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Order versus Justice: An Assessment of the Challenges Faced by
The Commission of Experts and The International Criminal
Tribunal for the former Yugoslavia During Their Attempts to
Investigate and Prosecute Atrocity Crimes

By

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The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

The English School focuses on the issue of humanitarian intervention, because “it poses the conflict between order and justice in international relations in its starkest form.” This thesis posits that international investigations and prosecutions of atrocity crimes poses the conflict between order and justice in international relations in an equally stark form. Diplomatic attempts to facilitate a negotiated settlement to an armed conflict (order) may be undermined by attempts to investigate and prosecute atrocity crimes (justice), particularly where individuals deemed crucial to any settlement become the specific focus of investigations. Similarly, attempts to arrest individuals indicted for atrocity crimes (justice) in post-conflict environments, may in some instances lead to the nascent, fragile peace (order) breaking down where their supporters retain the capacity to act in a destabilising manner .

The thesis explores these tensions between order and justice by focusing on the challenges faced by the Commission of Experts and the International Criminal Tribunal for the former Yugoslavia during their attempts to investigate and prosecute atrocity crimes.

Table of Contents

Acknowledgements	i
Abstract	ii
Acronyms	v
Introduction: The English School – A framework for analysis.	1 – 20
Chapter One: Uncharted Territories: The Commission of Experts and international efforts to investigate atrocity crimes.	21 – 54
Chapter Two: A Solidarist Moment? The Establishment of The International Criminal Tribunal for the former Yugoslavia (ICTY) and the challenges confronting the Tribunal during its initial investigations.	55 – 91
Chapter Three: What Price Justice? An assessment of attempts to include robust provisions relating to the prosecution of atrocity crimes into peace agreements: The Dayton Accords.	92 – 123
Chapter Four: What Price Order? An assessment of NATO's justifications for failing to arrest persons indicted for war crimes (PIFWCS) and the consequences of this policy.	124 – 167

Chapter Five: Between Order and Justice? An exploration of the reasons behind NATO's reluctance to arrest PIFWCs and an examination of strategies adopted by the Tribunal in order to induce cooperation.	168 – 225
Conclusions	226 – 258
Sources and Selected Bibliography	258 - 269

Acronyms

ACABQ - Advisory Committee on Administrative and Budgetary Questions

AID – Agency for Investigation and Development

AIHRC – Afghan Independent Human Rights Commission

BND – Bundesnachrichtendienst (German Intelligence Service)

BS – Bosnian Serb

BSA – Bosnian Serb Army

BTF – Balkans Task Force

CIA – Central Intelligence Agency

CIC – Counter Intelligence Corps

CIPVI – South African Commission of Inquiry into Political Violence and Intimidation

CIVPOL – U.N. Civilian Police

CPA – Coalition Provisional Authority

CSCE – Conference on Security and Co-operation in Europe

DIA – Defense Intelligence Agency

DIS – Defence Intelligence Staff

DoD – Department of Defense

DPA – Dayton Peace Agreement

DPKO – Department of Peacekeeping Operations

DRC – Democratic Republic of the Congo

E.C. – European Community

ECMM – European Community Monitoring Mission

ECOWAS – Economic Community of West African States

ESI – European Stability Initiative

EU – European Union

EUR – Bureau of European Affairs

FRY – Federal Republic of Yugoslavia

GCHQ – Government Communications Headquarters

HDZ – Hrvatska Demokratska Zajednica, Croatian Democratic Union

HIS – Hrvatska Izvestajna Sluzba, Croatian Intelligence Service

HRW – Human Rights Watch

HVO – Hrvatsko Vijece Obrane, Croatian Defence Council

ICC – International Criminal Court

ICFY – International Conference on the Former Yugoslavia

ICG – International Crisis Group

ICRC – International Commission of the Red Cross

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

IDP – Internally displaced person

IFOR – International Military Force

IJC - International Judicial Commission

IMF – International Monetary Fund

IMT – International Military Tribunal at Nuremberg

IMTFE – International Military Tribunal for the Far East

INR – Intelligence and Research section of the State Department

IPTF – International Police Task Force

IRA – Irish Republican Army

JAG – Judge Advocate General

JCS – Joint Chiefs of Staff

JIC – Joint Intelligence Committee

JNA – Yugoslav People's Army

KFOR – Kosovo Force

LURD - Liberians United for Reconciliation and Democracy

LRA – Lords Resistance Army

MNB – Multi National Brigade

MoD – Ministry of Defence

MOU – Memorandum of Understanding

MODEL – Movement for Democracy in Liberia

MP – Military Police

MPRI – Military Professional Resources Incorporated

MUP - Ministry of Interior Special Police

NAC – North Atlantic Council

NATO – North Atlantic Treaty Organization

NGO – Non Governmental Organization

NIC – National Intelligence Cell

NORDPOL – Nordic/Polish Battle Group

NRO – National Reconnaissance Office

NSA – National Security Agency

NSC – National Security Council

OHR – Office of the High Representative

OLA – Office of Legal Affairs

OOTW – Operations other than War

OSCE – Organization for Security and Cooperation in Europe

OSS – Office of Strategic Services

OTP – Office of the Prosecutor

PHR – Physicians for Human Rights

PIFWC – Person Indicted for War Crimes

PMC – Private Military Company

POA – Croatian Intelligence Service

POW – Prisoner of War

ROE – Rules of Engagement

RPE – Rules of Procedure and Evidence

RPG – Rocket Propelled Grenade

RRF – Rapid Reaction Force

RS – Republika Srpska

RSK – Republika Srpska Krajina

RUC – Royal Ulster Constabulary

RUF – Revolutionary United Front

SACEUR – The Supreme Allied Commander Europe

SAS – Special Air Service

SCSL – Special Court for Sierra Leone

SDS – Srpska Demokratska Stranka, Serbian Democratic Party

SEAL – Sea, Air and Land, Special Operations Forces

SFOR – Stabilization Force

SHAPE – Supreme Headquarters Allied Powers Europe

SIS – Secret Intelligence Service

SNA – Bosnian Croat intelligence

SNS – Bosnian Croat National Security Service

SOF – Special Operations Forces

TLAM - Tomahawk Land Air Missile

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

UNIMBH – United Nations Mission in Bosnia and Herzegovina

UNPROFOR – United Nations Protection Force

UNTAES – United Nations Transitional Administration for Eastern Slavonia

UNSC – United Nations Security Council

UNWCC – United Nations War Crimes Commission

U.S. CENTCOM – United States Central Command

USIP – United States Institute of Peace

VOPP – Vance Owen Peace Plan

VRS – Vojska Republike Srpske, Army of Republika Srpska

Introduction: The English School – A Framework for Analysis

This thesis assesses the challenges faced by the Commission of Experts and the International Criminal Tribunal for the former Yugoslavia (ICTY) during their attempts to investigate and prosecute atrocity crimes¹ committed during the armed conflicts which took place in the Former Republic of Yugoslavia (FRY) during the early 1990s. The thesis posits that The English School theory of international relations represents a valuable conceptual lens from which to explore these issues for the following reasons. Firstly, international investigations and prosecutions relating to atrocity crimes are often concerned with acts which are in many cases inextricably linked to considerations as to whether Humanitarian Intervention, the English School's primary scholarly focus, should occur. Secondly, the international investigation and prosecution of atrocity crimes may be viewed as an expression of solidarism, a key normative position within the English School. Thirdly, many scholars within the English School have focused on the issue of humanitarian intervention, because "it poses the conflict between order and justice in international relations in its starkest form."² In a society of States guided by the cardinal principal of non-intervention in a State's internal affairs (order), military intervention (justice) which seeks to bring an end to widespread and systematic violations of human rights, may also undermine international order. However, this thesis will demonstrate that the establishment and operation of bodies mandated to investigate and prosecute atrocity crimes *also poses the conflict between order and justice in an equally stark form*. Diplomatic attempts to facilitate a negotiated settlement to an armed conflict (order) may be undermined by attempts to investigate and prosecute atrocity crimes (justice), particularly where individuals deemed crucial to any settlement become the specific focus of investigations. Similarly, attempts to arrest individuals indicted for atrocity crimes (justice) in post-conflict environments, may in some instances lead to the nascent, fragile peace breaking down (order). Before elaborating these points further however, it

¹ For the purpose of this thesis the term atrocity crimes refers to genocide, crimes against humanity, and violations of the laws and customs of war (often referred to as war crimes).

² See Nicholas J. Wheeler 'Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention' *Millennium: Journal of International Studies*. Vol. 21, No. 3, 1992, p. 463.

is necessary to provide a brief overview of the English School and its focus on humanitarian intervention.

The English School has applied a tripartite distinction of *international system*, *international society* and *world society*, as a means of looking at international relations. For the international system approach “there is no universal agreement on ideas of justice and morality against which to judge moral behaviour in international politics.”³ At the other end of the spectrum, the world society perspective “sees the grand narrative of international relations not in terms of a society of states, but that of a community of humankind ‘which exists potentially, even if it does not exist actually.’”⁴ For Hedley Bull, the middle ground of international society represented the most appropriate prism in which to interpret international relations. As Wheeler highlights, Bull defined his idea of international society “in terms of what it was a rejection of: realism on the one hand, and global universalism on the other.”⁵ Such an international society existed “when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with each other, and share in the workings of common institutions.”⁶

Bull went on to postulate that two perspectives exist within the international society approach: pluralism and solidarism. For pluralists, “states are the principle bearers of rights and duties in international law, with individuals having rights insofar as the state provides them.”⁷ The cardinal principle of pluralist international society is the idea of territorial sovereignty which incorporates the norm of non-intervention in a state’s internal affairs. Non-intervention is viewed as the key to maintaining the orderly coexistence of states, via its prevention of inter-state interference which could lead to

³ See Nicholas J. Wheeler ‘Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention’ *Millennium: Journal of International Studies*. Vol. 21, No. 3, 1992, p. 464.

⁴ See Nicholas J. Wheeler ‘Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention’ *Millennium: Journal of International Studies*. Vol. 21, No. 3, 1992, p. 464.

⁵ See Nicholas J. Wheeler ‘Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention’ *Millennium: Journal of International Studies*. Vol. 21, No. 3, 1992, p. 465.

⁶ See HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (Macmillan) 1995, p. 26, [hereinafter BULL, *THE ANARCHICAL SOCIETY*]

⁷ See Nicholas J. Wheeler ‘Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention’ *Millennium: Journal of International Studies*. Vol. 21, No. 3, 1992, p. 467.

conflict. Conversely, the solidarist perspective accords moral priority to individual human persons and “assert there is a duty of collective humanitarian intervention [by external forces within a state’s territory] in cases of extreme humanitarian suffering.”⁸

In Bull’s earlier work, it is evident that he endorsed a pluralist conception of international society and was skeptical as to the existence of consensus on a universal conception of justice which he viewed as necessary to advance solidarism, claiming “the tentative steps that have been taken in our own times towards establishing the rights and duties of individuals in international law *do not in fact reflect agreement as to what in fact these rights and duties are.*”⁹ Furthermore, the pursuit of justice, in the form of humanitarian intervention, was, in light of the realities of the geo-political environment of the Cold War, viewed potentially too destabilizing to international order due to the threat of conflict ensuing from any such intervention.

Nevertheless, it has been highlighted that even in this earlier work, there is evidence, albeit brief of solidarist inclinations. Bull stated “if any value attaches to order in world politics, it is order among all mankind which we must treat as being of primary value, not order within the society of states.”¹⁰ He went on to posit “the moral value of international society has to be judged in terms of its contribution to individual well-being, making this the ultimate test of any ethical position.”¹¹ Bull seemed optimistic that a movement in this direction was indeed possible; suggesting that although in the twentieth century attempts to apply the solidarist formula had “proved premature, this does not mean that the conditions will never obtain in which it could be made to work.”¹² Perhaps the work which most illustrates Bull’s approbation of solidarist precepts and the ability to see beyond the purely state-centric approach is the Hagey Lecture “The Concept of Justice in International Relations” where he acknowledged that “issues about justice in international

⁸ See Nicholas J. Wheeler ‘Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention’ *Millennium: Journal of International Studies*. Vol. 21, No. 3, 1992, p. 468.

⁹ See HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (Macmillan) 1995, p. 146, [hereinafter BULL, *THE ANARCHICAL SOCIETY*]

¹⁰ See BULL, *THE ANARCHICAL SOCIETY*, p. 143.

¹¹ See Nicholas J. Wheeler, ‘Guardian Angel or Global Gangster: A Review of the Ethical Claims of International Society’, *Political Studies*, Vol. 44, No. 1, 1996, p. 125.

¹² See BULL, *THE ANARCHICAL SOCIETY*, p. 232.

relations.... [are] profound questions about the world community or society in which we live."¹³ Indeed Bull became increasingly critical of this pluralist normative foundation, which rests on the assumption that states operate in a way which is intrinsically beneficial for its citizens, asserting, "the rights and benefits to which justice has to be done ... are not simply those of states and nations but those of individual persons throughout the world."¹⁴ Such statements clearly illustrate a progression from a state-centric perspective. Similarly in the lecture, Bull enounced a more solidarist outlook, submitting that "Western states had both a long-term interest and a moral obligation in strengthening justice in world politics."¹⁵ Furthermore, as Linklater and Suganami note Bull suggested that the modern society of states had moved into the direction of solidarism "by deciding that it is morally and legally entitled to take action to prevent human rights violations *while stopping short of embracing new principles of humanitarian intervention.*"¹⁶

Another advocate of the international society tradition, John Vincent, may be viewed as pursuing an intellectual path similar to Bull, by also initially expressing pluralist inclinations, but becoming increasingly solidarist in outlook. This development is explicit in his two main texts; *Nonintervention and International Order*¹⁷, and *Human Rights and International Relations*¹⁸, where the former advocated the principle of the rule of non-intervention in the affairs of other states, whereas the latter qualified that view holding that intervention could be countenanced if a State violated basic rights. Vincent was more positive than Bull about the role of human rights and rather than viewing them as a dynamic which would undermine international society, deemed the doctrine of

¹³ See Hedley Bull, 'The Concept of Justice in International Relations', The Hagey Lectures, University of Waterloo, (1983-84) p. 1.

¹⁴ See Hedley Bull, 'The Concept of Justice in International Relations', The Hagey Lectures, University of Waterloo, (1983-84) p. 12.

¹⁵ See Hedley Bull, 'The Concept of Justice in International Relations', The Hagey Lectures, University of Waterloo, (1983-84) p. 13.

¹⁶ See ANDREW LINKLATER AND HIDEKI SUGANAMI, THE ENGLISH SCHOOL OF INTERNATIONAL RELATIONS. A CONTEMPORARY REASSESSMENT (Cambridge Uni. Press) 2006, p. 132. [hereinafter LINKLATER AND SUGANAMI, THE ENGLISH SCHOOL]

¹⁷ See R. J. VINCENT, NON-INTERVENTION AND INTERNATIONAL ORDER (Center of International Studies) (Princeton Uni. Press) 1974

¹⁸ See R. J. VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS (Cambridge Uni Press) 1987 [hereinafter VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS]

universal human rights as having had the potential to strengthen it. Although Vincent acknowledged the principle of non-intervention enshrined in Article 2(7) of the U.N. Charter, he also emphasized that international law had developed principles which provided for the protection of human rights such as Articles 55 and 56 of the Charter. Vincent set forth a general grounding of human rights, defining them as “the rights that everyone has, and everyone equally, by virtue of their common humanity.”¹⁹ He specifically focused on the concept of ‘basic rights’ acknowledging that whilst different cultures may express different conceptions of human rights, a floor of fundamental human rights existed, emphasizing; “a core of basic rights that is common to all cultures despite their apparently divergent theories.”²⁰ Following on from this, Vincent argued that “The failure of a government of a state to provide for its citizens’ basic rights *might now be taken as a reason for considering it illegitimate.*” He then went on to posit that the question as to whether humanitarian intervention should occur should “correlate with a right on the part of individuals everywhere not to be treated outrageously.”²¹

In posthumously published work, Vincent expanded his solidarist outlook, challenging Bull’s assertion that no international consensus existed as to what constituted justice, stressing, “we have to engage with an emerging notion of international legitimacy: ‘emerging since it can now be argued that the international law of human rights is recognized as part of *ius gentium intra se*.... This opens up the state to scrutiny from outsiders and propels us beyond non-intervention.”²² He also went on to question “whether states ought to satisfy certain basic requirements of decency before they qualify for the protection which the principle of non-intervention provides.”²³ Ultimately, Vincent’s exploration of individual human rights led him to recognize that if human

¹⁹ See VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS, p. 13.

²⁰ See VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS, p. 48.

²¹ See VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS, p. 125.

²² See R. J. Vincent and Peter Wilson, ‘Beyond Non-Intervention’ in IAN FORBES & MARK HOFFMAN (EDS.), POLITICAL THEORY, INTERNATIONAL RELATIONS AND THE ETHICS OF INTERVENTION (Macmillan) 1993, p. 128.

²³ See R. J. Vincent and Peter Wilson, ‘Beyond Non-Intervention’ in IAN FORBES & MARK HOFFMAN (EDS.), POLITICAL THEORY, INTERNATIONAL RELATIONS AND THE ETHICS OF INTERVENTION (Macmillan) 1993, p. 125.

rights are “to mean anything at all” it is necessary to “reduce the domain defended by non-intervention”²⁴

In the Post-Cold War environment, solidarist precepts began to be increasingly expressed beyond the academic realm. In a speech delivered in 1991, (then) United Nations Secretary General, Perez de Cuellar, declared “every state has the duty to fulfill in good faith the obligations assumed by it in accordance with the United Nations Charter.... From this follows another essential proposition namely that each government is open to scrutiny by the United Nations and is internationally accountable for its efforts to live up to the precepts of the Charter.”²⁵ De Cuellar went on to stress, “The sovereignty which resides in the people and is meant to be exercised for the benefit of the people can neither be used against the people, nor for the destruction of the patrimony of humanity.... The sovereignty that resides in the people and seeks to promote the welfare of the people cannot ignore the suffering of people, whether inside or outside its borders. Sovereignty and solidarity are thus parallel concepts.”²⁶ He concluded, “It is now increasingly felt that the principle of non-interference with the essential jurisdiction of States *cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity*.... [T]he case for not impinging on the sovereignty, territorial integrity, and political independence of States is by itself indubitably strong. But it would only be weakened if it were to carry the implication that sovereignty...includes the right of mass slaughter or of launching systematic campaigns of decimation or of forced exodus of civilian populations in the name of controlling civil strife or insurrection.”²⁷

Similarly, the statement adopted in 1991 by the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE) rejected the principle of *absolute* State sovereignty and non interference in states

²⁴ See LINKLATER AND SUGANAMI, THE ENGLISH SCHOOL, p. 139.

²⁵ See Perez de Cuellar Discusses Sovereignty and International Responsibility ‘*The Review*’, International Commission Of Jurists, No. 47, December, 1991, p.25.

²⁶ See Perez de Cuellar Discusses Sovereignty and International Responsibility ‘*The Review*’, International Commission Of Jurists, No. 47, December, 1991, p.26.

²⁷ See Perez de Cuellar Discusses Sovereignty and International Responsibility ‘*The Review*’, International Commission Of Jurists, No. 47, December, 1991, p.27. (emphasis added).

internal affairs, and went on to draw a nexus between justice (in the form of the human rights protection) and order; “issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, *as respect for these rights and freedoms constitutes one of the foundations of the international order.... the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong to the internal affairs of the State concerned.*”²⁸ This trend continued in 1993 when the Vienna Declaration and Programme of Action was adopted by consensus by the U.N. World Conference on Human Rights, which enounced that the protection and promotion of human rights and fundamental freedoms was “the first responsibility of Governments...[and] a legitimate concern of the international community.”²⁹

Nicholas Wheeler explores these contemporary developments in *Saving Strangers* which enounces a solidarist vision “that looks to strengthen the legitimacy of international society by deepening its commitment to justice.”³⁰ Wheeler challenges the pluralist conception of international society, emphasizing the “glaring contradiction between the moral justification of pluralist rules and the actual human rights practices of states.”³¹ Instead, like Vincent, he advocates “upholding minimum standards of common humanity, which means placing the victims of human rights abuse at the centre of its theoretical project, since it is committed to exploring how the society of states might become more hospitable to the promotion of justice in world politics.”³² Following on from this foundational premise, Wheeler goes on to set out a framework to provide the grounds to justify legitimate humanitarian intervention. Although the tenets of State sovereignty and non-intervention are still viewed as “the constitutive rules of international society”³³, Wheeler argues that humanitarian intervention *can* override these core tenets if four

²⁸ See Final Statement, Moscow Meeting of the Conference on Security and Cooperation in Europe (CSCE) 1991, cited in HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT. LAW, POLITICS, MORALS* (Clarendon Press) 1996 p. 371. (emphasis added)

²⁹ See Vienna Declaration and Programme of Action, UN Doc A/CONF. 157/23 12 July 1993.

³⁰ See NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* (Oxford Uni. Press) 2000, p. 11 [hereinafter WHEELER, *SAVING STRANGERS*]

³¹ See WHEELER, *SAVING STRANGERS*, p. 27.

³² See WHEELER, *SAVING STRANGERS*, p. 38.

³³ See WHEELER, *SAVING STRANGERS*, p. 28.

requirements are satisfied: there must be a supreme humanitarian emergency; the use of force must be a last resort; the intervention must meet the requirement of proportionality. and finally; there must be a high probability that the use of force will achieve a positive humanitarian outcome.

Addressing the Gap

Whilst the English School has clearly focused a great deal on humanitarian intervention, it has however, largely overlooked the issue of international criminal justice. This thesis submits that an exploration of this issue marks a natural progression for the following reasons.

Firstly, the focus of humanitarian intervention is concerned with bringing a halt to the commission of widespread or systematic human rights violations of a state's civilian population. In cases where some level of humanitarian intervention occurred (Bosnia, Kosovo, East Timor) atrocity crimes were committed on a scale which also led to calls for investigations and prosecutions to be instituted with an international dimension. Secondly, attempts at achieving accountability via international criminal prosecutions, may be viewed as providing a form of 'justice' which Humanitarian Intervention often fails to provide. As Wheeler highlights, "if we wait until the emergency is upon us, it will come too late to save those who have been killed or forcibly displaced... This brings us to an important point: in all cases covered in this volume, with the possible exception of the Kosovo one, military intervention came too late to protect civilians from the killers".³⁴ In other instances, military intervention did not come at all, as exemplified by the 'International Community's' failure to intervene to attempt to stop the genocide which took place in Rwanda in 1994. Consequently, international criminal prosecutions may thus be viewed as a potential forum to achieve some measure of justice for the victims of atrocity crimes and their families.

Thirdly, the international investigation and criminal prosecution of atrocity crimes may also be viewed as an expression of solidarism. As Linklater and Suganami highlight "the

³⁴ See WHEELER, *SAVING STRANGERS*, p. 34.

creation of international tribunals for investigating war crimes in Rwanda and in the former Yugoslavia, and the establishment of the International Criminal Court, have greatly strengthened the solidarist vision of the universal culture of human rights."³⁵

Furthermore, whilst Wheeler posits that the reason the English School focused "on the subject of humanitarian intervention *is that it poses the conflict between order and justice in international relations in its starkest form*"³⁶, this thesis will highlight that the issue of international criminal prosecutions reveals *a conflict between order and justice in international relations in an equally stark form*. Many of the normative tensions explored in the context of humanitarian intervention, also manifest themselves with regard to international criminal prosecutions. Thus, like humanitarian intervention, international criminal investigations and prosecutions of atrocity crimes may also represent a direct challenge to the pluralist conception of international society by their potential ability to penetrate State sovereignty and via their promotion of the principle of individual criminal responsibility, hold individuals up to the level of head of State, responsible for their involvement in the ordering or commission of atrocity crimes. Consequently, attempts to enforce atrocity law challenge conventional practice that prioritizes national sovereignty over individual rights. Additionally, these institutions of international criminal justice in some instances also challenge the principle of the primacy of non-interference in a State's internal affairs by virtue of their power to order the disclosure of documents which have traditionally been withheld under the principle of national security.

Critically, like humanitarian intervention, international investigations and prosecutions of atrocity crimes may also act as a potentially destabilising dynamic by undermining attempts to achieve order through internationally mediated efforts to terminate conflicts via a negotiated political settlement. There has been only a limited exploration from English School scholars of this potential tension between attempts to achieve order via a negotiated political settlement and justice via international criminal prosecutions. These

³⁵ See LINKLATER AND SUGANAMI, *THE ENGLISH SCHOOL*, pp. 140-141.

³⁶ See Nicholas J. Wheeler 'Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention' *Millennium: Journal of International Studies*. Vol. 21, No. 3, 1992, p. 463.

issues have however, received much more attention within the field of international law and international human rights discourse, where it has been framed as the ‘Peace versus Justice’ debate.³⁷

Peace Versus Justice

The Peace versus Justice debate centres on the challenges associated with halting armed conflict and the associated atrocity crimes committed during its course, via a political negotiation process, whilst also attaining accountability via pursuing criminal prosecutions against those implicated in the commission or ordering of such atrocity crimes. As Scharf states “In order to end an international conflict or internal conflict, negotiations often must be held with the very leaders who are responsible for war crimes and crimes against humanity.”³⁸ Consequently, “The former or current heads of states in which alleged crimes against humanity have occurred may prove to be essential to any formula for political stability [and] peace.”³⁹ This reality has often led to “the metamorphosis of yesterday’s war monger into today’s peace broker.”⁴⁰ Within the discourse focusing on the Peace versus Justice debate, two particular perspectives may be discerned, which this thesis will categorize as ‘pro-negotiation’ and ‘pro-prosecution’. These may be seen to loosely mirror the order/justice debate which lies at the heart of English School theory.

³⁷ See Anonymous, ‘Human Rights in Peace Negotiations’, *Human Rights Quarterly*, 18, 2, 1996; Felice D. Gaer, ‘UN-Anonymous: Reflections on Human Rights in Peace Negotiations’, *Human Rights Quarterly*, 19, 1, 1997; Richard J. Goldstone, ‘Bringing War Criminals to Justice during an Ongoing War’, in JONATHAN MOORE (ED) *HARD CHOICES. MORAL DILEMMAS IN HUMANITARIAN INTERVENTION* (Rowman & Littlefield) date; Michael P. Scharf ‘Justice versus Peace’ in SARAH B. SEWALL & CARL KAYSEN (EDS) *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW*. (Rowman & Littlefield); See Anthony D’Amato, ‘Peace vs. Accountability in Bosnia’, *American Journal of International Law*, Vol. 88, (1994); See Jack Snyder and Leslie Vinjamuri, ‘Trials and Errors. Principle and Pragmatism in Strategies of International Justice’, *International Security*, Vol. 28, No. 3, Winter 2003/04; See Anonymous, ‘Human Rights in Peace Negotiations’, *Human Rights Quarterly*, 18.2, (1996); Richard J. Goldstone, ‘Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals’, *New York University Journal of International Law and Politics*, Vol 28, No. 3 (1995-96)

³⁸ See Michael P. Scharf ‘Justice versus Peace’ in SARAH B. SEWALL & CARL KAYSEN (EDS) *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW*. (Rowman & Littlefield) 2000, p. 179.

³⁹ See Mahmood Monshipouri & Claude E. Welch ‘The Search for International Human Rights and Justice: Coming to Terms with the New Global Realities’, *Human Rights Quarterly* 23.2 (2001) 370 – 404, p. 392.

⁴⁰ Payam Akhavan ‘The Yugoslavia Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond.’ *Human Rights Quarterly* 18 (1996): 259, 271.

Pro-Negotiation

The 'pro-negotiation' perspective is primarily concerned with and supportive of diplomatic initiatives which strive to achieve a negotiated settlement during periods of international or internal armed conflict. As Hannum highlights, "Any negotiator's priority must be to end violence and in most cases, devise an acceptable means of power-sharing among former enemies."⁴¹ In light of such objectives, demands for justice via the prosecution of individuals implicated in atrocity crimes at the time of political mediation, are often viewed by the 'pro-negotiation' perspective as a potentially destabilising dynamic which may adversely affect and imperil the diplomatic initiative. The tension becomes particularly acute where those involved in the negotiations may be potential target of indictments. As D'Amato questions "Is it realistic to expect them to agree to a peace settlement...[if] directly following the agreement, they may find themselves in the dock? If they, or their close associates and friends, face potential life imprisonment by simply signing a peace treaty, what incentive do they have to sign it?"⁴²

In light of such considerations, some 'pro-negotiation' advocates argue that the demand for prosecutions whilst negotiations are ongoing "risks causing more atrocities than it would prevent, because it pays insufficient attention to political realities."⁴³ D'Amato further elaborates this dilemma, highlighting "[h]owever desirable the idea of war crimes accountability might appear in the abstract, pursuing the goal of a war crimes tribunal may simply result in prolonging a war of civilian atrocities. This would surely be a paradoxical result, for the idea of war crimes accountability is to deter the commission of war crimes and not to serve as a barrier to discontinuing them."⁴⁴

⁴¹ See Hurst Hannum, 'Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding', *Human Rights Quarterly*, 28, (2006) p. 22.

⁴² See Anthony D'Amato, 'Peace vs. Accountability in Bosnia', *American Journal of International Law*, Vol. 88, (1994) p. 500.

⁴³ See Jack Snyder and Leslie Vinjamuri, 'Trials and Errors. Principle and Pragmatism in Strategies of International Justice', *International Security*, Vol. 28, No. 3, Winter 2003/04, p. 5.

⁴⁴ See Anthony D'Amato, 'Peace vs. Accountability in Bosnia', *American Journal of International Law*, Vol. 88, (1994) p. 500.

The 'pro-negotiation' perspective demonstrates how amnesties⁴⁵ have been employed in order to facilitate a cessation of hostilities or enable a transition from authoritarian military rule to nascent civilian-led democracy. This strategy was particularly prevalent within Latin America during the political transitions which took place in the late 1980s where the issue arose as to whether the successor regimes should institute trials against the leaders of the juntas. In many cases the price of relatively peaceful transition was the promulgation of laws which provided blanket protection for individuals connected with the previous dictatorial regimes.⁴⁶ As Huntington highlights, "virtually every authoritarian regime that initiated its transformation to democracy also decreed an amnesty as part of that process."⁴⁷ Similarly, in approving the 'Governors Island Agreement' the 1993 Haiti peace deal which included an amnesty clause, the U.N. Security Council stated the deal was "the only valid framework for resolving the crisis in Haiti."⁴⁸

Such dynamics lead the 'pro-negotiation' perspective to emphasize the acute difficulties diplomats involved in peacemaking negotiations face. In some respects, an analogy here can be drawn with the 'terrible choices'⁴⁹ Bull recognized foreign policy makers were confronted with over whether to rule out humanitarian intervention in deference to the sanctity of State sovereignty, abandoning the victims of human rights abuses to their fate, or to accept that a State forfeits its sovereignty when it commits serious violations of human rights, which could potentially open the floodgates to intervention justified on 'human rights' grounds, but ultimately predicated on more Machiavellian grounds (e.g. territory/ resource acquisition). An 'Anonymous' article published in a leading human rights journal, succinctly outlines the dilemma facing negotiators; "what should one do if the quest for justice and retribution hampers the search for peace, thereby prolonging the

⁴⁵ Black's Law Dictionary defines amnesty as 'the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted'. See BLACK'S LAW DICTIONARY, (West Group) 1999, p. 83.

⁴⁶ For more details *see generally* RUTI G. TEITEL TRANSITIONAL JUSTICE (2000)

⁴⁷ *See* SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (Uni. Of Oklahoma Press) 1991, p. 215

⁴⁸ *See* Statement of the President of the Security Council of July 15, 1993.

⁴⁹ *See* Hedley Bull quote *in* LINKLATER AND SUGANAMI, THE ENGLISH SCHOOL, p. 140.

war and increasing the extent of suffering? The quest for retribution or for a perfect peace can result in a long war. Is this defensible?”⁵⁰

Pro-Prosecution

In contrast, the ‘pro-prosecution’ perspective is primarily concerned with ending the culture of impunity which has been a dominant feature of international affairs. Impunity has been defined as “the impossibility, *de jure or de facto*, of bringing perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.”⁵¹ The ‘pro-prosecution’ perspective emphasizes the existence of the positive duty in international law incumbent on States to either prosecute or extradite to an appropriate alternative legal forum individuals who stand accused of either committing or ordering the commission of atrocity crimes. Instead of viewing institutions of international criminal justice as an impediment to peacemaking initiatives, ‘pro-prosecution’ advocates argue that these institutions can play a central role as a mechanism to address conflict, and can *actively contribute to peace*. Additionally, ‘pro-prosecution’ advocates submit that the pursuit of justice in the form of prosecutions, particularly when held at the international level, not only actively addresses the culture of impunity but also has additional benefits. Thus, it is argued that the prosecution of atrocity crimes *deters* future transgressions by demonstrating that perpetrators are not above the rule of law. As Argentina’s President Raul Alfonsin’s highlights, the decision to embark on a series of criminal prosecutions against members of the former Junta implicated in the country’s ‘Dirty War’ was predicated on the deterrence value; “Our intention was not so much to punish as to prevent; to insure that what had happened could not happen in the future.”⁵²

⁵⁰ See Anonymous, ‘Human Rights in Peace Negotiations’, *Human Rights Quarterly*, 18.2, (1996) p. 249.

⁵¹ See ‘The administration of justice and the human rights of detainees: Questions of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)’, Final Report prepared by Mr. Joinet Pursuant to Sub-Commission decision 1996/119, U.N. Doc. E/CN.4/Sub.2/1997/20, June 26, 1997. Annex II, pp. 13-14.

⁵² See Raul Alfonsin, ‘Never Again in Argentina’, *Journal of Democracy*, 4, No. 1, January 1993, p. 16.

Additionally, the ‘pro-prosecution’ perspective has sought to draw an explicit nexus between criminal prosecutions for atrocity crimes and reconciliation. Former President of the ICTY, Antonio Cassese argued that “Trials establish individual responsibility over collective assignation of guilt....justice [also] dissipates the call for revenge....by dint of dispensation of justice, *victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes.*”⁵³

Similarly, former Canadian Foreign Minister Lloyd Axworthy posited that, “Without firm action on war crimes, *reconciliation is doomed.*”⁵⁴

Many ‘pro-prosecution’ advocates also contend that the ‘pro-negotiation’ contention that a choice must be made between peace or justice is both illusory and ultimately short sighted. Instead, the maxim that “there can be No Peace without Justice” is often invoked. This phrase became a strategic rallying call for many ‘pro-prosecution’ advocates during the 1990s⁵⁵ who argued that any peace secured without addressing the commission of atrocity crimes would be tenuous, dysfunctional and ultimately pyrrhic. As Richard Goldstone, the former Chief Prosecutor of the ICTY suggested, “a negotiated peace without responding to demands of justice would hardly be worth the paper it is printed on. In many cases, one such superficial and fallacious peace returns in reality to prepare the sly return of war....A peace concluded by war criminals returns finally to serve their own aims....[and] will be known to be neither real nor durable.”⁵⁶

The ‘pro-prosecution’ perspective has been widely critical of diplomatic initiatives which seek to negotiate with individuals implicated in war crimes, and which fail to accord *explicit* support to justice mechanisms. Consequently, the ‘pro-negotiation’ endeavours are condemned as ‘Realpolitik’ which serves to reaffirm the culture of impunity, undermine the potential of justice and lead to a peace which it is argued rests on unstable

⁵³ See Antonio Cassese Statement reproduced in ERIC STOVER AND HARVEY M. WEINSTEIN (EDS.) MY NEIGHBOR, MY ENEMY. JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Cambridge Uni. Press) 2004, p. 3-4 [hereinafter STOVER & WEINSTEIN, MY NEIGHBOR, MY ENEMY]

⁵⁴ See Lloyd Axworthy quote in WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 222.

⁵⁵ Including Non Governmental Organizations (NGOs) such as Human Rights Watch, Amnesty International.

⁵⁶ See Richard Goldstone quote in HAZAN, JUSTICE IN A TIME OF WAR, p. 63.

foundations.⁵⁷ Negotiators are decried as “self-proclaimed realists who would put a political settlement before justice”⁵⁸ and diplomacy castigated as “the antithesis to justice,”⁵⁹ Instead, elements within the ‘pro-prosecution’ perspective submit that “The search for justice cannot be tainted by diplomatic or political considerations.”⁶⁰ with some proposing “what we need now is the political will to *pursue justice without compromise*.”⁶¹

Aims of Thesis

1. – The thesis will explore the challenges faced by the Commission of Experts and the International Criminal Tribunal for the former Yugoslavia (ICTY) during their attempts to investigate and prosecute atrocity crimes. These institutions were selected for the following reasons. Both bodies represented the *first* internationally mandated mechanisms established to investigate (which the Commission was mandated to do) and prosecute (which the ICTY was mandated to) violations of atrocity law, in this case relating to atrocity crimes occurring in Croatia and Bosnia. Secondly, both institutions would find themselves discharging their mandates whilst the conflicts in the Croatia and Bosnia were ongoing, a dynamic which served to heighten the potential tensions between peace and justice.⁶² This wider environment which the Commission and ICTY found themselves operating contrasted starkly with both the institution which is in many respects viewed as the historical predecessor to the ICTY; the Nuremberg Trial for major

⁵⁷ See M. Cherif Bassiouni, ‘Justice and Peace: The Importance of Choosing Accountability over Realpolitik’, *Case Western Reserve Journal of International Law*, Vol. 35, No. 2, Spring 2003.

⁵⁸ See M. Cherif Bassiouni & Marcia, ‘Sexual Violence. An Invisible Weapon of War in the Former Yugoslavia’, Occasional Paper No. 1, International Human Rights Law Institute, DePaul University College of Law, 1996, p. 2.

