of ICTY law. The differences between the defendants were sizeable, but hidden in a few sentences. Concretely, we expected both treatments to shift the affirmance probability by about 40 percentage points. That is, we expected that most judges would overturn Horvat's conviction under the *Vasiljević* precedent and affirm Vuković's conviction under the *Šainović* precedent, and the other two combinations to fall somewhere in the middle. Such effect sizes have been observed in comparable experiments with lay subjects (e.g., Norton et al. 2004; Norton et al. 2007).

To verify that our treatments represented interesting variation, however, we surveyed law professors about their expectations for the experiment. We emailed a brief description of the experiment to all tenured faculty at four of the top ten US law schools and to a randomly selected subset at the six others. The email invited recipients to submit their expectations of effect sizes (none, modest, or strong) via an anonymous link. The response rate was over 25% at the first four schools and 17% at the latter six. The full text of the email and survey is reproduced in online appendix A.2.

In the interest of achieving a decent response rate, our email's description of the experiment had to be brief. Any brief description inevitably leaves many details to the respondents' imagination. We hope that the email's information was sufficient, however, for respondents to have the right idea about the key variations in the experiment whose effects they were asked to predict. In particular, the survey sent to

faculty at the latter six schools explicitly listed the key attributes of our defendants, describing them as “a regretful, conciliatory Croat or a hateful, nationalist Serb.” (At the former four schools, we described the defendants either as “a likeable Croat or an unsympathetic Serb,” with virtually identical results.) This description arguably made the defendant differences appear more prominent than they really were because it did not mention that they were discreetly interspersed in just a few sentences. As to the precedents, the email described them as “dicta or distinguishable (because the precedent involved primary perpetrators in the same formal organization as the accused).” This description does not mention that the “dicta” in *Vasiljević* was a mere definition without extended discussion, and hence rather weak even within the class of *obiter dicta*. On the other hand, the email’s description also did not point out that the discussion in *Šainović* aimed directly at the prior panel’s decision in our case, making it a rather strong precedent as far as distinguishable precedents go. Overall, our email’s description arguably gave an accurate idea of the distance between the two precedents.

Table 1 summarizes the professors’ responses. Most professors expected both the precedent and the defendant to have an effect, notwithstanding the fact that the precedent was weak and that the defendant characteristics were legally irrelevant. The professors also thought, however, that the precedent would have a stronger effect than the defendant. 66 professors thought the precedent’s effect would be stronger, whereas only 13 thought the opposite. A Wilcoxon signed-rank test overwhelmingly rejects the null hypothesis that the average professor expected the defendant to have as strong an effect as the precedent.

Table 1. Law professors’ expectations of effect sizes (N = 102)

		Precedent			Total
		None	Modest	Strong	
Defendant	None	2	28	9	39
	Modest	2	18	29	49
	Strong	3	8	3	14
	Total	7	54	41	102

Wilcoxon signed rank test of defendant vs. precedent effect:  $p < 1.4 \times 10^{-8}$

## 4 Results

Table 2 summarizes participant judges’ actual decisions by treatment condition. The precedent treatment varies along the horizontal axis, and the defendant treatment along the vertical axis. For each of the four defendant-precedent combinations, the table shows the fraction of the judges that upheld the conviction. (Recall that each judge only received one of the two precedents and judged only one of the two defendants.)

Table 2: Fraction Affirmed (Guilty) ( $N=32$ )<sup>15</sup>

	Precedent		Total	
	<i>Vasiljević</i> (favorable to defendant)	<i>Šainović</i> (unfavorable to defendant)		
Defendant	Horvat (sympathetic)	0.50 (3/6)	0.36 (4/11)	0.41 (7/17)
	Vuković (unsympathetic)	0.75 (6/8)	1.00 (7/7)	0.87 (13/15)
	Total	0.64 (9/14)	0.61 (11/18)	0.63 (20/32)

Boschloo unconditional exact tests:  
 (two-sided)       $Vuković - Horvat = 0.45; p < 0.01$   
                           $Šainović - Vasiljević = -0.03; p = 1.00$   
                           $(Vuk. \wedge Vas.) - (Hor. \wedge Šai.) = 0.39; p < 0.11$

<sup>15</sup> Cell sizes (i.e., number of participants per precedent-defendant combination) differ by more than one observation because some iPads froze, interfering with randomization, but there is no reason to think that these failures biased our results.

When an iPad froze, the student assistants gave the participant a new one. The randomization mechanism, however, compensated for the frozen iPads only if the participation was explicitly cancelled, which the freezing generally prevented. Treatment conditions with higher freezing rates would therefore have smaller cell sizes in the ultimate participations (freezing rates were not exactly equal, even though the differences were not statistically significant). Group sizes including frozen participations were 12, 11, 10, and 10 (the two-subject discrepancy between 12 and 10 presumably arose from one explicitly cancelled participation in the 12-member group).

It is likely that a participant affected by freezing subsequently received an iPad with a different defendant-precedent treatment combination (we did not have a process for transferring participations). This is not a problem if the freezing occurred before the participant read the instructions because the only materials up to then – the consent form – did not differ by treatment condition. The instructions themselves only differed in a very minor way, namely the name of the defendant and the military group he supported (which at that stage would not have meant anything to the participants). It hardly affects the results, however, if we exclude the five participations that began after the first unfinished participation proceeded beyond the instruction stage (approximately 2 minutes into the experiment): the Fisher exact  $p$ -value for the defendant effect is now 0.018, and there still is no precedent effect at all.

There is no reason to think that the freezing induced bias. The freezing resulted from the large size of the ICTY judgments included in the materials (trial judgment and precedent). To induce bias, the freezing would have had to be correlated with the potential outcomes in our experiment. For example, iPads would have had to be more likely to fail for participants who judged Horvat's appeal and would have confirmed, or who judged Vuković's appeal and would have reversed. It is theoretically possible that participants with such inclinations were more likely to click on certain documents in a certain order that caused the operating system to choke. We see no indication for this in the code, the click data, or the treatment-specific drop-out rates. In particular, an almost equal number of Horvat (5) and Vuković (6) treatments failed. Among the Vuković treatments, an equal number of *Sainović* and *Vasiljević* treatments failed (3 each). The only asymmetry is that more Horvat-*Vasiljević* combinations (4) than Horvat-*Sainović* combinations (1) failed, which should if anything have worked against the finding of a defendant effect because *Vasiljević* favored the defendant.

The table shows that the precedent made no detectable difference in our sample: The affirmance rates are almost exactly identical for both precedents. By contrast, the conviction of the unsympathetic defendant (Vuković) was upheld at more than twice the rate as the sympathetic defendant's (Horvat's). 87% of the judges upheld Vuković's conviction, whereas only 41% upheld Horvat's. This difference is not only substantively but also statistically very significant. If the two defendants' true affirmance probabilities were equal (null hypothesis), we would observe such an extreme sampling difference with less than 1% probability, even in as small a sample as ours. We calculate this and all other  $p$ -values using exact methods, i.e., we do not rely on large-sample approximations.<sup>16</sup>

We have verified that our results are not explained by observable confounding factors, which might fortuitously be present in our sample in spite of randomization. Neither defendant nor precedent differ significantly by the participants' personal characteristics we collected in the exit survey ( $N=30$ ), namely age group, gender, professional background (prosecutor or defender), and prior knowledge of international criminal law. The only exception is that all 7 female participants were fortuitously assigned defendant Horvat. But controlling for gender does not change our results at all.<sup>17</sup> Finally, our results are also unchanged if we exclude certain suspicious observations.<sup>18</sup>

In view of our small sample size, it is worth emphasizing that our results are not only improbable under the null hypothesis (as summarized by the  $p$ -value) but constitute strong affirmative evidence for the alternative hypothesis that Horvat would receive (considerably) more lenient treatment. Under conservative ancillary assumptions, our results yield a Bayes factor of 15 for this alternative over the null.<sup>19</sup> The Bayes factor is the ratio of the (rational) posterior odds to the prior odds in favor of one

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<sup>16</sup> The Boschloo unconditional exact test we use in table 1 is the recommended conceptually superior, uniformly more powerful generalization of the better-known conditional Fisher exact test (Mehrotra et al. 2003). The  $p$ -values from Fisher exact tests corresponding to those reported in Table 2 are 0.01, 1.00, and 0.17, respectively. A standard large-sample  $z$ -test would yield smaller  $p$ -values (e.g., 0.008 for the defendant effect), while the "Bayesian  $p$ -value" using Howard's (1998) standard conservative prior is slightly larger at 0.014. In the robustness checks reported in footnotes 18 and 15, we refer for simplicity to the (excessively conservative) Fisher test.

