Pursuing Justice in the Midst of War: The International Criminal Tribunal for the Former Yugoslavia

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Abstract

The International Criminal Tribunal for the former Yugoslavia (ICTY) was the first international war crimes tribunal since Nuremberg and the first to start proceedings before the war had ended. This paper examines the challenges of pursuing a peace agreement while war crimes, crimes against humanity, and genocide are being investigated and prosecuted. The question of the impact of international war crimes tribunals on peace efforts is increasingly important with the advent of a permanent International Criminal Court whose cases to date are all active conflict situations. Drawing on interviews with key actors during the war in Bosnia, this paper presents the perspective of mediators, the ICTY prosecution, and parties to the conflict in examining whether the pursuit of justice during the Bosnian war impeded the pursuit of peace.

> The norm of justice applied through the approach of accountability may be a useful tool for the diplomat or peace builder, and given the limited number of tools in the diplomatic bag, a detailed understanding of the norm of justice and the approach of accountability can only help to foster a better and more lasting peace. (Williams & Scharf, 2002: xvii)

Peacemaking is a creative process. Negotiators for warring parties and mediators have had free rein to find solutions that will end deadly conflict in as expeditious a manner as possible. Sometimes, perhaps often, this has involved less-than-perfect settlements.

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Amnesties are granted to leaders known for massive human rights abuses, exile is arranged for despotic leaders, or leaders known to be authoritarian and repressive are left in power in the interest of peace. These less-than-ideal arrangements may be attributed to the belief held by many in the peacemaking community that innocent people have the basic human right not to be killed and that stopping the killing is the imperative. This belief is at odds with many in the human rights community who see justice as the imperative without which any peace is appeasement. Achieving a just peace is a goal not often attained in practice.

Since the establishment in 1993 of the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), the first war crimes tribunal since Nuremberg, there have been a number of other war crimes tribunals created: the International Criminal Tribunal for Rwanda (ICTR), a hybrid international–national tribunal for Cambodia, the Special Court for Sierra Leone, the Human Rights Court on East Timor, and the new, independent, permanent International Criminal Court (ICC). The ICC came into effect in July 2002; as of this writing, 117 countries are signatory to the Rome Statute that established the ICC.

The ICTY was not only the first of these tribunals, but it was unique in operating during the war, which was the subject of its investigations and prosecutions. About 10 years after the ICTY began work, the ICC came into being; the first cases it has taken—Uganda, Darfur (Sudan), Democratic Republic of Congo, and the Central African Republic—are all situations of ongoing armed conflict. The ICTY, created during the Bosnian war, presented peacemakers with new challenges—challenges that will confront more and more peacemakers as the ICC follows along the path of the ICTY in attempting to administer justice during war.

With these new tribunals, the old debate between peace *versus* justice or peace *and* justice has been given new life. Peacemakers are suddenly confronted with the reality of constraints on their peacemaking creativity. Can amnesty be on the table when there is an international tribunal? Can a suspected war criminal go into exile without fear of prosecution? Can mediators deal with people indicted for war crimes? Some peacemakers' tools, notably offers of amnesty or exile, may have to be removed. Will the already limited number of tools be sufficient? Can the work of the tribunals themselves become part of a new peacemaking toolkit? Does the pursuit of justice in the midst of war facilitate or hinder a peace process?

While there is a growing literature on issues of war crimes, crimes against humanity, and genocide (e.g., Cobban, 2007; Goldstone, 2000; Hamburg, 2000; Mani, 2002; Minow, 1998; Parlevliet, 2002; Staub, 1989; Stover & Weinstein, 2005), there are few studies on the impact of the work of tribunals on peace processes. A notable exception to this is the research by Williams and Scharf (2002). My research examines this issue and analyzes whether or how a peace process is impacted when a war crimes tribunal launches investigations while a war is being waged. This article presents a case study of Bosnia, where I have found that the attention to war crimes contributed to the eventual peace agreement even if it did not manage to ensure that justice was done or that the peace agreement adequately addressed the injustices of the war. This research is based on a review of the conflict management and human rights/international criminal law

literature, official documents, reports and briefings by NGOs, and interviews I conducted with people involved in the Bosnian peace process including attorneys and prosecutors responsible for the establishment and operations of the ICTY.

Background on the Conflict and Peace Processes, 1992–1995

War in Bosnia broke out in April 1992, 1 month after Bosnia declared independence from Yugoslavia. Different peace efforts and many conferences followed. The main peace efforts during the war consisted of the Vance–Owen plan of spring 1993, the Owen–Stoltenberg plan of fall 1993, and the Contact Group plan of July 1994. All of these plans were based on divisions of Bosnian territory according to ethnicity and battlefield gains and losses. The final peace process began in summer 1995 and concluded with the signing of the Dayton peace accords in December 1995. This peace agreement, like the others, was based on territorial allocations based on ethnicity (Dayton Peace Accords, 1995).

In December 1992, at a peace conference in Geneva to discuss the Vance–Owen plan, and before the creation of the ICTY, Acting U.S. Secretary of State Lawrence Eagleburger stunned participants by announcing that the United States had identified suspected war criminals and he proceeded to name them, saying that they needed to be tried in a court of law. The infamous Serb paramilitary leader ''Arkan'' (Zeljko Raznatovic) was named, together with Serbian President Slobodan Milosevic, Bosnian Serb President Radovan Karadzic, and Bosnian Serb General Ratko Mladic (Neuffer, 2001). One Bosnia expert alleges that Eagleburger sabotaged the Vance–Owen agreement to gain the moral high ground as the Bush administration was leaving office having done nothing to alleviate the suffering of the Bosnian Muslims (the term ''Bosniak'' is commonly used to refer to Bosnian Muslims; Hazan, 2004). However, the act of naming Milosevic, Karadzic, and Mladic war criminals did not discourage them from engaging in talks nor did it keep mediators away.

Jim O'Brien, a legal advisor in the U.S. Department of State under both the Bush and Clinton administrations who is credited with helping to establish the ICTY, takes a different perspective. He said that meetings at the State Department with Tadeusz Mazowiecki, appointed UN Special Rapporteur on the Situation of Human Rights in the Territory of the Former Yugoslavia in August 1992, and Nobel Peace Prize Laureate Elie Wiesel, shortly before Eagleburger's trip to Geneva, were influential in Eagleburger's decision to raise the issue of war crimes in Geneva. Mazowiecki and Wiesel had told Eagleburger that the crimes being committed in Bosnia were crimes against humanity. According to O'Brien, Eagleburger's speech was an attempt to move justice onto an agenda that had, until then, been dominated by peace talks without reference to human rights (personal communication, February 27, 2007). With the Bush administration on the way out, however, Eagleburger's speech opened the door to greater support for an investigative commission on human rights abuses in the former Yugoslavia that was established by the UN, but it did not advance the creation of a tribunal.

Because the war began simultaneously with Bosnia becoming a sovereign state, Bosnia had no preexisting army, little equipment, and few weapons. UN Security Council

Resolution 713 (1991) placed an arms embargo on Yugoslavia and disproportionately affected the Bosniaks as they did not have the large arms caches or equipment from the Yugoslav National Army (JNA) that the Bosnian Serbs and Bosnian Croats had. This seriously diminished their capacity to respond to the Bosnian Serb onslaught in early 1992. But neither the Bosniaks nor the Bosnian Serbs were ready to settle early on—the Bosnian Serbs, with their dream of a Greater Serbia and superior military power—were convinced they could gain more territory. The Bosniaks, not certain of military conquest, were not willing to sacrifice the newly independent state of Bosnia to the Bosnian Serbs and Bosnian Croats as they sought to carve up the country.