⁵⁹ See GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY. THE STRUGGLE FOR GLOBAL JUSTICE* (Allen Lane, The Penguin Press) 1999, p. xvii [hereinafter ROBERTSON, *CRIMES AGAINST HUMANITY*]

⁶⁰ See VIRGINIA MORRIS AND MICHAEL P. SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. A DOCUMENTARY HISTORY AND ANALYSIS. Vol. II* (Transnational Publishers) 1995, p. 181. [hereinafter MORRIS AND SCHARF, *AN INSIDER’S GUIDE TO THE ICTY Vol. II*]

⁶¹ See M. Cherif Bassiouni & Marcia, ‘Sexual Violence. An Invisible Weapon of War in the Former Yugoslavia’, Occasional Paper No. 1, International Human Rights Law Institute, DePaul University College of Law, 1996, p. 2.

⁶² Although, the fighting in Croatia had largely subsided by the time the CoE and ICTY were set up, the situation on the ground was merely an uneasy ceasefire and no comprehensive settlement had been reached. Military engagements would again take place in 1994 and 1995, with the launching of the Croatian offensives ‘Operation Flash’ and ‘Operation Storm’. with the aspects of the latter investigated by the Tribunal.

war criminals⁶³; and the other ad hoc Tribunal established by the U.N. Security Council; the International Criminal Tribunal for Rwanda (ICTR).

For Nuremberg, the preceding dynamics meant that the prosecution of senior Nazis would not adversely impact on the wider strategy to end the War. The Allies were actively engaged in fighting the Third Reich and its Axis supporters, and although the Yalta Declaration stipulated their commitment to “bring all war criminals to a just and swift punishment”, it also highlighted the Allies agreement on “common policies and plans for enforcing the unconditional surrender terms which we shall impose together on Nazi Germany after German resistance has been finally crushed.”⁶⁴ Consequently, with a strategy of unconditional surrender being pursued, there were no delicate political negotiations which could have been undermined by prosecutions. Furthermore, when the Nuremberg trials were established, they would focus on individuals from an utterly defeated State, whose power to adversely affect the outcome of the post-war environment was negligible, and who were already detained in Allied custody.

Similarly, although the institutional architecture of the ICTY was largely replicated as an international legal response to the Rwandan genocide via the establishment of the ICTR, the *Arusha* tribunal was established *after* the genocide had been committed and a Tutsi-led RPF rebel army had largely routed the Hutu *genocidaires* from Rwanda.⁶⁵ Thus, again, the dilemma over the threat of prosecutions undermining delicate peace negotiations was avoided. In contrast, both the Commission and the Tribunal would be established *during* the course of the conflicts they were mandated to focus on. Furthermore, unlike the Allies during World War Two, the ‘International Community’, was until the final stages of the conflict in the former Yugoslavia, clearly reluctant to

⁶³ For further details on the Nuremberg Trial of Major German War Criminals see TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (Alfred A. Knopf) 1992; WHITNEY R. HARRIS, *TYRANNY ON TRIAL. THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG 1945-1946* (Southern Methodist Uni. Press) 1999.

⁶⁴ See The Yalta Declaration, 1945.

⁶⁵ The genocide took place from April to mid-July 1994. The establishment of the ICTR largely followed the same procedures as those used to establish the ICTY. The U.N. Secretary General appointed a fact finding team in August 1994 which found evidence of grave violations of international humanitarian law. Based on these findings the U.N. Security Council established the ICTR under Security Resolution 955.

engage in any military operations beyond peacekeeping.⁶⁶ Instead the primary focus was on an attempt to facilitate a negotiated settlement. This strategy necessarily entailed dealing with the senior political and military leaders of the various ‘warring factions’⁶⁷, who retained, by virtue of their involvement in the diplomatic process, varying degrees of international legitimacy. These dynamics produced a clear challenge for the Commission and the Tribunal, whose investigations would lead them to focus on some of the very individuals deemed to be essential to any negotiation process and subsequent settlement.

The ICTY was also selected as the main case study for the thesis in order to assess whether useful indications of the challenges which may confront the International Criminal Court (ICC) may be discerned from its operation. With the ICC already established, it is inevitable that it will, like the ICTY, face the challenge of investigating and possibly issuing indictments where alleged atrocity crimes have been committed whilst conflicts *are ongoing*. Thus, like the ICTY, tensions over pursuing justice in the form of criminal prosecutions whilst negotiations are taking place in an attempt to resolve the conflict, are likely to arise.

2 - The thesis seeks to critically assess a number of key premises made by ‘pro-prosecution’ advocates. It does so in recognition that “Many assumptions about the effects that justice has on individuals and societies have gone unexamined and unchallenged for too long,”⁶⁸ noting Forsythe’s premise that, “International criminal courts are assumed to reflect wise policy simply because it is morally unacceptable to

⁶⁶ Even when the use of force was finally applied by the ‘international community’ during Operation Deliberate Force, where NATO air-strikes and the Multinational Brigade Rapid Reaction Force (RRF) targeted Bosnian Serb positions, contrary to popular conception, it would be done in an extremely limited and measured way and was explicitly linked to the wider central strategy of achieving a negotiated settlement.

⁶⁷ The phrase ‘warring factions’ has tended to be controversial within the discourse covering the wars in Croatia and Bosnia. Some commentators assert that such language was used by sections of the international community as a way of blurring the distinction between aggressor and defender, perpetrator and victim, in an attempt to infer moral equivalence between the parties and deflect calls for intervention to support the Bosnian Government or Bosnian Muslims, *See generally* SIMMS, *UNFINEST HOUR*. Whilst this contention may be in certain respects valid, the phrase is applied here in its neutral context, merely to refer to forces within Bosnia and those proxy forces from Serbia and Croatia, who engaged in military operations against each other.

⁶⁸ *See* STOVER & WEINSTEIN, *MY NEIGHBOR, MY ENEMY*, p. 3.

consider the alternative”⁶⁹ and that “social scientists who aspire to objectivity and critical appraisal are often regarded as [being] in the camp of the immoral and as unsympathetic to human rights.”⁷⁰ Consequently, the thesis aims to critically assess two contentions expressed by ‘pro-prosecution’ advocates:

(i) Firstly, the contention that “justice should be pursued without compromise.”⁷¹ The claim will be assessed via an assessment of the implications of attempting to incorporate explicit provisions relating to the prosecution of individuals implicated in atrocity crimes into peace deals, and by examining the viability of alternative ‘pro-justice’ options to negotiating with individuals implicated in atrocity crimes.

(ii) Secondly, the contention that “there can be No Peace Without Justice.” The claim will be assessed by examining the impact and consequences of the ‘International Community’s’ failure to actively pursue and arrest persons indicted for war crimes (PIFWCs) in post-conflict Bosnia, particularly during the first eighteen months of the international force’s deployment.

3. The thesis also seeks to critically assess dimensions of the ‘pro-negotiation’ perspective by examining the claims that States make to defend the sacrifice of international and cosmopolitan values, which Linklater and Suganami highlight is “a neglected area within the English School.”⁷² It aims to do this by exploring two specific areas:

(i) The reasons behind the ‘International Community’s’ failure to pursue justice in the form of prosecutions in a more robust manner during the various peace negotiation processes aimed at ending the wars in the former Yugoslavia, and

⁶⁹ See David P Forsythe, ‘International Criminal Courts: A Political View’, *Netherlands Quarterly of Human Rights*, Vol. 15, 1, (1997) p. 7.

⁷⁰ See David P Forsythe, ‘International Criminal Courts: A Political View’, *Netherlands Quarterly of Human Rights*, Vol. 15, 1, (1997) p. 7.

⁷¹ See M. Cherif Bassiouni & Marcia, ‘Sexual Violence. An Invisible Weapon of War in the Former Yugoslavia’, Occasional Paper No. 1, International Human Rights Law Institute, DePaul University College of Law, 1996, p. 2.

⁷² See LINKLATER AND SUGANAMI, *THE ENGLISH SCHOOL OF INTERNATIONAL RELATIONS*, p. 241

(ii) The justifications advanced by NATO and the major troop contributing States for the failure to actively pursue and arrest PIFWCs, particularly within the initial stages of post-conflict peacebuilding in Bosnia.

Chapter Outline

Chapter one focuses on the establishment of the Commission of Experts and the challenges the body faced in obtaining State cooperation. It also explores how the investigation into atrocity crimes was perceived by some sources as a potential impediment to obtaining a negotiated diplomatic settlement.

Chapter two focuses on the establishment and initial operation of the International Criminal Tribunal for the former Yugoslavia. It includes a critical assessment of the claim that the Tribunal was established due to a recognition by States of the active contribution the body could make towards restoring peace to the region. It also explores the acute challenges the Tribunal faced in obtaining State cooperation, particularly with regard to the provision of intelligence material.

Chapter three focuses on three specific areas. Firstly, it explores the debate within the U.S. administration during 1995, which effectively set the parameters of the mandate for the proposed international peacekeeping force to be deployed in Bosnia once the conflict had ended, and how this impacted upon the Tribunal. Secondly, it critically assesses the 'pro-prosecution' contentions that Milosevic should have been indicted at Dayton and that further military operations should have been pursued instead of negotiation. Finally, it explores the Dayton Peace negotiations and the Tribunal's endeavours to keep the issue of atrocity crimes on the agenda.

Chapter four focuses on the immediate post-conflict environment in Bosnia, critically assessing the justifications advanced by NATO for its failure to actively pursue persons indicted for war crimes (PIFWCs). It also critically assesses the contention that domestic prosecutions for atrocity crimes were a viable option in the region and explores the

impact of failing to pursue a robust arrest strategy against PIFWCs during the initial two years post-Dayton.

Chapter five examines the additional reasons behind NATO's unwillingness to pursue PIFWCs, assessing how considerations of force protection and a reluctance to engage in Operations Other Than War (OOTW) were of significant influence. The chapter goes on to examine the Tribunal's continued struggle to obtain intelligence material from States, and explores how under a new Prosecutor, innovative strategies were developed in order to induce NATO's cooperation in arrest operations.

The conclusion will review the main findings of the thesis, and seek to assess how these insights may inform the challenges which the International Criminal Court (ICC) is likely to confront.

The main contributions of the thesis will be empirical. The author was granted access to the U.N. Commission of Experts archive by the former Chairman of the Commission Cherif Bassiouni, during a fellowship at the International Human Rights Law Institute, Depaul University College of Law and chapter one draws heavily on insights gathered from this material. The author also conducted a series of interviews with key individuals involved in various ways with the Commission and Tribunal. These include former senior officials within the U.S. State Department and Department of Defense, and Tribunal officials including former investigators, and members of the Office of the Prosecutor (OTP).

Chapter One: Uncharted Territories: The Commission of Experts and international efforts to investigate atrocity crimes.

Chapter one focuses on the establishment of the Commission of Experts.¹ the first international body to investigate atrocity crimes since Nuremberg. The Commission, established by the U.N. Security Council acting under Chapter VII of the U.N. Charter, was mandated to investigate allegations of atrocity crimes committed in Croatia and Bosnia, gather relevant material, and submit a report to the United Nations Office of the Secretary General. It would act as a catalyst for the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and several of its investigations would form the foundational basis of the Tribunal's first indictments. However, the Commission would be confronted with a myriad of challenges; bureaucratic, financial and logistical, all of which would undermine its capacity to discharge its mandate effectively.

The chapter will also demonstrate how the Commission faced protracted problems in obtaining State cooperation for a variety of reasons. The British Conservative Government viewed the establishment of the Commission as a potentially disruptive dynamic which could complicate and undermine diplomatic endeavours to obtain a cessation of the hostilities. This view would lead to both the pursuit of a policy aimed at restraining the investigative body's potential power, and active measures to prevent relevant material being obtained by the Commission. The chapter goes on to explore how the twin objectives of obtaining a negotiated diplomatic settlement and investigating atrocity crimes would inevitably end up clashing, with specific reference to The Vance Owen Peace Plan (VOPP).

Although sections within the U.S. State Department would be more supportive of the Commission, their endeavours to increase support in the form of intelligence sharing would be constantly challenged and blocked by elements within the intelligence community and The Pentagon. A reluctance to disclose methods and sources, and the

¹ Hereinafter, the Commission.

existence of serious concerns that an acknowledgment of U.S. possession of information relating to atrocities would increase calls for it to become militarily involved. also impacted upon the Commission's requests for assistance.

Finally, the Commission's investigations within the region will also be explored. illustrating the difficult relationships the body experienced with several of the international organizations operating on the ground, particularly the U.N. peacekeeping forces in the region. Whilst this may in part be explained by the fact that the force included contingents from States which perceived the Commission as a threat to the negotiation process, the chapter will also demonstrate that the deep institutional reluctance of peacekeeping forces to become embroiled in areas of human rights investigations, also played a significant part.

International Responses to the Atrocities Committed in Croatia and Bosnia

On July 13, 1992 the U.N. Security Council adopted Resolution 764,² the first in a series of Resolutions which would prepare the legal ground for the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY). It reaffirmed that all parties to the Yugoslav conflict should comply with their obligations under international humanitarian law, in particular the Geneva Conventions, stressing that those who committed or ordered violations of the Conventions would be deemed individually criminally responsible in respect of such breaches.³

The warning was reinforced one month later, with the adoption of Resolution 771 which demanded an immediate cessation of all violations of international humanitarian law.⁴ The Resolution also expressed the Security Council's intention to invoke its authority to take binding decisions under Chapter VII of the U.N. Charter, and held that "all those concerned in the former Yugoslavia and all military forces in Bosnia and Herzegovina shall comply with the resolution" warning that "noncompliance would result in the

² See S.C. Res. 764, U.N. SCOR, 47th Sess., 3093rd mtg. U.N. Doc. S RES 764 (1992)

³ See S.C. Res. 764, U.N. SCOR, 47th Sess., 3093rd mtg. U.N. Doc. S RES 764 (1992)

⁴ See S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg. U.N. Doc. S RES 771 (1992)

adoption of further measures by the Council.”⁵ It also called upon States and humanitarian organizations to submit “Substantiated information” regarding violations of international humanitarian law, to the Council.

Despite the apparent toughening of attitudes within the Council towards the commission of atrocity crimes, the language of elements of the Resolution was nebulous. As one of the drafters noted, the failure to specifically define the term “substantiated information” led to material being submitted of vastly differing standards. A number of governments (e.g. Canada) only reported information which had been “corroborated by other sources”, whilst others (e.g. U.S.) merely provided open source material including newspaper articles.⁶ Other States avoided submitting any information on the grounds “that it had not been “substantiated” through judicial means”.⁷ The general reluctance expressed by many States to disclose material relating to violations would be a recurring theme for both the Commission and the Tribunal.

The Human Rights Commission and the CSCE

By mid-August 1992, the U.N. Human Rights Commission appointed former Polish Prime Minister, Tadeusz Mazowiecki as Special Rapporteur on the Former Yugoslavia. His September 3, 1992 report emphasized, “The need to prosecute those responsible for mass and flagrant human rights violations and for breaches of international humanitarian law.” Mazowiecki went on to suggest that in order “to deter future violations....a systematic collection of documentation on such crimes and of personal data concerning those responsible [was necessary].” He concluded, “A commission should be created to assess and further investigate specific cases in which prosecution may be warranted.”⁸

⁵ See S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg. U.N. Doc. S/RES 771 (1992)

⁶ See MICHAEL SCHARF BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG. (Carolina Academic Press) 1997, p. 39 [hereinafter SCHARF, BALKAN JUSTICE]

⁷ See SCHARF, BALKAN JUSTICE p. 39.

⁸ See Periodic Report of the Special Rapporteur, U.N. Doc. A/47/418-S 24516, at 14-15. In his three year tenure, Mazowiecki would write eighteen reports, before resigning in protest at the international community’s failure to protect the Srebrenica safe area. For more details see Konstanty Gebert, ‘In Investigating Human Rights Abuses, Reporting Is Not Enough’, *Transitions*, January 26, 1996, pp. 40-44.

On September 28, 1992, three Rapporteurs were appointed under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia. Ambassador Correl Ms. Thune and Mr. Turk were mandated to “investigate reports of atrocities against unarmed civilians in Croatia and Bosnia, and to make recommendations as to the feasibility of attributing responsibility for such acts.”⁹ The Rapporteurs recommended that a committee of experts immediately be convened to propose the necessary rules for the collection of information on suspected war crimes.

A Commission of Experts

Within two weeks, on October 6, 1992, the Security Council unanimously adopted Resolution 780.¹⁰ The Resolution requested the Secretary General establish “as a matter of urgency, an impartial commission of experts to assess the information submitted pursuant to Resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations....with a view to providing the Secretary General with its conclusions on the evidence of grave breaches of the Geneva Conventions or other violations of humanitarian law in the territory of the former Yugoslavia.”¹¹ Behind the unanimity of the vote however, clear divisions existed within the Council, and the negotiations surrounding the drafting of the Resolution involved acrimonious disagreements, particularly between its initial sponsor the U.S., and the U.K.¹² Former Bush administration State Department official, Michael Scharf recalled, “It became very clear to me and my colleagues that what the British were doing from the very beginning was obstructionistic.”¹³

The ‘pro-prosecution’ elements within the State Department lobbied for the Security Council Resolution to include three particular elements which they viewed as non-negotiable. These related to: the body’s title, mandate, and mechanism to ensure State

⁹ See MORRIS AND SCHARF, AN INSIDER’S GUIDE TO THE ICTY Vol. II p. 213.

¹⁰ See S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. U.N. Doc S/RES 780 (1992)

¹¹ See S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. U.N. Doc S/RES 780 (1992)

¹² Notably, although several States made supportive speeches during the ensuing debate within the Security Council after the Resolution was passed, the U.K. remained silent.

¹³ See Michael Scharf comments in, ‘Getting Away with Murder’, Panorama, BBC, December 13, 1993.

cooperation. Firstly, it was proposed the new body be named the War Crimes Commission, thus invoking the historic precedent of the investigative body which preceded Nuremberg, the United Nations War (UNWCC) Crimes Commission. Although this linkage conveniently overlooked the fact that the UNWCC was in many respects viewed as a failure, it was done to create the expectation that war crimes prosecutions would flow from investigations, as had been the case at Nuremberg. The U.K. opposed the suggested title, preferring the body be merely referred to as a committee of inquiry with no mention of war crimes. The rather insipid compromise title 'impartial Commission of Experts' was finally agreed upon, in order to placate the U.K.'s objections.

Secondly, it was proposed the Commission should have the authority to launch its own investigations. Again the U.K. was opposed to the suggestion. Williams and Scharf highlight that the U.K. "made no secret of its preference that the commission be limited to a passive group which would merely analyze and collate information that was passed to them."¹⁴ As one former State Department official remembered, "they [the U.K.] wanted one of those anonymous committees that produce endless reports which no one reads."¹⁵ The proposal was included in the Resolution after the British reluctantly backed-down due to high-level interventions by U.S. Government officials.¹⁶ However, the U.K. managed to undermine this potential capability by blocking the inclusion of a specific budget for the Commission, which given its own dire record of late payment of U.N. dues, the U.S. found it hard to object to. Instead as the Secretary General stated in his October 14, 1992 report on the establishment of the Commission, "The expenses....will be met as far as possible from existing resources."¹⁷ However, "existing resources" were severely limited, meaning that the Commission would come into existence without *any* money for field investigations, and it would take over one year before alternative funding could be located.

¹⁴ See WILLIAMS AND SCHARF, PEACE WITH JUSTICE?, p. 94.

¹⁵ Comment of former State Department official, See Iain Guest, 'On Trial – The United Nations. War Crimes and the Former Yugoslavia', The Refugee Policy Group, September 1995, p. 55. [Hereinafter Guest, On Trial]

¹⁶ See MORRIS AND SCHARF. AN INSIDER'S GUIDE TO THE ICTY Vol. II, p. 26.

¹⁷ See UN Secretary General's report on the Establishment of the Commission of Experts, October 14, 1992, S/24657.

The third element the ‘pro-prosecution’ advocates proposed was the inclusion of terminology which would request States, relevant U.N. bodies and other relevant organizations to provide the Commission with substantiated information in their possession concerning violations of international humanitarian law, including grave breaches of the Geneva Conventions being committed in the territory of the former Yugoslavia *within thirty days of the adoption of the resolution and as appropriate thereafter*. Supporters of an activist Commission envisaged that this “request,” which was included in the final text of the Resolution, would enable the body to quickly gain access to valuable information. However, although a few States would provide the Commission with some material of interest, the “request” for information, like the one contained in Resolution 771, was almost exclusively ignored.

The disagreements within the Security Council surrounding Resolution 780¹⁸ would set the tone for an ongoing debate between those who advocated a robust Commission and Tribunal and those who sought to limit their scope and minimize their impact. Although Scharf characterizes the U.K. as the main opponent to the Commission, the former State Department official fails to highlight that significant differences of opinion also existed within the U.S. administration regarding the desirability of pursuing war crimes investigations and prosecutions. Much of the literature focusing on the establishment of the Commission and the Tribunal has tended to portray the State Department as being ‘pro-prosecution.’¹⁹ Indeed, John Shattuck, (then) U.S. Under-Secretary of State for Democracy, Human Rights and Labor highlighted that several officials including himself, Jim O’Brian, Conrad Harper, James Matherson and David Scheffer, formalized themselves into a ‘human rights coalition’²⁰ and were vocal supporters of both bodies. However, these advocates were engaged in a constant battle with other elements of the Bush administration, including colleagues in the Bureau of European Affairs (EUR),

¹⁸ Resolution 780 was followed by Resolution 787 in which the Security Council welcomed the establishment of the Commission and requested it to “pursue actively its investigations [of]...grave breaches ... and other violations of international humanitarian law.”

¹⁹ See BASS, *STAY THE HAND OF VENGEANCE: Leslie Vinjamuri, ‘Trading Order for Justice? Prosecuting War Criminals In The Aftermath of Conflict’*, (2001) PhD (Columbia University), p. 206.

²⁰ See JOHN SHATTUCK, *FREEDOM ON FIRE. AMERICA AND ITS RESPONSE TO THE HUMAN RIGHTS WAR OF THE 1990S* (Harvard Uni. Press) p. 12. [hereinafter SHATTUCK, *FREEDOM ON FIRE*]

who, like the British government, were also concerned that such justice initiatives could complicate the ongoing diplomatic negotiation process striving to achieve a peace settlement for the region. Similarly, the Department of Defense (DoD) and National Security Council (NSC) accorded little priority to the pursuit of justice; with NSC staffer Richard Clark declaring that all policy relating to human rights issues would have to be “consensus driven.”²¹ This allowed the NSC and the Pentagon to effectively block many moves by the ‘pro-prosecution’ elements within the State Department to implement a more proactive approach. For example, David Scheffer’s proposal that the administration publicly announce that it would “use all available means to continue gathering evidence against war criminals” would be rebuffed²² and Shattuck’s proposal to visit the region opposed.

The Commission Gets to Work²³

On October 10, 1992, Professor M. Cherif Bassiouni received a telephone call from his friend Ambassador Nabil El-Arabi, Permanent Representative of Egypt to the U.N., informing him of the establishment of the Commission and revealing that the U.N. Secretary General, Boutros Boutros Ghali intended to appoint Bassiouni to it. Bassiouni, an Egyptian born American citizen and Law Professor at the International Human Rights Law Institute, DePaul University College of Law, Chicago, had spent most of his professional life working on various international criminal law, human rights, and humanitarian law issues, and was a leading authority on the law relating to crimes against humanity.²⁴ On October 20 1992, Bassiouni was contacted by Carl Fleischauer, the Under Secretary General and Legal Counsel to the U.N., who confirmed his appointment to the Commission, and also inquired if he would serve as Chairman. Bassiouni was

²¹ See SHATTUCK, FREEDOM ON FIRE, p. 123.

²² See David Scheffer, ‘Three Memories from the Year of Origin, 1993’ in *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Vol. 2. No. 2. June 2004, p. 356.

²³ The following section on the Commission of Experts draws heavily on material accessed whilst researching the Commission’s archive, including; minutes of the meetings; internal memos; U.N. telefaxes; correspondence with U.N. member States. This material has been further supplemented with the personal notes and diary of Cherif Bassiouni.

²⁴ Bassiouni was instrumental in navigating the U.N. Torture Convention through the labyrinthine committee stages of the U.N., after a number of States had acted to side-line the treaty, and had spent much of his professional career working on ways to advance the goal of establishing an International Criminal Court.

keen to take up the post and was surprised to learn that Frits Kalshoven had been appointed as Chairman.²⁵ He would subsequently discover that Ralph Zacklin, a senior staffer in the U.N.'s Office of Legal Affairs (OLA) had convinced Boutros Ghali that Bassiouni should not assume the position, due to concerns that a Muslim Chair might send the wrong message to the Serbs regarding impartiality.²⁶ The incident would mark the commencement of a bitter struggle between the two men, with Bassiouni believing Zacklin to have "an agenda that went far beyond simply not wanting to send the wrong public relations message to the Serbs."²⁷

Eager to iron out a number of issues, Bassiouni sent an internal memo to the other Commissioners, which included a discussion paper for the first meeting and a proposed agenda. He suggested that the Commission should divide its tasks into a number of phases, with Phase One consisting of "the gathering, correlation and analysis of available data" and Phase Two "devoted to the Commission's own investigation and fact finding."²⁸ The memo also contained a proposed agenda for the first meeting. However, during the meeting held on November 4, 1992, disagreement emerged as to what direction the Commission should take. The nebulous wording of Resolution 780 and the absence of any explicit mention of a Tribunal led to debate over whether the body should prepare legal cases, or merely compile an archive.²⁹ Officials from the OLA argued that the evidence should be "demonstrative" rather than "evidentiary."³⁰ Some of the

²⁵ The five Commission members appointed were Professor Frits Kalshoven, Emeritus Professor of International Humanitarian Law at the University of Leiden (The Netherlands), (Chairman); M. Cherif Bassiouni, Professor of Law at DePaul University College of Law and President of DePaul University's International Human Rights Law Institute (Egypt); Commander William Fenrick, Director of Law for Operations and Training in the Department of Defense (Canada); Professor Torkel Opsahl, Professor of Human Rights Law at Oslo University, President of the Norwegian Institute of Human Rights and former member of the UN Committee on Human Rights and the European Commission on Human Rights (Norway); and the Hon. Keba M'Baye, former President of the Supreme Court of Senegal, former President of the Constitutional Council of Senegal, and Former President of the International Court of Justice (Senegal). Bassiouni would later characterise the overall composition of the commission as "a great group of people but for another purpose [the compilation of analytical reports] than the one we had to do....none of them had faced difficult circumstances of having to investigate and obtain evidence in time of war." Interview with M. Cherif Bassiouni.

²⁶ M. Cherif Bassiouni personal diary.

²⁷ Interview with M. Cherif Bassiouni.

²⁸ Internal Memorandum To the Commissioners from M. Cherif Bassiouni, October 30, 1992

²⁹ See Guest, On Trial, p. 59.

³⁰ See Guest, On Trial, p. 60.

Commissioners disagreed with this, arguing that the compilation of criminal cases was paramount. Zacklin, who had been appointed the Commission's Legal Counsel, also gave a brief presentation. Zacklin foresaw that the need to gather detailed information "will no doubt, call for the development by you of *innovative working methods* and procedures. *In this, you can count on the full support of the Secretariat.*"³¹ Bassiouni's experience over the database, would in time, however, reveal such assurances to be hollow.

Funding Problems

The Commission was to be administered by the U.N.'s OLA. However, the OLA's primary function was to advise the Secretary-General on legal matters, not oversee investigatory bodies intending to launch field investigations, leading to suggestions that it was "singularly ill-equipped to administer the Commission."³² Already suffering from an increased workload and a zero growth budget, the OLA could only access additional funding by gaining the approval of the Advisory Committee on Administrative and Budgetary Question (ACABQ). This U.N. financial monitoring body, established to review spending proposals for the General Assembly, was driven by a zealous determination to curb U.N. spending. Thus, when the OLA submitted the Commission's initial budget, it was cut by a third in December 1992.³³ Furthermore, the budget was only extended until the end of August 1993.

Given the restrictions imposed by the ACABQ's cuts, it was essential to secure alternative sources of funding including a trust fund comprising voluntary contributions. Such trust funds are a common source of U.N. funding and several members of the Commission were now hopeful that the failure to provide specific U.N. funding could be overcome via this means. Kalshoven drafted a letter requesting funds directly from Member States. However, the move was opposed by the OLA, with Francis M. Ssekandi, the Deputy Director of the General Legal Division, OLA, informing Zacklin, "we believe that the appeal for voluntary contributions should in any event be made by the Secretary

³¹ Commission minutes, First Meeting, November 4, 1992, emphasis added.

³² See Guest, *On Trial*, p. 63.

³³ From \$1,000,000 to \$680,000

General and not the Chairman of the Commission.” The memo went on to posit that “authorization or approval by the General Assembly for soliciting voluntary contributions is necessary.”³⁴ Attempts by the Commission to expeditiously resolve its financial problems were becoming embroiled in bureaucratic wrangling, and it was only after U.S. pressure that the General Assembly eventually approved a trust fund for the Commission in March 1993. However, the Commissioners were not informed of this development by the OLA until May, with funds being unavailable until July-August that year. Several months of potential investigation time had been wasted.³⁵

The limited and delayed funding may be interpreted either as a symptom of bureaucratic inertia and poor management, endemic in many large institutions, or as a tactical maneuver to impede the Commission’s work.³⁶ Either way, Bassiouni is unequivocal: “[c]onsidering the Commission’s mandate and the extent and range of the violations reported, it is incomprehensible that no resources were made available through the regular UN budget process for either the investigations or the operating expenses of the Commission.”³⁷ He went on to dryly question, “If the Iran-contra investigation in the United States cost over \$40 million, how could a \$1.3 million trust fund be sufficient in the context of such large-scale victimization as had occurred in the former Yugoslavia?”³⁸

³⁴ UN Interoffice Memorandum, to Ralph Zacklin from Francis M Ssekandi, OLA, January 7, 1993.

³⁵ The voluntary fund would be used to cover the Commissions operating costs and investigations after UN funding ended. The following countries contributed a total of \$1,320,631: Austria, \$20,000; Canada, \$237,000; Czech Republic, \$1,000; Denmark, \$15,201; Germany, \$16,000; Hungary, \$3,000; Iceland, \$500; Liechtenstein, \$3,184; Micronesia, \$300; Morocco, \$5,000; the Netherlands, \$260,000; New Zealand, \$53,000; Norway, \$49,978; Sweden, \$94,955; Switzerland, \$50,000; Turkey, \$10,000; the United States \$500,000. Three permanent members of the UN Security Council Britain, France and Russia made no contribution.

³⁶ As Guest observes “UN rules are no obstacle when the political will exists. (Thus, in 1992 the Human Rights Component of the UN transitional Authority in Cambodia (UNTAC) asked the Secretariat in New York to establish a human rights trust fund to take in pledges of support that it was receiving from governments. The fund was established, and the money was available. within a matter of weeks.)”, *see* Guest, *On Trial*, p. 65.

³⁷ *See* M. Cherif Bassiouni, ‘The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia’, in ROGER S. CLARK AND MADELINE SANN (EDS.) *THE PROSECUTION OF INTERNATIONAL CRIMES* (Transaction Publishers) 1994, p. 70. [hereinafter CLARK AND SANN, *THE PROSECUTION OF INTERNATIONAL CRIMES*]

³⁸ *See* M. Cherif Bassiouni, ‘The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia’.

Emerging Frustrations

With little in the way of tangible progress, the Commission began to receive negative media coverage, with suggestions that the body had achieved little in the six months of its creation.³⁹ Tensions were also surfacing within the Commission, with some of the members expressing frustration that things were not progressing with the necessary urgency. A revelatory correspondence between the Chairman and one of the Commissioners who was advocating a more pro-active approach, provides a valuable insight into the pressures the Chairman evidently felt. Kalshoven confided “I can assure you that from the very first day, I have been hearing the reproach that we were doing – nothing – *meaning that we were not doing what they wanted us to do. In this respect, I need hardly remind you that the very existence of the Commission finds its origin in disagreement among members of the Security Council about the course to steer with respect to the war criminality in former Yugoslavia....I am well aware....that public opinion is increasingly losing patience with the rather ineffective way the international community is handling the situation in the former Yugoslavia, and now in particular in Bosnia.*”⁴⁰

The Commission’s Database

During its third meeting in mid-January 1993, consensus emerged over the need to gather the data so far received by the Commission in an organized and systematic manner. Consequently, Bassiouni was appointed “Rapporteur for the Gathering and Analysis of the Facts.” However, the initiative was soon beset by problems, with funding objections again being raised. In response to the request for \$10,000 to purchase computers, the U.S. member of the ACABQ reportedly recommended computers be transferred from the U.N. mission in Cambodia, an option which would have further delayed the commencement of work. Zacklin, suggested the Commission take a couple of old

Occasional Paper No. 2, International Human Rights Law Institute, DePaul University, College of Law, 1996, p. 67.

³⁹ See Roy Gutman, ‘War Crime Unit Hasn’t a Clue; UN setup seems designed to fail’, *Newsday*, March 4, 1993.

⁴⁰ Telefax from Fritz Kalshoven, Chairman of Commission of Experts, to Commission member (emphasis added)

systems from the OLA which were about to be discarded; hardly an adequate response given the size of the anticipated task.

In light of the dire situation, Bassiouni proposed that the database be administered from DePaul University's International Human Rights Law Institute in Chicago, of which he was a Director. An inter-office memo reveals the OLA's strong opposition to conducting the work outside of U.N. premises; "we suggest that the United Nations should *insist* on performing the services in Geneva and under strict control and supervision of the commission."⁴¹ Bassiouni contested this, noting "most Rapporteurs of UN bodies work elsewhere than at UN facilities."⁴² Objections were also raised over confidentiality and security measures. These were addressed by a series of protective measures which were instituted: the site would be protected by an electronic security system linked to the Chicago Police Department; documents would be stored in locked security cabinets with copies stored in a secure off-site facility; and all persons working at the project would sign and be bound by a confidentiality agreement. Given the lax security measures in place in the Commission's premises in Geneva (By late December 1993, the Commission's Geneva office still did not have a safe or shredder.⁴³) such concerns seemed somewhat misdirected.

With no viable alternative, the OLA reluctantly agreed to the proposal. After securing \$250,000 from the Soros Humanitarian Foundation⁴⁴ Bassiouni and a team of attorneys and volunteer law students began work to compile the database from his University. The team would go on to compile and organize over 64,000 pages of documentation. However, the whole affair had further strained relations between Bassiouni, the OLA and also Kalshoven (it was not until several months into the compilation of the database that

⁴¹ UN Interoffice Memorandum, to Ralph Zacklin from Francis M Ssekandi, OLA, January 7, 1993. (emphasis added)

⁴² See M. Cherif Bassiouni, 'The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia', in ROGER S. CLARK AND MADELINE SANN (EDS.) THE PROSECUTION OF INTERNATIONAL CRIMES (Transaction Publishers) 1994, p. 75.

⁴³ Internal Minutes, Commission of Experts, Ninth Session, First Meeting, December 14, 1993.

⁴⁴ Donations would also be received from the Open Society Foundation, and the John D. and Catherine T. MacArthur Foundation

the Chairman even formally acknowledged its existence.), although Bassiouni feels the work carried out by the DePaul Database team was ultimately vindicated by the subsequent commendation from the (then) U.N. Secretary General Boutros Ghali.

Obstacles to Information Gathering

It was anticipated that several key organizations working on the ground in Croatia and Bosnia would provide a vital source of information. However, specific requests for information were rebuffed by the International Commission of the Red Cross (ICRC) and the United Nations High Commissioner for Refugees (UNHCR) both of whom claimed their mandate precluded such disclosure.⁴⁵ UNPROFOR was initially receptive to the Commission's requests for information, although an internal telefax reveals that the UNPROFOR liaison office in Geneva, which had at first permitted the Commission to see reports, was becoming increasingly reluctant to provide access due to "their confidential nature", leading to The Commission's secretary appealing directly to the Deputy Head of UNPROFOR, Cedrick Thornbury, in an attempt to have the Geneva office revert to its initial policy.⁴⁶ In his report compiled after a Commission reconnaissance mission to Croatia, Bill Fenrick, the Rapporteur for on-site investigations, pointed out that UNPROFOR did not have a usable humanitarian law violation reporting procedure in place, nor a central office to gather violation reports. However, he informed the other Commissioners "at least one contingent [of UNPROFOR] concerned about the possible long-term impact of turning a blind eye to humanitarian law violations, had established its own reporting procedure and a central point for the collection of reports."⁴⁷ Fenrick also divulged that several U.N. Civilian Police (CIVPOL) officers had gathered information concerning atrocities on their own initiative.⁴⁸

⁴⁵ The issue of disclosure would again be raised by the Tribunal, relating to ICRC personnel and the organizations policy of non-disclosure, see 'Red Cross: 'Absolute Right to Non-Disclosure', Tribunal Update, No. 146, Institute for War and Peace Reporting, October 4-9, 1999.

⁴⁶ Commission internal correspondence – UN telefax transmission, From: Jacqueline Dauchy, To: M. Cherif Bassiouni, March 9, 1993. Similar problems of obtaining cooperation from UNPROFOR were experienced by Mazowiecki, See Konstanty Gebert, 'In Investigating Human Rights Abuses, Reporting Is Not Enough', *Transitions*, January 26, 1996, p. 42.

⁴⁷ Final Version of Mr. Fenrick's Report on the Reconnaissance Mission to the Territory of the former Yugoslavia, March 24, 1993.

⁴⁸ Final Version of Mr. Fenrick's Report on the Reconnaissance Mission to the Territory of the former Yugoslavia, March 24, 1993.