<sup>17</sup> We linearly regressed affirmance on defendant, precedent, and controls. The controls were gender alone or in combination with other participant characteristics. We calculated standard OLS, robust, and bootstrap standard errors. In all permutations, the defendant coefficient is less than -0.45 with a  $p$ -value below 2% in all permutations, whereas the precedent point estimate is close to zero and statistically insignificant.

<sup>18</sup> First, our results would be even stronger if we excluded two participants that submitted a judgment but did not formally finish the experiment. One participant cancelled the participation after submitting a judgment, and another did not formally end the experiment with the "finish" button. Excluding these two observations reduces the Fisher exact  $p$ -value for the defendant effect to 0.007.

Second, our results are unaffected by correcting or excluding judgment based on inconsistent or missing written reasons (marked with an X or an asterisk in A.3). Participants' reasons reveal that three of them erroneously acquitted the defendant, i.e., the written reasons support affirmance (guilty) but the judgment entered was reversal (not guilty). This affected both nationalities and both precedents, however, and hence correcting these barely changes the results: the Fisher exact  $p$ -value for the nationality effect is still 0.018. Similarly, if in addition to this correction we exclude the three judges who did not write down reasons at all, the Fisher exact  $p$ -value remains low at 0.08 or 0.003, depending on whether we otherwise retain the full sample or also exclude the two participants who did not formally finish. Finally, if we also exclude the one judge who overrode the factual stipulation that the defendant "had rendered practical assistance," we are left with a sample of 21 observations and yet still obtain a highly significant result for the defendant effect ( $p=0.006$ ).

<sup>19</sup> Calculation of the Bayes factor requires specification of (a distribution over) the details of the competing hypotheses. We conservatively use completely agnostic (flat) priors. That is, we assume that Vuković's affirmance

hypothesis over another (Jeffery 1939; Kass and Raftery 1995). That is, someone who initially gave a mere 1/16 chance to the possibility that Horvat would be treated more leniently should now be in equipoise, whereas someone who was initially in equipoise should now favor the existence of such an effect 15:1.

Of particular interest is the comparison of precedent and defendant effect sizes. Without imposing any additional structure, only 19 observations are informative for this comparison: those with a precedent favoring the unsympathetic defendant (*Vuković-Vasiljević*), and those with a precedent disfavoring the sympathetic defendant (*Horvat-Sainović*). (In the other observations, both factors work in the same direction and hence cannot be distinguished.) The difference between these two groups' affirmance rates is 75% – 39% = 36%. While insignificant at conventional levels ( $p < 0.11$ ), this difference is quite informative in the sense that it gives a Bayes factor of 8.7 for the comparison of defendant and precedent effects.<sup>20</sup> To make this more concrete, consider that before the experiment, only 13 of the 102 law professors thought that the defendant would matter more than the precedent. If one treated the distribution of survey answers as a “collective prior,” the posterior odds should thus be  $13/(102-13) \times 8.7 = 1.27$ . That is, after the experiment, “the professoriate” should view it as more likely than not that the (legally irrelevant) defendant characteristics mattered more for the outcome than the weak precedent.

The judges' written reasons, however, entirely disregard defendant characteristics and focus on the precedent. Online appendix A.3 reproduces these reasons verbatim. The majority of the judges (20) engaged the precedent. By contrast, only one participant mentioned a defendant characteristic that was not shared by the two defendants (remorse), and only to dismiss it as legally irrelevant. In general, the judges' written reasons discuss the legal issues in a tone that one would find in real legal decisions (but understandably in less polished language, grammar, and orthography), mentioning both legal and policy considerations but not personal attributes of the defendants.

On the surface, the participants thus followed the standard legal model and did not assign any relevance to factors that legally should not be relevant. But the participants were slightly more likely to mention (73% vs. 67%) and, if they mentioned it, significantly more likely to follow (75% vs. 33%,  $N=20$ , one-sided  $p=0.085$ ) the precedent when it helped the sympathetic defendant or hurt the unsympathetic defendant.<sup>21</sup> Given the anonymity and zero stakes of the experiment, we think that this selective use of precedent was most likely unconscious. In any event, the discrepancy between professed reasons and actual drivers of decisions is familiar from experiments with lay people (e.g., Norton et al. 2004).

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probability  $p_V$  was initially equally likely to be anywhere between 0 and 1, and that Horvat's affirmance probability was (1)  $p_V$  under the null and (2) equally likely to be anywhere between 0 and  $p_V$  under the alternative. We would obtain an even larger Bayes factor if we had centered (2) around our personal prior of a 40% effect, which was close to the difference we ultimately observed. Inversely, we would obtain a smaller Bayes factor if we centered (2) around a small effect size, perhaps on the theory that the effect cannot plausibly be large. Given the large effect sizes observed in related experiments (e.g., Norton et al. 2004; Norton et al. 2007), we would find this theory itself implausible.

<sup>20</sup> We again use completely agnostic (flat) priors within each hypothesis as explained in the previous footnote, and consider effects in the predicted direction (i.e., lower affirmance rates for Horvat and under *Vasiljević*).

<sup>21</sup> The reported  $p$ -value is from a Fisher exact test. A standard  $z$ -test of equal proportions gives a (one-sided)  $p$ -value of 0.035.

If judges are moved by defendant characteristics but must motivate their decision based on precedent, then a conflict between the two complicates the judges' task. Thus we might expect the judges to need more time with the legal materials if the defendant is sympathetic but the precedent favors affirming the conviction, and vice versa (cf. Kennedy 1998). In our sample, judges spent on average about two minutes more with the legal materials (precedent and statute) when faced with such a conflict. This difference equals only about one standard deviation, however, and is thus not statistically significant.

## 5 Discussion

### 5.1 What legal models are inconsistent with our findings?

Our results do not “reject the legal model” or show that “law does not matter.” As mentioned before, the precedents were intentionally chosen to be weak precedents, whereas strong precedents might have been determinative. To the extent the majority of trial cases turn on the facts against the background of strong precedents or otherwise clear law, our results have little immediate application to them (but similar results from fact-finding experiments do, e.g., Guthrie et al. 2007).

Nevertheless, the present results are important for understanding the limits of legal reasoning relative to other influences on judicial decision-making. A good lawyer should be able to circumvent the weak precedent, as the judges did in our experiment. At the same time, weak precedents are frequently invoked as persuasive authority by judges and other participants in the legal system. Indeed, the participants in our experiment dedicated much of their written reasons to a discussion of the precedent, and to the extent they followed it, tended to portray this as legally required. If weak precedents actually have no impact on the outcome at all, as in our experiment, then such attention seems irrelevant, ritualistic, or even misleading, albeit unbeknownst to the judges themselves.

Moreover, the very idea of judging according to the law is that legally irrelevant factors should not influence the decision. This idea is challenged by the strong impact that our description of the defendant seems to have had on judge-participants' decisions. Especially striking is the contrast of the effect of the defendant, which should not matter, to the absence of a detectable effect of the precedent, which judges treated as if it should matter.

To be sure, one might think that the law must displace non-legal considerations only when the law is sufficiently determinate. But courts, particularly higher courts, routinely decide cases on the basis of law that is as unclear as in our experiment. The case in our experiment was, after all, derived from a real case at the ICTY. Like other courts, the ICTY's aspiration is to be completely impartial, “tak[ing] no side in the conflict” and determining guilt solely on the evidence presented.<sup>22</sup> Our participants were not ICTY judges, but their commitment to this aspiration seems clear from their written reasons and the self-image of the US judiciary. Again, sophisticated observers have long understood that the idea cannot be realized in pure form, but our survey shows that law professors still underestimated the degree of impurity.