The war dragged on with the siege of Sarajevo shown on televisions around the world, arousing outrage yet inaction. Bosnians—Muslims, Serbs, and Croats—were targeted and shot by Bosnian Serb snipers in the hills around Sarajevo and in villages and towns across Bosnia. The creation of the UN Protection Force (UNPROFOR) through UN Security Council Resolution 743 (1992) was a means of intervening without direct military engagement by the major powers. Indeed, the UN peacekeeping forces on the ground ended up being witnesses to atrocities without having the mandate or capacity to intervene. Tragically, UNPROFOR became a symbol of the international community's impotence and lack of political will to stop the bloodshed. UNPROFOR could neither protect civilians nor itself; in May 1995, over 370 peacekeepers were taken hostage with some used as human shields, chained to potential NATO targets (Silber & Little, 1997). All hostages were eventually released, but this and earlier hostage-taking episodes contributed to UNPROFOR's perceived and real impotence. While it was established "to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis," it was never given the means to do so (UN Security Council Resolution 743). In addition to the error of defining its mandate as the delivery of aid, another was the lack of will on the part of member states of the Security Council to allow the use of force to stop atrocities and aggression (International Commission on the Balkans, 1996). The U.S. government, while highly critical of the UN for not using force, had no troops on the ground; other countries with troops on the ground were unwilling to use force against the Serb forces knowing their own troops could then be targeted. When the United States finally sent troops as part of NATO forces after the signing of the Dayton Peace Accords, U.S. commanders were told they could take no casualties. One commander said the United States had fewer casualties in Bosnia than they would have had in peace time operations in the United States (W. Stuebner, personal communication, April 11, 2007).

By summer 1992, with over a million Bosnians and 600,000 Croatians having lost their homes, Europe was experiencing the largest flow of displaced persons and refugees since World War II (Gutman, 1993). With no commitment by state actors, the UN was left as the sole military peacekeeping force with no peace to keep.

Roy Gutman, a reporter for *Newsday*, was instrumental in bringing the horrors of the war to citizens around the world. In a July 1992 story entitled "The Death Camps of Bosnia," Gutman described two camps set up by the Bosnian Serbs and accused them of an organized effort to exterminate Bosniaks (Silber & Little, 1997). The story captured world attention, but as early as May 1992, less than 2 months into the war,

Muhamed Sacirbey, then Bosnian ambassador to the UN, reportedly told UN Secretary-General Boutros Boutros-Ghali about the existence of these camps (M. Sacirbey, personal communication, January 20, 2007 and April 6, 2007; Silber & Little, 1997). In August 1992, staff from the U.S. Senate Foreign Relations Committee presented a report that stated, ''The failure to respond reflects systematic defects in the way the international community and the United States monitor human rights crises. Had the world community focused earlier on the atrocities in Bosnia-Herzegovina, many lives might have been saved'' (Silber & Little, 1997: 251).

The inaction of the Bush administration carried over to the Clinton administration despite expectations that President Clinton would take a more active role in the Bosnian war. Human Rights Watch (1994) wrote that ''Indecision regarding Bosnia was arguably President Clinton's most glaring foreign policy failure in 1993. The Clinton administration vocally threatened to intervene militarily against Serbian forces three times [in 1993] only to renege on the threat each time.''

With no effective diplomatic or military action taken to end atrocities in the center of Europe, the UN Security Council passed a resolution in February 1993 to establish an international tribunal to prosecute persons responsible for violations of international humanitarian law committed in the former Yugoslavia beginning January 1, 1991 (UN Security Council Resolution 808, 1993).

The Creation of the International Tribunal for the Former Yugoslavia

> For me, the legal mechanisms that we had in place, the ICTY, the ICJ, were exactly the reasons why I thought reintegration was possible… by identifying and prosecuting those responsible, both individuals and institutions, you're also going to exonerate the innocent. (M. Sacirbey, personal communication, January 20, 2007: 32)

> [T]he theory was that if the Tribunal did its job, it would assist peace. (R. Goldstone, personal communication, April 4, 2007: 5)

> Worse than a dismissal, worse than voluntary blindness, [the creation of the ICTY] is a deliberate public relations exercise to use morality and law as camouflage for a policy of abandonment. (Hazan, 2004: 41)

The International Criminal Tribunal for the Former Yugoslavia, established by UN Security Council Resolution, was ''established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'' (UN Security Council Resolution 808, 1993). The Tribunal consists of three components: (a) the Chambers, consisting of 16 permanent judges elected by the UN General Assembly and up to 12 ad litem judges who are assigned to represent parties who do not have representation or who are incapable of representing themselves; (b) the Office of the Prosecutor; and (c) the Registry, tasked with administrative and judicial support services for the Tribunal. The ICTY's goals are to bring to justice persons allegedly responsible for serious violations of international

humanitarian law, render justice to the victims, deter further crimes, and contribute to the restoration of peace by holding accountable persons responsible for serious violations (International Criminal Tribunal for the former Yugoslavia).

Some believe that the tribunal was created as a cynical ploy to salve the world's conscience in the face of almost complete inaction (R. Holbrooke, personal communication, March 30, 2007; J. O'Brien, personal communication, February 27, 2007; D. Serwer, personal communication, February 15, 2007; also see Neuffer, 2001; Woodward, 1995). Holbrooke (1998) wrote that it was "widely viewed as little more than a public relations device" (190) and said it was his impression that the ICTY "had been set up as more or less a theatrical gesture at the end of the Bush administration by people who were otherwise determined not to involve the United States in Bosnia" (personal communication, March 30, 2007: 2). O'Brien said that it was created because:

> I think, first, people were just stunned by the stories coming out of Yugoslavia… 1992 was a Presidential election year; they weren't going to get involved militarily, we weren't going to take the lead diplomatically… so I think people were pleased there was some response the U.S. could lead on, even though it was a small thing to do in light of what was happening on the ground. (Personal communication, February 27, 2007: 6)

In creating the ICTY as the war was being waged, the victims of the war were not consulted. While the Bosniak leaders were full partners in the creation of the ICTY, the design of the ICTY according to international legal standards did not take into account "the perceptions of, and needs for, justice held by the people in the ex-Yugoslav states" (Allcock, Biro, Gordy, Mertus, & Oloffson, 2006: 1). The lack of broader consultation with people in the region on the ICTY may have led to some of the criticisms discussed later.

While some human rights scholars had long recognized the need for a permanent war crimes tribunal, this was not actively in the works at the time of the Yugoslav war (Goldstone, 2000; R. Goldstone, personal communication, April 4, 2007). The U.S. government, particularly in the person of then U.S. ambassador to the UN, Madeleine Albright, insisted on a tribunal for Yugoslavia. The atrocities being committed in Bosnia drove the United States and the UN Security Council to create a tribunal that would hold perpetrators of such crimes accountable. The United States was the primary funder.

In July 1994, Justice Richard Goldstone of South Africa was appointed the first prosecutor (Goldstone, 2000; Hazan, 2004). Between the time of the UN Security Council Resolution establishing the Tribunal and the arrival of Goldstone, the United States seconded about two dozen attorneys to begin research and investigations. Nancy Paterson, former Acting Senior Trial Attorney in the Office of the Prosecutor, remembered the ICTY's early days: "We were literally physically setting up our own desks, we were sharing computers. We didn't even have paper and pencils. We had no library, no legal books" (personal communication, March 21, 2007: 7).