States' Non-Disclosure

The Commission's work was seriously inhibited by the reluctance of most States to provide information. Kalshoven contacted all the U.N. Member States permanent missions in Geneva, with a request that they provide any material in their possession which may have been of use to the Commission. However, the response was minimal, particularly with regard to intelligence material. Bassiouni would berate this abject non-disclosure, noting "Governments did not provide *any* intelligence information in their possession."⁴⁹ The inadequacy of most government submissions was all the more frustrating since it was anticipated that they would be "the Commission's primary source of information."⁵⁰

In the early stages of the conflicts in Croatia and Bosnia, Western intelligence services were initially relatively ill-prepared to gather information, and their human intelligence, [humint] was limited. As Wiebes notes, it would not be until 1993 that the U.S. Assistant Secretary of Defense established the Defense Human Intelligence Service, which came to reside under the Defense Intelligence Agency (DIA).⁵¹ Similarly, the U.S. National Security Agency (NSA) reportedly had a lack of translators and analysts trained in Serbo-Croat.⁵² To a large extent these deficiencies related to the fact that most U.S. intelligence agencies were operating on a Cold War mindset, focusing on the enemy in the East.⁵³ Indeed, similar problems existed within other Western intelligence agencies which had also paid scant attention to FRY. British Secret Intelligence Service (SIS - also known as MI6), reportedly had difficulties in these early stages together with British Government Communications Headquarters (GCHQ). A senior Defence Intelligence Staff (DIS)

⁴⁹ See M. Cherif Bassiouni, 'The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia', Occasional Paper No. 2, International Human Rights Law Institute, DePaul University, College of Law, 1996, p. 22.

⁵⁰ See M. Cherif Bassiouni, 'The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia', Occasional Paper No. 2, International Human Rights Law Institute, DePaul University, College of Law, 1996, p. 25.

⁵¹ See CEES WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA 1992-1995* (Lit Verlag Munster) 2003, p. 52 [hereinafter WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*] The Service was not officially activated by the DIA until October 1995, and was only declared fully operational in September 1996.

⁵² See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 55.

⁵³ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 54.

officer acknowledged that British intelligence agencies “had a bit of trouble getting up to speed. It wasn’t a priority they could quickly get good at. SIS and GCHQ needed to improve their expertise in the language. On the frequencies [to be intercepted], GCHQ had to start almost from scratch. The quality at the beginning was a bit iffy, it was never exceptionally good.”⁵⁴

However, over time, these capabilities improved dramatically. Urban highlights that after the imposition of a no-fly zone, more sophisticated intelligence-gathering aircraft were deployed to the region enabling electronic intelligence to be gathered.⁵⁵ The U.S. intelligence community established a ‘Balkans Task Force’ (BTF) which included representatives from the Central Intelligence Agency (CIA) and DIA. This was supplied with intelligence from the National Reconnaissance Office (NRO) and NSA⁵⁶, the latter of which capitalized on the Bosnian Serb military’s limited ability to encrypt their communications. As one U.S. military intelligence officer said “If it ain’t scrambled, were listening to it.”⁵⁷ A separate Balkans Task Force was also established within the Intelligence and Research section of the State Department (INR) which received information from both U.S. intelligence agencies and the Private Military Company (PMC), Military Professional Resources Incorporated (MPRI).⁵⁸ Additionally, the NSA formed its own special Bosnia group in 1994.⁵⁹ The U.S. embassies in Belgrade and Zagreb⁶⁰ contained both CIA and NSA personnel who were monitoring communication traffic throughout the area, and the CIA and DIA were reportedly conducting clandestine operations in Serbia.⁶¹ U.S. Special Operations Forces (SOF) had infiltrated various NGOs and humanitarian aid organizations within Bosnia, or were using them as cover, and were reportedly permitted to use United Nations High Commissioner for Refugees

⁵⁴ See Captain Jonathan Cooke quote in MARK URBAN, *UK EYES ALPHA. THE INSIDE STORY OF BRITISH INTELLIGENCE* (Faber and Faber) 1997, pp. 215-216. [hereinafter URBAN, UK EYES ALPHA]

⁵⁵ See URBAN, UK EYES ALPHA, p. 216.

⁵⁶ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 72.

⁵⁷ See anonymous U.S. military intelligence officer quote in Charles Lane and Thom Shanker. ‘Bosnia: What the CIA Didn’t Tell Us’. *New York Review of Books*, May 9, 1996, p. 11.

⁵⁸ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 66.

⁵⁹ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 72.

⁶⁰ In addition to focusing on Croatia, the CIA station within the US embassy in Zagreb was also responsible for Republika Srpska.

⁶¹ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 60.

(UNHCR) jeeps for their operations.⁶² Furthermore, Miro Tadjman, son of the late president Franjo Tadjman and head of the Croatian Intelligence (POA) in the mid-1990s, revealed that the CIA also spent at least \$10 million on equipment in Croatian listening posts intercepting telephone calls in Bosnia and Serbia; "All our [electronic] intelligence in Croatia went online in real time to the National Security Agency in Washington," says Tadjman. "We had a de facto partnership."⁶³ The installation of CIA interception equipment in a secret base in Croatia close to Sveta Gera, meant that the majority of General Ratko Mladic's (Commander of the Bosnian Serb Army) conversations were recorded.⁶⁴

Similarly, as the conflict progressed and its involvement became more pronounced, British efforts to gather information became more successful. Although the "UN itself did not empower its peacekeeping or humanitarian forces to compile intelligence"⁶⁵, UNPROFOR provided ideal cover for British, French and Danish SOF national intelligence cells (NICs) to be inserted. Intelligence gathered by these NICs was transmitted directly to national capitals and was not disclosed within the formal U.N. system. Additionally, the British coordinating body for intelligence, the Joint Intelligence Committee (JIC) established the Current Intelligence Group for the Balkans and a Bosnia cell was established in the U.K. Defence Intelligence Staff (DIS).⁶⁶ Within eighteen months of the commencement of the conflicts, MI6 had operatives on the ground and had recruited sources within all the warring factions including "excellent sources close to Mladic."⁶⁷ Furthermore, improved Signals Intelligence (Sigint) capabilities meant that conversations between Mladic and his subordinates were regularly intercepted.⁶⁸

⁶² See US Special Operations Command, 10th Anniversary History, (MacDill, AFB). 1997, pp. 52-55.

⁶³ See "What did the CIA know?", *Newsweek*, August 27, 2001, p. 30.

⁶⁴ See Gordan Malic, "Alleged CIA transcripts on Mladic published by the Zagreb Weekly, *Globus*, translated on *SoutheastEurope online*, January 19, 2006.

⁶⁵ See URBAN, UK EYES ALPHA, p. 214.

⁶⁶ See WIEBES, INTELLIGENCE AND THE WAR IN BOSNIA, pp. 72-73.

⁶⁷ See WIEBES, INTELLIGENCE AND THE WAR IN BOSNIA, p. 79.

⁶⁸ See URBAN, UK EYES ALPHA, p. 216.

Evidently, although a number of Western States initially had limited capabilities on the intelligence front, they quickly improved. Unsurprisingly, these capabilities and assets were primarily used for the purposes of gaining a clearer insight into political and military developments in the region, and by UNPROFOR troop-contributing states for the purposes of force protection. As Air Marshal John Walker, (then) director of British Defence Intelligence Staff (DIS) emphasized, “[Y]ou need a military intelligence job to protect your troops. If you don’t, you pay for it in body bags.”⁶⁹ Nevertheless, a number of Western intelligence services *were* gathering material relating to atrocities.

According to a State Department official, “by the third week of September [1992] we had a very large, comprehensive list of camps, with descriptions, places, information on inmates, conditions, maps.”⁷⁰ U.S. Army Intelligence and Security Command ran programmes in Germany and Italy to interview refugees and deserters from FRY, and in a rare instance of inter-agency cooperation CIA agents interviewed survivors of the detention camps and were accompanied by FBI sketch artists who attempted to reconstruct likenesses of alleged perpetrators. In Croatia, the CIA also established the Refugee Debriefing Center which recorded material from refugees coming from Bosnia.⁷¹ Such refugee accounts contributed to an intensive study of ethnic cleansing conducted by the agency which also used open source material and aerial reconnaissance to document the destruction of over 3,500 villages, mass expulsions and murder of Muslims.⁷²

Similarly, a member of Britain’s DIS also revealed (in the context of a discussion relating to the somewhat thorny issue of the U.S. withholding intelligence material from the British due to their wide policy differences over Bosnia) that the U.S. possessed intelligence relating to Serbian war crimes, “They [the U.S.] more or less admitted they were holding stuff back from us, not everything but really the bits relating to the most

⁶⁹ See URBAN, UK EYES ALPHA, p. 214.

⁷⁰ See anonymous State Department official quote in Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’, *New York Review of Books*, May 9, 1996, p. 10.

⁷¹ See WIEBES, INTELLIGENCE AND THE WAR IN BOSNIA, p. 75.

⁷² See Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’, *New York Review of Books*, May 9, 1996, p. 12.

pronounced political divide. *They didn't feel we took their information about Serb atrocities seriously enough.*⁷³

Wiebes also highlights that declassified U.S. government documents reveal that in 1992 and 1993, it had a good insight into atrocities committed in the various Bosnian Serb run camps in North Western Bosnia including Omarska. He goes on to note that “[a]ccording to a senior US intelligence official, *US awareness on this issue was broad and well-defined.* Nevertheless, the reporting priority given to atrocities was nil....*Reporting on atrocities was seen as being aimed at three to five years down the road, for some ill-defined effort to hold parties accountable.*”⁷⁴ This rationale appears somewhat spurious: rather than “reporting atrocities three to five years down the road” the Security Council had already specifically established a Commission to examine allegations of violations of international humanitarian law, and had *explicitly* asked States to provide information to the new body.

Despite, the presence of strong supporters of the Commission within the U.S. State Department, liaison with the body was generally accorded limited priority, with the task assigned to an officer in the Human Right Bureau with little knowledge of Balkan affairs, and to a short-term intern recently out of college.⁷⁵ Although the State Department would pass on several reports on atrocities in the former Yugoslavia to the Commission,⁷⁶ Bassiouni claimed “there was nothing in it that was particularly enlightening....it was heavily edited.”⁷⁷ In an attempt to increase the flow of information Bassiouni attended a meeting with State Department officials where he was informed that in order to receive intelligence material he would have to undergo security clearance. At a following meeting Bassiouni was informed that any material disclosed could only be used subject to approval by the State Department, a condition he was unwilling to be bound by.⁷⁸

⁷³ See URBAN, UK EYES ALPHA, p. 241. (emphasis added)

⁷⁴ See WIEBES, INTELLIGENCE AND THE WAR IN BOSNIA, p. 75. (emphasis added)

⁷⁵ See SAMANTHA POWER, “A PROBLEM FROM HELL”. AMERICA AND THE AGE OF GENOCIDE (Basic Books) 2002, p. 292. [hereinafter POWER, “A PROBLEM FROM HELL”]

⁷⁶ See SHATTUCK, FREEDOM ON FIRE, p. 131.

⁷⁷ Interview with M Cherif Bassiouni.

⁷⁸ Interview with M Cherif Bassiouni.

Clearly, large amounts of material which would have been very useful to the Commission had been collected by U.S. As Power contends “No other atrocity campaign in the twentieth century was better monitored and understood by the U.S. government.”⁷⁹ However, information was not being passed on. Whilst this was partially predicated on the contention expressed by the intelligence agencies that disclosure would reveal methods and sources⁸⁰ deeper concerns were also being harboured by elements within the Bush administration, particularly the DoD. Calls from the ‘pro-prosecution’ sections of the State Department to increase disclosure were met with by “A quiet mini-firestorm of negative reaction in the Pentagon among people who see it as an effort to bring Americans into the conflict.”⁸¹ Bush’s foreign policy team applied criteria largely similar to that enounced by President Regan’s Defense Secretary Casper Weinberger, (known as the Weinberger Doctrine) to determine whether the U.S. should use military force. In 1984, Weinberger proposals included the provisions that armed intervention (1) be used only to protect the vital interests of the U.S. or its allies; (2) be in pursuit of clearly defined political and military objectives; (3) be waged only as a last resort. To this, Colin Powell, the Chairman of the Joint Chiefs of Staff (JCS) added the requirement of “decisive force” and a clearly defined “exit strategy”, and he was strongly opposed to U.S. military action in Bosnia.⁸² As Samantha Powell notes, for the administration “The war [in the former Yugoslavia] was “tragic,” but the stakes seemed wholly humanitarian. It met few of the administration’s criteria for intervention.”⁸³ Thus, the views of Secretary of State, James Baker would prevail, who famously declared that the U.S. did not “have a dog in this fight.” Consequently, the Bush administration assiduously resisted defining the ‘Serbian Project’ as genocide throughout 1992 due to concerns that the genocide label would have demanded a U.S. response.⁸⁴ Furthermore, despite having intelligence from May 1992 of the existence of Bosnian Serb-run detention camps located

⁷⁹ See POWER, “A PROBLEM FROM HELL” p. 264.

⁸⁰ For further details on this issue see chapters two and five.

⁸¹ See Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’, *New York Review of Books*, May 9, 1996, p. 12.

⁸² See Michael Gordon, ‘Powell Delivers a Resounding No on Using Limited Force in Bosnia’, *New York Times*, September 28, 1992.

⁸³ See POWER, “A PROBLEM FROM HELL”, p. 262.

⁸⁴ See POWER, “A PROBLEM FROM HELL”, p. 288. Power goes on to highlight that The White House never issued a directive calling for research and analysis to determine whether a genocide case could be made against Milosevic or FRY see p. 290.

throughout North West Bosnia, administration officials never publicly condemned the camps or demanded their closure.⁸⁵ When *Newsday*'s Roy Gutman broke the story in late July 1992 and continued to write a series of articles in August,⁸⁶ U.S. State Department spokesman Richard Boucher would confirm that the U.S. possessed evidence of the camps. However, the administration quickly backtracked, when other State Department officials testified on Capitol Hill that the U.S. had no *substantiated information* to verify the news accounts.⁸⁷

Similarly, with the U.K. opposed to an activist Commission, due to concerns that it could upset the negotiation process, cooperation was at a bare minimum. This was particularly frustrating for the Commission given that British troops formed a significant part of UNPROFOR and could have potentially been a source of useful first-hand material. U.K. military debriefing teams based in Kent had also interviewed hundreds of refugees including former detainees from a number of Bosnian Serb run detention camps, collecting over five hundred testimonies. The Commission made a specific request to the U.K. to send it all information that was substantiated. However, Bassiouni recounted that the U.K.'s response merely amounted to a single affidavit consisting of a diary from a former detainee at one of the detention camps. A BBC Panorama investigation however, revealed an internal Foreign Office memo from March 1993, which acknowledged that the British had "a good untapped source of first hand substantiated information [relating to atrocities]"⁸⁸

The Commission anticipated that the European Community Monitoring Mission (ECMM) reports would also be a potentially a rich source of information, particularly regarding troop movements and command and control issues. However, The ECMM's response to requests for information would vary dramatically depending on which state had the rotating chair and could thus dictate disclosure procedure. Furthermore, although

⁸⁵ See POWER, "A PROBLEM FROM HELL", p. 270.

⁸⁶ For further details of Gutman's accounts see ROY GUTMAN, A WITNESS TO GENOCIDE: FIRST INSIDE ACCOUNT OF THE HORRORS OF ETHNIC CLEANSING IN BOSNIA (Element Books Ltd) 1993.

⁸⁷ See Charles Lane and Thom Shanker, 'Bosnia: What the CIA Didn't Tell Us', *New York Review of Books*, May 9, 1996, p. 12.

⁸⁸ See 'Getting Away With Murder', Panorama, BBC, December 13, 1993.

the Commission established positive relationships with a number of ECMM Observers on an individual basis, the ECMM's liaison office in Geneva was unwilling to help. The majority of the Mission's documents were stored in Zagreb, and were difficult to access, although arrangements were eventually made for a member of the Commission's secretariat to visit Zagreb and consult the files.⁸⁹ However, as Bassiouni highlighted, "it appeared that some governments, including the United Kingdom, when chairing the ECMM, had removed some of the records,"⁹⁰ later recalling that "some of the warehouse staff [in Zagreb] told us that U.K. military personnel had removed material."⁹¹

Peace versus. Justice: The International Conference for the former Yugoslavia (ICFY) and the Commission of Experts

Whilst the U.N. Security Council had adopted several Resolutions providing the framework for war crimes investigations and possible prosecutions, a major diplomatic initiative was also taking place in London in August 1992, aimed at finding a solution to the conflict. The London Conference led to the creation of the International Conference on the Former Yugoslavia (ICFY) which set out and approved a dual track strategy in response to the crisis.⁹² This comprised a U.N. mission to provide humanitarian assistance to the civilian population of Bosnia, and a European Community (E.C.) led negotiation process designed to achieve a political settlement. By early 1993 that process led to the formulation and unveiling of the Vance Owen Peace Plan (VOPP), by the U.N. and E.C. Special Envoys Cyrus Vance, Secretary of State under President Carter, and David Owen, a former U.K. Foreign Secretary⁹³ Despite the assertions that the

⁸⁹ Commission internal correspondence – UN telefax transmission, From: Jacqueline Dauchy, To: M. Cherif Bassiouni, Mr. Schiller, March 15, 1993.

⁹⁰ See M. Cherif Bassiouni, 'The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia' in CLARK AND SANN, THE PROSECUTION OF INTERNATIONAL CRIMES, p. 81.

⁹¹ Interview with M. Cherif Bassiouni.

⁹² For more details on the London Conference and subsequent peace negotiations *see generally* GOW, TRIUMPH OF THE LACK OF WILL, pp. 224-232.

⁹³ VOPP proposed that Bosnia remain a republic but be divided into ten ethnically based, Croat, Muslim and Serb autonomous provinces, loosely bound under a central government with limited powers. The plan prohibited the provinces from entering into 'agreements with foreign states' in order to deny any Bosnian Serb and Bosnian Croat efforts to accede to Serbia and Croatia, and proposed progressively demilitarizing the republic under U.N./EC supervision. For further details *see* GOW, TRIUMPH OF THE LACK OF WILL, pp. 232-248. Three other internationally sponsored peace plans were proposed after VOPP: The Owen

negotiation process and war crimes investigations were “two separate tracks”⁹⁴. the two dynamics were soon to collide. The issue of war crimes had uncomfortably intruded into the political negotiations during one of the ICFY’s December, 1992 meetings. In a rare departure from the usually sedate diplomatic protocol, Lawrence Eagleburger, the outgoing U.S. Secretary of State delivered a bombshell, with his so-called “naming names speech” informing the participants, “My government believes it is time for the international community to begin identifying individuals who have to answer for crimes against humanity....We know that crimes against humanity have occurred, and we know when and where they occurred....We can also identify individuals who committed them....We know, moreover, which forces committed these crimes, and under whose command they operated. And we know, finally, who the political leaders are to whom the military commanders were – and still are – responsible.”⁹⁵ Eagleburger went on to identify ten individuals the U.S. had determined may be implicated in the commission or ordering of atrocity crimes, including Karadzic, Milosevic and Mladic, all of whom the international negotiators were in contact with in their efforts to achieve a negotiated settlement. Reaction in the room was reportedly “dead silence”.⁹⁶ Eagleburger recalled, “I thought there was a certain degree of discomfort, wiggling in the chair and looking uncomfortable.”⁹⁷ When asked specifically about the British response he replied, “I think it would be fair to say they did not greet what I did with great enthusiasm.”⁹⁸ Similarly, former State Department official, John Fox recounted, “the discussion that I recall in the U.S. government about the attitude of key allies towards prosecution of war crimes was that it could get in the way of the peace process, that the overriding objective was to keep the diplomatic game going at whatever cost, that prosecution of war crimes was too much

Stoltenberg Plan, the EU Action Plan, and Contact Group Plan. All would fail to bring an end to the fighting.

⁹⁴ See Madeline Albright comments in ‘Getting Away with Murder’, Panorama BBC, December 13, 1993.

⁹⁵ See Lawrence Eagleburger, ‘The need to respond to war crimes in the former Yugoslavia’, December 16, 1992, reproduced in ‘The Path to the Hague’, official publication of the ICTY.

⁹⁶ See Carla Anne Robbins, ‘World Again Confronts Moral Issues Involved in War Crimes Trials’, *Wall Street Journal*, July 13, 1993.

⁹⁷ See Lawrence Eagleburger comments in ‘Getting Away with Murder’, Panorama, BBC 1, December 13, 1993.

⁹⁸ See Lawrence Eagleburger comments in ‘Getting Away with Murder’, Panorama, BBC 1, December 13, 1993.

of a cost to pay and could undercut the process by targeting individuals.”⁹⁹ However, it was not only the British Government which was unhappy with the speech, with Eagleburger noting that David Owen “made it clear that he considered my remarks “unhelpful”.”¹⁰⁰ Ultimately, Eagleburger’s speech would be no more than an act of political grandstanding of an outgoing Secretary of State. As Fox recalled, “On his return, Eagleburger does not do what all secretaries of state usually do after publicly launching such an initiative, that is, create a working group to study how to enact such a proposition.”¹⁰¹

In addition to Owen’s concern about the impact of highlighting war crimes during the diplomatic initiative, it appears that the E.C. negotiators were also uneasy about according those directly involved in investigating atrocity crimes and human rights lobbying a formal role in the process. U.N. Special Rapporteur on the Former Yugoslavia, Mazowiecki claimed he was effectively shut out from the negotiations due to the nature of his investigations. During meetings with Owen, Mazowiecki would be requested to be “less emotional” and in a later encounter with Vance’s successor, Thorvald Stoltenberg¹⁰², the U.N. Rapporteur was lambasted; “We do not need your moralizing. We know best how to protect human rights.”¹⁰³

Hannum succinctly highlights the tensions between those investigating human rights abuses and advocating prosecutions, and those involved in trying to achieve a negotiated settlement, contrasting their respective strategies. He stresses how human rights advocates are “confrontational and norm-based (if not moralistic) and they try to practice their craft through “naming and shaming” rather than through [the diplomatic approach of] persuasion or consensus building.”¹⁰⁴ To illustrate the vastly differing approaches,

⁹⁹ See John Fox comments ‘Getting Away with Murder’, Panorama, BBC 1, December 13, 1993.

¹⁰⁰ See Eagleburger quote in SCHARF, BALKAN JUSTICE, p. 44.

¹⁰¹ See John Fox quote in HAZAN, JUSTICE IN A TIME OF WAR, p. 33.

¹⁰² Stoltenberg succeeded Vance in May 1993.

¹⁰³ See Konstanty Gebert, ‘In Investigating Human Rights Abuses, Reporting Is Not Enough’, *Transitions*, January 26, 1996, p. 41.

¹⁰⁴ ¹⁰⁴ See Hurst Hannum, ‘Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding’, *Human Rights Quarterly*, 28, (2006) p. 16.

Hannum notes the view of a U.N. human rights official interviewed, who maintained that there must be “no compromise” in maintaining human rights principles”¹⁰⁵ Herein lies the acute dilemma for diplomatic negotiators who are often faced with the complex challenge of incorporating these principles, whilst also achieving the objective of obtaining a settlement and bringing an end to conflict. The prospect of successfully realizing both goals is all the more difficult where the negotiators have limited political support, and few ‘sticks or carrots’ to induce cooperation from the ‘warring factions’. Hannum goes on to neatly summarize this quandary. “It is almost a truism that negotiators need to deal with all parties to a conflict, including those guilty of committing or at least tolerating gross abuses of human rights that constitute war crimes or crimes against humanity. Human rights negotiators on the other hand, are in the business of demanding compliance with international law, including international humanitarian law, rather than negotiating with the perpetrators.”¹⁰⁶ The VOPP negotiations are merely one illustration of this tension. More recently, during the early U.N. negotiations with Indonesia relating to East Timor in 1999, Jasmsheed Marker, the Personal Representative of the U.N. Secretary General, explained how he addressed the challenge, noting his “basic objectives were political and diplomatic. I judged, therefore, that it would be unproductive for my political negotiations if I were to imprudently concentrate efforts on investigations of human rights violations.”¹⁰⁷ Owen appears to have applied a similar strategy, with some claiming the E.C. negotiator had “basically been advocating immunity for Milosevic and Karadzic.”¹⁰⁸ Owen has himself conceded, “I don’t think there was any great enthusiasm for [the Tribunal] while there was a chance of an early settlement.”¹⁰⁹ Despite making supportive remarks regarding the Tribunal in public, Owen has since opined; “If the VOPP had been accepted in February 1993, I doubt a war

¹⁰⁵ See anonymous U.N. human rights official quote in Hurst Hannum, ‘Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding’, *Human Rights Quarterly*, 28, (2006) p. 17.

¹⁰⁶ See Hurst Hannum, ‘Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding’, *Human Rights Quarterly*, 28, (2006) p. 37.

¹⁰⁷ See Jasmsheed Marker quote in Hurst Hannum, ‘Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding’, *Human Rights Quarterly*, 28, (2006) p. 24.

¹⁰⁸ See Robert Fox quote in SIMMS, UNFINEST HOUR, p. 148

¹⁰⁹ See Lord David Owen quote, in Leslie Vinjamuri, ‘Trading Order for Justice? Prosecuting War Criminals In The Aftermath of Conflict’, (2001) PhD (Columbia University) p. 206. footnote. 115.

crimes tribunal would have been established.”¹¹⁰ Evidently, it appears that Owen would have been willing to countenance impunity in order to secure a deal. In light of these factors, it would seem that Bertrand de Rossanet’s assertion that the ICFY “Pioneered, and worked assiduously for, the establishment of an international penal tribunal,”¹¹¹ is perhaps a somewhat inaccurate characterization. Indeed, it would not be long before a member of the Commission would experience first hand, attempts to muddy the waters over war crimes and accountability.

Bassiouni recounted having lunch at the Palace of Nations in Geneva with New Zealand Diplomat, Kennedy Graham, who informed him that Owen was sitting at a table near them. Graham’s brother was an MP, who knew Owen and it was suggested they should say hello. Bassiouni was reluctant and had purposely not wanted to meet Owen. “they [Vance and Owen] were working the political field and I was working the investigations field, and I felt it’s better our paths didn’t cross.”¹¹² Owen rose to meet Graham and was introduced to Bassiouni. “He said to me ‘I hear you are to investigate a mass grave at Ovcará’, and I said ‘Yes.’ He said ‘How many bodies are there?’ I said ‘I estimate about 200.’ He said ‘Did you hear of Bratunac?’ And I said ‘Yes.’ He said ‘I heard there are Serb bodies in a mass grave there, are you going to investigate?’ I said ‘I hope so’, and he said ‘How many do you think there are?’ And I said ‘39’, and he said ‘No, no, no, no there are 200’, and I said ‘No there’s 39.’ He asked me ‘How could I be so sure?’ I said ‘I have a rule that if I have a report that has confirmation from another source, I take that report in, if it’s not confirmed I put it as questionable, and I have seven reports about this mass grave, and all of them differ except as to one thing, all of them spoke of 35 bodies’....He looked at me and he said, ‘You really have to investigate three mass graves [of each ethnic group] of 200 each’, and it suddenly hit me as a sort of naivety. I looked at him and said ‘I can’t do that.’ He stood up and looked at me with that sort of aristocratic imperious English look....contemptuously said something to the effect that ‘I

¹¹⁰ See Lord David Owen quote, in Leslie Vinjamuri, ‘Trading Order for Justice? Prosecuting War Criminals In The Aftermath of Conflict’, (2001) PhD (Columbia University) p. 189. footnote 73.

¹¹¹ See BERNARD DE ROSSANET, WAR AND PEACE IN THE FORMER YUGOSLAVIA (Kluwer Law International) 1997, p. 2.

¹¹² Interview with M. Cherif Bassiouni.

don't know how you got this job' and walked away."¹¹³ Clearly, those who were involved in investigating violations of international humanitarian law were viewed as individuals who could, due to the nature of their mandate, complicate the work of the political negotiators. As Bassiouni recounts, "the last thing that those who wanted a political settlement to be reached was to have an activist Commission of Experts that could likely prove the accusations made by Secretary Eagleburger. The priority at that time was to achieve a political settlement – and justice was not viewed as an inducement to that end."¹¹⁴

VOPP was widely condemned in the media (particularly in the U.S.) as tantamount to appeasement and rewarding Bosnian Serb ethnic cleansing, and after a period of prevarication, the U.S. administration refused to support the initiative, claiming it rewarded ethnic cleansing. A number of critics even claimed that in establishing 'ethnic cantons' which disproportionately favored the Bosnian Croats, VOPP may have unwittingly served to exacerbate forced displacement. As Lloyd darkly recounts, "even they [the Bosnian Croats] joked that HVO stood for 'Hvala Vance Owen', thank you Vance Owen." The journalist goes on to highlight that in the areas of the proposed Bosnian Croat sector of the plan, "tensions there rose even further, catalysed by the very diplomatic initiative that sought to end it all."¹¹⁵ Nevertheless, before invoking the widespread criticism of Owen as nothing more than a cynical proponent of Realpolitik, the following factors should be considered. VOPP required the Bosnian Serbs to significantly roll back from the 70% of the territory they controlled, and critically, as Gow points out, unlike the final Peace Deal agreed at Dayton in late 1995, the Bosnian Serb territory would *not have* been contiguous, thus defeating one of the cardinal Serb war aims of attaining a 'Greater Serbia'.¹¹⁶ Vance and Owen were assigned the thankless task of trying to find a solution to the war in Bosnia whilst working under prevailing political conditions which meant they possessed little or nothing in the way of coercive

¹¹³ Interview with M. Cherif Bassiouni.

¹¹⁴ See M. Cherif Bassiouni, 'The Commission of Experts Established pursuant to Security Council Resolution 780. Investigating Violations of International Humanitarian Law in the Former Yugoslavia.' Occasional Paper No. 2, International Human Rights Law Institute. DePaul College of Law, 1996, p.8.

¹¹⁵ See ANTHONY LLOYD, MY WAR GONE BY, I MISS IT SO (Anchor) 2000, p. 86

¹¹⁶ See GOW, TRIUMPH OF THE LACK OF WILL, p. 240.

power to back up their endeavors. As Owen later recalled in his memoir, “The daunting challenge for the ICFY in November 1992 was whether, armed with only moral authority and weak economic sanctions, and with no credible threat of selective counter-force, we could roll back the Serb confrontation lines and create a new map.”¹¹⁷

However, a defence of Owen’s attempts to achieve a negotiated settlement should not be interpreted as a belief that the plan was viable or would have been successful (admittedly, this is no more than speculation). VOPP’s proposed patchwork of cantons was probably practically unworkable. Furthermore, on the basis of Owen’s own remarks outlined above, it appears likely that had VOPP been successful, impunity would have prevailed and calls to establish a Tribunal deflected. Ultimately, the VOPP failed due to a combination of factors: The U.S. was steadfastly opposed to the plan. Instead, it briefly advocated an alternative ‘lift and strike’ strategy, which the UNPROFOR troop contributing States refused to accept due to legitimate concerns that their forces would be placed in an increasingly volatile environment. Without the associated U.S. troop deployment on the ground, the major European states were also unwilling to deploy the necessary troops to enforce VOPP. Emboldened by the clear division within the ‘International Community’, the Bosnian Serb Assembly in Pale sealed the plan’s fate by overwhelmingly rejecting it.

The Interim Report

In February 1993, the Commission published its interim report which defined the term ‘ethnic cleansing’ as “rendering an area wholly homogeneous by using force or intimidation to remove persons of given groups from the area”¹¹⁸ and stated that such ethnic cleansing had been carried out in the former Yugoslavia “by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on

¹¹⁷ See David Owen, *BALKAN ODYSSEY*, p. 67.

¹¹⁸ See Letter from the secretary-General to the President of the Security Council, Feb. 10, 1993, U.N. Doc S/25274 (1993), transmitting *Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, reproduced in MORRIS AND SCHARF, *AN INSIDER’S GUIDE TO THE ICTY* Vol. II, p. 311.

civilians and civilian areas, and wanton destruction of property.”¹¹⁹ The report went on to state that the practices of ethnic cleansing constituted crimes against humanity, and could also constitute the crime of genocide. It concluded that the establishment of an International Criminal Tribunal would be “consistent with the direction of its work.”¹²⁰ By late February, the Security Council had adopted Resolution 808, which decided that such a Tribunal would be established. In time, this development would play a part in the Commission’s early termination.

Field Missions

During the first half of March 1993, Fenrick led an initial reconnaissance mission to Croatia and also Belgrade, but was informed by UNPROFOR that the deteriorating security situation precluded any visit to Sarajevo. The team consisted of Fenrick, two Canadian team members¹²¹ and two representatives from Physicians for Human Rights (PHR). It soon became clear to the team that cooperation from UNPROFOR would be limited. Fears of a backlash by disgruntled local belligerents was clearly a factor, and the U.N. forces insisted on maintaining parity. When the team visited the Ovcara mass-grave site, UNPROFOR “indicated very strongly....that balance was essential in Commission activities, and that if we were to excavate one mass grave site, we should excavate two sites at essentially the same time.”¹²² Furthermore, the U.N. peacekeeping forces were reluctant to expend its limited resources on tasks beyond its main goals.

However, beyond these practical and logistical considerations, the difficulties the Commission experienced during its dealings with UNPROFOR also reflected the

¹¹⁹ See Letter from the secretary-General to the President of the Security Council. Feb. 10, 1993, U.N. Doc S/25274 (1993), transmitting *Interim Report of the Commission of Experts Established pursuant to security Council Resolution 780 (1992)*, reproduced in MORRIS AND SCHARF, AN INSIDER’S GUIDE TO THE ICTY Vol. II, p. 311.

¹²⁰ See Letter from the secretary-General to the President of the Security Council. Feb. 10, 1993, U.N. Doc S/25274 (1993), transmitting *Interim Report of the Commission of Experts Established pursuant to security Council Resolution 780 (1992)*, reproduced in MORRIS AND SCHARF, AN INSIDER’S GUIDE TO THE ICTY Vol. II, p. 311.

¹²¹ In late 92, the Canadian Government wrote to Kalshoven offering the Commission the services of five of its nationals comprising lawyers, criminal investigators and support staff. Letter to Prof. Frits Kalshoven from Gerald E Shannon, Ambassador and Permanent Representative of the Permanent Mission of Canada to the United Nations. December 11, 1992.

¹²² Final Version of Mr. Fenrick’s Report on the Reconnaissance Mission to the Territory of the former Yugoslavia, March 24, 1993.

institutional and substantive tensions which exist between a military force which has historically been guided by a narrowly proscribed mandate, and the normative demands of a body established to investigate atrocity crimes and human rights violations. UNPROFOR's guarded attitude towards the Commission was informed by deep-rooted assumptions relating to the role of peacekeeping. As Bellamy and Williams highlight, traditional conceptions of peacekeeping are premised on "the so-called 'holy trinity' of consent, impartiality and the minimum use of force. Their principal purpose is to assist in the creation and maintenance of conditions conducive to long term conflict resolution."¹²³ This "Westphalian"¹²⁴ conception of peacekeeping is thus premised on the belief that the achievement of peace can only be facilitated by an approach which respects the sanctity of sovereignty and the principle of non-interference. Consequently, the prospect of interacting and cooperating with bodies focused on human rights investigations and "naming and shaming" was for many, a development they were unwilling to countenance. In addition to this institutional reluctance illustrated by UNPROFOR's stance, it is evident that expanding the parameters of the traditional peacekeeping doctrine is something which some forces struggle to comprehend. As O'Neill notes "Ask a peacekeeper....what OXFAM, CARE or UNICEF did and you got a blank stare from most. Tell a soldier that he or she was needed to deliver food to a group of IDPs [internally displaced persons] and they would, respond: "not in my job description and what is an IDP?"....None of this was in any peacekeeping manual or the ROEs [Rules of Engagement]."¹²⁵ Both factors would play a part in limiting the extent of cooperation the Commission would receive.

After returning from the field mission, Fenrick informed the Commission of the team's plan to carry out a limited exhumation at Ovcarica of around 20 -25 bodies with the intention of identifying a number of victims and returning them to next of kin, and most

¹²³ See Alex J. Bellamy and Paul Williams 'Introduction: Thinking Anew about Peace Operations', *International Peacekeeping*, Vol. 11, No. 1, Spring 2004, p. 3.

¹²⁴ See Alex J. Bellamy and Paul Williams 'Introduction: Thinking Anew about Peace Operations', *International Peacekeeping*, Vol. 11, No. 1, Spring 2004, p. 3.

¹²⁵ See William G. O'Neill, 'A New Challenge for Peacekeepers: The Internally Displaced.' Occasional Paper, The Brookings Institution – John Hopkins SAIS Project on Internal Displacement, April 2004, p. 6.

importantly, establishing a link to the Vukovar hospital patients.¹²⁶ He proceeded to set out the requirements of the exhumation which would require a PHR team, a small investigative team, a combat engineering unit, and crucially, approval from the local ‘authorities.’ Tentative approaches were subsequently made with the local Croatian Serb representatives in Knin, and Fenrick received oral confirmation from Boro Martinovich, Advisor to the Serbian Krajina ‘government’ that written permission to excavate Ovcara operation would be arranged.¹²⁷ Problems were however, encountered in finding any State willing to provide the necessary combat engineering troops. UNPROFOR refused to provide assistance and Kalshoven informed the other Commissioners that his requests to various member states, including Russia, France and China had been declined. The U.K. didn’t even bother to respond.¹²⁸ The U.S. also failed to respond positively. Despite Clinton’s initial rhetoric during the 1992 Presidential election campaign, that he would be prepared to use force to halt the ethnic cleansing, once in office, like Bush, he would also be reluctant to become militarily involved. As Power notes, whilst the Clinton administration were “far more attentive to the human suffering in Bosnia, they did not intervene to ameliorate it.”¹²⁹ Consequently Kalshoven’s request was met by strong opposition from the Pentagon, which felt that the deployment of U.S. troops, even for the relatively sedate task of guarding a mass grave and providing security in area where fighting had subsided, could lead to its forces being dragged into the conflict.¹³⁰ Clinton’s unwillingness to confront the U.S. military (the President had been derided as a “draft dodger” for his avoidance of the Vietnam War, and his policy to allow gay soldiers to serve in the military had done little to improve his relationship with its senior echelons¹³¹) meant that the Pentagon’s perspective would prevail.