### 5.2 Ecological validity

We carefully designed our experiment to capture the defining features of real-world judicial decision-making. We provided the full setting of a real case including briefs on both sides, a live legal question,

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<sup>22</sup> See <http://icty.org/sections/AbouttheICTY> (visited 10/11/2015, archived at <http://perma.cc/ZN6A-FEWU>).

and legal materials to consult. We gave the judges time to absorb the materials, reflect, and reach a decision that they had to justify in writing. Last not least, all the participants were highly professional, real judges.

The amount of time available (one hour) and the absence of a hearing corresponds to the severe constraints facing many congested courts for many decisions. For example, US district courts on average spend only one hour on an entire probation case and resolve many types of motions in one hour or less.<sup>23</sup> US circuit judges decide most cases without a hearing and spend an average of only three hours per case, including all ancillary or preliminary matters.<sup>24</sup> Practitioners have told us that judges in state courts have even less time per case. In addition, cases that do take more time tend to involve the resolution of many more factual and legal issues than our experimental case. That being said, in many cases judges do have more time per issue, particularly for novel questions of law. The additional time for reflection might reduce the influence of non-legal factors. On the other hand, the direct impressions of litigants from a hearing might increase this influence. Moreover, more time may in fact reduce legal constraints because it allows judges to craft a reasoning around them (Kennedy 1998).

This being said, our design is clearly not a faithful representation of decision-making in any one court, particularly not in the ICTY. Our design casts US judges into an unfamiliar legal system (the ICTY) and mostly an unfamiliar specific role (as an appeals judge). Our design also has judges decide by themselves without a hearing in an hour, whereas ICTY judges decide in panels after many month of hearings and with the help of judicial clerks.<sup>25</sup> The ecological validity of our design thus presupposes, firstly, that the characteristic features of judicial decision-making transcend the details of individual courts; secondly, that these characteristics are at least partially shared between trial and appeals courts; and thirdly, that the participants had the skills and time to overcome the lack of familiarity with the particular legal setting. The first presupposition is shared by most of the literature, which treats judicial decision-making as a distinct activity. Some of the literature differentiates appeal and trial courts because only the former are focused on questions of law and developing the law (e.g., Kennedy 1998). The distinction is hardly rigid, however, as trial courts also treat questions of law and many courts have dual roles as trial and appeals courts (e.g., US district courts hear bankruptcy appeals).<sup>26</sup> Finally, the judges' written

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<sup>23</sup> See Federal Judicial Center, Appendix Q to the 2003–2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CaseWtsQ.pdf/\\$file/CaseWtsQ.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CaseWtsQ.pdf/$file/CaseWtsQ.pdf) (archived at <http://perma.cc/9XJL-W4GG>).

<sup>24</sup> In 2014, US Courts of Appeals decided 34,114 cases on the merits; 80.5% of them without a hearing. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 2014*, table B-10, available at <http://www.uscourts.gov/file/14286/download> (archived at <http://perma.cc/CE3R-KKS3>). There are 167 authorized judgeships in these courts, which hear cases in panels of three. If these judges dedicated 2,000 hours per year on the cases decided on the merits, they would spend  $167 \text{ judges} \times 2,000 \text{ hours} \times 60 \text{ minutes per hour} / (34,114 \text{ cases} \times 1 \text{ panel per case} \times 3 \text{ judges per panel}) = 196 \text{ minutes per case}$ . In reality, administrative tasks and cases not resolved on the merits consume some of the judges' time. Judges from other courts sitting by designation may increase the time available per case.

<sup>25</sup> Clerks of course have their own biases (cf. Ferguson et al. 2008b).

<sup>26</sup> To the extent trial judges behave differently when cast in the role of appeals judge in an alien system, it is not clear in which direction their behavior changes. On the one hand, trial judges might feel less constrained by precedent when they cannot be reviewed, their unfamiliar role as appeals judge invites them to develop the law, and the law they apply is not theirs. On the other hand, the precedential value of an appeals decision invites abstraction from the particular litigants before the court, and lack of expertise in a legal system increases the

reasons demonstrate that the vast majority of them fully comprehended the purposefully straightforward legal question before them and answered it with standard legal arguments. Five judges noted that time was too short or did not submit written reasons at all, but most arrived at a decision early (the mean time spent with the legal materials before entering judgment was 35 minutes, with negative skew and only five observations above 45 minutes).

The artificiality of the experimental setting should if anything create a bias against our findings. The reason is that the artificiality should make it easier to block out legally irrelevant but emotionally salient factors and act like a “legal automaton.” A real-world judgment has a deep impact on the litigants, and often on politically and otherwise important matters far transcending the case at hand. By contrast, in the experiment, nothing is at stake except judges’ professional pride. The litigants are known to be fictitious, and information about them had to be slipped in obliquely and could easily be overlooked. US judges’ implicit associations for Croats and Serbs, which we were trying to exploit, are presumably not nearly as powerful as those documented for race and other characteristics the judges would face in domestic cases (cf. Lang et al. 2007). (On the other hand, judges may be particularly sensitized to, and thus possibly inoculated against, the biases that are most likely in their court.) Moreover, the judges knew they were being directly observed. That should have made the judges particularly legalistic. Finally, the judges had been assigned an article about judicial biases by Guthrie et al. (2007) before the experiment, which should have raised their awareness of and, presumably, effort to avoid undue influences. From outward appearance, the participant judges seemed to take the experimental task very seriously.

## 6 Conclusion

In this study, we experimentally investigated the effect of a weak precedent and legally irrelevant defendant characteristics in a setting uniting the key features of real-world judicial decision-making. In particular, we had real judges deciding a real case in 55 minutes. We found that defendant characteristics appeared to have a strong effect, whereas the precedent had no detectable effect.

In principle, the legal model of judicial decision-making can accommodate the irrelevance of the weak precedent. By definition, weak precedents are distinguishable or otherwise circumventable by a legalistic judge. At the same time, weak precedents are in fact frequently cited as support in legal briefs and decisions, including by our participants, and judges make many decisions in circumstances where no stronger authority than a weak precedent is available. In any event, the strong effect of legally irrelevant defendant characteristics is troublesome for the legal model, and particularly striking when compared to the non-effect of the precedent. The deviations from the legal model observed in our experiment are much stronger than law professors had predicted in a survey.

We hesitate to draw policy conclusions until more studies have replicated and refined our results. Taken at face value, our results argue for greater reliance on rules rather than standards (cf. Kaplow 1992). In theory, delegating thorny questions to judges may enable a more nuanced evaluation of case-specific facts under accepted general principles and precedents. Our experiment suggests, however, that oftentimes the principles and precedents may be too ambiguous, and irrelevant facts too difficult to ignore, for this delegation strategy to succeed. Alternatively, we need to uncover strategies that

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attraction of the guidance offered by precedent, even a weak one. Similarly, the fact that appellate judges usually decide in groups (panels) may attenuate or exacerbate biases (cf. Kerr and Tindale 2004).

reinforce the influence of relevant criteria over irrelevant ones (cf Sood and Darley 2012; Nadler 2012; Sood 2015). In particular, our results would provide a powerful rationale for blinding judges to many details of the facts, for example "sanitizing" the record before it is sent up to an appeals court.

On a methodological level, we have demonstrated that experimental investigation of long-standing jurisprudential questions under more realistic conditions is possible. But we have also found that the results are mostly consistent with those obtained in less realistic designs, as mentioned in the introduction. If this consistency is confirmed in future studies, then the credibility of the less realistic designs will be greatly enhanced and the need for cumbersome realistic designs concomitantly reduced. This would considerably facilitate further research into the black box of judicial thought processes.