Goldstone was under pressure from the international community to get the tribunal up and running and prove the viability of this new instrument of accountability; he could not afford to lose the backing of the United States and other donor countries'

support. Even though the ICTY had been established, it was none too secure. Paterson thought the UN looked at the ICTY as a kind of experiment; they would allow the ICTY to do its work for a couple of years and then "they would close us down and say nice try, but it wasn't meant to be" (personal communication, 5). Even those within the U.S. State Department who had supported the creation of the ICTY had concerns about the ICTY's survival given the peace process and wondered if the ICTY would be sacrificed for peace. Jim O'Brien noted that this was something that he and others worried about, asking "Would this [the ICTY] survive? Was it real enough? Would it have to be traded away, in the context of a peace deal? Or just disappear? And so there was some tension about this" (personal communication, February 27, 2007: 8–9). O'Brien said that they wanted to make ICTY real enough so that if it were traded away, they would get something of value for it (personal communication, February 27, 2007).

Rather than launch the ICTY through indictments for the masterminds of the war, Goldstone issued indictments for the "small fish," those people who had been seen committing atrocities. Indicting the leaders required establishing a chain of command that showed that they had ordered the commission of atrocities—a more difficult and time-consuming task. Many were displeased at Goldstone's approach as they wanted to see indictments against the "big fish"—e.g., Milosevic, Karadzic, and Mladic. Getting the "small fish" would not deter leaders from committing atrocities; indicting the "big fish" would send a clear message that no one was immune from prosecution. On this issue, Goldstone remarked,

> Nothing would have delighted me more than to have an indictment against Milosevic. It was well known what he did. The thing was to get the evidence to prove it beyond doubt—that's something many people have difficulty in understanding. They sort of assume that you can use what's in the media as proof. (Stephen, 2004: 106)

Neither the Pentagon nor the State Department was initially helpful in sharing intelligence that might have helped the Tribunal with evidence. William Stuebner, who served at different times during the war as Special Advisor to the Prosecutor of the ICTY and as Senior Deputy Head of Mission for the Organization for Security and Cooperation in Europe, noted that "It is accurate to say that in his first year as prosecutor, Justice Goldstone received almost nothing of value to the prosecution from the American intelligence community" (Stuebner, 2006: 93).

The ICTY issued its first indictments in November 1994 against a Bosnian Serb prison commander, Dragan Nikolic, a relatively low-level Bosnian Serb soldier. Even Goldstone acknowledged that Nikolic was "hardly an appropriate defendant for the first indictment issued by the first-ever international war crimes tribunal" (Goldstone, 2000: 106). One of the prosecutors noted that "we knew people were clamoring for us to go after bigger fish but from a practical standpoint it wasn't realistic… we weren't going to issue indictments unless we really felt confident that we had the evidence to back them up" (N. Paterson, personal communication, March 21, 2007: 11).

Two of the "biggest fish"—Republika Srpska President Radovan Karadzic and General Ratko Mladic, commander of all Bosnian Serb forces—were indicted in July 1995. The indictments charged Karadzic and Mladic with genocide, crimes against humanity, and

violations of the laws or customs of war. Karadzic was additionally charged with breach of the Geneva Conventions. Despite the indictments, Karadzic and Mladic remained at large for more than 12 years. Karadzic was arrested on July 21, 2008 and is currently at the ICTY where his trial is ongoing. Mladic was arrested on May 26, 2011 and extradited to the ICTY where his trial has started.

In addition to the late indictments of the architects of the war, the ICTY came under other criticisms: (a) no Bosnian, Serb, or Croat nationals were employed by the tribunal when it started out of concern it would be seen as partial to one group or another; (b) the tribunal was located far from the conflict, in The Hague, making it impossible for most Bosnians to observe the proceedings and creating apprehension on the part of those going to testify; and (c) a belief on the part of the Bosnian Serbs that it was biased against them since most of the indictments were against Bosnian Serbs.

The ICTY's concern about being perceived as biased was reasonable given the U.S. position against the Serbs. Getting the parties' buy-in to the ICTY might have been facilitated by soliciting their views of a tribunal in the early stages of the creation of the ICTY and by informing them of the ICTY's procedures so that there would be no surprises as the ICTY began investigations. Conflict resolution scholars have long identified stakeholder engagement in a process as critical to obtaining constructive participation in peacemaking and peacebuilding and have laid out certain principles for establishing trust in a peacemaking process (e.g., Crocker, 2001; Miall, Ramsbotham, & Woodhouse, 2000; Moore, 2003; Ury, Brett, & Goldberg, 1988). Research in social psychology on procedural justice provides evidence that people who have a voice in the process evaluate that process as fairer than those who do not have a voice (van den Bos, Wilke, Lind, & Vermunt, 1998). If outcomes are allocated based on what are perceived as fair procedures, people are more willing to accept them (van den Bos, Wilke, & Lind, 1998).

Second, locating the ICTY outside the region was not optimal, but was the only feasible option given that the tribunal started operations during the war. The proceedings were broadcast by radio, and in special cases, for example, the trial of former Serbian President Slobodan Milosevic, they were televised. Allowing observers to witness the process is important to gaining a favorable view of the proceedings, but unfortunately, was not adequate to counter the propaganda being waged against it from Belgrade (Walker, Lind, & Thibaut, 1979). Even after a war, survivors sometimes prefer to have trials conducted outside of the region when they believe that holding them nearby would be a threat to their security. The Special Court for Sierra Leone, based in Freetown, Sierra Leone, took the extraordinary measure of holding the trial of former Liberian President Charles Taylor in The Hague out of the Liberian peoples' concern that he would incite violence in Liberia where his trial to be held in Sierra Leone, a neighboring state.

Third, the Bosnian Serbs' belief that the ICTY was biased against them because early indictments were mainly against Bosnian Serbs was not unexpected. Since the Bosnian Serbs did not permit access to either sites of interest or witnesses to the ICTY investigators, it was difficult to collect evidence against the other warring factions (Stromseth, 2007). Research by Lind, Kray, and Thompson (2001) on perceptions of fairness has shown that timing is important in establishing a climate of fair treatment. If people do

not have positive evaluations of the fairness of a procedure early on, it is more difficult to change these perceptions later. The perceived unfairness of the ICTY starting from its inception in 1994 lingered for more than a decade. In December 2000, a few months after Serbian President Milosevic was arrested, 72% of Serbs thought the ICTY ''threatened the safety of Serbs'' (Arzt, 2006: 232). By 2003, 59% of Serbs polled believed Serbia should not cooperate with the ICTY although 64% said they did not know much about it (Arzt, 2006).

The most important criticism has been that the ICTY has no power to implement its arrest warrants. The ICTY has no police force and must rely on states to make arrests. Goldstone said, ''If governments don't cooperate there's nothing that these bodies [tribunals] can do…You're dealing with sovereign states, you'll never in my grandchildren's lifetimes see an international police invading the sovereign territory of nations'' (personal communication, 14). These issues raised concern that pursuing justice during war could become a source of conflict rather than an aid to the restoration of peace.

The first indictee to be sent to The Hague for trial, Dusko Tadic, was living in Germany when he was arrested in February 1994 on suspicion that he had committed offenses in Yugoslavia in 1992, including aiding and abetting genocide, a crime under German law. He was not indicted by the ICTY until February 1995 and was transferred to The Hague 2 months later. This first trial began as Goldstone was ending his 2-year appointment as chief prosecutor.