Faced with such lack of support, alternative options were discussed, and the Commission’s internal minutes reveal a fascinating discussion over whether, in the event of no government providing the requisite forces, private sources should be approached to

¹²⁶ Internal Minutes of the Commission of Experts, Fifth Session, First Meeting, May 24, 1993.

¹²⁷ William Fenrick letter to Frits Kalshoven, Department of National Defense, Office of the Judge Advocate General, Canada, June 4, 1993.

¹²⁸ Internal Minutes of the Commission of Experts, Fifth Session, First Meeting, May 24, 1993.

¹²⁹ See POWER, “A PROBLEM FROM HELL” p. 294.

¹³⁰ See Guest, On Trial, p. 70.

¹³¹ See POWER, “A PROBLEM FROM HELL” p. 304.

carry out the work. Whilst Fenrick had no objections to using a private company to carry out the excavation or engage in mine clearance, he was much more reluctant to engage the services of private sources *for security provision*. The other Commissioners were equally reluctant to explore the avenue of obtaining private security to support the mission.¹³² After receiving authorization from UNPROFOR, Fenrick and members of the Canadian team also conducted a mission in Sarajevo between late June and early July 1993, conducting a ‘Draft Sarajevo Battle Study’ focusing on Serb artillery attacks on the city. Despite the Commission’s imprecise mandate, the focus of the team was to specifically conduct “insofar as it is possible, a proper in depth criminal investigation onto incidents in the area.”¹³³

Kalshoven Steps Down

On August 30 1993, Zacklin informed the other Commissioners that Kalshoven, who had taken leave during August, had requested sick leave for an indefinite period. In September, he offered his resignation, publicly berating the lack of support the Commission had received and reserving particularly scathing comments for the U.K. and France, “At a practical level we haven’t received any help in particular from [them]....Britain hasn’t done anything for us – nothing at all. I was very angry about these two because they are permanent members of the UN Security Council. If they didn’t want us to participate actively. they shouldn’t have voted for us.”¹³⁴ Fellow Commissioner Torkel Opsahl assumed the position of acting Chairman. With the Tribunal established (at least on paper) there were increasing calls for the Commission to wind down its work. In late August, the Secretary General met with the remaining Commissioners and requested they draft a “non-paper”, outlining proposed options for the body.¹³⁵ The “non-paper” suggested two options: (i) The continuation of the Commission until July 31, 1994, at which time it would submit its final report and supporting documents, (ii) to continue the work on an indefinite basis to support the work of the prosecutor as well as to fulfill its mandate in accordance with Security Council

¹³² Internal Minutes of the Commission of Experts, Fifth Session, First Meeting, May 24, 1993.

¹³³ Letter from William Fenrick to Frits Kalshoven and M. Cherif Bassiouni, Department of National Defence, Office of the Judge Advocate General, Canada June 10, 1993.

¹³⁴ See Patrick Bishop, ‘Britain ‘snubbed’ war crimes team’, *Daily Telegraph*, December 4, 1993.

¹³⁵ Personal Diary of M. Cherif Bassiouni.

Resolution 780.¹³⁶ When Opsahl died suddenly of a heart attack in September requiring the Commission to be reconstituted, Bassiouni, initially denied, was finally appointed Chairman. Two new members were also appointed.¹³⁷ At this stage the Commission still envisaged it would be working until July 1994 and forged ahead with large-scale rape investigation¹³⁸, the Ovcara exhumation and several specific studies including Dubrovnik, Medak, Prijedor, Sarajevo and Vukovar.

However, by October 1993, Fenrick's proposed exhumation of the site at Ovcara were running into trouble. Although the Serb 'authorities' in Knin issued three decrees granting the team the necessary authorization, and a Dutch military engineering unit had been provided, the mission was abruptly halted after two days as a result of a subsequent Serb decree ordering all work to stop until a final political outcome had been reached in Republika Srpska Krajina (RSK).¹³⁹ The team had no other option but to pack up and leave. Ultimately, both the exhumation at Ovcara and the rape inquiry would remain unfinished as a result of the decision to terminate the Commission's budget as of April 30, 1993, three months earlier than the date previously agreed upon. Bassiouni was highly critical of the decision, arguing it would endanger the completion of the mass rape inquiry and suggesting the Commission should continue working until the Tribunal's investigations gained momentum. However, the internal minutes of the Commission reveal that two other Commissioners were of the opinion that its work should be concluded and taken over by the Tribunal, with Greve informing Bassiouni that the Norwegian government was reluctant to continue supporting the Commission in light of the recent appointment of Ramon Escobar Salom as ICTY Prosecutor.¹⁴⁰ Bassiouni's concerns would be to some extent realized when Salom decided not to take up the post,

¹³⁶ Commission "non paper."

¹³⁷ Christine Cleiren (The Netherlands) would conduct a specific study on the legal aspects of sexual assault as a war crime and Hanne Sophie Greve (Norway) who would be appointed Commissioner for the Prijedor Project.

¹³⁸ For more details see M. Cherif Bassiouni and Marcia McCormick, 'Sexual Violence. An Invisible Weapon of War in the Former Yugoslavia', Occasional Paper No. 1, International Human Rights Law Institute, DePaul University College of Law, 1996.

¹³⁹ Internal Minutes of the Commission of Experts, Eighth Session, First Meeting, October 27, 1993.

¹⁴⁰ Internal Minutes of the Commission of Experts, Ninth Session, Third Meeting, 1993.

throwing the Office of the Prosecutor (OTP) into confusion and undermining the commencement of investigations.¹⁴¹

Conclusions

Despite the numerous obstacles it faced, the Commission of Experts succeeded in compiling extensive documentation relating to violations of International Humanitarian Law which served to illustrate the systematic and organized nature of much of the atrocities occurring in Bosnia and Croatia. Its field missions to the Ovchara mass-grave site were also instrumental in persuading individuals within the U.S. administration to support the establishment of an international tribunal. The Commission's specific inquiry into rape in war was the largest ever undertaken, and although it would be terminated before completion, placed the issue of sexual violence firmly on the agenda and provided momentum for calls to prosecute such acts by the Tribunal. Furthermore, Fenrick would go on to work for the Tribunal providing the nascent court with some much needed continuity and expertise.

Bassiouni concludes that the "cumulative effect of [the Commissions work,] much of which was corroborative, was to help establish patterns of violations from which certain policies could be identified, particularly the policy underlying the consistent failure of military and political leaders to act to prevent grave human rights violations and to punish their perpetrators."¹⁴² Others have been less sanguine about the value of the Commission's material for the purposes of launching prosecutions. Chuter claims, "Whatever its other virtues [the Commission Report] was described...by one investigator as "basically useless" for evidential purposes, since it simple rehashed secondary sources."¹⁴³ However, this assessment appears overly critical. Indeed, Greve's Prijedor report was vital for the Tribunal and was relied on in the application by the Office of the Prosecutor (OTP) in order to persuade Germany to defer to the Tribunal

¹⁴¹ For further details on the selection of the Tribunal's Prosecutor *see* chapter two.

¹⁴² *See* M. Cherif Bassiouni, 'The Commission of Experts Established pursuant to Security council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia' in ROGER S. CLARK AND MADELINE SANN (EDS.) *THE PROSECUTION OF INTERNATIONAL CRIMES* (Transnational Publishers) 1994, p. 83.

¹⁴³ *See* DAVID CHUTER, *WAR CRIMES CONFRONTING ATROCITY IN THE MODERN WORLD* (Lynne Rienner) 2003, p. 159. [hereinafter CHUTER, *WAR CRIMES*]

in the prosecution of Dusko Tadic. Furthermore, as Fenrick highlights, the 'Draft Sarajevo Battle Study' investigation was one of "the first steps forming the intellectual under-pinning of the Galic case [one of the Tribunal's subsequent key cases]."¹⁴⁴ Additionally, physical evidence, evidence logs, photos and police notes secured and compiled by the Canadian team would also prove highly valuable to the Tribunal. Richard Goldstone, the Tribunal's first Prosecutor, provides perhaps the most balanced overall conclusion; "it was a huge help because it was a compass.... It pointed [the Tribunal's Deputy Prosecutor] Graham Blewitt in the direction of the massacre and the death camps in the Prijedor region."¹⁴⁵

With the Commission terminated, the focus turned to the Tribunal. As the following chapter illustrates, the Court would also confront many of the challenges which the Commission had faced. However, with its objectives to indict, obtain custody and place on trial, the stakes for the Tribunal would be much higher.

¹⁴⁴ See William Fenrick quote in JOHN HAGAN, JUSTICE IN THE BALKANS. PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL (University of Chicago Press) 2003, p. 44 [hereinafter HAGAN, JUSTICE IN THE BALKANS]

¹⁴⁵ See Richard Goldstone quote in HAGAN, JUSTICE IN THE BALKANS, p. 69.

Chapter Two: A Solidarist Moment? The Establishment of The International Criminal Tribunal for the former Yugoslavia (ICTY) and the challenges confronting the Tribunal during its initial investigations.

Chapter two will focus on the establishment of the ICTY and the challenges the Tribunal faced during its initial years. Like the Commission, the Tribunal was established under Chapter VII of the U.N. Security Council and a number of ‘pro-prosecution’ commentators have argued that the decision to use this route was predicated on the recognition within the Council of a nexus between justice and the restoration of peace. The author challenges this premise, suggesting that behind this purported apparently complementary nexus, lay deep contradictions. With the ‘International Community’ refusing to engage in more robust military action to bring an end to the fighting, negotiation with the senior political and military leaders of the ‘warring factions’ remained a necessity. Thus, rather than representing a mechanism which would facilitate the restoration of peace, a Tribunal which could indict such leaders was viewed by some as a potentially disruptive dynamic.

Consequently, the debate surrounding the creation of the Tribunal largely mirrored that of the negotiations relating to the establishment of the Commission. With the U.K. playing a lead role in the diplomatic negotiations, it pursued a policy which sought to seriously erode the Court’s power, advocating a series of proposals including the suggestion that amnesties for heads of state should be retained as an option. Although, the ICTY’s statute would expressly rule out the proposal, the threat of de facto amnesties being offered would constantly loom over the Tribunal. The chapter will go on to demonstrate how the appointment of a Prosecutor would descend into a protracted, politicized affair, with the U.K. blocking the candidacy of former Commission Chairman, Cherif Bassiouni, due to fears that an activist prosecutor would focus on senior leaders involved in the negotiations.

The Tribunal’s Statute will also be briefly assessed, illustrating how a number of key provisions granted the institution an unprecedented level of power to penetrate State

sovereignty. This development would be greeted with unease, not only by Serbia, the focus of a large part of the Tribunal's investigations, but also by other U.N. member-States concerned at the potential precedent the Tribunal may have established. The chapter will also discuss how the Tribunal was placed in a similar predicament to the Commission regarding State cooperation. The problem was perhaps even more acute for the ICTY in light of its goal of actually issuing indictments and obtaining the necessary evidence to ensure a conviction. With the conflicts ongoing, the scope for conducting investigations on the ground was extremely limited during this time. However, the Tribunal's endeavors to establish credible cases via the use of other material were also undermined by the unwillingness of many Western States to provide relevant intelligence material. Similar to the experiences of the Commission, this also appears to have been partially predicated on some States' concerns that such information could have facilitated indictments, which if directed at senior leaders, could complicate the ongoing negotiation process, and also a reluctance to disclose methods and sources. Additional factors however, will also be explored, demonstrating that both a culture of non-disclosure inherent within many intelligence services, and the perception that information sharing with the Tribunal resulted in *no reciprocity*, played a significant role in determining minimal cooperation. Finally, the chapter will conclude by briefly exploring the events which led to the end of the conflicts in Croatia and Bosnia, paving the way for the Dayton diplomatic peace initiative.

Establishing the Tribunal

On February 22, 1993, The Security Council had unanimously adopted Resolution 808¹ which decided, "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."² However, the Resolution failed to specify how the Tribunal would be created or on what legal basis, and instead requested that the Secretary General present, within 60 days, a report "including specific proposals and where appropriate options for the effective and expeditious implementation of the

¹ See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. U.N. Doc. S/RES/808 (1993)

² See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. U.N. Doc. S/RES/808 (1993)

decision [to establish an international tribunal]....taking into account suggestions put forward in this regard by Member States.”³ Proposals were received from thirty States and a number of NGOs, and three draft statutes were submitted.⁴ The U.N.’s OLA, with whom the Commission had experienced a fractious relationship, was assigned the task of compiling the report.

In many ways the suggestions advanced by Member States (both public and private) reflected their wider attitude towards the Tribunal. Given the deteriorating humanitarian situation in Bosnia in 1993, and the numerous media reports of widespread and systematic violations of international humanitarian law, most States were aware that ‘officially’ opposing a Tribunal was not a viable policy. Thus, instead, a number embarked on what Forsythe characterizes as “double diplomatic game of public endorsement but private opposition.”⁵ Again, Britain has been singled out by a number of sources as pursuing a strategy designed to undermine the court, leading Simms to charge “At almost every stage of its gestation at the UN, British diplomats and lawyers strove to stifle the War Crimes Tribunal at birth.”⁶ With British government policy primarily focused on achieving a diplomatic settlement to the conflict, an active Tribunal with the power to indict individuals deemed crucial to such a settlement, appears to have been perceived as contrary to achieving this aim. Thus, a confidential British non-paper submitted to the U.N. Secretariat, entitled ‘Former Yugoslavia: War crimes Implementation of Resolution 808. Comments and Observations of the United Kingdom’⁷ contained a number of premises, which, if implemented, would have frustrated The Tribunal’s creation, or at a minimum, curtailed the court’s scope to prosecute those most responsible. The non-paper argued, “The most appropriate basis for establishing an international criminal tribunal would be a treaty between the successor

³ See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) U.N. Doc S/25704, 3 May 1993.

⁴ Draft Statutes were submitted by France, Italy, and Sweden on behalf of the Chairman-in-Office of the CSCE.

⁵ See David Forsyth, ‘International Criminal Courts: A Political View’, *Netherlands Quarterly of Human Rights*, Vol. 15/1, 1997, p. 8.

⁶ See BRENDAN SIMMS, *UNFINEST HOUR. BRITAIN AND THE DESTRUCTION OF BOSNIA*. (Allen Lane, Penguin Press) 2001, p. 62. [hereinafter SIMMS, *UNFINEST HOUR*]

⁷ See Guest, *On Trial*, Annex 2. ‘The British “Non-paper” on the Tribunal’ pp. 181-184.

states of former Yugoslavia and other concerned states. Under it the successor states would cede jurisdiction to the tribunal.”⁸

Whilst this approach may have been the most legally sound from a narrow positivist, sovereigntist perspective, it had serious practical limitations. As the subsequent report of the Secretary General noted, “the treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, *there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.*”⁹ As Madeline Albright, U.S. Ambassador to the U.N. pointed out, “The crimes being committed ... often are the systematic and orchestrated crimes of government officials, [and] military commanders.”¹⁰ Given the extensive nature of State involvement in the commission of many of the atrocities, particularly with regard to the execution of the ‘Serbian project’, the British proposal to go down the Treaty route with the FRY successor states can be characterized as either naïve or a mechanism designed to delay the court’s creation.

Perhaps the most revealing passage of the non-paper related to the issue of *Competence Rationae Personae*.¹¹ It suggested “Consideration may, however, have to be given to the question whether some persons (e.g. Heads of State and Government) might be entitle[d] to immunity from the jurisdiction of the tribunal.” The paper then went on to acknowledge Article 7 of the Nuremberg Charter, explicit denial of sovereign immunity, but also posited; “It may in any case be undesirable politically to include any provision on the subject in the draft statutes (or even a reference to it in the report).”¹² The position clearly contradicted the principles of international law enshrined in the

⁸ See Guest, On Trial, Annex 2. ‘The British “Non-Paper” on the Tribunal’, p. 181.

⁹ See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (1993) reproduced in MORRIS AND SCHARF, AN INSIDER’S GUIDE TO THE ICTY Vol. II, p. 7. (emphasis added.)

¹⁰ See Madeline Albright statement, Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting. Held at Headquarters, New York, on Tuesday, 25 May 1993, at 9 p.m., reproduced in MORRIS AND SCHARF, AN INSIDER’S GUIDE TO THE ICTY, pp. 185-186.

¹¹ Personal Jurisdiction.

¹² See Guest, On Trial, Annex 2. ‘The British “Non-Paper” on the Tribunal’, p. 183.

Nuremberg Charter and affirmed in the subsequent judgment U.N. Declaration on the Nuremberg Principles, which declared that sovereign immunity *does not* afford protection to individuals where crimes against humanity have been committed. It also contrasted with the other submitted opinions as the U.N.'s subsequent commentary on the Statute revealed, "virtually all of the written comments received by the U.N. would argue that heads of state could be held criminally responsible."¹³

Finally, the non-paper stated "the tribunal should be modest in size [and] [t]he judges, including the President, should not be full-time.... [and] [a]cademic lawyers and specialists in human rights law would not be suitable."¹⁴ These suggestions, if acted upon would have prevented the appointment of some of the most knowledgeable and proactive candidates (such as the Tribunal's first President, the distinguished Italian international humanitarian law Professor, Antonio Cassese). Given that the Tribunal's judges would be responsible for drafting the Tribunal's rules of procedure, the suggested prohibition of "specialists" in the fields of human rights law, could also be interpreted as either a crass oversight or another way of removing a potential strength of the court.

In light of Britain's earlier attitude to the Commission and the possibility of prosecutions, the paper conveyed the impression that it "was merely the latest in a series of moves to undermine the U.N.'s pursuit of war criminals. First there had been the campaign to weaken the Commission of Experts and deny it funds; then the apparent reluctance to supply information to the Commission; then the campaign to weaken references to genocide; now opposition of a strong Tribunal. Taken singly, these concerns might have appeared justified and prudent. Taken together, however... they amounted to a singular vote of no confidence in the U.N.'s war crimes effort."¹⁵

Russia proposed that the Tribunal be administered by a sub committee of the CSCE governments (which included the states of the former Yugoslavia.)¹⁶ In a similar vein,

¹³ See Guest, *On Trial*, p. 120.

¹⁴ See Guest, *On Trial*, Annex 2. 'The British "Non-Paper" on the Tribunal', p. 184.

¹⁵ See Guest, *On Trial*, pp. 122-123.

¹⁶ See Steven Erlanger, 'Moscow Stepping in', *New York Times*, 20 May, 1993.

the U.S. suggested the court be supervised by an administrative council composed of the members of the Security Council.¹⁷ Supporters of the Tribunal viewed the Russian suggestion as an attempt to restrict the institution by additional bureaucratic constraints, whereas the U.S. proposal was seen as a crude attempt to impose the Security Council's influence and agenda directly on the Tribunal. Ultimately, both options were rejected. However, by controlling all the key nominations of the Court, the Security Council would retain significant influence.

The U.S. also called for the Tribunal to be funded from the U.N. regular budget, leading some to accuse it of wanting the best of both worlds; the retention of substantial influence over the Tribunal via the Security Council nexus, without having to pay for it. The Dutch Government's submission was the most proactive. It proposed that investigations should commence "immediately" after the adoption of the charter and suggested that the prosecutor would need "at least several hundred investigators, including public prosecutors, policemen and medical specialists, all with considerable experience in the investigation of serious crimes."¹⁸ In its submission to the Security Council, France concluded that the establishment of an international criminal court to adjudicate atrocity crimes "while not impossible, would encounter numerous obstacles, and it seems unrealistic to believe that such a court could be established within the necessary time-frame."¹⁹ Instead, it suggested, "[i]n line with the trend towards interpreting the Charter dynamically and teleologically, the Committee believes that the Security Council could, if necessary, establish such a Tribunal by virtue of the powers conferred on it by Chapter VII of the Charter."²⁰

¹⁷ See Federic Megret 'The politics of International Criminal Justice', *European Journal of International Law*, Vol. 13., No. 5., (2002) p. 1275.

¹⁸ See Guest, *On Trial*, p. 124.

¹⁹ See Letter dated 10 February 1993 from the permanent representative of France to the United Nations Addressed to the Secretary-General S/25266, 10 February 1993, reproduced in, MORRIS AND SCHARF, *AN INSIDER'S GUIDE TO THE ICTY* Vol. II, p. 332.

²⁰ See Letter dated 10 February 1993 from the permanent representative of France to the United Nations Addressed to the Secretary-General S 25266, 10 February 1993, reproduced in, MORRIS AND SCHARF, *AN INSIDER'S GUIDE TO THE ICTY* Vol. II, p. 334.

The Security Council Route

The OLA ultimately decided that the Tribunal should be established by the U.N. Security Council, acting under powers conferred upon it by Chapter VII of the U.N. Charter. The Security Council route was consistent with the process by which the Commission was created and it also removed the problem of obtaining States' ratification. The alternative approach contained considerable drawbacks. A treaty, by its very definition, only enters into force once its parties sign and ratify it. Given FRY's policy of the "Serbian Project" and its "strategy of War Crimes" it was inconceivable that it would agree to such a Treaty. However, a Chapter VII declaration by the Security Council would take effect immediately, and critically, create binding obligations on all States.

A number of 'pro-prosecution' commentators have emphasised the existence of a clear nexus between justice and peace, suggesting that the establishment of such a Tribunal under the Council's Chapter VII powers would actually *contribute to the restoration and maintenance of peace*. Hochkammer argued that the ICTY was "significant because its very existence will at the very least *facilitate negotiations towards a peace settlement*."²¹ Similarly, Akhavan argued that "there was a political consensus on the complementary interrelationship between the establishment of the Tribunal and the restoration of peace and security in the former Yugoslavia"²², whilst David Scheffer claims that "The Council recognized the enforcement of international law as an immediate priority, *subordinate to neither political nor military imperatives*."²³ Similarly, Arbour noted, "The link between criminal accountability and peace *was essential to the juridical foundation of the intervention by the Security Council*. In order to avail itself to chapter 7....thereby overriding state sovereignty....the Security Council was bound by law to find a threat to world peace and to enact a measure – in this case, for the first time ever, a measure of

²¹ See K. A. Hochkammer, 'The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics and International Law', *Vanderbilt Journal of Transnational Law*, Vol. 28, pt. 1, 1995, p. 124. (emphasis added)

²² See Payam Akhavan quote in David P. Forsythe, 'International Criminal Courts: A Political View', *Netherlands Quarterly of Human Rights*, 15.1, March 1997, p. 9.

²³ See David Scheffer quote in David P. Forsythe, 'International Criminal Courts: A Political View', *Netherlands Quarterly of Human Rights*, 15.1, March 1997, p. 9.

personal criminal accountability – *that would serve to re-establish the disturbed peace.*²⁴

The Tribunal's first annual report also optimistically suggested that rather than representing an obstacle to peace, the court would contribute to the peace process by "creating conditions rendering a return to normality less difficult."²⁵

Whilst Arbour's contention that the link between accountability and peace was *essential to the juridical foundation of the intervention by the Security Council*, is factually correct, the author contests the other remarks, positing that behind this suggested unequivocal link between justice and the restoration of peace, lay a profound tension. With the 'International Community' unwilling to pursue robust military options to decisively end the conflict in Bosnia, and none of the 'warring factions' able to achieve an outright military victory, the diplomatic negotiation process remained the most viable route to end the fighting. Thus, rather than the establishment of the Tribunal representing a dynamic which would *contribute* to the restoration of peace, the possibility that the court would indict senior leaders deemed essential to any negotiated settlement, represented a possible impediment to such a settlement. In light of this tension, the above 'pro-prosecution' assertions seem to be premised on a somewhat tenuous rationale, leading Forsythe to argue such narratives "seem to be trying to construct a certain interpretation for the benefit of posterity, rather than accurately report what actually transpired during 1992-1993. Nothing could be further from the truth than to say that there was a consensus on the compatibility between peace and legal justice, and that it was agreed that legal justice should be pursued without concern for political and military factors."²⁶ Indeed, much of the empirical material presented in this thesis supports this view. Britain clearly saw both a robust Commission and Tribunal as having the potential to disrupt the diplomatic drive to achieve a negotiated settlement. Whilst it may have voted for the Tribunal, this decision was predicated largely on the strategic premise that to be seen to vote against

²⁴ See Madam Justice Louise Arbour, 'War Crimes and the Culture of Peace', The Senator Keith Davey Lecture, Delivered in the MacMillan Auditorium, University of Toronto, January 11, 2001. (emphasis added)

²⁵ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A/49/342/S/1994/1007, 29 August 1994, para. 15.

²⁶ See David P. Forsythe, 'International Criminal Courts: A Political View', *Netherlands Quarterly of Human Rights*, 15.1, March 1997, p. 9.

such an institution would clearly be a serious public relations error. Even within States which some commentators have portrayed as largely championing the court i.e. the U.S., deep tensions existed between the 'pro-prosecution' and 'pro-negotiation' camps over the extent to which the policy of prosecutions should be supported. Again, Forsythe's insights provide perhaps a more pragmatic and balanced assessment, when he posits "The Court did not reflect a sea change in international moral solidarity, but rather a confluence of varying political calculations."²⁷

Piercing Sovereignty: The Tribunal's Statute and States Responses

The Statute provided for jurisdiction over four different international crimes: Grave breaches of the Geneva Conventions of 1949²⁸, Violations of the laws or customs of war²⁹, Genocide³⁰, and Crimes against humanity.³¹ It also stipulated that The Tribunal had primacy over national courts³² and granted the Prosecutor the power to conduct on-site investigations.³³ States would be under an obligation to cooperate with the Tribunal and to assist at all stages of investigation.³⁴ Contrary to British suggestions regarding head of State immunity, the statute invoked the precedent of the Nuremberg judgment, with Article 7 (2) providing; "The official position of any accused person, whether head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."³⁵ It also went on to reaffirm the principle of command responsibility in Article 7(3) declaring; "The fact that any of the acts referred to in articles 2 to 5 of the present statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed

²⁷ See David P. Forsythe, 'International Criminal Courts: A Political View', *Netherlands Quarterly of Human Rights*, 15,1, March 1997, p. 8.

²⁸ See Article 2, Statute of International Criminal Tribunal for the Former Yugoslavia

²⁹ See Article 3, Statute of International Criminal Tribunal for the Former Yugoslavia

³⁰ See Article 4, Statute of International Criminal Tribunal for the Former Yugoslavia

³¹ See Article 4, Statute of International Criminal Tribunal for the Former Yugoslavia

³² See Article 9(2), Statute of International Criminal Tribunal for the Former Yugoslavia

³³ See Article 18(2), Statute of International Criminal Tribunal for the Former Yugoslavia

³⁴ See Article 29, Statute of International Criminal Tribunal for the Former Yugoslavia

³⁵ See Article 7(2), Statute of the International Criminal Tribunal for the Former Yugoslavia.

to take necessary and reasonable measures to prevent such acts or punish the perpetrators thereof.”³⁶

The establishment of an international judicial organ, mandated to prosecute atrocity crimes under the principle of individual criminal responsibility, represented an unprecedented development by the Security Council. The Tribunal was keen to emphasize its unique character, stressing that unlike Nuremberg or Tokyo, it was not an organ of a group of States, but “an organ of the whole international community.”³⁷ However, for several States, both the establishment of an institution, which in principle, had the power to penetrate State sovereignty and exert primacy over a State’s domestic jurisdiction, and the associated expansion of the Security Council’s power, was greeted with unease.

Given its extensive involvement in the commission of atrocity crimes, the move was predictably condemned by FRY. In a written response to the OLA’s draft submission which was transmitted to the General Assembly and Security Council, the Deputy Prime Minister and Minister for Foreign Affairs of FRY countered, “Yugoslavia has its doubts about the impartiality of the ad hoc tribunal, particularly because of the one-sided approach of the United Nations Security Council to the responsibility for armed conflicts in the territory of the former Yugoslavia.” They went on to argue “the Security Council has no mandate to establish an international tribunal, nor does Chapter VII of the United Nations Charter provide for the establishment of that tribunal... The proposed statute... is inconsistent and replete with legal lacunae to the extent that it makes it unacceptable to any State cherishing its sovereignty.” Finally, the letter alluded to the level of cooperation the Tribunal could expect to receive from FRY, warning, “The establishment

³⁶ See Article 7(3), Statute of the International Criminal Tribunal for the Former Yugoslavia

³⁷ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A.49/342.S/1994/1007, 29 August 1994, para. 10.

of an ad hoc tribunal is also contrary to the provisions of the Constitution of [FRY] which prohibits extradition of Yugoslav nationals."³⁸

However, it was not only FRY which expressed concerns. As French Foreign Minister Roland Dumas noted, the U.N. Secretary General Boutros Ghali reportedly expressed some sympathy towards the FRY reaction: "He thought that such a tribunal constituted interference in the interior affairs of the state. Yugoslavia had been an important state for the U.N., one of the diplomatic standard-bearers for the Non-aligned movement."³⁹

Similarly, although China voted for Resolution 827, its remarks to the Council during the ensuing debate illustrated its deep unease over the possibility that the ICTY represented a template which could be applied to other situations. China's representative claimed "to adopt by a Security Council resolution the Statute of the International Tribunal which gives the Tribunal both preferential and exclusive jurisdiction *is not in compliance with the principle of State judicial sovereignty...* In short, the Chinese delegation emphasizes that the International Tribunal established in the current manner *can only be an ad hoc arrangement suited only to the special circumstances of the former Yugoslavia and shall not constitute any precedent.*"⁴⁰ Evidently harbouring similar concerns over the development of a potential precedent, elements within the Pentagon maintained strong reservations relating to Article 7 (3) and the principle of Command Responsibility.⁴¹ Several other States also expressed disquiet over the expansion of Security Council power, and the way in which the five permanent members had decided at informal meetings that there would be no amendments or wider discussions of the Statute. The process was viewed as particularly exclusive and exclusionary by the nonaligned States. "It was rammed down our throats," claimed Diego Arria, Venezuela's (then) ambassador to the U.N., "They said to us: 'If you object you'll be responsible for damaging the war

³⁸ See Letter Dated 19 May 1993 from the Charge D'Affaires A. I. of the Permanent Mission of Yugoslavia (Serbia and Montenegro) to the United Nations Addressed to the Secretary-General A/48/170, S/25801. 21 May 1993, reproduced in MORRIS AND SCHARE, AN INSIDER'S GUIDE TO THE ICTY Vol. II, p. 480.

³⁹ See Roland Dumas quote in See HAZAN, JUSTICE IN A TIME OF WAR, p. 36.

⁴⁰ See Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting. Held at Headquarters, New York, on Tuesday 25 May 1993, at 9 p.m. S/PV. 3217, 25 May 1993, reproduced in MORRIS AND SCHARE, AN INSIDER'S GUIDE TO THE ICTY Vol. II, p. 199-200.

⁴¹ See HAZAN, JUSTICE IN A TIME OF WAR, p. 36.

crimes Tribunal.”⁴² The affair caused deep resentment within the General Assembly, intensifying the division between the two U.N. bodies. This would directly impact upon the Tribunal when, as a way of responding to the Security Council’s high-handed approach, the General Assembly would regularly contest and limit the Court’s budget, leaving it financially hamstrung in its early years.

In contrast to the perspective which maintained the Tribunal was established due to a recognition of the role it could play in actively contributing to peace, a number of commentators argued that the ‘International Community’s’ decision to establish a Tribunal represented nothing more than a cynical exercise, designed to assuage guilt for its reluctance to militarily intervene and stop the ‘Serbian project.’ As Hazan suggests, “For Western governments.... to assert the need for an international tribunal....is clearly an attempt to dispel suspicion of their own cowardice....The ‘new Nuremberg’ is designed to soothe public opinion.”⁴³ Similarly, Antonio Cassese a former President of the Tribunal would later highlight, “Some assert outright that the creation of the Tribunal reflects the incapacity of the international community to deal with the tragic conflict raging in the former Yugoslavia. [They believe] the judicial solution has been adopted for want of a better one, as an ‘ersatz’ for the political solution; the establishment of the Tribunal is thus viewed as no more than a sign of weakness, if not hypocrisy on the part of the United Nations.”⁴⁴ David Scheffer, the former U.S. Ambassador at large for war crimes issues, who was heavily involved in the process, provides a rare and refreshing insider response which challenges this oft-repeated charge. Scheffer argues “The failure to act militarily resulted from decisions and circumstances that had nothing to do with the ICTY and should be critiqued on their own merits. Those decisions would have been the same with or without the existence of the ICTY in 1993 and for some time thereafter.” He goes on to point out “If the ICTY had been the excuse for governmental inaction that some presume, then the Tribunal would have been accorded far more deference in policy-making, as a panacea for such action. But, we had to struggle every step of the way to

⁴² See Guest, *On Trial*, p. 129..

⁴³ See HAZAN, *JUSTICE IN A TIME OF WAR*, p. 40.

⁴⁴ See Antonio Cassese quote in WILLIAMS AND SCHARF, *PEACE WITH JUSTICE?*, p. 96.

sustain the ICTY's relevance and importance in deliberations over US and UN policy in the Balkans."⁴⁵

Whatever the motivations behind the creation of the ICTY, at a very minimum, by paying lip service to the notion of international criminal prosecutions, the 'International Community' created a serious benchmark, which over time would become increasingly difficult to completely control. Indeed, as Robertson notes, once such institutions are established they "have the tendency to develop a momentum of their own, independent of the concerns of those who create them."⁴⁶ As Louise Arbour, former Prosecutor of the tribunal remarked "as a lawyer I find it difficult to believe that those who voted for [the tribunal] didn't realize what they were launching. On its face, were launching a pretty robust and well-equipped institution, and one that is difficult to recall. If it was a cynical act, my God, was it ever stupid."⁴⁷ Nevertheless, as will be illustrated, during the initial few years of its existence, the Tribunal would face a particularly difficult struggle to discharge its mandate.

An Uncertain Start: Appointing the Bench

Unlike the International Military Tribunal at Nuremberg, which employed several hundred personnel and was well funded, the ICTY found itself under-staffed, under-funded, and after being informed by representatives of the International Court of Justice that it could not use its premises, having to set up in the offices of an insurance firm. Despite the lofty proclamations of support from the members of the Security Council, the Tribunal would face an uphill battle during its early years to gain the necessary staff and funding to enable it to discharge its mandate properly. As Akhavan dryly noted "There is a great distance between the establishment of an ad hoc judicial institution through a Security Council resolution and rendering it operational at the practical level."⁴⁸

⁴⁵ See David Scheffer, 'Three Memories for the Year of Origin, 1993', Symposium on 'The ICTY 10 Years on: The View from Inside', *Journal of International Criminal Justice*, Vol. 2, No. 2, 2004, p. 354.

⁴⁶ See ROBERTSON, *CRIMES AGAINST HUMANITY*, p. 267.

⁴⁷ See Charles Trueheart, 'A New Kind of Justice', *Atlantic Monthly*, April 2000.

⁴⁸ See Payam Akhavan 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', *American Journal of International Law*, 90, No. 3, 1996, p. 508.

The U.N. Secretary General invited States to submit nominations for the judicial positions. However, still angry at their exclusion from the Statute negotiations, many States failed to nominate. 41 candidates from 38 countries were proposed and submitted to the General Assembly, only half the number expected by the U.N. In mid-September, after three days of voting the eleven judges were selected.⁴⁹ At their first meeting in The Hague on November 17, 1993, the judges elected Italian jurist Antonio Cassese as the Tribunal's first President, and the enormity of the task ahead became clear. The Judges had to wear gowns donated by The Hague Bar Association at the swearing in ceremony, with Cassese recounting "Our borrowed robes symbolized the total lack of infrastructures or facilities at our disposal. We had no seat, no courtroom, no prison, no budget, no computers, no law clerks, no secretaries and no set of rules guiding criminal procedure."⁵⁰ The absence of a Prosecutor or a functioning prosecution team also meant that investigations could not commence and indictments could not be issued. With no permanent staff, and an uncertain financial future, Cassese would later suggest that the Security Council had "thought we'd never become operational."⁵¹

A number of commentators have subsequently criticised the way in which the ICTY was established, with one of the Tribunal's Prosecutors, Louise Arbour, later arguing, "you don't launch an investigative and judicial tribunal the way the ICTY was set up. You don't start with renting a building, hiring 11 judges, including a full complement of appeal court judges before you've even hired the first investigator, let alone the prosecutor."⁵² Similarly, Chuter suggests that for many officials in The Hague, it was strange that most of the early attention was focused on the appointment of judges, "*who had nothing at all to do for several years*, rather than on investigations staff, without whom the judges would continue to have nothing to do."⁵³ Indeed, a similar view

⁴⁹ The judges were; Georges Michel Abi-Saab (Egypt); Antonio Cassese (Italy); Jules Deschenes (Canada); Germain le Foyer de Costil (France); Adolphus Karibi-Whyte (Nigeria); Li Haopei (China); Gabrielle Kirk McDonald (United States); Elizabeth Odio Benito (Costa Rica); Rustam Sidhwa (Pakistan); Ninian Stephen (Australia); Lal Chand Vorah (Malaysia);

⁵⁰ See Antonio Cassese, 'The ICTY: A Living and Vital Reality', in *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Vol. 2, No. 2, June 2004, p. 585.

⁵¹ See BASS, *STAY THE HAND OF VENGEANCE*, p. 217.