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# Online Appendix

## A.1: Experiment materials

### A.1.1.: Invitation letter

*Dear Judge:*

*I look forward to welcoming you to the session on “Behavioral Research on Judicial Decision-Making” at the Harvard/FJC Law & Society program on April 13 at 8:35am.*

*In agreement with the FJC, I will use the first 55 minutes of my session for an experimental study of judicial decision-making. I hope you will participate in the study, but participation is entirely voluntary. In particular, you can attend the remainder of the session (from 9:30am to 10am) regardless of your participation in the study, and you can withdraw from the study at any time without penalty.*

*If you do participate, you will be asked to judge a fictitious yet highly realistic international law case. I expect and indeed hope that you are completely unfamiliar with the applicable law. Relevant legal materials will be provided to you on a tablet or other computer that will log all of your activity, i.e., which materials you consult when. At the end, you will also be asked to sketch the reasons for your judgment in a paragraph, either on the computer or on a piece of paper. The goal of the study is to learn about the process of legal reasoning and the role of various legal materials therein. I am not testing your knowledge of, or opinions about, particular legal issues. In the future, I plan to run the same study in other jurisdictions and compare the results.*

*There is no remuneration for participation in the study. But I hope that the case will teach you something interesting about a hot topic in a controversial area of international law. I also hope that participation in the study will bring to life the methods of the research I will review in the remainder of the session, and that my colleague Jim Greiner will discuss later in the day. I will provide you more details of the research plan and initial results right after completion of the study.*

*No more than minimal risk is expected from participation in this study. To keep your answers confidential, I will not record your name, and I will immediately transcribe and then destroy any handwritten answers. You need not provide identifiable information such as age-group, and if you do, I will store it separately on a password-protected computer and not share with anyone except with other researchers who want to replicate the results and undertake to keep the data confidential in the same way. In the very unlikely event of a breach of confidentiality, it is possible that someone with outlier demographic information might be able to be identified. If that were to happen, the risk of harm could include embarrassment or reputational harm.*

*If you have any questions about the study, please do not hesitate to contact me. I look forward to meeting you on April 13.*

*Sincerely, [s/ Holger Spamann]*

### A.1.2.: Experimenter welcoming remarks

*Good morning, your honors.*

*I am not Larry Tribe.<sup>27</sup> My name is Holger Spamann, and I am an assistant professor here.*

*It is truly a great pleasure and a privilege to be able to talk to you today.*

*As you know from my letter, I have prepared an exercise for you, and I suggest we get started on that right away so that we have enough time for discussion later.*

*You will find in front of you an iPad. When we begin in just a moment, all you will have to do is swipe, and the experiment site should show up immediately. Then you just follow the instructions on the screen.*

*If you have any problems operating the iPad or navigating the experiment site, my lovely assistants Priyanka, Caleb, and Hannah are here to help you. They are all law students here and can't wait to tell a judge what to do, so they'd be happy if you have questions. But they do not know anything about the legal question you are about to confront.*

*Everything else will be explained on the screen. Please begin. I hope you will find this interesting and educational.*

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<sup>27</sup> This was a reference to last minute rescheduling within the program. Larry Tribe was originally scheduled to speak during the time slot of the experiment, which was originally supposed to run a day earlier.

### A.1.3.: Instructions

*Please imagine you are an appeals judge in the case Prosecutor v. [NAME] pending at the International Criminal Tribunal for the Former Yugoslavia (ICTY). This case is fictitious but very closely resembles an actual case recently decided by the ICTY. The ICTY is an international tribunal with the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the ICTY Statute. [As an international tribunal, the procedure of the ICTY combines elements from common law and from civil law systems, some of which may seem unfamiliar to you. – VISIBLE TO ONLY HALF THE SUBJECTS]*

*You have already presided over several hearings. The prosecution and the defence have now submitted their final appeals briefs and agreed on a list of agreed facts.*

*Your task is to judge whether the defendant is or is not guilty of aiding and abetting various war crimes by the [RELEVANT MILITARY GROUP] on the territory of Bosnia-Herzegovina in the years 1992-1994.*

*In reaching your judgment, you will be able to peruse the aforementioned briefs and the list of agreed facts. I recommend you read these in full. The briefs link to other documents, namely the decision of the trial court below, a recent decision by the Appeals Chamber in another case, and the statute establishing the ICTY. These other documents are very long. You will not have time to read them in full, but you may pursue a handful of further passages that you deem particularly relevant.*

*Please do NOT access any information on another device such as your smart phone, and please do NOT talk to your neighbors until the study is completed.*

*You have 50 minutes to reach a decision and submit a brief summary of your reasoning, either on this computer or on a separate piece of paper marked with your participant number, which will be randomly generated at the end of the study. To help you keep track of time, a clock on the screen will count down the 50 minutes.*

*By clicking on the button below, you will proceed to an index page with all the documents provided. You can at any time return to this introduction or to the index page by clicking the relevant link at the top of the page.*

A.1.4.: Statement of Agreed Facts (differences between defendants [Vuković/Horvat] in square brackets; substantive differences in bold)

*The parties have agreed that the following key facts are not in dispute.*

*THE ACCUSED [BORISLAV VUKOVIĆ / ANTE HORVAT]*

*[Borislav Vuković / Ante Horvat] was born on 22 May 1944 in [Koštunići, Serbia, in the Socialist Federal Republic of Yugoslavia / Skradin, Croatia]. After joining the Yugoslav People's Army, he graduated from the Ground Forces Military Academy in 1966 and became an officer. Shortly after the conflict in the former Yugoslavia began, [Vuković / Horvat] became the Chief of Staff and then Commander of the 3rd Army within the [Yugoslav / newly formed Croatian] Army ("[VJ/HV]") based in [Niš, Serbia / Knin, Croatia]. On 26 August 1993, the President of [the Federal Republic of Yugoslavia ("FRY") / Croatia] appointed [Vuković / Horvat] as Chief of the [VJ / HV] General Staff, a position which made him the most senior officer in the [VJ / HV]. He held this position until his mandatory retirement from the [VJ / HV] in 2004, when he became **[advisor to the FRY government for "the rehabilitation of Serb victims of Albanian persecution" and chairman of the United Serbia Party / Croatian vice-chairman of the Croatian-Bosnian Reconciliation Commission]**.*

*THE INDICTMENT*

*[Vuković / Horvat] was charged on the basis of individual criminal responsibility (Article 7(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia, hereinafter "the Statute") with aiding and abetting crimes in the Bosnian towns of [Sarajevo / Mostar] and [Vlasenica / Ahmići] by facilitating the provision of military and logistical assistance from the [VJ / HV] to the [Army of the Republika Srpska ("VRS") / Defence Council of the Hrvatska Republika Herceg-Bosna ("HVO")]. The [VRS / HVO] was an armed group of ethnic [Serbs / Croats] in the Bosnian civil war. [Vuković / Horvat] was also charged with superior responsibility (Article 7(3) of the Statute); since he was acquitted of these charges and this part of the decision is not on appeal, however, no further mention will be made of the facts underlying this part of the indictment.*

*THE UNDERLYING CRIMES COMMITTED BY [VRS / HVO]*

*The underlying events took place in the territory of Bosnia and Herzegovina in the period between August 1993 and November 1995.*

*[SARAJEVO / MOSTAR] From September 1992 to November 1995, the [VRS / HVO] conducted a lengthy campaign of shelling and sniping in [Sarajevo / Mostar] which resulted in the deaths of hundreds of civilians and the wounding of thousands of others.*

*[VLASENICA / AHMIĆI] In the summer of 1995, the [VRS / HVO] invaded the town of [Vlasenica / Ahmići], which the United Nations Security Council had previously established as a safe area for civilians. After taking over [Vlasenica / Ahmići], the [VRS / HVO] proceeded to forcibly remove and massacre hundreds of Muslim civilians and persons not taking an active part in hostilities.*

*THE ASSISTANCE PROVIDED BY [VUKOVIĆ / HORVAT]*

Since August 1993, [Vuković / Horvat] oversaw the [VJ / HV]'s provision of extensive logistic assistance to the [VRS / HVO] as the [VJ / HV]'s Chief of General Staff.