In violation of the Dayton Peace Accords, Croatia, Serbia, and Republika Srpska did not readily head over indictees. The ICTY engaged in difficult negotiations to get war criminals handed over to The Hague. The two top Bosnian Serb leaders, Karadzic and Mladic, were arrested by Serbia 13 and 16 years, respectively, after their 1995 indictments and extradited to The Hague, finally bringing Serbia into compliance with the Dayton Peace Accords.

The Dayton Peace Process, June–December 1995

With the war in Bosnia in its third year, over 100,000 dead, more than 200,000 wounded, and more than a million displaced from their homes in a campaign that gave rise to the term ''ethnic cleansing,'' the detritus of peace processes was strewn about like flotsam (Ivanisevic, 2006). By mid-1995, peace talks were going nowhere; the United States had not spoken with the Bosnian Serb leadership in months. A number of events took place that summer 1995 that injected new momentum into the peace process, largely by shaming the international community into action. In early July, in what has been called ''the darkest moment in international involvement in Bosnia,'' Bosnian Serb forces, led by General Ratko Mladic, assaulted the UN safe area of Srebrenica, home to 40,000 Bosniaks guarded by a small Dutch peacekeeping contingent (Silber & Little, 1997: 345, 350). Despite calls for air strikes by the Dutch commander at Srebrenica to stop the assault, no air strike was forthcoming; the UN force commander believed air strikes would be too dangerous. It was not until several weeks later that what had happened at Srebrenica became clear: over 7,000 Bosniak men and boys in the UN safe zone had been rounded up and massacred, some after surrendering. This

massacre highlighted the impotence of the UN to protect civilians even in the so-called "safe areas." Zepa, another safe area, fell to the Bosnian Serbs 2 weeks later.

Concerned about the Bosnian Serbs' control of a disproportionate amount of Bosnian territory, the West had encouraged military actions by the Bosniaks that would balance the land equation and put the Bosniaks in a better negotiating position for the peace talks. There was recognition that the prewar mix of ethnicities throughout the country made dividing up the territory by ethnicity a controversial issue that had stymied previous peace plans. According to one member of the Bosniak negotiating team, there was a betrayal of Srebrenica and Zepa by the West to allow the Bosnian Serbs to take those two pockets of land to make the final land distribution easier (M. Sacirbey, personal communication, January 20, 2007). By late summer, the Bosnian military was finally regaining lost territory through help from the Croatian military—a result of the Federation of Bosnia and Herzegovina, consisting of Bosnian Croats and Muslims that the United States had helped create in spring 1994 (Banac, 2006). The United States apparently encouraged the taking of more land by the Bosnian government:

> Various parts of the U.S. delegation were encouraging us to go much further, including Banja Luka…and we were told to keep the corridor open—the Brcko corridor…. [President Izetbegovic] said, 'Going on to Banja Luka could be a military victory, but in the end it doesn't translate into a political triumph. In the end, we could end up being guilty of the same things we're accusing them of.' (M. Sacirbey, personal communication, January 20, 2007: 13)

On July 25, cooperating with the Bosnian government as part of the Federation agreement negotiated between Croatia and Bosnia in March 1994, Croatia launched an offensive to save the northwestern Bosnian safe area of Bihac from the Bosnian Serbs. The U.S. government was concerned that Croatian President Franjo Tudjman might seize the opportunity to go further and expel Serbs from the Krajina region of Croatia, an area occupied almost entirely by ethnic Serbs (Chollet, 1997). The United States feared this would cause a wider war between Croatia and Serbia by forcing Milosevic to come to the aid of the ethnic Serbs in Croatia. The U.S. ambassador in Croatia told Tudjman that the U.S. government "would tolerate military action to take Krajina provided the battle was 'short and clean'" (Silber & Little, 1997: 360). Tudjman understood this as a green light (O'Shea, 1998). "Operation Storm" was unleashed on August 4, and the Croatian military onslaught in the Krajina caused hundreds of thousands of Serbs to flee the region.

In less than a week, Operation Storm "cleansed" Croatia of over 300,000 Serbs and damaged 20,000 homes owned by Serbs (O'Shea, 1998). There was no military response, either from the Krajina Serb forces or from the Serbian military. By this time in the war, Milosevic had most likely determined that defending the Krajina would be too costly and his interest was on seeing sanctions lifted against Serbia. By August 6, the Croatian flag flew over Knin, the capital of the region. The only vocal opposition was that of Carl Bildt, the former Swedish prime minister, "Carl Bildt, the European Union mediator, was the lone voice of outrage… suggesting that Tudjman could be indicted for war crimes" (Silber & Little, 1997: 360). The retaking of Bihac and Knin by the

Bosniaks and Croatians, respectively, and of Srebrenica and Zepa by the Bosnian Serbs, constituted a final grab for territory before peace talks.

Almost simultaneously with these upheavals in Bosnia and Croatia, just weeks after the massacres at Srebrenica, Goldstone issued indictments against the top two Bosnian Serb leaders, Radovan Karadzic and Ratko Mladic, for their command roles in orchestrating and carrying out genocide and crimes against humanity.

August 1995 saw the tragic deaths of Robert Frasure, Principal Deputy Assistant Secretary of State for European and Canadian Affairs and President Clinton's envoy to the Contact Group; Nelson Drew, an Air Force Colonel who had recently begun work at the NSC on the Balkans; and Joseph Kruzel, Senior Deputy Assistant Secretary of Defense. On August 19, the armored personnel carrier they were riding in went off the road taking their lives and threatening to derail the peace process Frasure had been leading.

Following Frasure's death, his boss at the State Department, Assistant Secretary of State for European and Canadian Affairs Richard Holbrooke, took up the reins of the peace process and began an intensive series of trips to the Balkans. On August 28, yet another event raised the stakes for peace. Thirty-seven people were killed, and 85 wounded in the same Sarajevo marketplace that the Bosnian Serbs had shelled over a year earlier, killing 68 (Chollet, 1997). President Clinton requested air strikes against the Bosnian Serbs, saying, "We have to hit 'em hard" (Chollet, 1997: 69). Air strikes, authorized by the UN Under-Secretary-General for Peacekeeping Operations, Kofi Annan, began within 48 hr.

Richard Holbrooke arrived in Belgrade on August 30 as the NATO bombing was underway. Holbrooke believed, as had Frasure, that the Bosnian Serbs could be sidelined in favor of dealing only with Milosevic, who was perceived as more reasonable. While in most mediations, the mediator seeks to include all warring factions since anyone left out can become a spoiler, Holbrooke believed Milosevic could deliver the Bosnian Serbs and preferred dealing with him. In his meeting with Milosevic, Holbrooke was surprised to be handed a letter signed by the Bosnian Serb leadership, including Karadzic and Mladic, which authorized Milosevic to have a deciding and final vote on any decisions. The letter, known as the "Patriarch letter" was witnessed by Orthodox Serb Patriarch Pavle (Chollet, 1997).