⁵² See Louise Arbour quote in HAGAN, *JUSTICE IN THE BALKANS*, p. 97

⁵³ See CHUTER, *WAR CRIMES*, p. 145. (emphasis added)

apparently existed amongst some of the judges, who, seemingly unsure as to what their role was at the initial stages of the Tribunal's existence, suggested packing up and going home until a budget had been approved.⁵⁴

However, Chuter's characterization may be viewed as overly negative. Although it would be two years before any of the judges would see a defendant in court, they were in fact involved in crucially important work from the Tribunal's early stages. Under the guidance of Cassese, the judges spent three months drafting the Tribunal's Rules of Procedure and Evidence (RPE), a process that clearly benefited from their formidable legal skills. The RPE would prove vital in providing the necessary structure for all three organs of the Tribunal: the Chambers, the Office of the Prosecutor (OTP), and the Registry. As the Tribunal's first Annual Report highlights, without the RPE, the Prosecutor would not have been able to fully perform the task of investigation and prosecution.⁵⁵ Furthermore, the RPE provided important guidance to Member States which were required to enact or amend legislation in order to comply with their obligations vis-à-vis the Tribunal.⁵⁶ With little in the way of precedent (the RPE for both the Nuremberg and Tokyo Tribunals were rudimentary and brief), the judges drafted a total of 125 rules. The process was a formidable exercise in judicial independence and innovation with Judge McDonald later acknowledging "We basically created an international code of criminal procedure."⁵⁷ A number of the Rules served to reaffirm the provisions within the Statute with regard to the Tribunal's primacy over States. Rule 58 represented a thorough rebuff to the suggestion (alluded to in FRY's written response to the establishment of the Tribunal) that elements of a State's domestic legislation could override the Tribunal, emphasizing "The obligations laid down in Article 29 [Cooperation and judicial assistance] shall prevail over any legal impediment to the

⁵⁴ See HAZAN, JUSTICE IN A TIME OF WAR, p. 50.

⁵⁵ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A/49/342/S/1994/1007, 29 August 1994, para. 57.

⁵⁶ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A/49/342/S/1994/1007, 29 August 1994, para. 57.

⁵⁷ See Gabrielle Kirk McDonald quote in Barbra Crossette, 'World Criminal Court Having Painful Birth', *New York Times*, August 13, 1997.

surrender or transfer of the accused or of a witness to the Tribunal which may exist under national law or extradition treaties of the State concerned.”⁵⁸ In his summary of the RPE, Cassese stressed “These obligations prevail over any internal national law impediment to the surrender or transfer of the accused.” He went on to reassert the Tribunal’s “power to report to the Security Council cases of State inaction or refusal to cooperate... If such a step proves necessary, we will look to the members of the Security Council for support on an international scale.”⁵⁹ The Tribunal’s President would constantly remind the ‘International Community’ of the duty incumbent on States to comply with orders issued by the Tribunal and would be the first of a succession of the court’s senior officials who would try in vain to persuade the Security Council to impose sanctions on FRY for non-compliance.

A Rudderless Ship: The Struggle to Select a Prosecutor

Despite the impressive work done by the judges in drafting the RPE, the absence of a prosecutor was undermining the ICTY. Given the ambivalent attitude towards the Tribunal from many within the ‘International Community’, it was essential that a central figurehead should be quickly appointed, who could articulate the Tribunal’s mission, seek to ensure it was not sidelined, and provide crucial guidance and direction to the OTP. However, the statute of the Tribunal stipulated that the appointment would be made by the Security Council,⁶⁰ providing the U.K. with an opportunity to block the candidacy of Bassiouni, whom they viewed as likely to upset the diplomatic negotiations through an activist OTP strategy aimed at indicting the ‘Big Fish.’ Consequently, the selection process would descend into an embroiled “protracted, politicized fiasco”⁶¹ leaving the Court without a Prosecutor for fourteen months.

The candidacy of Kenya’s Amos Wako was swiftly rejected. Although Wako had a background in human rights and prosecutions, the appointment of an individual who served as the chief law enforcement officer under dictatorial Kenyan President Daniel

⁵⁸ See Rules of Procedure, Rule 58.

⁵⁹ See Statement by the President made at a Briefing to Members of Diplomatic Missions, IT 29, February 11, 1994, reproduced in MORRIS AND SCHARF, AN INSIDER’S GUIDE TO THE ICTY Vol. II, p. 655.

⁶⁰ See Article 16(4), Statute of the International Criminal Tribunal for the former Yugoslavia.

⁶¹ See BASS STAY THE HAND OF VENGEANCE, p. 217.

Arap Moi was viewed as less than ideal. Bassiouni was keen to take up the position, and received the support from the Islamic and nonaligned members of the Security Council. However, he came up against serious opposition from Britain, who after citing Bassiouni's lack of prosecutorial experience, proposed the alternative candidate John Duncan Lowe, the (then) Crown Agent for the Scottish legal system. In a letter to the Foreign Secretary, Douglas Hurd, William Powell MP (Corby Cons.), a keen supporter of a robust tribunal, was incredulous, "The suggestion that Professor Bassiouni lacks prosecutorial experience is unworthy of Great Britain – particularly as the United Kingdom has suggested a candidate without any known international experience or knowledge and whose past experience is widely regarded as limited." Powell continued, "My fear is that rather than seeking the person most qualified....Great Britain has opted for something rather different, namely to establish somebody without any knowledge of the situation in order that a politically desirable result can be achieved....I have been told from a variety of sources that our true motive is to discredit any idea of prosecutions in case they were to interfere with the work of Lord Owen."⁶² Similarly, the *Times* reported "diplomatic sources said the real reason [behind opposition to Bassiouni's appointment] is that the European countries are afraid Dr. Bassiouni *will move to quickly* to charge Serb and possibly Croat leaders with war crimes."⁶³ A British official acknowledged "[there was] a general feeling that at some stage we were going to have to talk to the Serbs. It wasn't going to help very much if all of them were going to be in fear of arrest at The Hague."⁶⁴ Such concerns may have not have been unwarranted, as Bassiouni himself stated, "From the beginning I said I was not interested in going after the little soldier who commits the individual crime. I was after building a case against the leaders who make the decisions."⁶⁵ In August 1993, Boutros Boutros-Ghali formally nominated Bassiouni. However, Albright telephoned the former Commission chairman, to inform him the soundings coming from New York were not positive and it did not look like he would achieve the requisite number of votes. As a compromise, Albright suggested Bassiouni take up the position of Deputy Prosecutor under Lowe, which he was unwilling to accept.

⁶² Letter from William Powell MP (Corby) to Rt. Hon Douglas Hurd, Secretary of State, The Foreign & Commonwealth Office, September 17, 1993.

⁶³ See James Bone, 'U.K. Blocks Choice of War Crimes Prosecutor', *Times*, September 4, 1993.

⁶⁴ See Tom Richardson, quote in SIMMS, *UNFINEST HOUR*, p. 63, footnote 75.

⁶⁵ See M Cherif Bassiouni quote, in HAGAN, *JUSTICE IN THE BALKANS*, p. 57.

Consequently, Bassiouni was voted down in the Council, and Britain went on to propose that any subsequent nominee must be selected by consensus, bringing the spectre of the veto into the process and effectively ending any chance of a quick appointment.

A series of alternative candidates were proposed, all of whom failed to receive the requisite support. The U.S. lobbied for Argentinean lawyer Luis Gabrielle Moreno Ocampo, who had had prosecuted a number of Argentine Generals implicated in the country's 'dirty war.'⁶⁶ However, Ocampo was a member of Argentina's political opposition, and the Menem government opposed his nomination.⁶⁷ The Secretary General nominated former Indian Attorney General, Soli Jehangir Sorabjee, only to be vetoed by Pakistan. The situation was rapidly descending into a political gridlock when Ramon Escovar Salom, a former Venezuelan Attorney General, was successfully nominated By Boutros-Ghali, and named Prosecutor on October 22, 1993. The relief at finding a candidate would be short lived, when after four months, Escovar Salom informed the Secretary General that he no longer wanted the position and would be assuming the role as Venezuela's Interior Minister. However, before resigning, Salom did at least appoint a deputy. Graham Blewitt, an Australian who had headed the country's war crime unit would be tasked with running the OTP until a Prosecutor could be found.

Russia, disgruntled over its failure to secure a judicial position at the ICTY, blocked the appointment of another U.S. nominee Charles Ruff, and also a Canadian candidate Christopher Amerashinge, on the grounds that no citizen from a NATO member-State would be acceptable. Frustration was giving way to desperation, and the situation was beginning to adversely affect the Tribunal. Blewitt expressed concern that he lacked the authority to issue indictments, and feared a potential legal challenge from the indictees defence counsel. President Cassese was even considering asking his fellow judges to

⁶⁶ For further details on Argentina's 'dirty war' see MARGUERITE FEITLOWITZ, *A LEXICON OF TERROR. ARGENTINA AND THE LEGACIES OF TORTURE* (Oxford Uni. Press) 1998

⁶⁷ See David Scheffer, 'Three Memories for the Year of Origin. 1993', Symposium on 'The ICTY 10 Years on: The View from Inside', *Journal of International Criminal Justice*, Vol. 2., No. 2, 2004, p. 359.

resign en masse in protest in response to the situation.⁶⁸ However, on July 8, 1994, the impasse was finally broken, when the Security Council unanimously approved the nomination of Richard Goldstone. A justice of the South African Supreme Court, Goldstone had made his name heading the South African Commission of Inquiry into Political Violence and Intimidation (CIPVI). Russia's initial skepticism was placated by U.S. assurances that Goldstone would be immune from direct influence by Contact Group countries.⁶⁹ The new Prosecutor would soon discover that like his previous work in South Africa, his role at the Tribunal would plunge him into a legal investigation influenced by a wider highly politicized environment. His initial visit to New York to meet the Secretary-General would be a sobering indication of the Tribunal's financial health: he had to pay for his own air fare.⁷⁰

Funding Problems

Indeed the Tribunal would be beset by funding problems during its first two years. As Guest notes, "In a series of extraordinary moves they [Member States and the U.N. Secretariat] ensured that the Tribunal's resources were inadequate, inappropriate, and vulnerable to political pressure."⁷¹ The main point of contention related to who would foot the bill, with The U.N. Security Council recommended it be financed from the U.N. regular budget. Whilst this route would have assured some continuity (as the U.N. budget runs on a two year cycle) the General Assembly, which has overall authority for budgetary issues, was not even consulted over this crucial proposal. "Not only was this [perceived to be] another example of the Security Council's arrogance, but [States of the General Assembly] would also be paying several times more towards the cost of the Tribunal than if it had been funded under U.N. peace-keeping. The five permanent members of the Security Council, in contrast, would be paying far less."⁷² Even

⁶⁸ See BASS STAY THE HAND OF VENGEANCE, p. 219.

⁶⁹ See SHATTUCK, FREEDOM ON FIRE, p. 144.

⁷⁰ See RICHARD J. GOLDSTONE, FOR HUMANITY. REFLECTIONS OF A WAR CRIMES INVESTIGATOR, (Yale University Press) 2000, p. 77.[hereinafter GOLDSTONE, FOR HUMANITY]

⁷¹ See Guest, On Trial, p. 135.

⁷² See Guest, On Trial, p. 135.

Bassiouni saw this as a politically tactless decision, describing it as a “knee-jerk reaction – keep out the General Assembly.”⁷³

The dispute over funding would have serious ramifications for the Tribunal and the proposed budget of \$31.2 million for the Court’s first year of operation was subsequently thrown out by the ACABQ (which aligned itself with the General Assembly). When, on December 8 1993, the Secretariat submitted a revised budget of \$33.2 million for two years it was under half the original proposal. However, still incensed at the Security Council’s earlier snub, the Third World members of the ACABQ rejected the proposal, permitting a mere \$5.6 million for the first six months of 1994. The intransigence of the ACABQ continued into 1994 when an OLA budget request of nearly \$33 million (to finance the Tribunal between 1994 & 1995) was again rejected. Instead \$11 million was authorized for the rest of 1994. The temporary funding had a dramatic impact on the Tribunal’s ability to carry out its work effectively. Employment contracts could only be offered on a six-month basis, deterring many potential staffers.⁷⁴ The recruitment drive was also initially frustrated by further bureaucratic barriers, with the U.N.’s Office of Human Resources issuing offers to applicants whom Blewitt viewed as totally unqualified. Consequently, the Tribunal began to appoint staff which had been seconded directly from governments. However, part of the seconded staff salaries had to be paid from the Tribunal’s voluntary trust fund, money which was originally intended to be allocated to the important tasks of counseling rape victims and promotional activities.⁷⁵ It also became clear that no specific consideration had been given to financing the investigation process. “Less than two percent of the total was budgeted for the critical work of tracking down witnesses, obtaining and translating their accounts, exhuming mass graves and conducting postmortems... no funds at all were budgeted for witness protection.”⁷⁶ The extent of the dire situation was aptly illustrated by the fact that the

⁷³ See Guest, *On Trial*, p. 119.

⁷⁴ See BASS STAY THE HAND OF VENGEANCE, p. 221.

⁷⁵ See GOLDSTONE, *FOR HUMANITY*, pp. 82-83.

⁷⁶ See WILLIAMS AND SCHARE, *PEACE WITH JUSTICE?* p. 110.

OTP only had one secure telephone line to make calls outside Holland.⁷⁷ Consequently, the Tribunal was forced to rely on a number of Charitable foundations to address specific needs, with The Heritage Foundation providing a substantial amount of money to the OTP, which was then able to equip its investigators with two-way radios.⁷⁸ The differences between the Tribunal and Nuremberg could not have been starker and did little to suggest that States were serious about supporting the first U.N. mandated tribunal to investigate war crimes.

Inducements for Peace?

Advocates of a robust Tribunal continued to face opposition from those who saw the Court, much like the Commission, as a possible impediment to political negotiations. Shattuck recalls when trying to gather more support for the court in the administration, “The European Affairs Bureau (EUR) and its assistant secretary, Steve Oxman, at first tried to block my memo, saying I was wrong to focus on a tribunal at a time when efforts were being made to get the Balkan leaders to participate in peace negotiations.”⁷⁹ Shattuck’s attempts to visit the Balkans in 1994 to assess the situation and keep the pressure on the war crimes issue would also be blocked by EUR. Throughout this initial period of the Tribunal’s establishment, the issue of amnesties still lingered. Madeline Albright’s, the U.S. Ambassador to the U.N., publicly declared “Let me...make it clear to the skeptics that the Clinton Administration will not recognize – and we do not believe the international community will recognize – any deal to grant immunity to those accused of war crimes.”⁸⁰ However, despite such public pronouncements, serious concerns existed that the Tribunal would be sidelined. Shattuck notes that in March 1994, “Heavy pressure to offer amnesty to the Balkan leaders to induce them to enter “serious” peace negotiations was coming from the Contact Group.”⁸¹

⁷⁷ See Thomas S. Warrick, ‘War Crimes: Don’t Let Them Get Away With It’, *Washington Post*, December 20, 1994.

⁷⁸ See Richard Goldstone, ‘A View from the Prosecution’ in *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Vol. 2, No. 2, June 2004, p. 382.

⁷⁹ See SHATTUCK, *FREEDOM ON FIRE*, p. 130.

⁸⁰ See Madeline Albright quote in Stanley Meisler, ‘Jury Still Out on Bosnian War Crimes Tribunal Created by U.N.’, *Los Angeles Times*, December 25, 1993.

⁸¹ See SHATTUCK, *FREEDOM ON FIRE*, p. 141. The Contact Group comprising Britain, France, Germany, Russia and the U.S., was established in 1993 as a mechanism to coordinate diplomatic peacemaking efforts.

Starting Investigations

Understaffed and under-funded, the OTP found itself facing a daunting task. Commencing investigations in the middle of a war made access to material evidence and some witnesses extremely difficult. The magnitude of the alleged crimes and the perceived complexity of the origins of the conflict also had the potential to overwhelm the investigators. As John Ralston, former Chief of Investigations noted, “there was a perception that nobody outside the Yugoslavia would ever be able to understand it. The Prosecutor’s office had to overcome this.”⁸² The OTP also faced the prospect of being overloaded by the sheer volume of open source material. Finally, the staff were acutely aware of the pressure they were under; there were high expectations and impatience for indictments, particularly from NGO’s, victim groups and the judges.

Blewitt’s frustration at the U.N.’s laborious and time-consuming recruitment process led to him accepting an offer from the U.S. to second twenty two personnel to the Tribunal. However, the move received strident criticism from a number of other Western States, as recounted by Cassese “The French Italian and German governments questioned me. ‘Why are you accepting all these Americans?’ ...I told them, ‘Do the same thing!’ They did nothing of the sort.”⁸³ Similarly, (then) ICTY spokesman Christian Chartier pointed out that many of the European governments “had sent us no personnel when we cried famine and did nothing even when we asked for help.”⁸⁴ Although relieved that the OTP now had the requisite staff to get down to serious work, Cassese was under no illusions as to the apparent U.S. philanthropy, noting “I was not duped by the generosity of the Americans. They helped the tribunal, but they wanted a hold on it.”⁸⁵

⁸² See John Ralston ‘Investigating War Crimes. “The Role of Investigators In Crisis Intervention”’, Presentation given at the International Society for the Reform of Criminal law, 15th International Conference, Politics, Crime and Criminal Justice, august 30, 2001.

⁸³ See Antonio Cassese quote *in* HAZAN, JUSTICE IN A TIME OF WAR, p. 53.

⁸⁴ See Christian Chartier quote *in* HAZAN, JUSTICE IN A TIME OF WAR, p. 53.

⁸⁵ See Antonio Cassese quote *in* HAZAN, JUSTICE IN A TIME OF WAR, p. 53.

The OTP was divided into four sections: the Administration and Records Section, the Special Advisory Section, the Prosecution Section, and the Investigations Section.⁸⁶ Investigations at alleged crime scenes were largely impossible at this stage due to either security concerns linked to on-going fighting or the local 'authorities' refusal to cooperate. Goldstone held a series of meetings with Ministerial officials, in Zagreb, Belgrade and Sarajevo in October 1994. This led to the establishment of a three-person liaison office in Sarajevo and Zagreb⁸⁷ to act as a point of contact between the OTP, local and national governments, the various local war crimes commissions, NGOs, and the different U.N. agencies on the ground. Despite this development, levels of cooperation varied dramatically. Whilst the Bosnian Government quickly entered into a memorandum of understanding with the Tribunal and offered material from its war crimes offices in Sarajevo, Tuzla and Zenica, the BS (Bosnian Serb) 'authorities' were utterly intransigent. In mid-November, Blewitt and two senior investigators visited Pale and Knin to discuss practical cooperation and attempt to obtain official documentation. The BS 'authorities' refused access to both suspected crime scenes and official records of its administration and BS military forces. Similarly, the Croatian Serb 'authorities' continued to block any exhumation of the Ovchara mass grave site. The consequences of prematurely closing down the Commission, which after protracted negotiations, had received authorization to exhume the site, were now painfully apparent. Relations with Serbia also continued to be strained. In a letter to Goldstone, the Deputy Prime Minister and Federal Minister of Justice of FRY refused to allow any rigorous investigations to take place on its territory. Whilst the federal government was purportedly prepared to grant Tribunal representatives contacts with Government bodies and non-governmental organizations, they were prohibited from any investigations which required interviewing individuals.

The Tribunal did, however, begin to develop a more productive relationship with UNPROFOR. Although the U.N. force had been generally reluctant to work closely with

⁸⁶ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A/49 342/S/1994/1007, 29 August 1994, paras. 151-154.

⁸⁷ Although Belgrade would formally agree to allow a liaison office to be opened, it continually blocked the office from actually opening.

the Commission, or become involved in 'human rights issues'. there were elements within the force, which, over time, began to assume a more proactive approach. An internal UNPROFOR memo highlights that, whilst acknowledging atrocity crimes investigations were uncharted territory, some efforts were made by Military Police (MP) forces attached to UNPROFOR to conduct atrocity crimes investigations. The memo written by a senior U.N. officer in the field, and sent to the headquarters office in New York, acknowledged that "In a theoretical point of view it appears that UNPROFOR has no mandate to conduct such investigations."⁸⁸ Nevertheless, it highlighted that MPs had undertaken several investigations and that equipment necessary to conduct investigations had been requested. The officer requested guidance from the Department of Peacekeeping Operations (DPKO) New York on the issue, and clear direction on; "the assignment of appropriate support personnel to assist in such investigations [and] clear direction as to who is responsible for the receipt of the police report and associated evidence." The memo went on to suggest that "Specific guidelines must be established on who will store, control...and be responsible for the evidence collected by the platoon on completion of the investigation."⁸⁹ Eventually such guidelines were drafted which provided that UNPROFOR personnel would secure and preserve evidence of possible atrocity crimes.

In light of the above obstacles, the OTP decided on a plan of establishing a tightly focused evidence collection plan. The early strategy was to focus on four areas: Vukovar, particularly the murder of the 200 men at the hospital and the Ovchara mass grave (which the Commission had focused on) where many were believed to have been buried; alleged murders by Bosnian Croat forces in Ahmici Vitez in Bosnia; alleged murders and mistreatment of prisoners by Bosnian government forces in Celebici prison camp; and allegations of murder, sexual violence and forced displacement of civilians and the practices in detention camps in various locations in Republika Srpska.⁹⁰ Like the Commission, the OTP would also make contact with the various refugee communities

⁸⁸ Confidential UNPROFOR Memo, February 22, 1994, Subject 'War Crime Investigation.'

⁸⁹ Confidential UNPROFOR Memo, February 22, 1994, Subject 'War Crime Investigation.'

⁹⁰ See John Ralston 'Investigating War Crimes. "The Role of Investigators In Crisis Intervention"', Presentation given at the International Society for the Reform of Criminal law, 15th International Conference, Politics, Crime and Criminal Justice, August 30, 2001.

spread throughout Western Europe in order to obtain witness testimony. In 1995 the OTP was re-organized and the Investigations Unit Strategy Team established. The 15 member Team was divided into four sub-units; the Intelligence Analysis Unit; the Strategy Unit; the Investigation Development Unit, and; the Special Projects Unit.⁹¹

In late 1994 and early 1995, Goldstone issued the court's first indictments⁹² against Dragan Nikolic,⁹³ Bosnian Serb commander of Susica detention camp, and Dusko Tadic,⁹⁴ a Bosnian Serb civilian who, although not a guard, visited Omarska Detention camp and was alleged to have tortured several detainees, leading to a number of deaths. A further two indictments involving 21 persons, also relating to Omarska Detention Camp were issued.⁹⁵ Many commentators were critical that the Tribunal was focusing on what they perceived as so-called 'small fish'. Goldstone despairingly justified the focus of the indictments, "It is highly unsatisfactory for someone at the level of Dusko Tadic should face trial and that those who incited and facilitated his conduct should escape justice and remain unaccountable. But it's really an academic question because we had no choice; Tadic was the only accused available to bring before the Tribunal at a time when the judges, the media and the international community were clamoring for us to begin prosecutions."⁹⁶

The Tribunal's Registry initially requested UNPROFOR to transmit the arrest warrants to the Pale 'authorities' but the peacekeeping force quickly rejected the proposal. The Pale 'authorities' in Geneva also refused to accept the documents. Finally, one month after their issue, Pale representatives in Belgrade agreed to accept the warrants. However, no assurance was given to the Tribunal that they would be transmitted to the accused, and

⁹¹ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A/50/365/S/1995/728, 23 August 1995, paras. 39-41.

⁹² Dragan Nicolik, Bosnian Serb commander of the Suscia detention camp (November 94) and Dusko Tadic, Omarska camp 'freelance torturer' (February 95)

⁹³ IT - 94 - 2 - R61: (Suscia camp) November 4, 1994.

⁹⁴ IT - 94 - 1 T: February 13, 1994.

⁹⁵ IT - 95 - 4 - I: (Omarska camp) February 13, 1995.

⁹⁶ See Richard Goldstone quote in WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 115.

subsequent correspondence from the ICTY was not responded to.⁹⁷ The experience of transmitting the arrest warrants was merely the first instance of a prolonged battle between the Tribunal and Bosnian Serb officials.

Empty Gestures: A Distinct Lack of International Cooperation

The Bosnian Serbs, Croatian Serbs, and FRY authorities were not the only ones stonewalling the Tribunal. Like its predecessor, the Commission, despite declarations of support in the Security Council, the OTP faced serious difficulties obtaining information from a number of key Western States, particularly intelligence material. U.S. Intelligence services have historically adopted conflicting positions towards international legal institutions established to investigate and prosecute atrocity crimes. For example, during the Nuremberg trials of major German War Criminals, The U.S. Office of Strategic Services (OSS) played a key role, providing considerable logistical, strategic, evidentiary and diplomatic assistance to the prosecutors, with approximately one third of the senior staff of the U.S. prosecution team comprising OSS personnel. Nevertheless, Western intelligence agencies attitudes towards suspected Nazi war criminals would also be influenced by considerations as to whether such individuals could play a positive role in addressing the threat from the Soviet Union. Consequently, U.S. intelligence agencies acted to exempt a number of suspected Nazi war criminals from prosecution at Nuremberg and subsequent prosecutions in exchange for their technical and espionage skills.⁹⁸ Thus, the U.S. Army Counter Intelligence Corps (CIC) in Germany recruited Klaus Barbie (an SS officer who would later be convicted for his role in rounding up Jews in France and for suppressing the French resistance) as an agent and smuggled him out of Europe, thereby facilitating his evasion of justice for over 30 years. Similarly, the CIA's recruitment of General Reinhard Gehlen to establish West Germany's intelligence service enabled him to "promote and protect" [suspected] war criminals⁹⁹, and the

⁹⁷ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A 50 365/S 1995/728, 23 August 1995, para. 92.

⁹⁸ See Bryan and Salter, 'War Crimes Prosecutors and Intelligence Agencies', p. 101.

⁹⁹ See Professor Timothy Naftali, consulting historian to The Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group (IWG) quote in RICHARD BREITMAN, NORMAN GODA, TIMOTHY NAFTALI, AND ROBERT WOLFE, U.S. INTELLIGENCE AND THE NAZIS, (National Archive Trust Fund Board) 2004, p. 406.

agency also failed to inform the Israeli authorities after learning the pseudonym and whereabouts of Adolf Eichmann, due to fears that Hans Globke, one of their top agents would be exposed.¹⁰⁰

Such episodes indicate that for many State's intelligence services, supporting efforts to investigate and prosecute atrocity crimes may be contrary to other priorities or considerations, which are deemed to be of greater importance; something which would rapidly become apparent to the Tribunal. Thus, as highlighted by chapter one, although a number of Western States had deployed significant intelligence assets throughout the former Yugoslavia, the Tribunal's head of investigations stated that during its early days the OTP "had no access to Western intelligence sources."¹⁰¹ Ralston went on to note that "Contemporaneous intelligence which had been gathered, allegedly no longer existed. If this contention was to be believed then most of the information which politicians, lobby groups etc used to base their calls for investigations on, was gone."¹⁰²

Intelligence sharing is nearly always a delicate issue. Indeed, even *within* States, various intelligence agencies are often embroiled in bitter turf-wars, jealously guarding their sources, and reluctant to share information.¹⁰³ The situation is often compounded in the case of intelligence cooperation *between* States. As Herman notes, intelligence liaison is

¹⁰⁰ See Scott Shane, 'C.I.A. Knew Where Eichmann Was Hiding, Documents Show', *New York Times*, June 7, 2006.

¹⁰¹ See John Ralston 'Investigating War Crimes. "The Role of Investigators In Crisis Intervention"', Presentation given at the International Society for the Reform of Criminal law, 15th International Conference, Politics, Crime and Criminal Justice, August 30, 2001.

¹⁰² See John Ralston 'Investigating War Crimes. "The Role of Investigators In Crisis Intervention"', Presentation given at the International Society for the Reform of Criminal law, 15th International Conference, Politics, Crime and Criminal Justice, August 30, 2001.

¹⁰³ For example, during the British Government's campaign against the Irish Republican Army (IRA) in Northern Ireland, British Army Intelligence was reluctant to share information with the province's police force the Royal Ulster Constabulary (RUC). Similarly, the relationship between the British Secret Intelligence Service (SIS) or MI6, and the Security Service (MI5) regarding their work in Northern Ireland was subject to intense rivalry and ill-feeling. For more details see MARK URBAN, *BIG BOYS RULES. THE SECRET STRUGGLE AGAINST THE IRA* (Faber and Faber) 1992, particularly Ch. 2 'The Security Establishment.' [hereinafter, URBAN, *THE SECRET STRUGGLE AGAINST THE IRA*] In the US, entrenched rivalry between the CIA, FBI and the White House National Coordinator for Security, Infrastructure Protection, and Counter-terrorism undermined the US policy towards al Qaeda during the several years leading up to 9/11. For more details see STEVE COLL *GHOST WARS. THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN. FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* (Penguin Books) 2004.

often a “patch work of bilateral and multilateral arrangements of all kinds and all degrees of intimacy.”¹⁰⁴ Intelligence liaison between States relating to the former Yugoslavia was considered a very sensitive issue. Within UNPROFOR’s HQ in Sarajevo, a number of National Intelligence Cells (NICs) were established in separate shipping containers. These NICs were essentially involved in intelligence gathering for their own States rather than for the U.N. Cooperation between the NICs was limited. Although several Nordic States allowed their personnel to enter into each others premises, intelligence was only shared on a bilateral, not multilateral basis. Beyond the Nordic States, an attitude of mistrust prevailed between many other States. CIA officers deployed in the Balkans operated under a golden rule: no contacts with the French foreign and/or military services; “the CIA apparently did not trust the French services.”¹⁰⁵ (This apparent concern over French operational security would later prove to be well founded, when a military mission to arrest Karadzic was reportedly compromised due to a tip-off received by his supporters from a French officer.¹⁰⁶) As Wiebes highlights, even liaison between friendly states cannot even be taken for granted.¹⁰⁷

The prospect of the Tribunal receiving sensitive material from States was even more limited. For many intelligence agencies keen to retain control of their material, cooperating with an international institution staffed with individuals from a variety of different states, some of whom were seconded from government positions, was anathema. As Lane and Shanker highlight, “Handing classified information to a multinational agency went against every tradition of the spy business.”¹⁰⁸ The U.S. was particularly reticent, and a senior White House advisor justified non-disclosure on the grounds that, “The US intelligence community will never release its intelligence because of methods

¹⁰⁴ See Michael Herman, ‘Intelligence after the Cold War: contributions to international security?’, unpublished paper, quoted in WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 57.

¹⁰⁵ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 79.

¹⁰⁶ See Thomas Sancton and Gilles Delafon, ‘The Hunt for Karadzic’, *Time Magazine*, August 10, 1998. For further details on the incident see chapter five.

¹⁰⁷ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 79.

¹⁰⁸ See Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’, *New York Review Of Books*, May 9, 1996, p. 12.

and sources.”¹⁰⁹ However, Wiebes characterizes the justification as a “remarkable statement”¹¹⁰ noting “there is rarely a genuine need to release both methods and sources.”¹¹¹ Evidently, the purported concern over methods and sources was only part of the story. Most intelligence organizations are, by their very nature, imbued with a culture of non-disclosure. Gaining cooperation from bodies such as the U.S. National Security Agency (NSA), described by the director of the National Security Archive at George Washington University as the “most close-mouthed of all U.S. government agencies.”¹¹² would be almost impossible. Although a number of legitimate objections were raised, including the lack of adequate storage facilities for classified material, the Tribunal was prepared to address these concerns, leading some commentators to conclude “the American intelligence agencies own penchant for secrecy was mainly responsible for the slow delivery of data to the Tribunal.”¹¹³

Beyond this culture of non-disclosure, other considerations also played a role. As a Clinton administration official noted, “Sharing information with international organizations is something which as far as I know is very new....Friendly governments, yes. But that’s where there were reciprocal arrangements. *Here there’s nothing reciprocal. We’re not getting anything back from this.*”¹¹⁴ Similarly, Wiebes notes, “if a service [or recipient] has nothing to exchange, then generally speaking it cannot be expected to be provided with much in return.”¹¹⁵ This mindset meant that particularly during the early years, the Tribunal received minimal cooperation, and it would take several years before a number of intelligence agencies finally begin to adopt a more accommodating attitude towards cooperation with the Court.

¹⁰⁹ See CHARLES GRANT, INTIMATE RELATIONS: CAN BRITAIN PLAY A LEADING ROLE IN EUROPEAN DEFENCE AND KEEP ITS SPECIAL LINKS TO US INTELLIGENCE, 2001, p. 6, quoted in WIEBES, INTELLIGENCE AND THE WAR IN BOSNIA, p 59.

¹¹⁰ See WIEBES, INTELLIGENCE AND THE WAR IN BOSNIA, p. 57

¹¹¹ See WIEBES, INTELLIGENCE AND THE WAR IN BOSNIA, p. 57

¹¹² See Scott Shane ‘Vietnam War Intelligence ‘Deliberately Skewed’, Secret Study Says’, *New York Times*, December 2, 2005.

¹¹³ See Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’, *New York Review Of Books*, May 9, 1996 p. 12.

¹¹⁴ See Quote of Clinton administration official in. Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’, *New York Review Of Books*, May 9, 1996 p. 12. (emphasis added.)

¹¹⁵ See WIEBES, INTELLIGENCE AND THE WAR IN BOSNIA, p. 87.

Consequently, during the Tribunal's initial investigations, its relationship with many intelligence services was often minimal and strained. In the U.S. however, it was not only the intelligence services which advocated a policy of non-disclosure. On January 4, 1995, the Republican controlled Congress introduced the National Security Revitalization Act. As Hendrickson highlights, the House of Representatives wanted to restrict the transfer of U.S. intelligence to the U.N. by requiring prior congressional approval *before* any information could be shared with the U.N.¹¹⁶ Although Goldstone formally requested that the U.S. administration provide assistance to the Tribunal through the provision of material from its intelligence agencies under the Rule 70 procedure, much of the information initially handed over turned out to be of limited value. The State Department's Bureau of Intelligence and Research had been designated the U.S. intermediary for U.S. dealings with the Tribunal. However, *only one junior official* was assigned the task of going through material which may have included information on possible crimes, and the "torturous" declassification process led to large passages of text being blacked out or deleted, significantly reducing its probative value.¹¹⁷ Similarly, when the CIA submitted over one thousand pages of refugee testimony they had recorded in Europe, it was so sanitized by the declassification process that it was rendered almost useless to the prosecution.¹¹⁸ A former senior State Department official involved in war crimes issues lamented "the CIA is not interested in law enforcement per se, unlike the FBI. There was a built-in tension between the organization [the CIA] and its mission to protect methods and not disclose sources, and the ICTY's mission to gather evidence. The bottom line is that the CIA is a terrible instrument of law enforcement."¹¹⁹ In other instances, basic recording errors rendered U.S. gathered material useless for the OTP. The DIA had reportedly recorded a great deal of material relating to evidence of atrocities, gleaned from debriefings with refugees, which was subsequently entered into the so-called *Blackbird Database*.¹²⁰ However, during the several hundred interviews

¹¹⁶ See RYAN C. HENDRICKSON, *THE CLINTON WARS. THE CONSTITUTION, CONGRESS, AND THE WAR POWERS* (Vanderbilt Uni. Press) 2002, p. 81

¹¹⁷ See Charles Lane and Thom Shanker, 'Bosnia: What the CIA Didn't Tell Us', *New York Review Of Books*, May 9, 1996 p. 12.

¹¹⁸ See Charles Lane and Thom Shanker, 'Bosnia: What the CIA Didn't Tell Us' *The New York Review Of Books*, May 9, 1996 p. 12.

¹¹⁹ Confidential interview with former senior State Department official working on U.S. Bosnia policy.

¹²⁰ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 75.

which took place in Germany. DIA operatives reportedly failed to note in the debriefing reports who said what. "Therefore these witnesses could not be used as witnesses by the Tribunal."¹²¹

Frustrated with the state of affairs, Goldstone sent a letter of complaint to the U.S. Embassy in The Hague, laying out a detailed chronology of the requests made by the OTP to the U.S. and the responses which were provided. He noted, "Regrettably, if I were to characterize those responses, I would have to say that the quality and the timeliness of the information has been disappointing." The Chief Prosecutor went on to emphasize "shorter response times will be necessary if the information is to be of any use to our investigations."¹²² The letter was subsequently leaked to the press, which only served to further strain the already tense relationship.

The German intelligence service, the Bundesnachrichtendienst (BND) were also reluctant to pass on material to the court. The BND's close relationship with the Austrian Army Intelligence Service, the Heeresnachrichtendienst (described as a "BND subsidiary"¹²³) gave it access to telecommunications installations in the Austrian Alps and signal intelligence. From there telecommunications throughout the former Yugoslavia were extensively monitored.¹²⁴ According to BND sources, a great deal of information of relevance to the Tribunal dating back to 1991 had been obtained. However, none of this had been passed on.¹²⁵ Similarly, France provided no intelligence material, although this

¹²¹ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 75.

¹²² See Letter from Richard Goldstone to Mr. Steve Mathias, Legal Advisor at the U.S. Embassy in the Hague, October 30, 1995.

¹²³ See Andreas Zumach 'Intelligence Agencies Fail to Supply Information to War Crimes Tribunal', British American Security Information Council, BASIC Reports, Newsletter on International Security Policy, No. 48, November 20, 1995.

¹²⁴ The BND was also receiving an unprecedented amount of material from the U.S. under a bilateral information exchange. The U.S. entered into this relationship largely as a result of its decision to reduce intelligence cooperation with the U.K. and France due to breakdown in transatlantic relations over Bosnia policy. U.S./British relations were characterized as being at the worst state since Suez. For more details see generally, SIMMS, *UNFINEST HOUR*; ROSE, *FIGHTING FOR PEACE*.

¹²⁵ See Andreas Zumach 'Intelligence Agencies Fail to Supply Information to War Crimes Tribunal', British American Security Information Council, BASIC Reports, Newsletter on International Security Policy, No. 48, November 20, 1995.

should perhaps not be so surprising: as Wiebes highlights, “the many French intelligence services seldom keep each other informed of what they are doing.”¹²⁶

Bosnia: End Game Strategy

By 1995, after the failure of a number of peace plans, a series of ceasefires were brokered. Despite this development, it became clear that all parties were merely using the break to prepare to mount operations in an attempt to settle the conflict militarily. The signing of the U.S. brokered Washington Accords in March 1994 ended the brutal and intense conflict between the Bosnian government and Bosnian Croats¹²⁷ leading to the formation of an (albeit fragile) alliance against the Bosnian Serbs. This allowed the Bosnian government to refocus their energy and resources and prepare to break the siege of Sarajevo. Meanwhile the Bosnian Serbs, with the assistance of Serbia, were finalizing plans to attack the remaining ‘safe areas’ of Gorazde, Zepa, and Srebrenica. In neighbouring Croatia, after receiving training, military equipment and strategic advice from the U.S. private military company, Military Professional Resources Incorporated (MPRI), Tudjman’s forces had retaken Western Slavonia during Operation Flash and were preparing to launch further military offensives to retake territory lost during 1991 and coordinate with Bosnian Croat forces to support operations in Bosnia. The subsequent events on the ground would ultimately facilitate the prospects for establishing viable territorial boundaries for a political settlement and also provide the pretext, finally, for a robust international military response to Bosnian Serb actions. However, they would also lead to one of the darkest events of the conflict, which would shame the U.N. and become one of the key focuses for the Tribunal.