Logistic assistance notably included vast quantities of infantry and artillery ammunition, fuel, spare parts, training and technical assistance. The Supreme Defence Council of [the Federal Republic of Yugoslavia / Croatia] granted [Vuković / Horvat] and the [Yugoslav / Croatian] Army the authority to provide logistic assistance to the [VRS / HVO]. Even though [Vuković / Horvat] was not officially a member of the Supreme Defence Council, he participated in the Council's meetings, along with its members, notably [Slobodan Milošević and Zoran Lilić / Franjo Tudjman], who at the time held the title[s] of President of [Serbia and President of the Federal Republic of Yugoslavia, respectively / Croatia]. [Vuković / Horvat] regularly urged the Council to continue providing logistic assistance to the [VRS / HVO], insisting that they could not wage war without significant military support.

A large number of [VRS / HVO] officers were drawn from the ranks of the [Yugoslav / Croatian] Army. They officially remained members of the [Yugoslav / Croatian] Army even as they were fighting in Bosnia under the banners of the [VRS / HVO]. [Vuković / Horvat] proposed and carefully implemented the idea of creating "Personnel Centres" to regularise the status of these officers and allow them to lawfully remain part of the [Yugoslav / Croatian] Army. [VRS / HVO] officers retained their salaries and benefits as [Yugoslav / Croatian] Army members through what was known as the 30th Personnel Centre. [Vuković / Horvat] was well aware that the payment of salaries was, in his own words, of "great help" to the [VRS / HVO].

#### [VUKOVIĆ / HORVAT]'S STATE OF MIND

[Vuković / Horvat] knew that the [VRS / HVO]'s operations encompassed grave crimes against civilians. [Vuković / Horvat] received information from a variety of sources concerning the [VRS / HVO]'s criminal behaviour and discriminatory intent against Muslims. Under [Vuković / Horvat]'s direction, the [Yugoslav / Croatian] Army's intelligence and security organs monitored the views of the international community and international media concerning the conflict in Bosnia and Herzegovina. **[The Yugoslav Army General Staff also received diplomatic reports about proceedings at the United Nations Security Council / During meetings with NATO to coordinate enforcement of the UN's no-fly zone against Serbian violations, Horvat also received briefings on NATO intelligence]** concerning grave abuses against civilians by [VRS / HVO] forces in [Sarajevo / Mostar] and other parts of Bosnia and Herzegovina. In particular, [Vuković / Horvat] was alerted to the fact that the [VRS / HVO] was conducting a campaign of sniping and shelling against civilians during its siege of [Sarajevo / Mostar]. These regular attacks were well documented and widely reported for a period of three years.

#### THE TRIAL JUDGMENT

On 7 January 2014, the Trial Chamber found defendant-appellant [Vuković / Horvat] guilty of aiding and abetting the following crimes committed by members of the [VRS / HVO] in [Sarajevo / Mostar] and [Vlasenica / Ahmići]: murder, inhumane acts (injuring and wounding civilians, inflicting serious injuries, wounding, forcible transfer), and persecutions as crimes against humanity; and murder and attacks on civilians as violations of the laws or customs of war. The

*Trial Chamber sentenced [Vuković / Horvat] to a single term of 27 years of imprisonment under Articles 3, 5, and 7(1) of the Statute.*

A.1.5: Brief for the Accused (cover page omitted; differences between defendants [Vuković/Horvat] in square brackets, with substantive differences in bold; differences between precedents [paragraph 4] separately marked)

*I. Introduction*

*1. 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.*

*2. The prosecution agrees that the defendant must be acquitted if specific direction was required, as the defendant merely provided unspecific support to the forces committing the crimes on the ground.*

*3. The Trial Chamber, however, convicted the defendant because it did not consider specific direction an essential element of aiding and abetting. We urge the Appeals Chamber to overturn this decision because it is inconsistent with prior decisions of the Appeals Chamber, the most fundamental principles of the Statute, and sound policy.*

*II. "Specific direction" is a component of the actus reus of aiding and abetting.*

[Precedent: Šainović]

*4. The Trial Chamber failed to take into account that aiding and abetting must be specifically directed to assist the commission of crimes. Neutral acts providing general logistic and military assistance to an army engaged in legitimate military operations do not qualify as aiding and abetting.*

[Precedent: Vasiljević]

*4. If there was ever any doubt about the requirement of "specific direction," it was laid to rest by the Appeals Chamber's Vasiljević decision handed down two weeks after the Trial judgment in the present case. The Vasiljević decision expressly required "specific direction" as part of the actus reus of aiding and abetting. Distinguishing aiding and abetting from joint criminal enterprise (JCE), the Appeals Chamber stated in Vasiljević:*

*"The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design."<sup>28</sup> (emphasis added)*

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<sup>28</sup> Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgement 23 January 2014, at para. 102.

5. The Appeals Chamber thus explicitly acknowledged that criminal liability does not attach to the mere assistance to a military group, even if that assistance had a substantial effect on the commission of the crime. Rather, the *actus reus* of aiding and abetting is assistance specifically directed at the commission of a crime.

5./6. It is true that not all prior decisions of the Appeals Chamber concerning aiding and abetting explicitly mention the element of specific direction. We submit, however, that specific direction has always been implicit in the finding that the accused provided practical assistance to the principal perpetrator that had a substantial effect on the commission of the crime. Specific direction was never in doubt in previous cases because the accused was at or proximate to the crime scene.

6./7. In contrast, in cases where the conduct of the accused is remote in relation to the commission of the crimes, the requirement of specific direction as an explicit element of aiding and abetting is manifest. This is especially important in this case, as [Vuković / Horvat] is not accused of providing assistance to the commission of crimes committed by the [VJ / HV]. Rather, he is accused of facilitating the commission of crimes committed by the [VRS / HVO], a separate military organization not under his personal command and not even part of the same command hierarchy.

ŠAINOVIĆ ONLY: 7. The prosecution relies on the recent Appeals Chamber's decision in *Sainović*<sup>29</sup> to argue that specific direction is not a component of the *actus reus* of aiding and abetting. However, as Judge Tuzmukhamedov stated in his dissent, this issue was not actually relevant for deciding the case in *Sainović*.<sup>30</sup> Furthermore the facts in *Sainović* are completely different from the facts at hand. In *Sainović* the accused aider and abettor Vladimir Lazarević was convicted for providing assistance to members of the [VJ / HV] while he was a commander in the [VJ / HV]. [Vuković / Horvat], however, is charged with aiding and abetting the war crimes of a distinct army, i.e. the [VRS / HVO]. Finally, [Vuković's / Horvat's] conduct was remote from the place of the crimes, whereas Lazarević was physically present at the crime scene.<sup>31</sup>

8. The additional element of aiding and abetting follows from the general principles governing the ICTY Statute. One of those principles is, as is generally accepted, that the Statute does not criminalise the waging of war *per se*. States provide military and technical assistance to one another with varying strategic objectives in a number of regions around the world. However, this aid in itself does not render the leaders of the assisting states individually criminally responsible

<sup>29</sup> Prosecutor v. Sainović, Case No. IT-05-87-A, Judgement 23.1.2014.

<sup>30</sup> Prosecutor v. Sainović, Case No. IT-05-87-A, Judgement 23.1.2014, Dissenting Opinion of Judge Tuzmukhamedov, at para. 40.

<sup>31</sup> Prosecutor v. Sainović, Case No. IT-05-87-A, Judgement 23.1.2014, Dissenting Opinion of Judge Tuzmukhamedov, at para. 43.