This was a clever power play by Milosevic to take control of the Bosnian Serbs with whom he was becoming increasingly impatient largely because of international sanctions on Serbia and Montenegro imposed after the war began in November 1991. Milosevic knew that the actions of Karadzic and Mladic guaranteed that the international community would not relax the sanctions and that Serbia would continue suffering under them (Silber & Little, 1997). The "Patriarch letter" played into Holbrooke's hands and allowed him to move forward with a peace process that, unlike previous efforts, included only heads of state and excluded Karadzic and Mladic. Sacirbey noted that "Even though he [Milosevic] was one of the gorillas, he could also be the zookeeper… I think that indictment was rather convenient for what Holbrooke was trying to achieve" (personal communication, January 20, 2007). During Holbrooke's many trips to the region, he never went to Pale and only met Karadzic once, when Milosevic surprised

him by having Karadzic in Belgrade on one of Holbrooke's trips there (Chollet, 1997; R. Holbrooke, personal communication, March 30, 2007).

According to David Rieff (1996), the American desire not to deal with the Bosnian Serbs because of the atrocities they were committing set the Americans apart from the British and the French. He noted that the Americans did not "park their morals at the door when they deliberated over Bosnia" (255). It is unlikely, however, that the Americans' desire not to deal with the Bosnian Serbs was only because of human rights concerns. The Americans had seen the complications of past peace processes that involved multitudes of people. In previous talks, ethnic factions were represented, often not by one group alone but by several. The leaders of Croatia and Serbia were also involved—thus there could be 7–8 different groups represented at the table.

From a mediation perspective, Bosnia was an alphabet soup that could not form a coherent sentence. Jim O'Brien, who worked with Holbrooke, noted, "The difficulty is that if you have multiple voices at the table whether it's two separate special envoys…it becomes easy to start bidding one off against the other. That essentially had been the fate of the peace talks for four years" (personal communication, February 27, 2007: 17–18).

When the U.S.-mediated peace talks began at Wright-Patterson Air Force Base in Dayton, Ohio, on November 1, the parties included Presidents Alija Izetbegovic of Bosnia, Franjo Tudjman of Croatia, Slobodan Milosevic of Serbia, and a Bosnian Serb observer delegation led by Momcilo Krajisnik. Notably absent was Dr. Radovan Karadzic, "President" of Republika Srpska and indicted war criminal.

During the talks, amnesty for war crimes was on the table at Dayton according to Michael Scharf (1999), former legal advisor at the State Department during the Dayton peace talks. As a member of the Bosniak delegation said, "So the idea of amnesty was put on the table by Holbrooke and company as being part of the things that the other side wants to discuss" (M. Sacirbey, personal communication, January 20, 2007: 35). The ICTY heard that amnesty was being discussed at Dayton. Paterson recounts:

> Now later on when the Dayton negotiations started, we started hearing rumors that there was talk of offering amnesties…. [I]f they had done that it would have essentially put us out of business…. Judge Goldstone got on the plane and went to the United States and spoke to people there…. [H]e apparently made a fairly persuasive case and convinced them not to do that. (Personal communication, March 21, 2007: 4–5)

Goldstone said he brought out the second indictment against Karadzic and Mladic for genocide in Srebrenica during the Dayton talks because he was worried that amnesty might be on the table and that the tribunal would become a bargaining chip. Goldstone was concerned that the leaders of the war might be offered immunity at Dayton in exchange for a peace agreement. He added the second indictments as if to remind the mediators of the horrific crimes for which these two men were accused (Stephen, 2004).

Nicholas Burns, then spokesperson for the State Department and Acting Assistant Secretary for Public Affairs for Secretaries of State Warren Christopher and Madeleine Albright, gave assurances that there would be no clemency for Karadzic and Mladic (Landry, 1995). But Goldstone was not so sure: "I accept it may well have been so, but

I didn't want to take any chances'' (personal communication, April 4, 2007: 10). He said there was no one from the ICTY at Dayton during the talks, ''I would have been very happy to have been involved… but they [the mediators] would have been stupid to have anybody from the Tribunal at Dayton. It would have been a red rag to a bull'' (personal communication, April 4, 2007: 9–11).

Holbrooke says that amnesty was never on the table at Dayton, ''Amnesty was never raised…one of my greatest fears was that Milosevic would ask for an amnesty provision, in which case we would have had a whopping debate. That would have had to go to President Clinton directly. But since it didn't come up, we didn't have to explore it'' (personal communication, March 30, 2007: 13).

Holbrooke recounted an interview with Robert Novak on August 27, 1995 in which Novak asked him, ''Do you think it's helpful to call [Karadzic] a war criminal? Do you think it's helpful in the negotiations?'' Holbrooke responded that ''It's not a question of what I call him or what you call him. There's an international tribunal going on…. I'm not going to cut a deal that absolves the people responsible for this'' (Holbrooke, 1998: 90). Holbrooke suggested that the reason amnesty was not raised by Milosevic was because he was cocky, because he did not accept the jurisdiction of the ICTY, and because asking for amnesty would have implied that he was guilty (personal communication, March 30, 2007).

The peace process did not seek redress for the injustices of the war through reversing the effects of ethnic cleansing. Rather, the new map of Bosnia represented battlefield losses and gains. Bosnia would be divided: 49% for the Republika Srpska, consisting of Bosnian Serbs, and 51% for the Federation of Bosnia and Herzegovina. The injustice of this realpolitik endgame caused distress and frustration for President Izetbegovic and his delegation and impatience on the part of the American mediators. What had been lost by the Bosniaks on the battlefield—Srebrenica and Zepa—had been included as part of the Federation on the earlier Contact Group peace map. President Izetbegovic did not want to negotiate any other map and did not want to give up Srebrenica and Zepa voluntarily at the peace table.

The Americans grew impatient and thought the Bosnians were being unreasonably stubborn. A member of the mediating team recalled, ''As long as unrealistic options were the only ones on the table, these talks with the Bosnians weren't negotiations – they were hand-wringing sessions'' (Donald Kerrick as cited in Chollet, 1997: 215). There appears to have been little empathy for the Bosnian delegation's sense of injustice in this redrawing of boundaries. The mediating team was focused on getting an agreement—an agreement that however imperfect, would put an end to the killing. While there was recognition that the Bosniaks were the main victims of the war, there was little acknowledgment of the Bosnian delegation's desire for a more just resolution:

> While the Serbs and Croats were the main perpetrators of the war, the Bosnians had become the chief impediments to the peace agreement.... The Bosnians, who the U.S. supported for both political and moral reasons, seemed blind to the fact that the agreement, while not perfect, was a good one. Indeed, it was the best offer they would ever get. (Chollet, 1997: 244)

And yet, a member of Holbrooke's team noted that "To the Muslims, accepting the Republika Srpska is like accepting the Third Reich" (Rieff, 1996: 258). Indeed, Izetbegovic said at Dayton that he had done everything he could to ensure that "the extent of the injustice to our people and our country will be decreased" (Rieff, 1996: 258). He believed the Dayton Peace Accords constituted an unjust peace, "but my people need peace" (Chollet, 1997: 248).

President Milosevic, on the other hand, was jubilant with the peace accords, knowing that sanctions on Serbia would be lifted following the signing. He played a key role as conciliator and was a good deal maker, especially at giving away what was not his, including Sarajevo. To the American delegation's surprise, Milosevic conceded Sarajevo; to the Bosnian Serb delegation's horror, they learned only on the final day of talks that Milosevic had given away Sarajevo. This became a sticking point—while Milosevic had initialed the agreement on behalf of the Bosnian Serbs, the United States would not be able to get agreement to put troops on the ground if the Bosnian Serbs refused to sign the agreement 3 weeks later in Paris. Although the Bosnian Serbs' approval of the peace agreement was not legally required, Defense Department officials, including Lieut. Gen. Wesley Clark, the Pentagon's top representative at the Dayton talks, were not eager to "sell" a peace agreement to Congress without assurances that the Bosnian Serbs would go along. Bosnian Serb forces would be a serious threat to NATO troops if they did not consent to the agreement (Schmitt, 1995). It was left to Milosevic to apply pressure to get the Bosnian Serbs' to agree to sign the accords in Paris—which he did (Schmitt, 1995).