By March 1995, the ceasefire was effectively over, and the Bosnian government launched a series of largely disastrous offensives against VRS positions around Sarajevo which were easily repelled with heavy losses. In May 1995 the VRS (with the support of the VJ) began its offensives against the three remaining enclaves in Eastern Bosnia and also

¹²⁶ See WIEBES, *INTELLIGENCE AND THE WAR IN BOSNIA*, p. 61.

¹²⁷ For more details on the Bosnian Government/Bosnian Croat Civil War in Bosnia see CHARLES R. SHRADER, *THE MUSLIM-CROAT CIVIL WAR IN BOSNIA: A MILITARY HISTORY, 1992-1994* (Texas A & M University Press) 2003.

intensified its shelling of Sarajevo. In response to the Bosnian Serb incursion into the weapons exclusion zone around the capital, the U.N. requested NATO air strikes against an ammunition dump in Pale. Mladic responded to the strikes by ordering that 400 U.N. peacekeepers be taken hostage. The episode clearly illustrated the contradiction in using airpower against the Bosnian Serb forces whilst UNPROFOR troops continued to be stationed in exposed positions. Subsequently, the U.N. was now unwilling to use aerial bombardment whilst its troops were still at risk.

The purported deterrence effect of the Tribunal, and the credibility of the U.N. 'safe areas' were cruelly exposed as paper tigers by the fall of the Srebrenica enclave. The Dutch U.N. Battalion surrendered to the advancing Serb forces, women were separated from men and boys, the former were bussed to Tuzla in Bosnian Government territory and the latter who failed to escape and make it over to Bosnian government territory were systematically executed and buried in mass graves over the next several days in a well organized operation.¹²⁸ In the aftermath of the U.N. hostage crisis and the fall of Srebrenica, the U.K. hosted an international conference in London on July 21, 1995. A consensus began to emerge amongst the British, French and Americans that a serious ultimatum should be issued to the Serbs. Consequently, it was agreed that an attack on Gorazde would be met with "a substantial and decisive response."¹²⁹ The U.N. authority (or 'key' as it was referred to) to use airpower was wrested away from the organization's headquarters and its senior civilian mediator Jasushi Akashi, whom had been reluctant to authorize air-strikes, and given to General Bernard Janvier, the U.N. military commander on the ground in Bosnia.

¹²⁸ Several thousand men staged a break-out from the enclave, aiming to cross into Bosnian government territory. Many were hunted down and executed by Serb forces, in some cases using the Dutch U.N. contingents vehicles and equipment as a means to lure them out under the guise of a neutral force. For more details on Srebrenica see JAN WILLEM HONIG AND NORBERT BOTH, *SREBRENICA. RECORD OF A WAR CRIME* (Penguin) 1996; DAVID RHODE, *ENDGAME. THE BETRAYAL AND FALL OF SREBRENICA: EUROPE'S WORST MASSACRE SINCE WORLD WAR II* (Farrar, Straus and Giroux) 1997; EMIR SULAGIC, *POSTCARDS FROM THE GRAVE* (Saqi Books) 2005.

¹²⁹ On August 1, 1995, the North Atlantic Council (NAC) agreed to extend the London Conference air strike ultimatum to the other 'safe areas'. For more details on the London Conference See 'The Road to Dayton. U.S. Diplomacy and the Bosnia Peace Process, May – December 1995', U.S. Department of State, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB171/index.htm#study> [hereinafter 'The Road to Dayton.' U.S. Department of State]

The London Conference statement represented a dramatic shift in policy by the 'International Community'. Whilst the hostage crisis and the fall of Srebrenica undoubtedly strengthened international resolve to finally take decisive action against the Serbs, the emerging policy shift by the Clinton administration was also of critical importance.¹³⁰ Clinton's national security advisor, Anthony Lake, began to advocate a more active engagement in the region both politically and militarily, and in 1995 his policy review asserted that U.S. credibility was being seriously eroded by its failure to take a strong lead over Bosnia. He recommended that the administration lead a diplomatic effort to achieve a peace settlement in Bosnia, and that this strategy should be backed by credible force. This 'endgame strategy' envisaged Milosevic as a key facilitator to any agreement. In exchange for lifting the economic sanctions, Milosevic was expected to assume the role of main negotiator for the Serbs, thus excluding the intransigent BS leadership.

Back in The Hague, after issuing another series of indictments against relatively low-level figures¹³¹, on July 25 1995, Goldstone's delivered a searing response to critics of the Tribunal's failure to focus on the 'big fish.' Karadzic and Mladic were indicted for genocide and crimes against humanity. However, the development caused considerable consternation for some, including the U.N. Secretary General, who reportedly felt that indicting senior figures could undermine the prospects of achieving a diplomatic settlement. Goldstone notes that Boutros-Ghali "made it clear to me that had I consulted him, he would have advised me not to indict Karadzic before peace had been brokered in Bosnia."¹³² Similar concerns were being aired by other diplomats. Goldstone reportedly informed Shattuck that Thorvald Stoltenberg, the Norwegian U.N. representative involved in negotiations with Milosevic, "was saying that the tribunal investigations should be negotiable. Stoltenberg had apparently raised the tribunal issue with Milosevic suggesting that he could "expect understanding from the Tribunal" if he cooperated with

¹³⁰ For more details *See generally* IVO H. DAALDER, *GETTING TO DAYTON. THE MAKING OF AMERICA'S BOSNIA POLICY* (The Brookings Institution) 2000, [hereinafter DAALDER, *GETTING TO DAYTON*]

¹³¹ IT- 95 – 5 – R61: July 25, 1995

¹³² Richard Goldstone quote in, WILLIAMS AND SCHARF, *PEACE WITH JUSTICE?* p. 103.

the peace negotiations.”¹³³ Goldstone reacted with fury at the suggestion of amnesties. “What politicians have the moral, legal or political right to forgive [individuals responsible for] the deaths of thousands of people – without consulting the victims?”¹³⁴

International military forces in Bosnia were finally beginning to assume a robust posture. A 4,000 strong Rapid Reaction Force (RRF) Anglo-Dutch-French Multi-National Brigade (MNB) had been deployed from Croatia, and took up positions on Mount Igman near Sarajevo. Although placed directly in the UNPROFOR chain of command, the RRF did not wear the Blue helmets of U.N. peacekeeping, but instead wore full combat camouflage and were equipped as a much more offensive force. On August 4, 1995, Croatian forces launched Operation Storm (Oluja) to retake the Serb-held territory of the Krajina. Serbian forces withdrew rather than face the newly equipped Croatian army and over 180,000 Serb civilians fled from the region fearing reprisals. Many of those who stayed were executed by advancing Croat forces.

On August 25, 1995, an artillery shell landed in the Sarajevo market place killing thirty eight and wounding eighty five. Once U.N. ballistics investigators determined the shell came from a Serb position, both U.N.¹³⁵ and NATO ‘keys’ were turned which led to the commencement of ‘Operation Deliberate Force.’ Throughout the previous four weeks, U.N. forces had been discreetly withdrawing from Bosnian Serb territory and the remaining ‘safe areas’, removing the threat of another hostage scenario. Just before ‘Operation Deliberate Force’ got under way, Holbrooke’s team arrived in Belgrade to meet Milosevic. The Serbian presented them with ‘The Patriarch Letter’ witnessed by the Patriarch of the Serbian Orthodox Church which granted Milosevic the authority to be the main Serbian negotiator at any future talks. On August 30, 1995, NATO aircraft and the MNB went into action striking numerous Bosnian Serb targets around Sarajevo. Capitalizing on NATO’s and the MNB’s operations, the Croats, Bosnian Croats and

¹³³ See SHATTUCK, FREEDOM ON FIRE, p. 150.

¹³⁴ See BASS STAY THE HAND OF VENGEANCE, p. 243.

¹³⁵ With Janvier temporarily out of the country, the ‘key’ was passed to his Deputy Lieutenant General Rupert Smith, British commander of UN forces inside Bosnia. Smith was much more willing to authorize the use force against the Serbs, thus the problem previously experienced of UN reluctance to turn the ‘key’ was conveniently removed.

Bosnian Government launched Operation Mistral 2 on September 8, 1995, a 'combined' offensive with the aim of "inflicting a decisive defeat on the Serbs."¹³⁶ The Bosnian Serbs finally began to feel the pressure and reluctantly agreed to cease offensive operations around Sarajevo and withdraw its heavy weapons. Successful combined Croat, Bosnian Croat and Bosnian Government offensives led to the situation on the ground starting to look something like the U.S. proposed territorial division, and on September 8, Holbrooke got the 'warring factions' to agree to a 51%:49% territorial split. After several more weeks of fighting, mainly in Western and North Western Bosnia, a ceasefire came into effect on October 15, 1995.¹³⁷

Conclusions

Despite facing resistance from opponents who viewed its establishment as either a potential impediment to a negotiated settlement or a dangerous erosion of the principle of State sovereignty, the Tribunal had managed to become operational. Furthermore, the Court managed to avoid the recommendations suggested by the British Government 'non-paper', which if implemented, would have significantly undermined its powers and capacity to investigate, prosecute and adjudicate atrocity crimes. Instead, innovative Rules of Procedure were drafted, judges appointed and although delayed, a Prosecutor selected. However, progress in investigations clearly remained a challenge. Again, like the Commission, the reluctance of many States to disclose intelligence material, seriously inhibited the work of the Tribunal. Nevertheless, the OTP still managed to issue a series of indictments.

With a pause in the fighting coming into effect in mid October, 1995, the stage was now set for political negotiations to attempt to turn this tentative ceasefire into something more concrete, and on November 1, 1995, the various parties convened at Wright Patterson Airbase, Dayton, Ohio in order to hammer out a settlement. However, as

¹³⁶ See TIM RIPLEY, OPERATION DELIBERATE FORCE. THE UN AND NATO CAMPAIGN IN BOSNIA 1995 (CDISS) 1999, p. 276 [hereinafter RIPLEY, OPERATION DELIBERATE FORCE]

¹³⁷ President Clinton announced the ceasefire on live television on October 5th. However, it did not come into effect around Sarajevo until October 10th, and five days later around Sanski Most.

chapter three demonstrates, many of the key decisions which would profoundly affect the Tribunal had already been determined.

Chapter Three: What Price Justice? An assessment of attempts to include robust provisions relating to the prosecution of atrocity crimes into peace agreements: The Dayton Accords.

Chapter three commences by exploring the debate within the U.S. administration which effectively set the scope of the military mandate of the NATO-led force to be deployed to Bosnia. It illustrates how the administration was divided between two opposing groups: the 'Minimalists' who advocated a narrow mandate for the force, focusing purely on conventional military tasks of monitoring the separation of the 'warring factions' armies; and the 'Maximalists' who argued the force should actively engage in arresting persons indicted for war crimes (PIFWCs), providing area security and support refugee return.

The chapter goes on to examine the Dayton Peace negotiations, and the Tribunal's endeavours to maintain the spotlight on the issue of atrocity crimes and accountability. A number of 'pro-prosecution' commentators have been highly critical of Dayton due to the purported failure to adequately address the issue of justice, particularly the decision to grant Slobodan Milosevic, (widely seen as the principal architect of the wars in Croatia and Bosnia) a key role in the negotiations, rather than indict him for atrocity crimes. 'Pro-prosecution' advocates are also critical of the substance of the Dayton Peace Accord, both for its failure to include robust provisions requiring the signatories to transfer PIFWCs (backed by specific sanctions in the event of non-compliance), and the omission of an explicit duty compelling NATO forces to actively seek out and arrest PIFWCs. Additionally, a number of 'pro-prosecution' commentators have posited that alternative strategies should have been pursued to ensure a more just peace, including countenancing the rolling back of Bosnian Serb territorial gains through continued military offensives by the other 'warring factions', and the 'International Community's' pursuit of unconditional surrender by Bosnian Serb military via continued NATO military offensive operations.

The chapter critically contests these contentions. Firstly, it will posit that the Tribunal's failure to indict Milosevic at the time of the negotiations was predicated on an absence of

viable evidence to support such an indictment. Secondly, the chapter will also argue that *even if* evidence had, at the time of Dayton, been available to the Tribunal which could have supported an indictment against Milosevic, it would have been prudent to defer an indictment and to negotiate with the Serbian President in order to bring an end to the fighting. The chapter will examine the events in West Africa during summer 2003 (when the indictment of the Liberian dictator Charles Taylor for crimes against humanity contributed to the collapse of the peace negotiations, resulting in an upsurge in fighting in and around the capital, Monrovia) in order to demonstrate that attempts to pursue justice by issuing indictments at such critical junctures, may in certain circumstances, actually serve to prolong conflict and result in the further loss of lives.

The chapter also posits that in light of the 'Minimalist' position prevailing within the U.S. administration, which included the outright refusal to countenance any more than vague, nebulous provisions relating to the responsibilities of the NATO led peacekeeping force vis-à-vis arresting PIFWCs, (a stance which had overriding influence within NATO, although most other member States agreed with it anyway), an explicit reference relating to the pursuit and arrest of PIFWCs *was not achievable*. Admittedly, such an approach is not without its problems. As will be demonstrated in the following chapter, for nearly two critical years, NATO's 'Minimalist' interpretation of the Accord's provision relating to PIFWCs provided the institution with a significant justification for its failure to apprehend PIFWCs. Nevertheless, despite recognizing such factors, the crucial issue, which advocates of the 'pro-prosecution' perspective have consistently failed to adequately address, remains: how can a greater level of justice be achieved at the time of peace negotiations when the 'International Community' is both unwilling to be bound by explicit obligations to actively seek out and detain PIFWCs, or pursue military enforcement measures to ensure compliance, and consequently individuals implicated in war crimes are deemed necessary to achieve a negotiated settlement?

The 'pro-prosecution' alternative strategies to negotiating with Milosevic are also challenged, with the chapter demonstrating that continued military offensives by the other 'warring factions', particularly those directed by Croatia, would most likely have

replaced one form of ethnic cleansing with another, rather than achieve a greater level of justice. Similarly, the suggestion that NATO could and should have continued its military offensives in order to obtain an unconditional surrender will be critically contested via an illustration of how the deep divisions within the Organization, meant that the option of expanding and intensify its military operations during Operation Deliberate Force *was not a viable option*.

Setting the Scope of the International Military Mandate – The Debate within the U.S. Administration and Military

Although a number of the critical issues, particularly the controversial subject of setting the territorial boundaries between the Federation and Republika Srpska, would not be resolved until the final hours of the Dayton conference, the scope of the international military mandate had been largely determined several weeks prior to the peace negotiations. As a recently declassified State Department document highlights, “since the beginning of the diplomatic initiative [to end the war], Pentagon officials “had no doubt” that the U.S. would assume the lead in drafting the military component of the peace agreement.”¹ During a series of meetings and deliberations, the U.S. administration decided the international military force, or IFOR, would not take on the role of actively hunting PIFWCs. With U.S. military personnel making up the majority of the NATO force to be deployed, this decision would hold sway within NATO’s political body, the North Atlantic Council (NAC). However, this essentially suited the majority of the other troop-contributing states, who were also keen to avoid adopting a more robust stance on the issue.

¹ See ‘The Road to Dayton.’ U.S. Department of State, Ch. 7, p. 149.

Within the administration, the Deputies Committee² would play a key role, meeting several times a week and passing on their recommendations to the principals for approval. Much of their time was taken up deliberating over the implications of successful peace negotiations and the nature and scope of any international military presence deployed to oversee the settlement. The meetings revealed intense disagreements between the various departments. Holbrooke characterized divisions between two camps: “minimalists” who wished to restrict the scope of the international forces’ duties, and the “maximalists” who argued that it was necessary for the military to engage in a broader mission, including actively going after PIFWCs and protecting returning refugees and IDPs.³ However, as Daalder highlights, acute differences of opinion existed within the “minimalists”. Whilst the JCS advocated a large force to be deployed to ensure “robust enforcement capability”, the Office of the Secretary of Defense reportedly wanted to “minimize both the size and nature of American military involvement.”⁴

The Deputies soon reached consensus over the deployment of a NATO-led force which would operate under a unified command. The painful experience of the “dual key” debacle with the U.N. had convinced the U.S. that their military forces would never again be controlled by anyone other than themselves. The proposed force’s primary objective would be to implement the military elements of the peace accord, such as ensuring the separation of the ‘warring faction’s’ military forces and monitoring their withdrawal to agreed boundaries. Equipped with robust rules of engagement, the force would react decisively against isolated security incidents or violations of the accord. However, if

² Chaired by Deputy National Security Advisor Sandy Berger, the Committee also included representatives from the State Department (Deputy Secretary Strobe Talbott, Undersecretary for Political Affairs, Peter Tarnoff, and Policy Planning Chief James Steinberg), the Office of the Secretary of Defense (Deputy Secretary John White and Under-secretary for Policy, Walter Slocombe), the Joints Chiefs of Staff (Admiral William Owens), the CIA (Deputy Director George Tenet and Vice Admiral Dennis Blair) and also representatives from the Office of the Vice President, US Mission to the UN, and in certain meetings representatives from the Treasury Department, the Agency for International Development, and the Office of Management and Budget.

³ See RICHARD HOLBROOKE, *TO END A WAR* (Random House) 1998, p. 216. [hereinafter HOLBROOKE, *TO END A WAR*]

⁴ See DAALDER, *GETTING TO DAYTON*, p. 141. The fact that the first version of the Joint Chiefs of Staff (JCS) concept paper to circulate amongst the other agencies was the seventeenth revision illustrates that even within the Pentagon, large differences of opinion existed. See DAALDER, *GETTING TO DAYTON*, p. 141.

more serious violations occurred the deputies proposed the force would “respond asymmetrically depending on the cause of the breakdown.”⁵ Thus, if the Bosnian Muslims were at fault, NATO would withdraw its forces and terminate its military assistance in the form of train and equip. If the Bosnian Serbs were held responsible for a serious violation and a breakdown in the peace, NATO would use all the capabilities at its disposal, including air-power to re-enforce the peace.⁶ With the basic parameters of the force determined by the Deputies, three senior U.S. officials⁷ were dispatched to engage in high level consultations with NATO allies in Europe.

The NAC convened on September 29, 1995, and approved the fundamental components of an IFOR mission.⁸ By early October a finalized concept of operations was submitted, and approved by NAC on October 11, 1995. The plan was very similar to the Deputies proposals.⁹ However, although NATO had approved the basic structure of the force, which would be referred to as the Implementation Force or IFOR, a number of crucial details still needed to be determined. The debate went back to the Deputies Committee. In the two remaining weeks before the commencement of Dayton, U.S. officials continued to be heavily focused on refining the U.S. role in IFOR. By late October, several issues had still to be resolved within the administration regarding the scope of IFOR’s mission. At this stage there was no agreement on whether the force would even be deployed in Bosnian Serb territory. The Deputies reaffirmed IFOR’s primary

⁵ See DAALDER, *GETTING TO DAYTON*, p. 142.

⁶ Interestingly, Daalder’s analysis on the pre-Dayton political deliberations within the US administration, there is no mention of what response NATO would have taken if the Bosnian Croats were responsible for a breakdown in the peace. However, given that many commentators have highlighted that Croatia was perhaps the main beneficiary of the Dayton peace process, it was largely inconceivable at that stage that the Bosnian Croats, whom Croatia held enormous influence over would have been either able or willing to seriously undermine any Accord, see Misha Glenny, ‘And the Winner Is . . . Croatia’, *New York Times*, September 26, 1995.

⁷ The team comprised Walter Slocombe, Wesley Clark and John Kornblum.

⁸ See ‘The Road to Dayton.’ U.S. Department of State, Ch. 7, p. 152. Strikingly – in the recently declassified State Department document on the Dayton negotiations, the chapter on setting the scope of IFOR completely fails to mention any of the policy disputes over the issue of IFOR and war crimes.

⁹ As Daalder notes “The similarity should not be surprising. Given the dominance of U.S. military personnel at the top and within the NATO military structure, every detail of force planning is shared between Washington and Mons, Belgium (where Supreme Headquarters Allied Powers in Europe, or SHAPE, is located). Indeed JCS representatives would often refuse to clear cables containing instructions from Washington to the U.S. mission at NATO until it had first been checked with the U.S. military representatives in Brussels”. See DAALDER, *GETTING TO DAYTON*, p. 142.

objective would be the implementation of the military aspects of the agreement. It would have no responsibility for basic policing functions and *would not* hunt war criminals, but could apprehend PIFWCs “if the opportunity for doing so presented itself during the course of performing its mission.”¹⁰

The dispute between the “minimalists” and “maximalists” would come to a head during two Principles Committee meetings on October 25 and October 27, 1995. Holbrooke, the chief ‘maximalist’ forcefully argued it was crucial that IFOR assume an expansive mandate, beyond the narrow, circumscribed role proposed by the Deputies. This would include a robust attitude towards arresting PIFWCs. He regarded the military’s objections, predicated on concerns over “mission creep”, as spurious. “In recent years, the military had adopted a politically potent term for assignments they felt were too broad: “mission creep.” This was a powerful pejorative, conjuring up images of quagmires. But it was never clearly defined, only invoked, and always in the negative sense, used only to kill someone else’s proposal.”¹¹ However, Holbrooke was reportedly cut off by General Shalikashvili, who was emphatic that there were certain things “that IFOR should not, would not, and could not do.”¹² As a compromise, General Shalikashvili suggested the military would be willing to accept the “*authority*” to do additional tasks, “but not the *obligation*.”¹³ As Holbrooke notes “the meaning of this finely crafted compromise would not be determined until the commanders on the ground decided how to use their “*authority*””.¹⁴

Opposition to the military taking on a more expansive, proactive role, did not stem purely from a military motivated by considerations of minimising the numbers of U.S. troops to be deployed and a fear of mission creep. A number of White House officials had similar views, premised upon a strategic rationale which sought to place the onus of the responsibility for peace on the domestic parties. Clinton’s National Security Advisor, Anthony Lake, argued that a more proactive approach by the major international players

¹⁰ See DAALDER, GETTING TO DAYTON, p. 143. (emphasis added.)

¹¹ See HOLBROOKE, TO END A WAR, p. 216.

¹² See DAALDER, GETTING TO DAYTON, p. 147.

¹³ See HOLBROOKE, TO END A WAR, p. 222, (emphasis added.)

¹⁴ See HOLBROOKE, TO END A WAR, p. 222.

such as NATO and the OSCE, would lead to the domestic parties developing “unreasonable expectations that the hard work will be done for them not by them.” Lake believed they should “tackle their own problems.”¹⁵ However, Lake’s rationale presupposed a level of consensus existed between the ‘warring factions’ as to what constituted the “problems.” As the following chapter will illustrate, many in both the Serb community within Bosnia and Serbia, and the Croat community within Bosnia and Croatia would openly revere individuals who had been, or would subsequently be, indicted by the Tribunal. Furthermore, the domestic political structures and associated legal, police, and security divisions continued to be controlled by individuals implicated in war time atrocities. Thus, the prospect of the issue of war crimes being tackled by the domestic parties was patently slim.

Despite losing the battle to the ‘minimalists’, Holbrooke was determined to persevere with the issue of arrests. During the administration’s final briefing before Dayton on October 31, 1995, he gave a stark warning to the President and the other participants. Holbrooke recounts in his memoirs “I said there was one critical issue I had to raise, even though it was difficult. “If we are going to create real peace rather than an uneasy cease-fire....Karadzic and Mladic will have to be captured. This is not simply a question of justice, but also of peace. If they are not captured, no peace agreement we create in Dayton can ultimately succeed.” There was silence at the Cabinet table.”¹⁶ Interestingly, two weeks prior to this meeting, Clinton had made a similar, although more general statement in public, noting “Even if a peace is reached, and I hope that we can do that, *no peace will endure for long without justice.*”¹⁷ Despite, this recognition however, the President would not seek to institute a policy to actively address the concern, with domestic political considerations restricting his scope for maneuver. Clinton had a strained relationship with the military, with some criticising his avoidance of active service in the Vietnam War. In addition, his policy towards gays in the military did little to endear him to the conservative institution. Ultimately, whilst the President may have

¹⁵ See DAALDER, GETTING TO DAYTON, p.

¹⁶ See HOLBROOKE, TO END A WAR, p. 226.

¹⁷ See President Clinton speech at the University of Connecticut in Storrs, October 15, 1995 (emphasis added).

supported the substance of Holbrooke's appeal, he was not willing to take on a JCS and DoD, both of whom were firmly opposed to an expansive IFOR mandate. Perhaps most importantly, as Daalder highlights, the scope and extent of IFOR's mandate was driven "to a considerable extent by political considerations of what the Congress and the public were likely to support a year before presidential elections."¹⁸

Dayton

Before exploring the relationship between the ICTY and the Dayton negotiation process, the author will critically assess two assertions which have been made by a number of 'pro-prosecution' commentators relating to the process. Firstly; the assertion that the Tribunal failed to indict Milosevic due to 'Realpolitik' considerations, and that conversely, the "full application of the norm of justice would have dictated the indictment of Mr. Milosevic in 1995, if not earlier"¹⁹, and secondly; the assertion that rather than negotiating with the Bosnian Serbs and Milosevic, securing a "just peace" would have entailed either the "reverse of much of the gains of ethnic cleansing"²⁰, or achieving an "unconditional surrender."²¹

The Failure to Indict Milosevic

The Tribunal's first Prosecutor, Richard Goldstone has on numerous occasions stated that indictments for leadership figures beyond Karadzic and Mladic were not issued by the Tribunal simply because the necessary information was not available to the court. The former Chief Prosecutor recounted in his memoirs "the charge was made that I had been pressured by the major powers not to indict Milosevic. What the media did not appear to recognize was that making war is not a war crime. Waging an aggressive war is certainly recognized as a crime by international criminal law, but it is not a crime within the jurisdiction of the Tribunal. That Milosevic may have approved of the criminal conduct of Karadzic and Mladic did not make him guilty of a war crime. Nor did the fact that he

¹⁸ See DAALDER, GETTING TO DAYTON, p. 144.

¹⁹ See WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 117.

²⁰ See WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 161.

²¹ See HAZAN, JUSTICE IN A TIME OF WAR, p. 72.

supplied weapons....to the Bosnian Serb Army.”²² He also pointed out “The only thing we had was the work of Bassiouni’s Commission of Inquiry, which permitted us to construct the Tadic case. But there was nothing in the dossiers to indict Milosevic.”²³ Hazan however, is unconvinced, arguing “Goldstone’s line of defense does not hold. *The only explanation is politics*, a terrain on which he excelled”²⁴

The charge that the Tribunal’s Prosecutor held back from indicting Milosevic as a result of a political decision which determined that the move would have upset the peace process is a serious one. However, it may be contended that it is Hazan’s rather strident claim that “the only explanation is politics”, which, to apply his own terminology, “does not hold” with regards to Goldstone’s conduct. Numerous Tribunal officials have stressed that the court did not possess the relevant evidence necessary to bring a case against Milosevic during or before 1995. Paul Stuebner, Goldstone’s principal counselor, emphatically stated, “We have no, let me repeat no information...Neither the United States, nor France, nor Great Britain, nor any of the other countries aided us in building an indictment against Milosevic.”²⁵

Bill Fenrick (who went onto work for the Tribunal) highlighted whilst working for the Commission, “it appears that there is a substantial degree of local autonomy for the large number of military and paramilitary formations deployed....It *may be* that the appearance of anarchy and chaos is carefully simulated by a rigidly hierarchical military and political command and control structure. The existence and effectiveness of this structure *must be proven. It may not be presumed.*”²⁶ As ICTY investigator John Ralston stressed, proving this was a considerable challenge: “without access to documentation, command structures and de jure responsibility were difficult to determine.”²⁷ Unlike the prosecution at

²² See RICHARD GOLDSTONE, FOR HUMANITY. REFLECTIONS OF A WAR CRIMES INVESTIGATOR. (Yale Uni. Press) 2000, p. 104

²³ See Goldstone quote in HAZAN, JUSTICE IN A TIME OF WAR, p. 60

²⁴ See HAZAN, JUSTICE IN A TIME OF WAR, p. 60. (emphasis added.)

²⁵ See HAZAN, JUSTICE IN A TIME OF WAR, p. 67.

²⁶ Final Version of Mr. Fenrick’s Report on the Reconnaissance Mission to the Territory of the former Yugoslavia, March 24, 1993, (emphasis added)

²⁷ See John Ralston ‘Investigating War Crimes. “The Role of Investigators In Crisis Intervention”’, Presentation given at the International Society for the Reform of Criminal law, 15th International Conference, Politics, Crime and Criminal Justice, August 30, 2001.

Nuremberg, the OTP would not in these early stages be able to rely on official documentary evidence. Indeed, as Carter points out, “There was no indication that there existed a parallel ‘Balkan penchant for meticulous record keeping.’ nor did it appear that a prosecution based on self-generated, irrefutable, incriminating documentation was likely.”²⁸

U.S. intelligence reportedly had no reliable evidence connecting Milosevic or his inner circle directly to war crimes. In a memorandum to State Department Chief of Staff Tom Donilon, Tobi Gati of the State Department’s bureau of Intelligence and Research (INR) reported that “the intelligence community for three years has looked for definitive evidence of President Milosevic’s personal involvement in managing ethnic cleansing and other war crimes, and has come up empty handed.”²⁹

However, this is not to suggest that the U.S. administration’s published conclusions or assertions should be unquestionably accepted. The administration was quite prepared to withhold information it possessed about the existence of Bosnian Serb-run detention camps in 1992 on the grounds that disclosure could have increased pressure on the U.S. to become further involved in the conflict.³⁰ Thus, it is conceivable that the U.S. may have withheld intelligence material which implicated Milosevic, based on the strategic rationale that the Serbian President was deemed a critical figure in any peace negotiation. Indeed, former State Department official John Fox claimed “There was very clear evidence coming in from Europe, for example, that the command and control, was clear, that it was from Belgrade. We knew for example that the shock troops of Arkan and the White Eagles were supported, armed and financed by Milosevic, by the security forces in Belgrade, so one has to close ones eyes very tightly to say there is not *a link*.”³¹

²⁸ See Kim Carter, ‘Proof Beyond a Reasonable Doubt?: Collecting Evidence for the International Tribunal for the Former Yugoslavia.’ *Annuaire canadien de Droit international*, 1993, p. 239.

²⁹ See Memorandum to Tom Donilon from Tobi Gati, ‘War Crimes and Milosevic’. November 3, 1995, in ‘The Road to Dayton’ U.S. Department of State, Ch. 8, p. 193.

³⁰ See Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’ *The New York Review Of Books*, May 9, 1996, pp. 10-11.

³¹ See John Fox comments in ‘Getting Away with Murder’. Panorama, BBC, December 13, 1993. (emphasis added.)

If indictments have any hope of standing up in court however, they need to demonstrate a lot more than a mere “*link*” in order to gain a secure conviction. Whilst, by 1995 there was undoubtedly a mass of information, especially journalistic accounts, alluding to Milosevic’s overall responsibility for war crimes in the region, such accounts, although useful in providing a contextual background, would not satisfy the high evidentiary threshold necessary to obtain a successful conviction. As Akhavan perceptively notes “individual criminal liability cannot be based on newspaper clippings.”³² Furthermore, as Sell highlights, “When Hague investigators approached....Western journalists....some were cooperative, but others proved unwilling to help or changed their stories when confronted with a request to testify on behalf of the tribunal.”³³

It is difficult to explain why, after the Kosovo conflict in 1999³⁴, when Milosevic lost the last remaining vestiges of diplomatic credibility, this allegedly available, comprehensively damning material, was not handed over to the Tribunal. Although a number of states did in fact provide more intelligence material to the court around this time,³⁵ the prosecution failed to produce a “smoking gun” or a decisively damning intercept during the Milosevic trial which would have made the case water-tight, particularly with regard to the indictment relating to Bosnia and Croatia. Instead, some of the prosecution’s most compelling evidence at the Milosevic trial came from the testimony of key insider witnesses, who in 1995, were in no way inclined to turn on their then patron, and *only since* the fall of the Milosevic regime and the demise of their own respective power bases, became willing to testify. Thus, it appears unrealistic that cooperation could have been obtained from these sources prior to this time.

³² See Payam Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’, *American Journal of International Law*, Vol. 95: 7, 2001, p. 19.

³³ See LOUIS SELL, *SLOBODAN MILOSEVIC AND THE DESTRUCTION OF YUGOSLAVIA* (Duke University Press 2002) p. 325. emphasis added [hereinafter SELL, SLOBODAN MILOSEVIC]

³⁴ For further details on the Kosovo conflict see IVO H. DAALDER, *WINNING UGLY: NATO’S WAR TO SAVE KOSOVO* (Brookings Institution) 2000.

³⁵ See Ed Vulliamy and Patrick Wintour, ‘Hawks smell a Tyrant’s blood; NATO’s New Confidence Suggests That the Neck of Slobodan Milosevic, the Butcher of Belgrade, May Itself Be on the Block’, *Observer*, May 30, 1999.

Ultimately, if evidence was withheld from the Tribunal, Hazan's charge that the failure to indict Milosevic on the grounds of political expediency is misdirected. It would appear to be more appropriate to level such accusations against a number of States, rather than Goldstone and the Tribunal. Noting that the U.K. had agreed to handover "all" its evidence which might link Milosevic to war crimes in 1999, Goldstone mused "One must question whether the information now being offered wasn't available two, three, or four years ago."³⁶ As Williams and Scharf highlight, it would not be surprising that the U.S. and U.K. withheld intelligence information regarding Milosevic's culpability (given the determination, which held the greatest sway within both governments, that he was a critical component of any peace negotiation process).³⁷

Additionally, Williams and Scharf go on to argue that the OPT failed to adequately explore the possibility that, as the civilian commander of the Serb military and police forces, Milosevic could have been prosecuted at this time under the doctrine of command responsibility for failing to prevent his forces from committing atrocity crimes in Bosnia.³⁸ Indeed, some of the Tribunal's judges argued that the IMTFE Yamashita case of December 7, 1945, could have been relied on to justify such an indictment.³⁹ However, many within the OTP were reluctant to rely on the case's dubious legacy, as recounted by Steubner, "[General] MacArthur wanted the head of General Yamashita because the Japanese commander had won battles in the Pacific....MacArthur succeeded and Yamashita was sentenced to death. Very frankly, the judgment was for me the quintessence of conqueror's justice. I did not want the Tribunal to take inspiration from this case."⁴⁰ More recently, the concept of command responsibility has come under sustained criticism, with a number of legal commentators suggesting the charge has been used "as a last resort" by prosecutors who feel obliged to indict senior officials, even though there is little evidence against them.⁴¹ During Milosevic's trial, the Former

³⁶ See Richard Goldstone quote in Raymond Bonner, 'Crimes Court Not Ready to Punish Kosovo Violence', *New York Times*, March 31, 1999.

³⁷ See WILLIAMS AND SCHARF, *PEACE WITH JUSTICE?* p. 117.

³⁸ See WILLIAMS AND SCHARF, *PEACE WITH JUSTICE?* p. 117.

³⁹ See HAZAN, *JUSTICE IN A TIME OF WAR*, p. 58.

⁴⁰ See Paul Steubner quote in HAZAN, *JUSTICE IN A TIME OF WAR*, p. 58.

⁴¹ See 'Command Responsibility Under Fire', *Tribunal Update*, Institute for War And Peace Reporting, No. 445, March 24, 2006.

Serbian President was relatively successful in obfuscating the role of Serbian military and police in Bosnia. The OTP's decision to submit additional video evidence well into the trial, showing a Serbian Special Forces unit present at Srebrenica, appears to confirm that prior to the introduction of the footage, the Prosecution had failed to comprehensively establish that Serbian forces directly under his control were present in Bosnia.⁴² As Nancy Paterson, a former OTP lawyer who played a key part in drafting the Milosevic indictment indicated, the evidence relating to Milosevic's direct involvement in Bosnia was always more limited than Kosovo; "In Bosnia, there was no direct chain of command. Kosovo was a Milosevic project from the start."⁴³

What Price Justice?

Critically, whilst a number of 'pro-prosecution' commentators have been quick to condemn the failure to indict Milosevic or arrest him at the Dayton Peace negotiations, they have largely failed to provide any serious analysis of the impact such a move would have had on the attempts to reach a negotiated settlement of the war in Bosnia. If Milosevic should have been arrested at Dayton for his involvement in the ordering of atrocity crimes, why not the Croatian President Tudjman? who, arguably, was also liable under the doctrine of command responsibility for crimes committed during Operation Storm.⁴⁴ And if Tudjman also, what about President Izetbegovic, under the same doctrine for the alleged crimes committed against Sarajevo's Serb residents during the city's siege.⁴⁵ An indictment against any of the three Presidents would have greatly increased the chances of the entire negotiation process collapsing, which may have increased the pressure on the 'International Community' to impose a settlement militarily, something, which as will be discussed below, it was clearly unwilling to do. However, before exploring this issue, it is instructive to explore the events in West Africa

⁴² More recently the Tribunal has amended the indictments issued against Franko Simatovic and Jovica Stanisic who were recently implicated in the Srebrenica massacre. The amended indictment now only ties them to the presence of the Serbian Special force unit shown in the video footage rather than to the wider operation.

⁴³ See Nancy Paterson quote in Ed Vulliamy, Rory Carroll and Peter Beaumont 'How I Trapped the Butcher of the Balkans', *Observer*, July 1, 2001.