*for aiding and abetting crimes committed during such wars. To be held individually criminally responsible, the leaders must be shown to have committed or aided and abetted the commission of some crimes during the war, an act which is distinct, and apart, from the mere provision of military assistance. To conclude otherwise, as the Trial Chamber has done, is to criminalise the waging of war, which is not a crime according to the Statute of the Tribunal. Any provision of weapons would result in the individual criminal responsibility of the provider, approaching a form of strict liability.*

*9. Moreover, dispensing with the requirement of specific direction, as the Trial Chamber did, leads to absurd consequences. It would potentially ensnare all military and political leaders who approve logistical assistance to a foreign army without the power to control every decision of that foreign army, in particular the intensity of its efforts to curb human rights violations. This would have a substantial chilling effect on all legitimate international military operations.*

### *III. Conclusion*

***[HORVAT ONLY: 10. From the very beginning of this case, the defendant has expressed his deep regret at all bloodshed in this tragic war, and in particular at the inexcusable crimes of certain soldiers and officers in the field. He categorically denies, however, that he is personally responsible for those crimes. We urge the Appeals Chamber to affirm that the law is on the side of the defendant and others forced by history to make difficult decisions in times of war, and to overturn the conviction by the Trial Chamber.]***

*[10 / 11]. For these reasons, [Vuković /Horvat] respectfully requests that the Appeals Chamber: (i) hold that the actus reus of aiding and abetting in international law requires specific direction; (ii) apply that standard; and (iii) reverse the Trial Chamber's judgment and enter an acquittal.*

A.1.6. Brief for the Prosecution (cover page omitted; differences between defendants [Vuković/Horvat] in square brackets, with substantive differences in bold; differences between precedents [paragraph 4] separately marked)

*I. Introduction*

*1. The defense requests that the Appeals Chamber reverse the Trial Chamber's judgment on the grounds that the assistance provided by [Vuković / Horvat] was not specifically directed at the war crimes committed by the VRS.*

*2. The defense's argument is without merit. The Trial Chamber correctly found [Vuković / Horvat] guilty of aiding and abetting under Article 7 of the Statute governing this Tribunal because [Vuković / Horvat] provided logistical and personnel assistance to the VRS in full knowledge that the [VRS / HVO] committed atrocious war crimes, as [Vuković / Horvat] knew fully well.*

*3. It is irrelevant that none of [Vuković's / Horvat's] acts were specifically directed toward the commission of the war crimes by the [VRS / HVO]. Specific direction is not an element of aiding and abetting. The defense's argument to the contrary is a transparent attempt to introduce a novel, restrictive element to the actus reus of aiding and abetting that has no basis in previous cases and that would make it more difficult to convict those who knowingly facilitate the most grievous crimes. We urge the Appeals Chamber to reject this attempt to undermine the very purpose of this Tribunal to hold to account those responsible for the horrors of the Yugoslav wars.*

*II. "Specific Direction" is not a requirement of aiding and abetting liability*

[Precedent: Šainović]

*4. If there was ever any doubt about the requirement of "specific direction," it was laid to rest by the Appeals Chamber's Sainović decision handed down two weeks after the Trial Chamber's judgment in the present case. The Sainović decision expressly required<sup>32</sup> "specific direction" as part of the actus reus of aiding and abetting. After an exhaustive discussion of the national and international case law, including all relevant decisions by the Appeals Chamber, the majority, Judge Tuzmukhamedov dissenting, came to the conclusion: "[t]hat 'specific direction' is not an element of aiding and abetting liability under customary international law."<sup>33</sup>*

[Precedent: Vasiljević]

*4. The defense's only legal argument is a quotation taken out of context from the Appeals Chamber's recent decision in the Vasiljević case.<sup>34</sup> The discussion in Vasiljević, however, was not concerned with systematically defining aiding and abetting liability. Vasiljević merely mentioned aiding and abetting in the context of defining a different basis for criminal liability, namely joint criminal enterprise. To better define the latter, the Vasiljević decision drew comparisons to the former. Nothing in that discussion suggests that specific direction is a stand-alone element of aiding and abetting. Indeed, the defense implicitly concedes that no prior decision of this Tribunal has ever*

<sup>32</sup> ["required" here was an error; it should have read "rejected." Judging by their written reasons, however, none of the judges were misled by this.]

<sup>33</sup> Prosecutor v. Sainović, Case No. IT-05-87-A, Judgement 23.1.2014, at para. 1649.

*denied aiding and abetting liability merely because the assistance was not specifically directed at the crime.*

*5. The prosecution agrees that the defendant's physical distance from the crime scene may be relevant for aiding and abetting liability. However, this follows from the simple fact that in these situations the assistance is less likely to have a substantial effect on the main act. The prosecution submits that the proximity of an alleged aider and abettor to crimes committed by the principal perpetrators is one factor that a trial chamber may consider in determining whether substantial contribution is established. If such effect is established, however, there can be no doubt that the assistance qualifies as aiding and abetting if the accused knows that it facilitates the commission of war crimes.*

*6. Moreover, requiring specific direction would make it almost impossible to prosecute aiding and abetting in practice. The only assistance that is clearly specifically directed at a crime is assistance that cannot be used for anything but criminal activity. It is doubtful whether, in real life, such assistance exists; surely it is rare. There is, however, much conduct that significantly contributes to crime even though it may seem harmless on its face (e.g. transferring money or seconding personnel). Such conduct should not be shielded from criminal liability merely because these acts might further both lawful and unlawful activities. The critical question is whether the assistance was provided with knowledge of the crimes and had an actual, substantial effect on the perpetration of the crime by its beneficiaries. In particular, the provision of weapons as a peculiar kind of assistance is never "neutral."*

*7. The defense submits that under the approach favoured by the Trial Chamber, any provision of weapons would result in individual criminal responsibility of the provider, approaching a form of strict liability. However, this fear is unfounded. In order for aiding and abetting liability to arise, a number of additional elements need to be present: one or more crimes must have been actually perpetrated; the weapons provided must have substantially contributed to the perpetration; and the weapons-provider must have been aware of their likely use. The fact that they could have theoretically been used in lawful activities would not be decisive in this assessment.*

### *III. Conclusion*

***[VUKOVIĆ ONLY: 8. For too long, the defendant has been able to walk free. He has publicly mocked this tribunal and repeatedly inflamed lingering tensions with inflammatory public statements showing absolutely no regrets about the horrors of the war in general, and the war crimes he supported in particular.<sup>35</sup> The Appeals Chamber should make a strong statement that generals in the headquarters can be as guilty as, or more guilty than, the soldiers on the ground when heinous crimes are committed, and that this Tribunal will prosecute both.]***

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<sup>34</sup> Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgement 23 January 2014.

<sup>35</sup> The prosecution recalls, for example, the defendant's opening statement before the Trial Chamber, where he stated, among other things, that his "only regret about the war is that too few of Serbia's enemies died." Defence Opening Statement, 22 February 2010, Trial Hearing Transcript 9904.

*[9 / 8]. For the reasons stated above, the Prosecution respectfully requests that the Appeals Chamber: (i) hold that the actus reus of aiding and abetting in international law does not require specific direction; (ii) and uphold the Trial Chamber's judgment.*

## A.2: Professor survey

Text of the invitation email (difference between 4-school and 6-school groups in square brackets [4/6]):

*[Subject: "3-minute survey on judicial decision-making"]*

*Dear [Colleague/Colleagues/Professor X<sup>36</sup>]:*

*I am conducting an experiment on judicial decision-making with real judges. [To help me plan / To put the results into perspective], it would be extremely helpful to know what you would expect the judges to do in the experimental setting described below. It will take you less than three minutes to read and then register your answers. The answers will be completely anonymous. I would really appreciate your help.*

**Description of the experiment:** *The judges are asked to decide a case on appeal at the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the court below, the accused was convicted of aiding and abetting war crimes committed by an armed group during the Bosnian war. The accused was not directly affiliated with this group or even physically present in Bosnia. He was the most senior officer in the army of an allied neighboring nation state. In this position, he organized extensive logistic assistance to the armed group, including weapons. As the accused knew fully well at the time, the armed group was committing atrocious war crimes. It is undisputed that the accused's assistance substantially contributed to the war crimes. The only question on appeal is whether this is sufficient for a conviction, or whether aiding and abetting requires in addition that the support be "specifically directed" at the war crime (which it was not). The ICTY statute explicitly criminalizes aiding and abetting but does not define it. There is no strong precedent on point.*

*I vary two dimensions of the case:*

*(A) the accused is either a likeable Croat or an unsympathetic Serb; and*

*(B) a precedent by the same appeals chamber has either explicitly required or explicitly rejected "specific direction," although those precedents are dicta or distinguishable (because the precedent involved primary perpetrators in the same formal organization as the accused).*

*How much, if at all, [do you think / would you expect] variations (A) and (B) [ / to] affect the probability that a [judge / US federal judge participating in the experiment] will affirm the conviction?*

*To preserve the anonymity of your answer, please register them by clicking [HERE](#) [link] (IP addresses will not be recorded).*

*[6 schools only: Please do not participate in this survey if you have already heard about preliminary results from me or somebody else.]*

*[Harvard only: Please do not participate in this survey if you have already heard about preliminary results from me or somebody else.]*

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<sup>36</sup> This differed by university.