The Dayton Peace Accords were initiated at the Wright-Patterson Air Force Base on November 21 by Presidents Alija Izetbegovic of Bosnia, Franjo Tudjman of Croatia, and Slobodan Milosevic of Serbia. As agreed with the French government before the talks started, the accords would be signed in Paris 3 weeks later. The agreement that emerged after a very difficult 21-day labor was successful in ending a brutal war and has maintained the peace despite numerous obstructions and obstacles over the years.

Holbrooke argues that criticism of the peace agreement is unjustified—that the issue is not the agreement but the implementation, "Nothing is more important than to make the distinction between the agreement and its implementation. No single point has been more confusing to people in the last eleven years…. 'You didn't capture Karadzic'…. Article IX provides clearly for his capture. It was a failure of implementation…." (Personal communication, March 30, 2007: 13)

Jones (1996) agrees that the key to the peace agreement lies in strict enforcement, but he criticizes it for not requiring IFOR or NATO to arrest war criminals: "…the Peace Agreement's marginalization of the Tribunal is in stark contrast to the pivotal role assigned to it by the Security Council…. The Agreement stops short of requiring cooperation from the international implementing force ("IFOR")" (227–228).

Holbrooke and others have blamed the international forces for not fulfilling the terms of the peace accords, "Our enforcement mechanism was called NATO, but our commanding officer didn't believe in his own agreement he was assigned to implement… it's not like they [NATO troops] weren't told to. They were told not to" (R. Holbrooke, personal communication, March 30, 2007: 13). This was reiterated by Major General

(retired) William Nash, then U.S. NATO commander in Bosnia, who said that he had been told not to arrest war criminals (personal communication, March 28, 2007). The New York Times reported that "NATO commanders know where Radovan Karadzic and General Ratko Mladic, who have been indicted, reside…. But NATO's position is that its forces are obligated to arrest only those war criminals they stumble upon…" (Hedges, 1996).

This was clearly troubling for the ICTY, which, as Goldstone had said, would never have its own police force to arrest those it indicted. Venting his frustration in a 1996 interview, Goldstone said that the arrest of Karadzic would be "not only in the interest of justice but in the interests of peace…. I can't believe that 60,000 troops would have difficulty" in arresting Karadzic (Perlez, 1996). As was the case in the lead up to the Dayton talks, peace remained the ultimate priority and arresting suspected war criminals was not NATO's mandate.

Six months after the Dayton Peace Accords, Karadzic was still President of Republika Srpska and head of his political party, the Serbian Democratic Party (SDS). "President Clinton evidently wants to be sure that nothing in Bosnia rocks the boat before Election Day. And American military leaders, gripped by the Colin Powell doctrine, do not want to risk casualties for any reason" (Lewis, 1996). Goldstone commented on the United States' fear of taking casualties, "Imagine how the victims must have felt, knowing that a different order would have been given had it not been an election year in the United States" (personal communication, April 4, 2007: 9).

The Clinton administration was concerned not only about its own reelection campaign, but about the first elections in Bosnia, slated for September 1996, 2 months before the U.S. elections. Having Karadzic and Mladic in power threatened free and fair elections. It became a top priority that Karadzic be removed from power before the elections; his leadership of the Bosnian Serbs was also a violation of the Dayton Peace Accords (Chollet, 1997; Holbrooke, 1998). Holbrooke, who had left the State Department for the private sector after the Dayton process, was asked by the Clinton administration to return to Serbia to secure Karadzic's ouster from power. Using Milosevic once again as the guarantor of Bosnian Serb cooperation with the Dayton Peace Accords, Holbrooke convinced Milosevic to exert pressure on Karadzic to resign as President. Karadzic resigned the following day (Holbrooke, 1998). While the elections were not without problems, Karadzic's removal from power was a critical step in putting teeth in the peace agreement.

What a Difference a Tribunal Makes: Implications for Peace Processes

On February 10, 1993, Secretary of State Warren Christopher argued strongly for U.S. engagement in the Balkans, saying, "Our conscience revolts at the idea of passively accepting such brutality" (Associated Press, 1993). Christopher observed:

> The events in the former Yugoslavia raise the question whether a state may address the rights of its minorities by eradicating them to achieve ethnic purity. Bold tyrants and fearful

> minorities are watching to see whether ethnic cleansing is a policy the world will tolerate. If we hope to promote the spread of freedom, if we hope to encourage the emergence of peaceful ethnic democracies, our answer must be a resounding 'no.' (Associated Press, 1993)

Muhamed Sacirbey, then Bosnian Foreign Minister, noted that the Bosniak delegation at the peace talks understood that they might have to sign a less-than-just peace agreement. They believed they could pursue remedies through legal channels. Sacirbey said, "I always saw there was an alternative route, which was, ok, decide what you can settle, but then leave other issues open for the International Court of Justice or the ICTY" (personal communication, April 6, 2007: 19).

For the first time ever, with the founding of the ICTY in 1993, the community of states, through the UN Security Council, had declared that atrocities committed in war were unacceptable. The impact of the ICTY on the peace process and subsequent peacebuilding efforts was substantial, if not always for its own achievements, but for the mere fact of its existence. Because the ICTY was created during the war, it was not a known quantity until it had been operational for a couple of years. By that time, the war in the Balkans was coming to an end. Nevertheless, the ICTY appears to have had an influence beyond what might have guessed from its humble beginnings in a life insurance building in The Hague.

Perhaps the most catalytic event for the peace process was the issuing of indictments against Karadzic and Mladic. Shrewdly using the indictments to sideline the two Bosnian Serb leaders who had been obstructionist and difficult, Holbrooke recognized that he could replace them with Milosevic, the architect of the wars in the Balkans to whom both Karadzic and Mladic were dependent for support. Holbrooke stated that he would announce publicly that he would refuse to meet with Karadzic and Mladic because they were indicted and that it would be inappropriate for him to have a conversation with them. O'Brien said, "from a negotiating standpoint, you had a much simpler environment and rather than having three people who had different agendas, you had one guy and it was up to him to deliver the other ones" (personal communication, February 27, 2007: 10).

The timing of the indictments was not viewed favorably at the UN whose priority was paving the way to peace. Boutros Boutros-Ghali saw the indictments as barriers to peace; he feared that the timing of the pursuit of justice would obstruct the peace process. Goldstone said that Boutros-Ghali "was pretty critical of me for issuing the indictment against Karadzic and Mladic while the war was raging. But that was his problem, not mine. My job was to prosecute" (personal communication, April 4, 2007: 14).

The American negotiating strategy to marginalize key players was possible because the indictments gave them an excuse to do so and because they had a willing partner in Milosevic who could deliver those not at the table. It is unlikely that Holbrooke would have had the support of the Contact Group countries to exclude Karadzic and Mladic had they not been indicted. In his book, *To End a War*, Holbrooke comments on the utility of the tribunal to the peace process: "the tribunal emerged as a valuable instrument of policy that allowed us, for example, to bar Karadzic and all other indicted war criminals from public office" (Holbrooke, 1998: 190). Daniel Serwer, Special Envoy

and Coordinator of the Bosnian Federation, said "I cannot think of an indictment that I truly felt set back the process" (personal communication, February 15, 2007: 9).