⁴⁴ After Tudjman's death in December 1999, the Tribunal acknowledged that they were conducting investigations into his culpability for atrocity crimes.

⁴⁵ After Izetbegovic's death in October 2003 the Tribunal acknowledged that they were conducting investigations into his culpability for atrocity crimes.

during summer 2003 in order to illustrate the potential consequences of pursuing criminal indictments during the delicate period of peace negotiations.

Liberia had been blighted by civil war and associated humanitarian catastrophe since 1989 when Charles Taylor, a former exiled ally of Liberian Dictator Samuel Doe, re-entered the country from Cote d'Ivoire and incited rebellion. Although the Doe regime was defeated by late 1990, the rebels quickly split into rival factions, plunging the country in further civil war for seven years. In 1996 there was a break in the fighting, with Taylor winning a Presidential election the following year. However, a new conflict broke out after Liberians United for Reconciliation and Democracy (LURD) a rebel group backed by neighboring Guinea emerged in the North of the Country. Taylor's powerbase was further eroded with the emergence of a second rebel group, the Movement for Democracy in Liberia (MODEL), in the South of the country in 2003.

A number of peace initiatives had been attempted over the years, with limited success, and by summer 2003, with fighting intensifying and the humanitarian situation deteriorating rapidly, there were serious concerns that the instability would again spill over into neighboring West African countries. In an attempt to resolve the crisis, a concerted diplomatic initiative was launched in an attempt to bring an end to the fighting. Under the auspices of the Economic Community of West African States (ECOWAS) a peace conference was convened in early June in Accra, Ghana. Nigeria, the dominant regional power, was instrumental in cajoling both LURD rebels and Taylor to agree to attend the talks. However, the negotiations were thrown onto crisis when, on the morning of June 4, whilst Taylor and his entourage arrived in Accra, the Special Court for Sierra Leone unsealed its indictment against the Liberian President (originally approved on March 7, 2003) for crimes against humanity, war crimes and other serious violations of international humanitarian law committed during the Sierra Leone conflict. A warrant for his arrest was served on the Ghanaian authorities and also transmitted to INTERPOL. Throughout the day senior Ghanaian officials insisted they had not received the documentation requesting Taylor's arrest.⁴⁶ The Special Court for Sierra Leone

⁴⁶ See Sierra Leone New Archives, June 4, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

(SCSL) quickly countered. A statement issued by the Court's Registrar Robin Vincent maintained "Copies of all relevant documents were served this morning personally on the Ghanaian High Commissioner in Freetown." Vincent went on to point out "In addition, copies of those documents were electronically transmitted to the Ghanaian Ministry of Foreign Affairs and acknowledgement of receipt of those documents has been received by telephone from a senior official in that ministry."⁴⁷ It was becoming clear that the Ghanaians were not about to arrest the Liberian President, and furthermore, were furious at the SCSL's indictment. Taylor left Accra and flew back to the Liberian capital. The peace negotiations had collapsed.

The SCSL's unsealing of the indictment received praise from a number of 'pro-prosecution' commentators. Human Rights Watch's Executive Director of the Africa Division described the indictment as "a tremendous step forward."⁴⁸ David Pratt, Canada's former Special Envoy to Sierra Leone argued "Under no circumstances should the Sierra Leone Special Court indictment against Liberian President Charles Taylor be lifted....If we are ever going to end the culture of impunity, we must support this Special Court and others in the future whose objective is to bring to justice those charged with war crimes and crimes against humanity,"⁴⁹

However, the architects of the peace conference were dismayed at the development. Ghana's Foreign Minister Nana Akufo-Addo lamented "Obviously it's an embarrassing incident....But as far as I'm concerned the focus should not be on our embarrassment....I believe the action of the prosecutor in unsealing the indictment at this particular moment has not been helpful to the peace process."⁵⁰ Similarly, former Nigerian leader Abdulsalami Abubakar, the Chief Mediator at ECOWAS-sponsored peace talks in Accra claimed "The announcement of this indictment came at a very, very wrong time,

⁴⁷ See Sierra Leone New Archives, June 4, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

⁴⁸ See 'West Africa: Taylor Indictment Advances Justice. Liberian President Must Be Arrested', Human Rights Watch Press Release, June 4, 2003.

⁴⁹ See Sierra Leone New Archives, June 13, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

⁵⁰ See Sierra Leone New Archives, June 4, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

throwing a spanner in the wheels and giving us a big problem.”⁵¹ The European Union’s response was also rather circumspect. After calling for the warring parties to cease hostilities and to seek a negotiated solution to the Liberian crisis, a EU statement declared “The European Union holds the view that the indictment against Charles Taylor should not impede peace efforts underway in Ghana.”⁵²

David Crane, the Chief Prosecutor of the SCSL was evidently conscious of the implications of unsealing the indictment. He acknowledged “I am aware that many members of the international community have invested a great deal of energy in the current peace talks. I want to make it clear that in reaching my decision to make the indictment public, I have not consulted with any state. I am acting as an independent prosecutor and this decision was based solely on the law.”⁵³ On June 5, the Court’s Prosecutor attempted to further justify the move “The disaster would have been if we would have allowed an indicted war criminal to sit through the (peace) process and to allow it to go forward, and then at the middle or the end let it be known that he was an indicted war criminal....It would have completely pulled the rug out from under the peace process. There was no disaster yesterday. The forces of good did in fact face down evil.”⁵⁴

However, for the people of Liberia, the breakdown in the peace negotiations represented a very real disaster. Representatives of the two main rebel groups LURD and MODEL put off signing a peace treaty, claiming Taylor’s forces had renewed military offensives. By June 6, LURD rebels had overrun several refugee camps on the outskirts of Monrovia which had housed over 100,000 people including Sierra Leonean refugees and internally displaced people. World Food Programme Spokesman Ramin Rafirasme told journalists “People are fleeing in all directions....tens of thousands....the situation remains highly

⁵¹ See Sierra Leone New Archives, June 13, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

⁵² See Sierra Leone New Archives, June 13, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

⁵³ See Sierra Leone New Archives, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

⁵⁴ See Sierra Leone New Archives, June 5, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

volatile.”⁵⁵ Heavy fighting broke out between Taylor’s soldiers and rebel forces in the capital’s suburbs. Thousands of the Sierra Leoneans who had lived at one of the Refugee camps began to arrive in Monrovia recounting stories of human rights abuse. UNHCR relayed “worrying reports of widespread incidents of violence, intimidation and extortion during and after the fighting.”⁵⁶

Amnesty International subsequently reported that the fighting which occurred after the collapse of the peace negotiations “exacted a heavy toll on civilians in Monrovia; the UN estimated that more than 1,000 people were killed and some 450,000 made homeless. Acute shortages of food, clean water, sanitation facilities and medical care resulted in an unprecedented humanitarian crisis, and collapse of law and order left Monrovia’s inhabitants, including Sierra Leonean refugees and hundreds of thousands of internally displaced people, increasingly vulnerable to human rights abuses.”⁵⁷

With civilian casualties mounting, the U.N. Secretary- General, the U.N. High Commissioner for Refugees, and international humanitarian agencies called for urgent international military intervention, and in early August the U.N. Security Council authorized deployment of an ECOWAS force. On August 11, Taylor left Liberia and went into exile in Nigeria. The Nigerian government reportedly gave implicit guarantees that the former President would not be handed over to the SCSL nor prosecuted in his newfound country of residence. On August 18, a peace agreement was signed in Accra between the Liberian Government, LURD, MODEL, and political parties, and with the deployment of international forces, the situation was stabilized.

Crane has reportedly admitted that the SCSL thought Taylor would not be arrested in Ghana, but that the unsealing of the indictment would be a catalyst for de-legitimizing the Liberian dictator, resulting in his removal from office. Crane also contended, in somewhat dramatic terms, that “the power of a pen, signing an indictment, humbled a

⁵⁵ See Sierra Leone New Archives, June 6, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

⁵⁶ See Sierra Leone New Archives, June 13, 2003, available at <http://www.sierra-leone.org/slnews0603.html>

⁵⁷ See Amnesty International Annual Report, 2004, Liberia Summary, available at <http://web.amnesty.org/report2004/lbr-summary-eng>

dictator.”⁵⁸ The SCSL Prosecutor’s pronouncements regarding the impact of the indictment are spurious. Rather, it may be contended that the military realities on the ground (LURD and MODEL’s rapid advance on the capital) was the key dynamic which sealed Taylor’s fate and political exile. With the government forces coming under increasing pressure and close to being routed from Monrovia, it appears that Taylor’s demise was likely, regardless of the existence of any criminal indictment against him.

Over the following two and a half years a steady stream of pressure was placed on the Nigerian government to hand over the former Liberian President. In April 2006, Nigeria declared it would have no objection to the Liberian authorities arresting Taylor and repatriating him to Liberia. However, it maintained its refusal to send him to the SCSL. In the ensuing confusion, Taylor left his palatial residence and attempted to flee the country, but was arrested at the Nigeria-Cameroon border and flown to Monrovia, where he was promptly arrested by U.N. authorities and transferred to the SCSL’s detention facility in Freetown.

Was the SCSL’s decision to unseal the indictment at the time of the peace negotiations justifiable? Anthony Lake, President Clinton’s National Security Advisor’s observations regarding the tensions between peace and justice may be viewed as particularly perceptive, highlighting there is “always a balance between achieving justice...and sacrificing future lives on the altar of justice...I think that to arrive at an absolutist answer on either side of that argument is wrong.”⁵⁹ It is impossible to determine whether the fighting would not have broken out if the peace negotiations had continued. Nevertheless, Crane’s claim that allowing Taylor to participate in the Peace Conference would have been a disaster and completely undermined the process is questionable. After the peace negotiations broke down, Liberia was again consumed in a humanitarian catastrophe, resulting in large-scale civilian deaths and massive population shifts. Ultimately, Taylor has ended up facing trial before the SCSL, illustrating that concerted

⁵⁸ See Comments made by David Crane during presentation at American Bar Association International Law Conference: Nuremberg and the Birth of International Law: A Day to Commemorate the 60th Anniversary of the Trials at Nuremberg, Georgetown University, Washington D.C. USA, November 11, 2005.

⁵⁹ See Anthony Lake quote in BASS, *STAY THE HAND OF VENGEANCE*, p. 232.

international pressure can be decisive in achieving justice *after* peace has been established. Thus, it may have been a more prudent option to have allowed the negotiations to continue, establish a ceasefire, deploy international troops to Liberia, countenance Taylor's exile to Nigeria, and only then unseal the indictment against him.

'Pro-prosecution' Alternatives to Negotiating With Milosevic: Rolling Back Ethnic Cleansing or Unconditional Surrender

A number of 'pro-prosecution' commentators who are critical of the failure to indict Milosevic at Dayton have also suggested more robust actions should have been pursued. For example, Williams and Scharf assert "to secure a just peace, it would have been necessary to reverse much of the gains of ethnic cleansing."⁶⁰ Hazan argues "the only remaining roads to justice [is] unconditional surrender" [of the Bosnian Serb Army]⁶¹ These contentions appear to be more informed by an admirable repugnance for the evils of ethnic cleansing, rather than any serious consideration of strategic, military, logistical or humanitarian realities.

Williams and Scharf highlight "It was believed if the [combined Croatian/Bosnian Croat/Bosnian Government] offensive continued[it] may well have been able to defeat the Serbian forces and thereby *reunify* Bosnia."⁶² This assertion is open to serious dispute. Whilst the combined offensives initially made significant territorial gains, when Mladic returned to Bosnia after a brief period in hospital in Serbia (ostensibly to treat a gallstone condition, but also interpreted as a means to enable him to meet with Milosevic to receive advice) the BSA began to stabilize their front lines (ironically, in part due to their redeployment of artillery withdrawn from Sarajevo in accordance with their unilateral agreement to the U.N. and NATO to remove heavy weapons around the capital, to Western Bosnia). Croatian units came up against sustained BSA resistance whilst trying to cross the Una River on the Croatian-Bosnian border,⁶³ and Bosnian Government offensives were becoming bogged down. The fragile alliance between the

⁶⁰ See WILLIAMS AND SCHARF, *PEACE WITH JUSTICE?* p. 161.

⁶¹ See HAZAN, *JUSTICE IN A TIME OF WAR*, p. 72.

⁶² See WILLIAMS AND SCHARF, *PEACE WITH JUSTICE?* p. 156. (emphasis added)

⁶³ See RIPLEY, *OPERATION DELIBERATE FORCE*, p. 307

Croatian/Bosnian Croats and Bosnian Government forces was also becoming increasingly strained. Friction between ABiH 7th Corps and the HVO around Sanski Most led to the Bosnian Croat leadership threatening to break off cooperation, and fighting broke out between Croats and Bosnian government forces around Bosnaki Petrovac.

Furthermore, it is highly questionable whether Croatian military aims were consistent with the premise of creating a “reunified Bosnia”, or whether instead, Tudjman envisaged that territory would be carved out in Bosnia which, in time would have been annexed into Croatia.⁶⁴ Chuter highlights that material which emerged during the *Blaskic* case at the Tribunal illustrates that as far back as late 1991, senior Bosnian Croat officials were zealously committed to the goal of a greater Croatia state comprising Croatia proper and parts of Herzegovina. At a meeting on December 12, 1991 in Travnik, Mate Boban, (then) President of the regional crisis staff for Herzegovina, and Dario Kordic, then President of the HVO in Travnik, co-chaired a meeting which concluded “the Croatian people of this region, and all of Bosnia still support the unanimously accepted orientation and conclusions adopted in agreements with President Franjo Tudjman on 13 and 20 June 1991 in Zagreb.”⁶⁵ These principles stipulated “the Croatian people in Bosnia and Herzegovina must finally embrace a determined and active policy *which will realize our eternal dream – a common Croatian state.*”⁶⁶

Indeed, when Tudjman held a secret meeting with Milosevic in Karedjordjevo in 1991, the two leaders discussed the partition of Bosnia.⁶⁷ Whilst attending a World War Two “Victory in Europe” dinner in London on May 6, 1995, Tudjman had confided to the (then) Liberal Democrat Party Leader Paddy Ashdown that he would like to divide Bosnia between the Croats and the Serbs, even drawing a cursory map outlining the division of Bosnia on a menu.⁶⁸ As Ripley points out, many senior U.N. officers and

⁶⁴ See Roger Cohen, ‘Croatia Expands Its Power In Bosnia’, *New York Times*, September 16, 1995.

⁶⁵ See CHUTER, WAR CRIMES p. 229.

⁶⁶ See CHUTER, WAR CRIMES p. 229 (emphasis added).

⁶⁷ See LAURA SILBER AND ALAN LITTLE, *THE DEATH OF YUGOSLAVIA* (Penguin) 1996 p. 131-132.

⁶⁸ See Thomas Friedman ‘Whose Balkan Menu’, *New York Times*, September 27, 1996.

western diplomats viewed the Croatian offensive as a “land grab.”⁶⁹ Even David Galbraith, U.S. ambassador to Croatia, who has been widely characterized as supportive of the Croatian offensives, predicted that had the advances continued, “Tudjman would never give up Banja Luka to the Serbs or the Federation.”⁷⁰ The Croatian President’s remarks during a meeting in Zagreb with Izetbegovic and Holbrooke on September 1995 may be construed as giving credence to such concerns; “We have suffered the casualties, and we liberated eighty percent of this territory... Now you demand we turn over to you the towns that belong to Croatia... This is simply unacceptable.”⁷¹ Similarly, the Judgment in *Prosecutor v. Dario Kordic and Mario Cerkez* of February 26, 2001⁷² was unequivocal, noting “The Trial Chamber finds that President Tudjman harboured territorial ambitions in respect of Bosnia and Herzegovina, and that was part of his dream of a Greater Croatia, including Western Herzegovina and Central Bosnia.”⁷³

Leaving Croatia’s evident expansionist intentions aside, there were also real concerns that an attack on Banja Luka “would bring about a near-catastrophic defeat for the Bosnian Serbs, thus drawing Belgrade into the war...the impression was that the Serbian military might feel compelled to intervene to stave off a complete BSA collapse.”⁷⁴ Even if the continued offensives would not have sparked off a wider regional conflict, they would have resulted in a humanitarian catastrophe. Holbrooke predicted that capturing Banja Luka would generate over two hundred thousand additional refugees,⁷⁵ Galbraith, four hundred thousand.⁷⁶ The earlier Croatian ‘Storm’ offensive to retake the Krajina led to the displacement of approximately one hundred and eighty thousand Croatian Serbs and was characterized by massive human rights violations and widespread killing of those who remained.⁷⁷ As Sell notes “Few of the refugees had actually witnessed the arrival of Croatian troops in Krajina. Most had fled before the invaders showed up, well aware of

⁶⁹ See RIPLEY, OPERATION DELIBERATE FORCE, p. 276.

⁷⁰ See RIPLEY, OPERATION DELIBERATE FORCE, p. 302.

⁷¹ See Tudjman quotes in HOLBROOKE, TO END A WAR p. 165.

⁷² IT – 95 – 14/2 – T

⁷³ IT – 95 – 14/2 – T, para. 142.

⁷⁴ See ‘The Road to Dayton’ U.S. Department of State, Ch. 5, p. 115

⁷⁵ See HOLBROOKE, TO END A WAR, p. 160.

⁷⁶ See RIPLEY, OPERATION DELIBERATE FORCE, p. 302.

⁷⁷ For further details of Croatian atrocities see RIPLEY, OPERATION DELIBERATE FORCE p. 191 – 192.

the fate that awaited them if they remained. None of these refugees mentioned it, but all of them understood that it was payback time, that the victorious Croats would extract revenge for what Serbs had done to the Croatian inhabitants of Krajina in 1991.”⁷⁸

More than 40,000 Serbs were displaced as a result of Operation Mistral 2. Given the atrocities committed against non-Serbs, particularly in Prijedor and Banja Luka, it is likely that had the Croatian/Bosnian Croat and Bosnian Government offensive been allowed to continue, massive Bosnian Serb population displacement into FRY would have also occurred from the areas overrun. This may well have forced the FRY forces to become further dragged into the fighting in Bosnia leading to an escalation of the conflict.⁷⁹ Whilst Williams and Scharf’s prescription of “rolling back ethnic cleansing” may have satisfied the desire for revenge of the Bosnian Muslims and Bosnian Croats whose citizens had been so badly treated by BS forces, it is questionable whether it would have been consistent with the “full application of the norm of justice.” Instead, such an approach may be viewed more as an application of the principle of *lex talions*, merely substituting one exercise of ethnic cleansing with another. The recent release of video footage of Croat paramilitary forces and Bosnian government soldiers harassing and attacking convoys of Serb refugees, which also includes a Bosnian government commander General Ante Dudakovic allegedly ordering his troops to burn a village, further serves to support this view.⁸⁰

Hazan’s consideration of the ‘International Community’ pursuing a policy of “unconditional surrender” (presumably against the Serbs) is even more spurious, as aptly illustrated by one particular encounter between the Bosnian President and U.S. negotiators at the Dayton talks. Izetbegovic declared that he could not be a party to an agreement signed by the Bosnian Serbs, and instead, like the Nazis, the Bosnian Serbs should have the agreement imposed upon them. Defense Secretary Perry bluntly informed the Bosnian President, that unlike the Allies victory over the Axis forces during

⁷⁸ See SELL, SLOBODAN MILOSEVIC, p. 242.

⁷⁹ Some Serbian forces, including Arkan’s Tigers and JSA Red Beret units were already operating around Sanski Most and in the Banja Luka region of Bosnia.

⁸⁰ See ‘Serbs see new ‘war crimes’ tape’, *BBC News*, August 9, 2006; ‘Bosnian President Defends a Muslim General’, *Associated Press*, August 10, 2006.

the Second World War, the Bosnian government had failed to militarily defeat the BSA.⁸¹ In light of this reality, the potential means to achieve an unconditional surrender could only have come from NATO military action. However, as the following section demonstrates, embarking on such a policy was never really possible, with the overriding consensus within NATO *against* the large-scale escalation which would have been necessary to achieve this strategy.

A popular misconception appears to exist that Operation Deliberate Force resulted in NATO “massively bombing the Serb leadership.”⁸² In reality, targets which would have led to high human casualties were assiduously avoided. As the (then) Commander of AIRSOUTH U.S. Air Force, Lieutenant General Mike Ryan recounted, the planning for Operation Deliberate Force was “very systematic...and avoided barracks.”⁸³ Similarly Lieutenant General Janvier, the French commander of UNPROFOR wanted the military action to “avoid gratuitously causing casualties so he did not want NATO to bomb military barracks or close to the Yugoslav border to prevent incidents.”⁸⁴ NATO’s political body, the North Atlantic Council (NAC) was even more circumspect. As Ripley notes, NAC was completely divided over the scope and duration of the organization’s offensive operations. Four days into Operation Deliberate Force, major diplomatic disagreements emerged, with some NATO ambassadors worrying the “short sharp shock” they had sanctioned would develop into a slogging match.⁸⁵ When 13 Tomahawk Land Attack Missiles (TLAMs)⁸⁶ were launched against Bosnian Serb targets on September 10, 1995, NAC ambassadors again voiced their concerns, with France, Spain, Canada and Greece warning the U.S. against pursuing a strategy of creeping escalation.⁸⁷ Similarly, the UNPROFOR Commander was also clearly opposed to ratcheting up the fighting. Although Bosnian Serb lines of communication and bridges were targeted, some were

⁸¹ See handwritten notes (no author) from Secretary Christopher’s briefing at the Hope Hotel, November 17, 1995, EUR files, in ‘The Road to Dayton’ U.S. Department of State, Ch. 9. p. 234, fn. 16.

⁸² See BASS, *STAY THE HAND OF VENGEANCE*, p. 234.

⁸³ See RIPLEY, *OPERATION DELIBERATE FORCE*, p. 236.

⁸⁴ See RIPLEY, *OPERATION DELIBERATE FORCE*, p. 238.

⁸⁵ See RIPLEY, *OPERATION DELIBERATE FORCE*, p. 263.

⁸⁶ The decision to use of TALMs was a US, not NATO decision. The Italians had initially refused to agree basing rights for US F-117 stealth fighters in response to them being refused a seat in the Contact Group. Rather than accede to the Italian’s demands the decision was made to use cruise missiles.

⁸⁷ See ‘The Road to Dayton’ U.S. Department of State, Ch. 5. p. 102.

left open for Bosnian Serb forces to withdraw along: “Janvier...did not want a close-quarter battle with the BSA.”⁸⁸

Furthermore, whilst aerial bombardment and cruise missile strikes of Serb communications systems had a dramatic impact on their ability to manage the battlefield, many strikes were merely targeting sites which had already been hit. When informal soundings were made about the option of extending air-strikes to Option 3 targets (large industrial targets, power stations, dams and other sites which would impact upon the Bosnian Serb civilian population), Field Marshal Sir Dick Vincent, (then) Chairman of the NATO Military Committee considered it a “non-starter.”⁸⁹ General George Joulwan, (then) Supreme Allied Commander Europe (SACEUR) recalled “NAC was “very nervous”, with some ambassadors wanting to stop the bombing.”⁹⁰ The British government reportedly did not view the existing U.N. Security Council resolutions as providing the requisite legal backing for Option 3 targets, and it was feared that any new Resolution would be vetoed by the Russians.⁹¹ More ominously, Russia viewed the air-strikes as supporting the Croat and Bosnian Government offensives, with the Russian Defense Minister warning U.S. Defense Secretary Perry “if the fighting continues...we will have to help the Serbs in a unilateral way.”⁹² In light of the protracted opposition within NAC and the U.N. to extending the bombing campaign, *and* Russia’s warning against further escalation, it appears that pursuing a policy of unconditional surrender against the Bosnian Serbs was never a viable option.

The Negotiations

Although the scope and mandate of any possible international troop deployment had been largely pre-determined by the U.S. in the preceding two months before the commencement of the negotiations, with the U.S. negotiation team having drafted an initial Accord, most of the key issues were still to be formally agreed on by the ‘warring parties’. Their delegations and the international mediators led by the U.S. would spend

⁸⁸ See RIPLEY, OPERATION DELIBERATE FORCE, p. 265.

⁸⁹ See RIPLEY, OPERATION DELIBERATE FORCE, p. 293

⁹⁰ See RIPLEY, OPERATION DELIBERATE FORCE, p. 293.

⁹¹ See RIPLEY, OPERATION DELIBERATE FORCE, p. 293.

⁹² See ‘The Road to Dayton’ U.S. Department of State, Ch. 5. p. 104.

three weeks arguing, blustering, prevaricating and eventually agreeing to a myriad of provisions which would be enshrined in the Dayton Accord. These included: Bosnia's constitutional framework; elections; the right of refugees to return home. and critically; determining the internal boundaries of the country. The Conference's opening event included the first face-to-face meeting between Presidents' Izetbegovic, Milosevic and Tudjman in over two years. U.S. Secretary of State Warren Christopher laid out four conditions for a settlement: Bosnia remaining a state with "a single international personality"; "the special history and significance" of Sarajevo had to be taken into account (Clinton had already informed Holbrooke that he did not want the city to be divided; only unified or internationalized); the resolution of eastern Slavonia; and finally that human rights must be respected and those responsible for atrocities be brought to account.⁹³ Despite the reservations expressed by many involved in the negotiation process that the issue of war crimes represented a potentially destabilizing dynamic, Christopher, at the very minimum, had publicly placed the issue on the agenda. Furthermore, in a speech delivered two weeks prior to the start of Dayton, Clinton recognized the need for balancing peace and justice, noting "We have an obligation to carry forward the lessons of Nuremberg." He continued "there must be peace for justice to prevail, but there must be justice when peace prevails."⁹⁴ In the early stages of the talks U.S. policy towards the war crimes issue appeared confused and contradictory. Despite the administration's "Minimalist" policy towards PIFWCs being essentially settled at the Principal's Meetings, elements of the media reported a more robust approach may have been emerging after Christopher declared "We cannot really expect that the forces of NATO would be there at the same time those individuals [PIFWCs] were in a position of power."⁹⁵ However, the "Minimalist" line was quickly re-asserted by a senior U.S. official involved in Bosnia policy, who clarified that "The charitable thing to say is that the secretary [of State] didn't quite get it right,"⁹⁶

⁹³ See HOLBROOKE, *TO END A WAR*, p. 237.

⁹⁴ See President Clinton Speech delivered at University of Connecticut in Storrs, October 15, 1995.

⁹⁵ See Erik Ipsen, 'Optimism on Bosnia: U.S. Position is Faulted', *International Herald Tribune*, November 6, 1995.

⁹⁶ See Erik Ipsen, 'Optimism on Bosnia: U.S. Position is Faulted', *International Herald Tribune*, November 6, 1995.

Representatives from the Tribunal failed to secure any formal role at Dayton and attempted to make up for their absence by keeping the issue of war crimes firmly within the media spotlight. Similar to Bassiouni's strategy whilst working in the Commission, the press was used as, if not "an equalizer", then a forum to maintain pressure. Goldstone wrote to Madeline Albright requesting that the US make the surrender of PIFWCs a condition for any peace deal. The request was subsequently leaked to the *New York Times*.⁹⁷ The OTP also issued a series of indictments throughout the negotiations. Investigations into the Ovchara massacre, which had been initially started by the Commission, would lead to the indictment on November 7, 1995, of three senior JNA officers, Mile Mrksic, Miroslav Radic and Veselin Sljivancanin.⁹⁸ Three days later the Tribunal issued a series of indictments against six members of the Bosnian Croat military (HVO) for crimes against humanity and grave breaches and violations of the laws of war arising out of their command responsibility relating to crimes committed in Lasva valley and the massacre at Ahmici in Hercegovina.⁹⁹ Finally, on November 16, 1995, new indictments were published against Karadzic and Mladic charging the two senior Bosnian Serbs with genocide, crimes against humanity and war crimes relating to the Srebrenica massacre.¹⁰⁰ Shattuck and Scheffer also invited Goldstone to Washington for a four day visit, in an attempt to build support for the Tribunal during the Dayton negotiations and try to overcome the difficulties the court was facing in obtaining intelligence information from the various U.S. agencies. After meetings with Warren Christopher, Tony Lake and CIA head John Deutch, the three U.S. officials agreed to have a secure phone installed in The Hague allowing Goldstone to contact them directly for information and evidence requests, in an attempt to circumvent the considerable bureaucratic process. The, 'pro-prosecution' advocates within the U.S. administration also continued to lobby for the Tribunal. However, as Shattuck recounts, for many attending the negotiations, accountability for war crimes remained a taboo issue. "As I went through the first round of Dayton meetings I felt like a skunk whose unpleasant message nearly everyone wanted to avoid....the European leaders and some Americans were not pleased to find

⁹⁷ See Stephen Engelberg, 'Panel Seeks U.S. Pledge on Bosnia War Criminals', *New York Times*, November 3, 1995.

⁹⁸ IT – 95 – 13 – R61: (Vukovar) November 7, 1995

⁹⁹ IT – 95 – 14 – I: (Lasva river valley) November 10, 1995.

¹⁰⁰ IT – 95 – 18 – R61: (Srebrenica) November 16, 1995.

themselves discussing war crimes and missing persons on an American military base with an American human rights official."¹⁰¹ During an earlier meeting with Goldstone, the Chief Prosecutor informed Shattuck that "Thorvald Stoltenberg of Norway [the U.N. representative in the ongoing negotiations with Milosevic] was saying that the tribunal's investigations should be negotiable. Stoltenberg had apparently raised the tribunal issue with Milosevic, suggesting that he could "expect understanding from the Tribunal" if he cooperated with the peace negotiations."¹⁰² Similarly, Russia attempted to persuade the Tribunal to assume a more flexible approach, with Foreign Minister Andrei Kozyrev sounding out, via a Russian Ambassador, whether the arrest warrants issued against Karadzic and Mladic could technically be frozen. Both Cassese and Goldstone emphatically ruled out such a move.¹⁰³

On November 7, 1995, the Tribunal's President gave a speech to the U.N. General Assembly lamenting the lack of cooperation the Tribunal had so far received on the issue of arrests, and highlighting that forty one of the forty three current indictees were reportedly residing in Bosnian Serb territory or in FRY. "Our tribunal is like a giant without arms or legs...To walk and work, he needs artificial limbs. These artificial limbs are the state authorities."¹⁰⁴ Cassese also suggested to the U.S. that he would draft a number of clauses in the peace treaty referencing the role of the Tribunal and establishing a unit of NATO soldiers, to be placed under the direction of the Chief Prosecutor, with the power to arrest, seize documents and participate in investigations."¹⁰⁵ The Americans were reportedly unimpressed, informing the judge the proposal was "out of the question. Our military are military, not policemen at the service of an international prosecutor."¹⁰⁶ It should be noted that the U.S. was not the only potential troop contributing delegation at Dayton opposed to IFOR actively pursuing PIFWCs. Russia was vigorously opposed and

¹⁰¹ See SHATTUCK, FREEDOM ON FIRE, p. 201

¹⁰² See SHATTUCK, FREEDOM ON FIRE, p. 150.

¹⁰³ See BASS, STAY THE HAND OF VENGEANCE, p. 249

¹⁰⁴ See Antonio Cassese quote *in* BASS, STAY THE HAND OF VENGEANCE, p. 243.

¹⁰⁵ See HAZAN, JUSTICE IN A TIME OF WAR, p. 68.

¹⁰⁶ See HAZAN, JUSTICE IN A TIME OF WAR, p. 68.

a senior State Department official noted that Greece also issued strong objections during the negotiations.¹⁰⁷

With NATO refusing to countenance any more than nebulous provisions vis-à-vis their responsibilities to arrest PIFWCs, Holbrooke asserted that it was essential to have a strong international, armed, police force endowed with a robust mandate to carry out arrests. However, the proposal came up against intense opposition from both E.U. members and NATO. The British representative Pauline Neville-Jones reportedly argued the “legacy of Northern Ireland precluded her government from allowing police officers to make arrests on foreign soil.”¹⁰⁸ As Holbrooke recounts “The connection between Northern Ireland and Bosnia was not clear to us.”¹⁰⁹ Neville-Jones’s analogy may be viewed as both misleading and inappropriate for a number of reasons. Firstly, in Northern Ireland, a local Police force, the Royal Ulster Constabulary (RUC) was operating on the ground and was quite able to carry out arrests, whereas in Bosnia, as will be further elaborated in the following chapter, local police officers were either unwilling or unable to arrest PIFWCs. Secondly, British military forces were also heavily involved in law and order issues in the province, which included occasional arrest operations. Finally, as for Neville-Jones’s pronouncement that the British government was against carrying out arrest missions “on foreign soil”, British special forces had been quite willing to carry out such missions within the Republic of Ireland.¹¹⁰ NATO was also reportedly opposed to a robust international police force, based on the rationale “if they [the police] got into trouble the military would have to come to their aid.”¹¹¹ The minimalist position prevailed, and the International Police Task Force (IPTF) was merely assigned responsibility for an assistance program restricted to: (a) monitoring, observing, and inspecting law enforcement activities and facilities; (b) advising law enforcement

¹⁰⁷ Interview with former senior State Department official. With its Orthodox connections, Greece had been a strong supporter of Serbia throughout the wars in Croatia and Bosnia. Greek Cypriot banks held secret offshore accounts for the Milosevic regime, and Greek mercenaries were also reportedly present during the fall of Srebrenica, *see generally*, MICHALIS PAPAKONSTANTINOU UNHOLY ALLIANCE: GREECE AND SERBIA IN THE NINETIES (EASTERN EUROPEAN STUDIES) (Texas A & M Uni. Press) 2002.

¹⁰⁸ *See* HOLBROOKE, TO END A WAR, p. 251.

¹⁰⁹ *See* HOLBROOKE, TO END A WAR, p. 251.

¹¹⁰ *See* URBAN, THE SECRET STRUGGLE AGAINST THE IRA, p. 9.

¹¹¹ *See* HOLBROOKE, TO END A WAR, p. 251

personnel and forces; and (c) training law enforcement personnel.¹¹² With NATO forces clearly reluctant to go after PIFWCs, and IPTF both unarmed and restricted by their mandate from doing so, General Clark prophetically observed “We are leaving a huge gap in the Bosnia food chain.”¹¹³

Shattuck returned to the Dayton negotiations intent on keeping up the pressure. However, his efforts to ensure more robust language relating to the scope of the international military force’s duty’s regarding PIFWCs would ultimately be unsuccessful. As a former senior State Department official recounted “The Pentagon had different priorities to Shattuck at Dayton. Their focus was on force protection, not to achieve war crimes accountability.”¹¹⁴ Christopher invited Shattuck for a walk around the grounds of the air base, and whilst commending him for “spotlighting” the human rights abuses which had been committed in the region, urged Shattuck “to be realistic....and to understand the limits of what we could expect to accomplish at Dayton on the issue of war crimes.”¹¹⁵

The Bosnian government delegation proposed that the Accord include a number of specific provisions, including; an explicit obligation that each party “arrest, detain, and transfer to the custody of the [ICTY] any and all indicted war criminals who reside in or transit through or are otherwise present on their territory”; a clause providing that sanctions be applied to parties not complying with the obligation to cooperate with the Tribunal; the maintenance of sanctions on Serbia until it surrendered PIFWCs in its territory; the establishment of a vetting mechanism to remove “individuals reasonably suspected of responsibility for war crimes” from military and police structures, and; a general provision barring any individual suspected of committed war crimes from holding elected office or other public positions.¹¹⁶ The Bosnian government delegation was also unhappy with the draft Annex on IFOR, viewing it as too weak on the issue of

¹¹² See Dayton Peace Agreement, Annex 11.

¹¹³ See HOLBROOKE, *TO END A WAR*, p. 252.

¹¹⁴ Interview with former Senior State Department official.

¹¹⁵ See SHATTUCK, *FREEDOM ON FIRE*, p. 211.

¹¹⁶ See WILLIAMS AND SCHARF, *PEACE WITH JUSTICE?* pp. 163-165.

war crimes. A U.S. negotiator noted the “storm clouds [begin to] thicken over IFOR.”¹¹⁷ Richard Perle, acting as an advisor to the Bosnian government delegation, attempted to “raise IFOR’s obligations....[he was concerned that] in its current form, IFOR would be authorized to do almost anything, but obligated to do very little.”¹¹⁸ Nevertheless, despite Perle’s endeavours, the IFOR Annex was not amended in any significant way. As to the other proposals, Holbrooke informed Sacirbey that most of them were “impossible.”¹¹⁹ Forcing the issue of war crimes was clearly viewed as a deal-breaker. The Bosnian delegation was reportedly placated by the suggestion that Goldstone had sent a letter agreeing that a general reference to an obligation to prosecute PIFWCs would be acceptable to the Tribunal. This subsequently turned out to be untrue, with Tribunal officials vigorously denying they had agreed to anything.¹²⁰ Ultimately, the only Bosnian government proposal which made it into the Accord related to barring PIFWCs from elected office.

After two weeks of protracted, tense negotiations, Presidents Izetbegovic, Milosevic and Tudjman signed the Dayton Accord on November 21, 1995.¹²¹ Ultimately, the issue of accountability for atrocity crimes within the Peace Accord would be only ascribed a minor role. As General Nash, Commander of ‘Taskforce Eagle’, the U.S. force to be deployed into Bosnia as part of IFOR remarked, provisions relating to war crimes were “glancing.”¹²² The Accord merely required the parties to “co-operate” with the tribunal. Former Swedish Premier, Carl Bildt, who had played a supporting role in the negotiating process, and was subsequently appointed as Bosnia’s first High Representative, recounted in his memoirs “The Serbs did not want any mention of The Hague Tribunal in the framework agreement – a battle which they eventually won in a direct session with Christopher. The Tribunal disappeared from the text, to be replaced by a general reference to international undertakings.”¹²³

¹¹⁷ See ‘The Road to Dayton’ U.S. Department of State, Ch. 8. p.210.

¹¹⁸ See ‘The Road to Dayton’ U.S. Department of State, Ch. 8. p. 210.