*Thank you very much!*

*Holger Spamann*

Online survey text (one choice per line permitted; ascending/descending and the order of precedent vs. defendant were randomized):

*You are being asked to take part in a research study by Holger Spamann from Harvard Law School. There is only the one question below, which, if you remember the text of the invitation email, will take you a couple seconds to answer. The survey is anonymous, and no one will be able to link your answers back to you. You can, of course, abort this poll simply by closing this browser tab. If you have questions, please contact [hspamann@law.harvard.edu](mailto:hspamann@law.harvard.edu).*

*How much would you expect the experimental variations to affect the judges' decisions, if at all?  
(see email for details)*

	<i>No effect</i>	<i>Modest effect</i>	<i>Strong effect</i>
<i>Croat v. Serb</i>	<i>[ ]</i>	<i>[ ]</i>	<i>[ ]</i>
<i>Precedent</i>	<i>[ ]</i>	<i>[ ]</i>	<i>[ ]</i>

*[Submit button]*

### A.3: Judges' written reasons

This table reproduces the judge-participants' reasons verbatim, sorted by defendant (Horvat/Vuković), precedent (Vasiljević/Šainović), and affirmance. The table also indicates whether the reasons mention the precedent, and if so, whether they followed it. An X next to the affirmance decision indicates that the decision seems to have been entered in error, as the reasons support the opposite decision. An asterisk indicates other issues with the reasons, including that they are lacking altogether.

Defendant	Precedent	Prec. mentioned?	Prec. followed?	Affirmed?	Reasons
H	V	1	1	0	<i>Both the prosecution and defense agree that this appeal turns on whether the the law requires that, to be guilty of aiding and abetting, defendant's conduct must have been "specifically directed" to the commission of the underlying crime. The Vasiljevic decision directs that the answer be yes. Not only did the Court define the standard as such, it applied it in Paragraph 135. The application of the aiding and abetting law by the Trial Court greatly expands the criminal responsibility of military leaders who participate from afar. Mere knowledge that another organization to whom support is provided is committing crimes is not specific direction as contemplated by the Court in Vasiljevic. The contrast between the facts of this case and that could not be more striking. The evidence against Horvat did not come close to satisfying the standard announced in Vasiljevic.</i>
H	V	0		0 X	<i>Defendant arranged for salaries, logistical support, etc. for 3 years after being appointed commander of the Croatian forces. He knew that this support was essential to the continued operations of the "squads" executing the "safe area" occupants. He knew through his confidential advisers that there were no official constraints on these murder squads. Compliance with a superior's orders is not a defense to aiding and abetting under the statute. Facilitating the ability of death squads to accomplish their known mission is not a defense under the statute either.</i>
H	V			0*	<i>Not sufficient time to form a judgment.</i>
H	V	0		1	<i>While insufficient time has been allowed to analyze all aspects of this case, I have given great weight to the findings of fact of the trial court. The short review time has made as detailed study of the law impossible so I have relied heavily on the propriety of the the trial court's conclusions re the state of the law. It is apparent that Muslim citizens were targeted by military groups under the control of the defendant. The defendant holds ultimate responsibility for this. Given the constraints of time pressure by this review, deference must be given to the trial courts findings. The outcome could have been completely different if allowed the typical review time such a critical decision deserves.</i>
H	V	1	0	1	<i>This is a question of statutory interpretation. The statute makes it criminal for an individual to have "planned, instigated, ordered, committed, or otherwise aided and abetted," the</i>

commission of a war crime. By introducing the phrase "aided and abetted" with the word "otherwise" the drafters suggested something apart from the more active means of committing the crime such as planning, instigating, or ordering the crime. Therefore providing indirect but critical logistical support for activities which you know involves the commission of war crimes by irregular forces would constitute "aiding and abetting" the commission of a war crime. The acts need not be "specifically directed" at the war crime. While our earlier decision may have used that term in distinguishing between "aiding and abetting" and a criminal enterprise, that language was dicta and is not binding here.

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**H V 1 0 1** *I would affirm the verdict finding Horvat guilty because I agree with the arguments set forth in the response brief concerning the correct interpretation of the V\_\_\_\_\_ case. That case does not appear to impose a requirement of "specific direction" on the actus reus element of an aiding and abetting offense. Rather, it discusses aiding and abetting for the sole purpose of contrasting it from the offense at issue: joint enterprise. Thus, I believe the V\_\_\_\_\_ case's mention of "specific direction" is merely dicta and not controlling. As the defense admits, the V\_\_\_\_\_ case is the only authority that can be read as imposing a specific direction requirement. In light of my conclusion that V\_\_\_\_\_ 's discussion of specific direction is dicta, it appears that the defense's reliance on V\_\_\_\_\_ dooms its case on the merits.*

*I also agree with the response brief's argument that imposing a requirement of specific direction on the offense of aiding and abetting would substantially gut the offense, by removing from its those who might attempt to excuse their conduct by cloaking it with some so-called "official" purpose, such as the need to provision the forces actually carrying out the atrocities. This would insulate from prosecution higher-up's such as the Appellant, who clearly knew that the war crimes at issue could not and would not have occurred without his assistance from afar. Criminal actors such as the Appellant should not be permitted to hide from the consequences of the actions behind their official positions.*

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**H S 0 0\*** *While "soecific direction" is not an essential element of aiding and abetting, the evidence adduced at trial does not support a finding that Horvat rendered practical assistance, encouragement or moral support that had a substantial effect on the perpetration of the crime committed by HOV. Horvat was denied the right to confront witnesses to the alleged crime. He may have been aware of alleged atrocities by HOV, but the weight of credible evidence does not support conviction for aiding and abetting. Tut*

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**H S 1 0 0** *It appears there is sufficient disagreement over the question of specific direction to conclude the question is an open one. This court concludes that to eliminate the requirement would be to open the door to strict liability for waging war and thus impose liability in a manner inconsistent with the concept of "legitimate" war. Without evidence of a party's specific direction over acts that amount to crimes against humanity, there would be no distinction between the type of grievous behavior sought to be singled out and that which is accepted as a part of the "civilized" conduct of war. Therefore, without compelling evidence of the defendant's specific direction regarding crimes against humanity, his conviction must be reversed.*

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**H S 0\***

**H S 0 0** *It's a close call because Horvat was aware of the atrocities that were committed but while he provided material and supplies that were most likely used in the atrocities, there was no conclusive evidence that he willfully made the civilian population the object of the attacks.*

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**H S 1 0 0** *The court finds that specific direction is an element of the offense of aiding and abetting. In the majority of the cited cases, while the term is not explicitly use, it is evident that the defendant's conduct was specifically directed at the commission of the crime.*

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**H S 1 0 0** *The defendant is not guilty of the crime of aiding and abetting because, in order to be found guilty of that crime, one must have substantially contributed to the criminal conduct under applicable law and the agreed-to facts do not establish the requisite contribution. Although the Sanovic decision rejected the proposition that "specific direction" is required, it confirmed that a substantial contribution is necessary for aid no and abetting liability, and it did so under circumstances in which a defendant actively commanded the criminal unit and was present at the scene of the crime. Defendant here did not command the unit that engaged in the conduct, nor did he participate directly in the unlawful activity (he was not even present at the scene). Rather, he merely provided "general logistic and military support to an army engaged in legitimate military operations," albeit with knowledge that the unit was ALSO engaged in illicit activities. The law of aiding and abetting should not be read so broadly as to criminalize general logistical support. Although the prosecution need not establish a defendant's active participation was specifically directed at aiding the criminal activity in particular, it must show that there was the kind of acute reas with respect to the offensive army unit and its activities that would support a finding of substantial contribution. The facts here are insufficient to make such showing.*