Contributing to the success of the Dayton process was that Milosevic, by that time, was a leader badly in need of help from the international community in lifting the sanctions on Serbia. Milosevic had an incentive to make peace in Bosnia and had the power to ensure that Karadzic and Mladic would cooperate. Although many believed (and hoped) that Milosevic would be indicted for his part in launching, funding, and supplying troops for the wars against Croatia and Bosnia, he was not indicted until 1999 and then, the indictment was for his role in the Kosovo crisis, not for his role in Bosnia.

Although some believe that Milosevic was not indicted because he was needed for the peace agreement on Bosnia, there is no evidence to suggest that the ICTY intentionally delayed issuing the indictments against Milosevic. Indeed, even after Goldstone left the ICTY in 1996, his successor, Louise Arbour had a difficult time finding satisfactory links between the crimes on the ground and Milosevic:

> … [I]ndicting Milosevic was a tricky proposition because of the difficulty in finding definite proof. The crimes in Bosnia and Croatia were carried out by local Serb forces and, officially at least, Milosevic, as president of Serbia, had no control over them. Piecing together the chain of command would take a long time…. (Stephen, 2004: 134)

It is difficult to understand how establishing a chain of command for Milosevic could have taken four more years after the indictments of Karadzic and Mladic. Perhaps it was delayed because the United States and Europeans failed to provide intelligence to the ICTY—some say that this was because of concerns about the peace process (Williams & Scharf, 2002). It was not until early 1998 and the crimes orchestrated in Kosovo that Arbour could establish a chain of command for Milosevic's role in war crimes and crimes against humanity. Milosevic was indicted on May 24, 1999 for crimes committed in Kosovo. Only when he was already in custody in The Hague was he charged with war crimes in Bosnia. His victims did not see justice done as Milosevic died of a heart attack in The Hague in 2006 at the age of 64. After 4 years, the trial was in its last phase when he died.

Bringing people to justice has been highly problematic because of the lack of will to arrest Karadzic, Mladic, and others. Justice Goldstone, on his last day as prosecutor, told the UN Security Council that the failure to arrest Karadzic and Mladic was the biggest disappointment of his 2 years as prosecutor (Landrey, 1996). His successor, Louise Arbour asked,

> How long will the world tolerate noncompliance, defiance, and possible contempt? If the tribunal is crippled by inaction or the lack of political will to make it happen, or the lack of resources, it will be another irritant that could contribute not to peace but to the rekindling of warlike activities…. Criminal justice is a very dangerous tool to play with. You can't go out and indict people and then sort of collapse into a state of inertia. (Landrey, 1996)

The inertia of the international implementing forces with respect to arrests was abundantly on display. It undermined the ICTY's ability to secure justice for victims of the war and undermined the deterrent impact of the Tribunal. Goldstone noted that "If

people in positions of authority cannot be brought to The Hague, the important deterrent value of the tribunal will be destroyed'' (Perlez, 1996).

Criminal justice—whether domestic or international—has the goal of deterrence. As Goldstone noted, ''The more efficient the criminal justice system, the lower the crime rate. That's axiomatic. Why should it be different with international criminal justice?'' (personal communication, April 4, 2007: 3). Because there was no functioning international criminal justice mechanism for the first 2 years of the Bosnian war, it would seem that the ICTY could not have served as a deterrent to potential war criminals in that conflict. Nevertheless, several people strongly believed that the ICTY had a deterrent effect on the parties to the conflict.

Robert Gelbard, Presidential Envoy to the Balkans said that ''once indictments were a threat, it changed people's behavior and people were afraid of being arrested.'' He added that although ''Krajisnik was worried about being indicted [he] still met with me'' (personal communication, February 13, 2007). Jadranko Prlic, a Bosnian Croat who had served as President and Prime Minister of the Bosnian Croatian Defense Council (HVO) during the war before becoming Foreign Minister of Bosnia and Herzegovina following the peace agreement, was also concerned about being indicted. ''It was pretty clear that part of the reason he was a good Foreign Minister was to make himself as immune from indictment as possible,'' remarked Serwer (personal communication, February 15, 2007: 8).

Deterrence is weakened if there is irregular implementation, and this serves neither the interests of peace nor justice:

> [I]f a Tribunal is established and is unable to indict those responsible for orchestrating the campaign of terror—as the case with the inability to indict Mr. Milosevic for war crimes in Bosnia, then it may in fact encourage them to feel free to commit atrocities in a future conflict—as in Kosovo, believing they possess some degree of de facto immunity. (Williams & Scharf, 2002: 22)

Stuebner recounts that Bosnian Serb official Jovan Zametica spoke with an American delegation at a conference on the upcoming September Bosnian elections. Zametica came away saying that it was obvious the Americans did not want Karadzic arrested because they did not want the elections disrupted. ''It was Clinton's reelection and that was what drove the election we were running… American politics interfered with the justice process because he [Karadzic] would have been in The Hague in 1996'' (personal communication, April 11, 2007: 11–12). Stuebner, who met with Karadzic on a number of occasions, said, ''These guys were really fixated on the Tribunal. They really truly were… so over the course of the next couple of weeks, Radovan [Karadzic] wanted to turn himself in. He really did, but he was terrified that Milosevic had planted people in his security force and if he tried to turn himself in, Milosevic would have him killed and then would blame NATO'' (personal communication, April 11, 2007: 10, 13–14).

More than a decade after the Dayton Peace Accords, with fewer NATO troops in Bosnia, a number of failed arrest attempts, and the mandate of the ICTY coming to an end, it was unclear whether Karadzic and Mladic would ever appear in the dock at The Hague. The European Union (EU) was poised to begin talks with Serbia on expanded

trade with the EU as a precursor to EU membership talks. The EU used this leverage to pressure Serbia to comply with the arrest warrants for Karadzic and Mladic and to cooperate on the implementation of the peace accords (Roth & Leicht, 2007). As mentioned previously, Serbia arrested Karadzic in 2008 and Mladic in 2010 and handed them over to the ICTY. As Goldstone wryly noted, "That's how the Croatians sent their generals so-called voluntarily to The Hague, because the United States was withholding over a billion dollars that Tudjman needed. So he said to his generals, 'Go and volunteer'" (personal communication, April 4, 2007: 15).

The historical record established by the ICTY speaks to the massive and widespread atrocities committed during the Bosnian war. The ICTY's work in documenting human rights abuses may help prevent historical revisionism from taking root and fueling future conflicts although it is difficult for a group to acknowledge the egregious acts of individual members of that group. In Republika Srpska, denial started within months of the end of the war. Hedges (1996) noted that despite all the evidence,

> The Bosnian Serbs have now embarked (like the Croatians who deny the Ustashe crimes of 50 years ago) on a new war against memory…. The Serbs, in Belgrade and Pale, eagerly hand out press packets with 'evidence' that it was not the Serbs who slaughtered civilians in Sarajevo, but Bosnia's Muslim-led Government in an effort to rouse international sympathy by secretly murdering their own. That any claim of innocence can be made, when up to 900 shells a day fell on Sarajevo from the Serb-held hills above, is stunning. But sincere and well-educated Serbs insist this is true.