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**H S 1 1 0 X** *This appeal challenges the judgment of conviction on a single legal ground: the accused did not specifically direct the army's war crimes, and the absence of this mens rea precluded his conviction under the statute as a matter of law. I am unconvinced by the argument. Its legal premise was expressly rejected by the Šainović panel, and the accused has not offered me a persuasive basis to countermand that opinion. Even if the Šainović panel's conclusion that specific direction "is not an essential ingredient of the acts reus" for an Article 7(1) violation, Šainović, para. 1650, were mere dicta, that conclusion was heavily researched, well-reasoned, and deeply analyzed, and I find no reason to depart from it.*

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**H S 1 1 1** *Recent caseload established that "specific direction" not an element of aiding and abetting as appellant argues. If specific direction were required, the rime of aiding and abetting would collapse into the underlying crime. While that case is factually different in that the defendant there had closer physical proximity to crime, in the current era of instant communication over long distances and concurrent ability to impact and control events far away, that is not a necessary factor in aiding and abetting. Rather, defendant had proven knowledge of repeated and extensive war crimes being committed by the HVO against civilians, including children, and including murder and assault, and deliberatiely and actively provided assistance in the form of not only materiel but also soldiers from the army under his direct control, effectively succounding them to the HVO with full knowledge that they would be committing such crimes. Further, his proposal and implementation of this provision for paying soldiers under him to fight with the HVO was done with secrecy, indicating a guilty state of knowledge. In addition, he did not implement measures to minimize killings of innocent civilians such as disciplining officers, suspending support or*

*condemning the war criminal mess at the time, whatever remorse he expresses after it was over. Under the facts here, defendant had more than just knowledge of the likelihood the assistance he directed and provided would aid war crimes but continued to do so because he had actual knowledge it was doing so.*

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**H S 0 1** *Following a superior's orders is not a defense under this statute and neither is ignoring responsibility for a subordinate's known and predictable actions. Defendant was commander for 3 years over the second massacre. He knew what the murder squads would do if allowed into a safe area. His actions facilitated these squads with results he knew were inevitable. Conviction for aiding and abetting the second massacre.*

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**H S 1 1 1** *I found the defendant guilty and based my decision largely on the precedent set, holding that specific activity or direct activity was not an element of aiding and abetting. I also found very compelling that the defendant had knowledge of the acts being committed when he provided assistance.*

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**H S 0 1** *Proof beyond reasonable doubt on all charges. Prosecution made thorough evidence presentation. Court opinion well reasoned and addressed evidentiary issues relevant to charges in sufficient detail.*

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**V V 1 1 0** *Not guilty. Based upon the decision in Vasiljević. No showing of specific direction by defendant here. He had some knowledge but nothing else.*

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**V V 1 0 0 X** *I would affirm the finding that the Defendant was guilty of aiding and abetting. He knew war crimes were being committed by the VRS.. Specific direction is not required under the statute and is not an essential element of aiding and abetting. The Vasiljević case was defining joint criminal enterprise and was not a full discussion of aiding and abetting liability.*

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**V V 1 0 1** *The language quoted from the subsequent appellate decision defining aiding and abetting is taken out of context. In context, the language defining aiding and abetting does not limit the mens rea requirement as the appellant suggests. There is sufficient evidence that the appellant knowingly provided support for actions of others that constitute war crimes, and that he knew the nature of those actions. The conviction should be affirmed.*

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**V V 1 0 1** *The applicable statute does not require specific direction as an element of the crime of conviction. The decision in VASILJEVIC does not establish a contrary precedent.*

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**V V 1 0 1** *Art 7(1) prohibits aiding and abetting. The relevant mens rea is knowledge of crimes being committed. The relevant actus reus is an act that has an actual, substantial, and foreseeable effect in furthering the applicable crimes. A specific direction is not required. Any statement to the contrary in Vasiljević is dicta, not necessary to the decision, and is not supported by any other precedent. A contrary holding would make the offense of aiding and abetting essentially the same as co-commission. A and A is a lesser crime.*

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**V V 0 1** *The statute provides that aiding and abetting requires carrying out acts specifically directed to assist, encourage or lend moral support to the perpetrators of a specific crime and this has a substantial effect on the perpetration of a crime. The facts as given are that Vuković received field and diplomatic reports that VRS forces were sniping and shelling civilians in Sarajevo, which is a crime against humanity. His logistical support therefor assisted the*

*perpetration of that crime and any support given after he had knowledge of the sniping can be deemed to have been done with the specific intent to commit the crime.*

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**V V 0 1** *Appellants knowledge of the extensive and systematic criminal nature of how the military operation was being carried out makes him guilty under the ICTY. It is impossible for such an endeavor to not result in terrible individual crimes which the appellant well knew. This was not conducting a war with isolated and unsanctioned criminal acts being perpetrated, but an illegal enterprise from the outset. This the appellant well knew and then aided and abetted.*

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**V V 1 0 1** *Statute does not require specific direction as appellant urges. Case law does not support a contrary conclusion.*

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**V S 1 1 1** *The Šainović decision holds that "specific direction" is not an element of aiding and abetting under customary international law. To hold otherwise, as argued by the government, would be a far too narrow interpretation of established principal versus aider and abetter law. Moreover, the facts and appellate standards here support Vucokik's longstanding role, proximity, and knowledge of his subordinates. This includes the possible outcomes of his subordinates. Accordingly, I would affirm the judgment of the lower court.*

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**V S 1 1 1** *I find the Šainović formula for the elements of the offense of aiding and abetting persuasive and authoritative. These are: knowledge by the defendant of the crimes; and a substantial effect upon these crimes by his own conduct. The record contains substantial evidence that he knew of the crimes of the SRJ (?) forces. His position as a military leader alone would be strong evidence of his access to this knowledge. The evidence is also strong that the material assistance he authorized had a substantial effect on the ability of the SRJ to carry out the crimes at the direct level. The defendants responsibility falls well within the mainstream of theories of accomplice liability.*

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**V S 1 1 1** *Although the time constraints of this exercise limited my ability to master the facts, my review of the decision below and the stipulated facts indicated there were a number of broad and specific steps that the defendant took knowing that they would facilitate the war crimes in question. These included covering up the reasons why VJ soldiers were refusing to go to the VRS and the SU and his decisive role in the creation of the PCS. The systematic nature of the persecution and killing of civilians, unconnected to legitimate war aims, made it impossible for the defendant not to know that he had facilitated mass murder of muslims. On the legal issue the defendant presents, it appears to be wrong, based on the Šainović decision, that specific involvement in a particular criminal act is needed; general support by a superior, with knowledge that it is facilitating a war crime, appears to suffice as a matter of law.*

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**V S 1 1 1** *Defendant provided practical assistance to the perpetration of war crimes as required by the actus reus element of the aiding and abetting charge. The mens era requirement is an awareness that crimes will probably be committed. Tacit approval is sufficient. These have been established. There is no articulated requirement of specific direction, and I do not believe this should be inferred. It is the responsibility of higher authority to prevent war crimes, because without the substantial assistance of men and materiel up the ladder, there will be no means for widespread atrocities such as these and what we saw in WW2.*

*Also, the appeals council has stated, albeit in dicta, that specific direction is not required, and I believe this dicta should be transformed into decisional law.*

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**V S 1 1 1\***

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**V S 1 1 1** *Based solely on what I remember of the evidentiary rulings, it appears that the tribunal carefully and methodically made appropriate evidentiary rulings.*

*The biggest legal issue to me is whether the defendant had specific intent to cause, or permit, to occur the atrocities of which he was convicted. Based solely on what I read, it appears that the tribunal reviewed the relevant precedents, and concluded that specific intent was not required.*

*It also appears that the tribunal appropriately applied the facts to the law, and properly convicted the defendant of the remaining crimes.*

*The sentence also seems to be supported by precedent.*

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**V S 0 1** *Clear evidence that defendant had to know nature of criminal activities of recipients of VJS assistance for which he was responsible. Those activities further strategic objectives of VJS. This decision does not push liability for indirect aid too far. It fail to punish it vitiates the most dangerous form of aiding and abetting in modern warfare.*