There is documentation of atrocities, and today there are leaders in Serbia (most notably, President Boris Tadic) who have recognized the abuses committed by Serb individuals during the war and have taken more realistic views on the need to cooperate with the ICTY. Britain's chief prosecutor at the Nuremberg tribunal said of the ICTY:

> [T]he tribunal will fail unless those indicted for the more serious war crimes in the former Yugoslavia are arrested so they can be brought to justice…there can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs. (Shawcross, 1996)

Conclusion

The case of Bosnia and the ICTY highlight how efforts to secure peace and justice can work together—but only under certain conditions. In Bosnia, at almost every turn, the priority for peace trumped demands for justice and perhaps because of this, there was less friction between the two than there might have been had the ICTY been a fully functioning system when the war began. Indeed, we are witnessing this friction now with the advent of the first independent, permanent International Criminal Court, established when 120 countries adopted the Rome Statute in 1998 and came into force in July 2001 after being ratified by the required 60 countries. As of October 2011, 118 states have ratified the Rome Statute. The International Criminal Court has taken six cases (in chronological order: Uganda; Democratic Republic of Congo; Central African

Republic; Darfur, Sudan; Kenya; and Libya). In the cases of Uganda and Darfur, particularly, there have been heated debates among those in the conflict zones as well as those engaged in mediation efforts on the primacy of concluding a peace agreement before justice is pursued. Justice is seen as a threat to peace because those indicted by the ICC have no incentive to engage in talks nor to stop fighting. However, in Kenya and possibly Libya, the ICC's role in pursuing justice is seen as a necessary part of a broader democratic transition that is a test of new governments' commitments to human rights and human security.

Because the ICTY was still getting up and running when the war ended, the peace process took precedence. The pursuit of justice during the war helped create new points of leverage for the mediators and new incentives and disincentives for the warring factions.

If the ICTY had been an established tribunal during the war, it is unclear how the peace process might have been impacted. Until indictments against Karadzic and Mladic were issued, the ICTY had not figured into peace processes. The ICTY was not yet created or too young to figure into the Vance–Owen, Owen–Stoltenberg, or Contact Group negotiations. By the time of the indictments against the two Bosnian Serb leaders, the Dayton peace process had been launched and the mediators found the ICTY a useful tool.

Part of its usefulness was no doubt because it was perceived by the mediators to be expendable if necessary. Amnesty, a useful carrot in many peace negotiations, did not appear to be taken off the table because of the ICTY even if its existence caused the mediators to reflect very seriously about the implications of offering amnesty. Had the ICTY been a more established and independent institution at the time, the peacemakers might have seen it as more of a threat because amnesty could not have been considered. It would have been inconceivable to consider using the tribunal as a bargaining chip to be given away in exchange for a peace deal. This was not the case during the Dayton peace process where the emphasis was on peace and amnesty may have been on the table. Amnesties or guarantees of immunity would have gutted the ICTY with profound repercussions for the future of international criminal law and justice.

Exceptionally, the issuing of indictments against the leaders of the Bosnian Serbs did not derail the peace process. In most cases, peacemakers face real dilemmas on whether and how to deal with unsavory characters such as terrorists and indicted war criminals. How is peace achieved if such persons are leaders of one or more of the warring factions and peacemakers will not meet with them? While human rights advocates may promote a policy of isolation and exclusion of such persons, peacemakers are more sanguine in believing that peace will come only through the inclusion of all factions. There are no legal restrictions on speaking with indictees—they are accused of crimes, but are not convicted. However, there is a danger for peacemakers in dealing with indictees. By negotiating with them, there is the risk that the indictees gain legitimacy and that the peacemaker is perceived to be appeasing a war criminal. There is a new personal threat to peacemakers since the 2010 U.S. Supreme Court decision in Holder v Humanitarian Law Project. It prohibits ''material support'' to groups designated as terrorists and includes providing advising or training to these groups—even if the advising or training

is on negotiations, mediation, and human rights to encourage their participation in a peace process.

Holbrooke chose not to speak with Karadzic or Mladic using the reason that they were indicted, even though at the time, there were no constraints on him doing so. Rather than disrupt the peace process, however, this facilitated it. Because Milosevic was the ''emperor'' to whom Karadzic and Mladic owed their fealty, these two indicted war criminals could be excised from the talks with no risk to achieving a peace agreement. Holbrooke was able to have an interlocutor—Milosevic—who had an interest in peace so that sanctions against Serbia would be lifted. It is rare to have someone other than the leader of a warring faction deliver that faction. Although Milosevic's role as the architect of the atrocities was well known in the early and mid-1990s, he was a useful partner in the peace talks. Had he been indicted before peace was negotiated; however, it is doubtful that peace talks would have moved forward unless the mediators had been willing to engage with him or the indicted Bosnian Serb leaders.

Having one external actor, the United States, serve as the lead mediator and as the main postwar guarantor of the peace worked against the interests of justice. In a U.S. election year, the State Department was unwilling to go for broke in trying to get an agreement that would address the root causes of the conflict and was not willing to challenge or reverse the results of ethnic cleansing. The State Department and the Pentagon were selective with sharing intelligence that could have expedited the search for evidence. The Pentagon was unwilling to go after war criminals for fear of losing soldiers in an arrest attempt and destabilizing the fragile peace. Ironically, not arresting the war criminals not only undermined justice, but peace as well. Bosnians were uncertain about the safety of returning to their prewar homes given that two of the most brutal leaders were still at large. Karadzic and Mladic were not forgotten. As Muhamed Sacirbey, the former Bosnian foreign minister said, ''How can you forget about them? It's not on everyone's daily breakfast menu, but … simply by arresting them they can say, 'we did it… we're over another hurdle'' (personal communication, January 20, 2007: 42–43).

A dilemma for justice being carried out in the Balkans was that there was little to no consultation with the victims of the conflict on what kind of justice they would have wanted nor what they believed would have helped secure the peace. If the goal of the peace agreement and the ICTY was to help end the war and build peace in Bosnia, it would have been fruitful if the parties most impacted by the crimes could have had some input into the mechanism for justice. More than a decade after the war, there has been little reintegration in Bosnia. One symbol of the territorial and psychological walls that divide people is language. Bosnians, Croats, and Serbs all spoke Serbo-Croatian before the war. Following the war, each group has created differences in their language use. The language Serbo-Croatian no longer exists; in its place are the Bosnian, Croatian, and Serbian languages.

Together with the lack of consultation was a lack of communication. During the war, it was not easy to reach out to the victims to explain what the ICTY's goals were and who they would be investigating. This led to misconceptions and unrealistic expectations for the tribunal. Trials were broadcast on television in Bosnia only irregularly.

What people saw was that those who had committed atrocities remained at large. Serbs distrusted the ICTY because most of those indicted were Serb. While the Serbs committed the vast majority of the crimes, the ICTY did not communicate that investigators were not permitted access to Serb witnesses to learn of crimes committed by others.

The Dayton peace process was successful in ending the war in Bosnia, and the ICTY was a valuable, if unintentional, partner in the peace process. There were few drawbacks to the pursuit of justice during the process since the Tribunal was not seen as having the capacity to trump peace by interfering with, or disrupting, the process. However, the lack of will to execute the arrest warrants against two of the main perpetrators of atrocities caused uncertainty for several years about whether the peace would hold. The outcry for justice in the midst of a vicious war where no peace was in sight led to the creation of a tribunal that advanced peace and that has had an impact in the Balkans and around the world far more profound than its creators likely imagined.

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