¹¹⁹ See BASS, STAY THE HAND OF VENGEANCE, p. 241.

¹²⁰ See WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 164.

¹²¹ The Accord was formally signed by the three Presidents in Paris on December 14, 1995.

¹²² See BASS, STAY THE HAND OF VENGEANCE, p. 245.

¹²³ See CARL BILDT, PEACE JOURNEY. THE STRUGGLE FOR PEACE IN BOSNIA (Weidenfeld and Nicolson) 1998, p. 149 [hereinafter BILDT, PEACE JOURNEY]

Conclusions

The Dayton negotiating process illustrates the acute difficulties in achieving explicit robust principles relating to accountability for war crimes, where the ‘International Community’ is unwilling to enforce compliance. Once the ‘International Community’ decided on a strategy of negotiation with all the ‘warring factions’, Milosevic’s participation was deemed crucial. Given that the U.S. and many other members of NATO were completely opposed to assuming a more pro-active role on PIFWC apprehensions, and the ‘International Community’ was unwilling to enforce peace militarily, it is difficult to see how more robust provisions vis-à-vis war crimes accountability could have been achieved. As Pauline Neville-Jones readily acknowledged “A negotiated peace was the essential objective....The question of justice was absolutely not a priority.”¹²⁴ In light of the prevailing dynamics, it is inconceivable that either Milosevic or Tadjman would have agreed to more explicit conditions to hand over PIFWCs. Thus, vague provisions relating to war crimes may have been the best that could be achieved under the circumstances. Perhaps the greatest flaw in the deal related to the failure to incorporate a more explicit sanctions mechanism to be imposed for non-compliance. For a number of ‘pro-prosecution’ commentators, Dayton was a missed opportunity, with Hazan characterizing the Accord as “A semblance of peace [which] wins out over justice.”¹²⁵ It is worth noting, that in some respects, the Tribunal’s actions were not totally contrary to the overall diplomatic strategy. The indictment of Karadzic and Mladic provided a convenient pretext for their exclusion from Dayton, with Holbrooke rather flamboyantly informing Milosevic that PIFWCs would be viewed as *persona non grata* in the U.S., and that he would personally assist in arresting them, should they attempt to attend the negotiations.¹²⁶ However, had the U.S. administration not decided to pursue “the Milosevic strategy”¹²⁷ it is conceivable that Karadzic may

¹²⁴ See HAZAN, JUSTICE IN A TIME OF WAR, p. 70.

¹²⁵ See HAZAN, JUSTICE IN A TIME OF WAR, p. 69.

¹²⁶ See HOLBROOKE, TO END A WAR, p. 107.

¹²⁷ Holbrooke determined that Milosevic was the key actor who could deliver cooperation from the recalcitrant Bosnian Serbs and had decided well before the commencement of Operation Deliberate Force that he would only negotiate with Milosevic. The signing of the ‘Patriarch Paper’ gave the Serbian leader the authority to represent Bosnian Serb interests at any subsequent political negotiations, see HOLBROOKE, TO END A WAR, p. 105. Holbrooke would remind critics of the approach that, “you can’t make peace without Milosevic”

have been accorded some role in the negotiations, albeit indirectly. As one senior U.S. official indicated, he had “no problem”¹²⁸ with Holbrooke meeting Karadzic and Mladic.

For all its flaws, the Dayton negotiation process and subsequent Peace Accord had managed to halt the war in Bosnia, which had claimed an estimated 250,000 lives between 1992-1995. Whilst justice may have been deferred at Dayton, the agreement did at least provide the scope for its realization post-settlement. However, the implications of the amorphous wording of the Accord’s military Annex were becoming all too clear. As David Scheffer, former Ambassador at large for war crimes issues acknowledged, “There’s some very subtle language in there if you want to interpret it aggressively. However, you can also interpret it very conservatively.”¹²⁹ Ultimately, Perle’s observations concerning the IFOR Annex, would turn out to be keenly prescient, and confirmed by the U.S. Joint Chiefs of Staff legal counsel who emphatically stated “we [NATO] are not going in to perform law and order functions – we are not going to do this.”¹³⁰ As chapter four demonstrates, whilst vague provisions relating to justice may be the only attainable option during delicate peace negotiations where the ‘International Community’ is unwilling to force compliance, the enforcement of such provisions remains at the mercy of the signatories. Holbrooke’s lament succinctly summarizes the dilemma; “Had I known how reluctant IFOR would be to use its “authority,” I would have fought harder for a stronger mission statement, although I would have probably lost.”¹³¹

¹²⁸ See BASS, *STAY THE HAND OF VENGEANCE*, p. 232.

¹²⁹ Interview with Ambassador David Scheffer, London, July 2004.

¹³⁰ See Colonel John T. Burton “‘War Crimes.’ Operations Other Than War: Military Doctrine and Law 50 Years After Nuremberg and Beyond”, *Military Law Review*, Vol. 149, Summer 1995, p. 202.

¹³¹ See HOLBROOKE, *TO END A WAR*, p. 223.

Chapter Four: What Price Order? An assessment of NATO's justifications for failing to arrest persons indicted for war crimes (PIFWCS) and the consequences of this policy.

Chapter four focuses on the challenges the Tribunal faced in obtaining custody of Bosnian indictees in the initial period post-Dayton due to the unwillingness of both the domestic authorities¹ and NATO forces (Implementation Force or IFOR, and its successor, Stabilization Force or SFOR) to facilitate arrests. The chapter commences with an examination of the U.S. administration's approach towards the Bosnia mission and the impact of congressional and public opinion. The consequences of Dayton's nebulously worded military Annex, which failed to impose an explicit duty on IFOR to apprehend PIFWCs, and the associated NATO rules of engagement, became abundantly clear when despite the deployment of some 60,000 troops, IFOR adamantly refused to carry out arrests. In order to justify this position, a series of arguments were advanced, each of which will be assessed and their validity challenged and contested.

The chapter discusses the scope of I/S/FOR's duty vis-à-vis arresting war criminals, highlighting that NATO's initial attempts to justify a 'minimalist approach' were effectively facilitated by the absence in the Dayton Accord of a clear duty to actively pursue PIFWCs. In response to calls for international forces to detain PIFWCs, IFOR's Commanding Officer initially denied that the force had the requisite *authority* to carry out such missions. This statement will be shown to be clearly false, and the scope of I/SFOR's *authority* to conduct arrests will be traced. Furthermore, the chapter also explores the debate surrounding whether, beyond a mere *authority*, I/SFOR was actually under a legal *obligation* to actively seek out and detain PIFWCs.

With media and NGO criticism intensifying, I/S/FOR, the North Atlantic Council (NAC) and the various key NATO troop contributing States also attempted to deflect pressure to conduct arrest operations by arguing that the onus was on the domestic parties. Although technically correct, the chapter will demonstrate that domestic cooperation is often

¹ Although the Sarajevo government was largely cooperative with the Tribunal, transferring indictees to The Hague, it could do little about PIFWCs residing in Republika Srpska (RS) or in the area of Herceg-Bosna controlled by Bosnian-Croat authorities.

impossible where indictees and individuals implicated in atrocity crimes retain considerable influence. As Harmon and Gaynor adroitly point out, domestic officials may have “little incentive to assist investigators and to disclose documents or other evidence which might inculcate them personally, their subordinates or their superiors.”² The chapter will also demonstrate that in such conditions, domestic authorities are also generally either unwilling or unable to institute domestic prosecutions, and the ‘pro-prosecution’ argument that domestic prosecutions in Bosnia were viable and were undermined by The Rules of the Road Agreement³ will be critically contested.

In an attempt to further circumscribe the scope of its duty vis-à-vis PIFWCs, the NAC issued a Directive which expressly defined IFOR’s authority to arrest PIFWCs “only if they come into contact with such individuals in the execution of assigned tasks and the situation permits detention.” The chapter will highlight the farcical state of affairs whereby NATO forces either acted to avoid contact or failed to act when encountering PIFWCs. In light of these realities, another justification was advanced; namely that arrest operations by NATO forces would serve to undermine and threaten the nascent, fragile order established through the Dayton Accord. The chapter will highlight how, *in certain cases*, the premise that the arrest of PIFWCs may have a potentially destabilising impact, is legitimate, as will be demonstrated by reference to recent events in Sierra Leone, Liberia, and Afghanistan.⁴ However, *in the case of Bosnia*, the chapter will posit that, given the presence of a robustly mandated and equipped NATO force, and in light of evidence to suggest that arrests would not have resulted in a significantly adverse reaction from local security forces; such arguments were unwarranted, representing instead a cynical cover for NATO inaction. Finally, the chapter will conclude by demonstrating that the failure to apprehend PIFWCs actually served to undermine the quality of the order established by the Dayton Accords, due to the negative impact

² See Mark B. Harmon and Fergal Gaynor, ‘Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings’, Symposium, The ICTY 10 Years On: The View from Inside’, *Journal of International Criminal Justice*, Vol. 2, No. 2, June 2004, p. 407 [hereinafter Harmon and Gaynor, ‘Prosecuting Massive Crimes with Primitive Tools’]

³ The Rules of the Road Agreement made domestic prosecutions for atrocity crimes subject to the Tribunal’s prior approval. For further details see below.

⁴ The contention is similar to the premise outlined in chapter three that the indictment of individuals deemed crucial to peace talks may *in certain cases*, be destabilising.

PIFWCs exerted on peacebuilding initiatives, particularly with regards to minority refugee and internally displaced persons (IDP) return.

Selling U.S. Troop Deployment to Bosnia to the U.S. Congress and Public

Even prior to the Dayton negotiations, the White House had embarked on a concerted public relations exercise in an attempt to obtain the endorsement of a sceptical Congress and the support of a nervous public, many of whom knew little about Bosnia.⁵ On October 26, 1995, Speaker of the House Newt Gingrich informed the President by letter, which was co-signed by the House Republican leadership, that “it would be a grave mistake” to deploy U.S. troops to Bosnia without Congressional approval.⁶ Although the Administration made the judgement that it did not need Congress’s formal consent to authorize the deployment⁷, it was keen to obtain the bipartisan support which would have been derived from Congressional support. A concerted lobbying campaign directed at Capitol Hill was instigated. Senior officials from the Department of Defense, State Department, and National Security Council began to seek out supporters, and Secretary Christopher, Secretary Perry and General Shalikashvili (Chairman of the Joint Chief of Staff) all appeared before congressional delegations. In addition a “buddy-system” strategy was established whereby officials from the above agencies and the White House were assigned to maintain contact with each member of Congress.⁸ The Administration also assisted in organizing a number of congressional delegations (CODELS) to visit the Balkans and meet with local leaders. Clinton also wrote to each Member of Congress, briefly outlining the Administration’s rationale and requesting support. On November 13, 1995 Clinton sent a comprehensive nine page response, which had been fine tuned by the State Department’s European Bureau and the NSC, to Gingrich’s earlier letter. It contained “the strongest and most detailed case”⁹ as to why the U.S. should be involved:

⁵ As one State Department official acknowledged, it was essential for the Administration to clearly articulate in a comprehensive statement “why we’re sending your kids and money to a strange place a long way away.” See comments made by John Price, State Department European Bureau, in ‘The Road to Dayton’ U.S. Department of State, Ch. 9, p. 222.

⁶ See Letter to President Clinton from Newt Gingrich et al., October 26, 1995, in ‘The Road to Dayton’ U.S. Department of State, Epilogue, p. 222. fn 34.

⁷ See ‘The Road to Dayton’ U.S. Department of State, Epilogue, p. 254.

⁸ See ‘The Road to Dayton’ U.S. Department of State, Ch. 9, p. 221.

⁹ See Elaine Sciolino, ‘Clinton Makes Case to Congress For Putting U.S. Troops in Bosnia’, *New York Times*, November 15, 1995.

arguing that peace in Bosnia was a clear U.S. interest, with the goal of an undivided, democratic Europe benefiting U.S. security and prosperity.” In a seeming acknowledgment that IFOR would come under pressure to address the issue of PIFWCs, the President emphatically stated that although “atrocities unknown in Europe since the Second World War have occurred [the President would] “not allow ‘mission creep’ that could involve IFOR in a nation-building role.”¹⁰ The letter also explicitly outlined the parameters of the mission, which included a 20,000 cap on U.S. forces, and critically, a 12-month deployment time limit.

Despite the extensive lobbying, Congress remained largely unconvinced. Gingrich and Senate Majority leader Robert Dole claimed legislative support for U.S. troop participation in IFOR was “virtually nil.”¹¹ Although Senator Dole eventually relented¹², a number of Republicans remained stridently opposed¹³, with the House of Representatives passing overwhelmingly a non-binding resolution stating that the U.S. should not send its troops without Congressional approval.¹⁴ In the end, Congress voted to approve the mission, with the Senate voting 69 to 30 to support the troop deployment. However, the House response was much more confrontational, voting 287 to 141 to *oppose the President’s policy* while supporting the actual deployment of the troops. However, both chambers rejected measures to cut off funds for the forthcoming mission. White House Press Secretary Michael McCurry was philosophical viewing Congress’s tepid response as “probably the strongest statement of support they could make. Having voted overwhelmingly not to shut off funding is, in a sense, supporting the President’s judgment.”¹⁵

¹⁰ See Letter from President Clinton to Newt Gingrich, November 13, 1995, in See ‘The Road to Dayton’ U.S. Department of State, Ch. 9, p. 222.

¹¹ See ‘The Road to Dayton’ U.S. Department of State, Ch. 9, p. 221.

¹² See Elaine Sciolino, ‘Dole Backs Plan to Send U.S. Force on Bosnia Mission’, *New York Times*, December 1, 1995.

¹³ See Stephen Engelberg, ‘Bosnia Highlights A Republican Split.’ *New York Times*, December 10, 1995.

¹⁴ See John Yang ‘House Votes to Limit Role of U.S. Troops in Balkans’, *Washington Post*, October 31, 1995.

¹⁵ See ‘The Road to Dayton’ U.S. Department of State, Epilogue, p. 255.

In addition to its lobbying of Congress, the Administration conducted an intensive media campaign in an attempt to assuage public concerns over U.S. troop deployment. Senior members involved in the peace initiative penned newspaper op-ed articles¹⁶ and gave numerous television and radio interviews putting the White House message across.¹⁷ U.S. Deputy Secretary of State Strobe Talbott emphasised the deployment's clearly proscribed scope, declaring "There will be no 'mission creep' – from purely military tasks into 'nation building'".¹⁸ The President also became heavily involved. In a speech at Freedom House, Clinton emphasised "as NATO's leader, the United States must do its part and send troops to join those of our allies under NATO command."¹⁹ He went on to state that the force would have clear rules of engagement and that it would not be sent into combat in Bosnia. In a television address to the nation on the evening of November 27, 1995, Clinton assured the American people that the deployment was a "clear, limited and achievable" and publicly announced the mission "should and will take about one year."²⁰ However, as the recently declassified State Department history of the Dayton Peace Process emphasised, despite the concerted media campaign by the Administration, it largely failed to allay public concerns about deploying U.S. troops to Bosnia, with "Public opinion polling show[ing] that the American people remained concerned that a Bosnia mission would turn into another Somalia, or worse, another Vietnam."²¹

The outcome of the debates within the U.S. would essentially set the tone for IFOR's deployment, particularly given that the U.S. was the dominant component of IFOR, contributing some 20,000 of the 60,000 force. This largely suited the majority of the other troop contributing states, who were also not very enthusiastic about taking on a more expansive mandate, especially with regard to arresting PIFWCs. Whilst delivering a speech to U.S. troops in Germany who were to be deployed into Bosnia as part of Task Force Eagle, Clinton again emphasised the limited time-scale and nature of the mission.

¹⁶ For example see Warren Christopher, 'No Troops, No Peace', *New York Times*, November 27, 1995.

¹⁷ See Elaine Sciolino, 'To Confront Call-In-Critics, U.S. Aides Take to the Airwaves', *New York Times*, December 7, 1995.

¹⁸ See Strobe Talbott, 'Job Can Be Done in Bosnia and Risks Can Be Managed', Remarks delivered to the Pittsburgh World Affairs Council, December 14, 1995.

¹⁹ See President Clinton, Remarks at Freedom House Breakfast, October 6, 1995.

²⁰ See President Clinton's Statement on Bosnian Peace-keeping Mission, November 27, 1995.

²¹ See 'The Road to Dayton' U.S. Department of State, Epilogue, p. 255.

“I pledged to the American people that I would not send you to Bosnia unless I was absolutely sure that the goals we set for you are *clear, realistic, and achievable in about a year.*”²² Clinton’s insistence that the military mission would only be around one year, appeared to confirm the ‘International Community’s’ lacklustre commitment to peace-building in Bosnia, emboldening the array of ‘spoilers’ to merely bide their time and sit out the apparently fleeting international deployment.²³

‘Operation Joint Endeavour’ Enter IFOR: “The Biggest, Toughest, and the Meanest Dog in Town”²⁴?

On December 16, 1995, The Supreme Allied Commander Europe (SACUER), U.S. General George Joulwan, formally ordered NATO forces into Bosnia.²⁵ Several days prior to Joulwan’s order Holbrooke and his core team reunited to conduct their final three-capital (Belgrade, Sarajevo, Zagreb) shuttle tour of the region. The shuttle aimed to ensure any outstanding issues were resolved prior to Izetbegovic, Milosevic and Tudjman meeting with the five Contract Group Presidents at the formal Accord signing ceremony in Paris.²⁶ Whilst noting that sufficient momentum existed in Sarajevo for implementation to begin successfully, Holbrooke warned “everything depends on *vigorous implementation* by IFOR from the first day. A slow start would be a mistake.”²⁷

With the deployment of some 60,000 troops, endowed with much more robust rules of engagement (ROE) than their UNPROFOR predecessors, a sense of anticipation existed amongst Tribunal officials that there would be some significant movement on the issue of arresting PIFWCs. However, despite Holbrooke’s recommendations, it soon became

²² See President Clinton, Speech to Troops in Baumholder, Germany, December 2, 1995. (emphasis added.)

²³ The Clinton administration would later recognize the imprudence of establishing arbitrary timescales, and in a Speech in January 1998, (then) Secretary of State Madeline Albright argued “The mission should determine the timetable, not the other way around.” See Madeline Albright Speech to the Center for National Policy, January 13, 1998.

²⁴ See William Perry, U.S. Secretary for Defense quote, in, BASS, STAY THE HAND OF VENGEANCE, p. 246.

²⁵ The deployment had been formally endorsed at the meeting of NATO foreign and defense ministers in Brussels on December 5, 1995. Whilst for some of the NATO forces (most notably the U.S. contingent) this would be their first time in the country, many of the forces already deployed in the country as part of UNPROFOR and the MNB RRF were merely transferred into IFOR’s chain of command structure. This formal takeover from UNPROFOR to IFOR occurred on January 19, 2006.

²⁶ See ‘The Road to Dayton’ U.S. Department of State, Epilogue, p. 257.

²⁷ See Message to Christopher from Holbrooke, ‘Official-Informal,’ Cable, Zagreb 8296, December 8, 1995, in ‘The Road to Dayton’ U.S. Department of State, Epilogue, p. 258. (emphasis added.)

apparent that IFOR would not be assuming a pro-active stance. As Shattuck recounts “as I discovered myself when I went to make the first international investigation of the sites of the Srebrenica mass executions, the U.S. commanders of IFOR were going out of their way to keep their troops from coming into contact with war criminals.”²⁸ Indeed, NATO’s first major experience of dealing with the war crimes issue would do little to assuage concerns expressed by its commanders over becoming embroiled in what they perceived as a controversial area, beyond their mandate.

Souring Relations – The Djukic Incident

In early February 1996, BS army command informed international officials that three of their military personnel had been arrested and were being detained in Sarajevo’s central prison. On January 30, two Bosnian Serb army officers, General Djordje Djukic and Colonel Aleksa Krsmanovic and their driver took a wrong turn whilst driving a civilian car through the Sarajevo suburbs and crossed into Federation territory. They were quickly apprehended by Bosnian government forces and the Federation authorities initiated an investigation into charges of genocide and crimes against civilians pursuant to Bosnia’s criminal code. In response, BS authorities broke off all formal contacts with both the Federation and IFOR. Bakir Alispahic, head of the Bosnian Federation security service (AID) maintained that under questioning, the two officers had confessed to committing war crimes. The international authorities expressed disquiet that the AID interrogation had continued for a week without any oversight or control.²⁹ They were also seriously concerned that an unregulated process of war crimes arrests and prosecutions by the domestic authorities would deteriorate into a politicized free for all. As Bildt noted “all parties to the conflict had long lists of persons they regarded as war criminals. In fact, there were few leading persons in the country who did not in one way or another figure on one of these often politically motivated lists. If arrests and incarceration of individuals were threatened on the basis of these lists, all opportunities to build up confidence and allow people to feel secure when they crossed the wartime

²⁸ See SHATTUCK, FREEDOM ON FIRE, p. 213.

²⁹ See BILDT, PEACE JOURNEY, pp. 188-189.

boundary lines would disappear very rapidly.”³⁰ The Tribunal was contacted in an attempt to resolve the issue.

Neither of the officers had been indicted by the ICTY and the Tribunal’s Rules of Procedure and Evidence did not permit the transfer and detention of a *suspect*. The Prosecutor therefore filed an application before a judge of the Tribunal for their transfer and detention to The Hague, arguing they could provide evidence on the siege of Sarajevo, of which both Karadzic and Mladic had been indicted. Acting pursuant to *Rule 90 bis*, which allows for the temporary transfer of individuals otherwise detained, whose appearance as a *witness* is required by the Tribunal, Judge Stephen ordered the men’s transfer. Both were quickly moved from Sarajevo by French IFOR troops and transported to The Hague by U.S. helicopters.³¹ Ultimately however, Krsmanovic was never indicted and was remanded to the custody of the Bosnian authorities in early April. Djukic was indicted and charged with crimes against humanity and violations of the laws and customs of war relating to shelling of Sarajevo, to which he pleaded not guilty. However, by April 1996, the OTP applied to have the indictment withdrawn in light of his deteriorating health. The Tribunal’s Trial Chamber 1 denied the request, but did order his provisional release. Djukic died in the following month.

The affair seemed to be badly managed by the OTP and the Prosecutor’s move to have the men transferred to The Hague was criticised by both IFOR commanders and U.S. negotiator Holbrooke, who viewed the move as “disrupt[ing] the implementation process and setting a bad precedent for the future.”³² IFOR commanders were also unhappy at the way the incident was handled, with General Nash, the Commander of Taskforce Eagle remarking “Judge Goldstone made a very serious mistake in having a nonindicted individual brought to The Hague.”³³ Even elements within the Tribunal were frustrated at being forced to act on the issue, as one investigator irritably recalled, “the Bosnians

³⁰ See BILDT, *PEACE JOURNEY*, p 189.

³¹ See HOLBROOKE, *TO END A WAR*, p. 332. – 333.

³² See HOLBROOKE, *TO END A WAR*, p. 333.

³³ See BASS *STAY THE HAND OF VENGEANCE*, p. 250.

[i.e. the Sarajevo authorities] really pushed us into a corner on that one.”³⁴ The whole affair did little to enhance an already tense relationship between the court and IFOR. As a result of the Djukic affair, Holbrooke was sent back to Bosnia and during a series of meetings with Milosevic and Izetbegovic, managed to persuade them to accept principles drawn up by the High Representative stating individuals *could not* be arrested for war crimes *unless approval was obtained from the Tribunal*.³⁵ On February 18, 1996, Presidents Izetbegovic, Milosevic and Tudjman formally signed an Agreement in Rome stipulating that “persons, other than those already indicted by the Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the Tribunal.”³⁶ The agreement became known as the Rules of the Road Agreement. ‘Pro-prosecution’ advocates Williams and Scharf, argue that the Agreement “was designed by Ambassador Holbrooke and Mr. Milosevic *to limit the role of justice by hampering domestic prosecutions*.”³⁷ They also contend “domestic war crimes prosecutions in Serbia, Bosnia and Croatia are crucial to achieving justice and peace in the former Yugoslavia....*the effect of the Rules of the Road Agreement was to entirely override the domestic legal structure in the area of war crimes*.”³⁸ However, as the section below will demonstrate, this perspective fails to recognize the significant barriers to pursuing viable domestic prosecutions.

No Authority

Holbrooke returned to Sarajevo on January 18, 1996, for a series of meetings with international officials. His encounter with Admiral Leighton Smith, IFOR’s Commander, was a strained and sobering experience. Friction between the two men dated back to Operation Deliberate Force, when Smith was angered by what he perceived as Holbrooke’s attempts to influence NATO’s air campaign to support his negotiation strategy. Smith was adamant that as NATO commander, he did not work to any national

³⁴ Interview with former ICTY investigator.

³⁵ See BILDT, PEACE JOURNEY, p. 190.

³⁶ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A/51/292/S 1996/665, 16 August 1996, para 80.

³⁷ See WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 118. (emphasis added.)

³⁸ See WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 119. (emphasis added.)

agenda (even U.S.) and instructed his subordinates not to talk with Holbrooke during the operation.³⁹ Relations had failed to improve, with Holbrooke viewing the Admiral as the wrong man for his additional assignment as IFOR Commander. As Holbrooke recounts in his memoirs, the meeting would shatter his hope that IFOR commanders would adopt a proactive interpretation of the force's mandate. "Based on Shalikashvili's statements at the White House meetings, Christopher and I had assumed that the IFOR commander would use his *authority* to do substantially more than he was *obligated* to do. The meeting with Smith shattered that hope."⁴⁰ Instead Smith made clear that IFOR would be adopting a minimalist approach to all areas of implementation, apart from considerations of force protection.

After encountering so many difficulties in obtaining access to crime scenes during the fighting, the OTP was keen to get to work on the ground and were hopeful of obtaining IFOR assistance. As Newton highlights "Military forces entering the area are uniquely situated to preserve evidence, begin forensics work at mass graves, and generate other highly probative evidence."⁴¹ Shattuck had planned to visit Srebrenica and the surrounding area in order to maintain the pressure on the war crimes issue. He soon learned however, that Admiral Smith refused to provide an IFOR escort. Admiral Smith's ostensible justification was that IFOR had just arrived in Bosnia and was not yet familiar with the territory. Given that a large part of IFOR comprised elements of RRF and UNPROFOR who possessed extensive knowledge of the area, Smith's excuses were unconvincing. As Shattuck recounts, "I suspected that the real reason was the presence of the two tribunal investigators on my team and the possibility that we might encounter war criminals during our mission."⁴² Instead Shattuck had to gain access via Belgrade, leading to the bizarre situation of the U.S.'s chief human rights advocate receiving support and protection from the very authorities implicated in the massacre he sought to investigate. On returning to Sarajevo, Shattuck met with Admiral Smith and other IFOR

³⁹ See RIPLEY, OPERATION DELIBERATE FORCE, p. 295.

⁴⁰ See HOLBROOKE, TO END A WAR, p. 328. For more details of the White House meeting see chapter three.

⁴¹ See Michael Newton, 'Harmony or Hegemony? The American Role in the Pursuit of Justice', *Connecticut Journal of International Law*, Spring, 2004, p. 255.

⁴² See SHATTUCK, FREEDOM ON FIRE, p. 214.

commanders, all of whom refused to help when Shattuck raised the arrest issue, asserting that tracking down PIFWCs was not in their mandate.⁴³

In response to the growing media criticism over IFOR's abject failure to take any proactive measures concerning law and order issues, Admiral Smith initially asserted that IFOR did not have the authority to conduct arrests. When the issue was raised at a press conference, he informed journalists, "One of the questions I was asked was. 'Admiral, is it true that IFOR is going to arrest Serbs in the Serb suburbs of Sarajevo?' I said, 'Absolutely not, *I don't have the authority to arrest anybody.*"⁴⁴ He also remarked "It would help a lot of people's tasks if [indicted Bosnian Serb war criminals Radovan Karadzic and Ratko Mladic] were gone, *but I'm not authorized to do that.* Hold those who signed Dayton responsible and get off IFOR's back."⁴⁵

NATO's responsibility vis-à-vis PIFWCS: Authority or Obligation?

Some commentators have interpreted specific elements of the Dayton Peace Agreement and subsequent UN Security Council Resolution 1031⁴⁶ as providing NATO the requisite authorization to arrest PIFWCs. Resolution 1031 "authorizes" IFOR "to take all necessary measures to effect the implementation of and ensure compliance with Annex 1-A of the Peace Agreement."⁴⁷ Article X of Annex 1-A of the Agreement stipulates that Parties "shall cooperate fully with all entities involved in implementation of this peace settlement...including the International Tribunal for the former Yugoslavia."⁴⁸ Jones argues that IFOR's arrest of PIFWCs would therefore represent action necessary to "ensure compliance with Annex 1-A of the Peace Agreement", particularly where the domestic parties have failed to carry out arrests.⁴⁹ Gaeta disagrees with Jones's

⁴³ See SHATTUCK, FREEDOM ON FIRE, p. 215.

⁴⁴ See Admiral Leighton Smith quote in HOLBROOKE, TO END A WAR, p. 328 (emphasis added).

⁴⁵ See Tracy Wilkinson, 'Serb Leaders Seen as Barriers to Peace', *Los Angeles Times*, April 29, 1996 (emphasis added).

⁴⁶ See S. C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. U.N. Doc S/RES/1031 (1995)

⁴⁷ See S. C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. U.N. Doc S/RES 1031 (1995)

⁴⁸ See Art. X, Annex 1A, Dayton Peace Accord.

⁴⁹ See John R. W. D. Jones, 'The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia', *European Journal of International Law*, Vol. 7, No. 2, 1996, p. 238. Similar arguments are made by Williams and Scharf, see WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 212.

suggestion, but does, however, posit there are more persuasive legal grounds within the Dayton Accord which confer an *authority* on IFOR troops to conduct arrests.⁵⁰ Article VI, paragraph 4, of Annex 1-A provides that the Parties “understand and agree further directives from NAC [the North Atlantic Council] may establish *additional* duties and responsibilities for the IFOR in implementing this *Annex*.”⁵¹ Paragraph 5 of the same Article also provides that the Parties “understand and agree that the IFOR Commander shall have the *authority*....to do all the Commander judges necessary and proper, *including the use of military force....to carry out the responsibilities listed above in paragraphs 2, 3 and 4.*”⁵² Furthermore, as outlined in the previous chapter, General Shalikashvili proposed that IFOR was willing to accept the “*authority*” to carry out additional tasks [including arresting PIFWCs] during the Principals Committee meeting in October 1995. The North Atlantic Council’s (NAC) Directive of December 16, 1995 also explicitly granted IFOR a qualified *authorization* to arrest PIFWCs.⁵³ In light of these factors, Admiral Smith’s belligerent assertions were clearly erroneous: As Gaeta notes “The multinational force has *undoubtedly the authority* to arrest persons indicted by the Tribunal.”⁵⁴

However, in addition to NATO being *authorized* to arrest PIFWCS, a number of legal scholars have argued that NATO forces were actually under an *obligation* to do so. Williams and Scharf highlight that in addition to representing an enforcement measure of the Security Council under Chapter VII of the U.N. Charter, the Tribunal may also be considered a subsidiary organ of the Security Council with delegated enforcement powers within the terms of Article 29 of the U.N. Charter.⁵⁵ Consequently, Article 29 of the Tribunal’s statute, which requires states to co-operate with the International Tribunal and

⁵⁰ See Paola Gaeta, ‘Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?’, *European Journal of International Law*, Vol. 9, No. 1, 1998, pp. 177-178. A similar perspective is also aired by Susan Lamb, see Susan Lamb, ‘The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia’, in *British Yearbook of International Law* (1999) p. 190.

⁵¹ See Art. VI., para. 4, Annex 1A, Dayton Peace Accord.

⁵² See Art. VI., para. 5, Annex 1A, Dayton Peace Accord.

⁵³ For further details see below.

⁵⁴ See Paola Gaeta, ‘Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?’, *European Journal of International Law*, Vol. 9, No. 1, 1998, p. 180.

⁵⁵ See WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 215.

to comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including the arrest or detention of persons and the surrender or the transfer of the accused to the International Tribunal, is deemed to confer such an *obligation* on IFOR.

Gaeta contests this, arguing “Neither treaty provisions nor Security Council resolutions impose upon IFOR/SFOR the obligation to execute warrants.”⁵⁶ However, Williams and Scharf highlight that Article 48 (2) of the UN Charter requires member states to carry out the decisions of the Security Council (and its subsidiary bodies of which the ICTY could be considered) under Chapter VII of the Charter “directly or through their action in the appropriate international agencies of which they are members,” which would include NATO.⁵⁷ Furthermore, as Han-Ru Zhou highlights, in *Simic*, the ICTY Trial Chamber held that Article 29 of the Tribunal’s statute *also applied* to international organizations; “the mere fact that Article 29 omits reference to collective enterprises of states such as NATO does not mean that such enterprises are exempted from complying with Article 29.”⁵⁸ Williams and Scharf also point out that, whilst considering the legal implications of an international arrest warrant, Colonel John Burton, the legal counsel for the Chairman of the Joint Chiefs of Staff (JCS) remarked “if the United States had such an order, that in Bosnia that the United States is charged to arrest and detain these people [PIFWCs] and turn them over, *would we be bound? As far as a state obligation goes, I think that the answer is “Yes.”* We view these orders, and literally the Statute of the Tribunal itself, as well as the United Nations Resolution under Chapter VII that set it up as binding.”⁵⁹ On July 11, 1996, the Tribunal issued an Arrest Warrant and Order for Surrender in the cases of Karadzic and Mladic which met these two criteria. Following Burton’s rationale, Williams and Scharf contend that the U.S. contingent of IFOR was consequently under an *obligation* to arrest the two senior Bosnian Serbs.

⁵⁶ See Paola Gaeta, ‘Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?’, *European Journal of International Law*, Vol. 9, No. 1, 1998, p. 180.

⁵⁷ See WILLIAMS AND SCHARF, *PEACE WITH JUSTICE?* p. 215.

⁵⁸ See Han-Ru Zhou ‘The Enforcement of Arrest Warrants by International Forces’, *Journal of International Criminal Justice*, 4, 2006, p. 207.

⁵⁹ See Colonel John Burton quote in WILLIAMS AND SCHARF, *PEACE WITH JUSTICE?* p. 215. (emphasis added.)

Beyond the discussion of whether I/S/FOR was under an *obligation* to arrest PIFWCs arising from either Article 29 of the ICTY statute, or arising from the Tribunal's orders, several legal commentators have also charged that I/S/FOR was under a duty to arrest PIFWCS arising from *obligations* relating to Grave Breaches provisions of the Geneva Conventions, Protocol 1 and the Genocide Convention. With the Geneva Conventions widely recognised as holding the status of customary international law, it has consequently been argued that international forces would be under a duty to 'search' for PIFWCs *regardless* of whether their mandate or rules of engagement encompassed such operations.⁶⁰ The existence of such an *obligation* was vigorously contested by Max S. Johnson Jr, NATO's legal advisor, who posited that neither NATO nor SHAPE nor IFOR were parties to the Geneva Conventions or Protocols; only states could be parties.⁶¹ In response, Orentlicher raises the compelling question as to whether parties to conventions may evade their commitments, merely by joining a multinational force, and also highlights that the ICRC has consistently taken the position that each state remains individually responsible for applying these treaties when it contributes contingents to multilateral peacekeeping forces.⁶²

Under the Geneva Convention "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches."⁶³ Walter Gary Sharp Sr., former Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff, posits that the text of the common article "*does not impose any geographical, temporal, or other limitations on this*

⁶⁰ See 'Bosnia-Herzegovina - The duty to search for war crimes suspects: An open letter from Amnesty International to IFOR commanders and contributing governments', Amnesty International, March 1, 1996.

⁶¹ See response from Max S. Johnson Jr., Legal Advisor to the Supreme Allied Commander Europe (SACEUR), to Amnesty International, March 12, 1996, in 'Bosnia Herzegovina: Amnesty International renews calls for IFOR to comply with international law', April 1, 1996

⁶² See Diane F. Orentlicher, 'Responsibilities of States Participating in Multilateral Operations with Respect to Persons Indicted for War Crimes', in MAKING JUSTICE WORK. THE REPORT OF THE CENTURY FOUNDATION TWENTIETH CENTURY FUND TASK FORCE ON APPREHENDING INDICTED WAR CRIMINALS (The Century Foundation Press) 1998, p. 94.

⁶³ See Geneva Convention.

obligation.”⁶⁴ In addition to stressing that no state made a reservation with regard to the textually unlimited obligation upon signing the four Geneva Conventions of 1949.⁶⁵ Sharp goes on to argue that Common Article 1 “strongly supports the interpretation that a state’s obligation to search for and arrest persons suspected of grave breaches is *universal and not limited to its own national territory.*”⁶⁶ Common Article 1 provides that state parties “undertake to respect and ensure respect for the present Convention in all circumstances.” The ancillary ICRC commentary to Common Article 1 emphasizes that state parties “should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.” Sharp therefore contends that “Accordingly, a duty under Common Article 1 “to ensure respect” for the four Geneva Conventions of 1949 in all circumstances and an absolute duty to prosecute grave breaches *includes* the obligation upon a state party to search for and arrest persons suspected of grave breaches.”⁶⁷

Conversely, Newton argues that the legal obligation flowing from the Geneva Conventions is a limited obligation applicable *only to states within their territory or in territory over which they exercise judicial control by virtue of the law of occupation.*”⁶⁸ Under article 29 of the Vienna Law of Treaties (1969), an obligation is binding upon a state within the state’s own territory, or where the state exercises de facto exclusive jurisdiction over additional territory.⁶⁹ Given the existence of the Bosnian government, I/S/FOR did not exercise de facto exclusive jurisdiction over Bosnia. Accordingly, it has been posited that this factor militates against the *obligation* extending to international forces in Bosnia to arrest PIFWCs.⁷⁰ Nevertheless, others have suggested that the

⁶⁴ See WALTER GARY SHARP, *JUS PACIARII. EMERGING LEGAL PARADIGMS FOR U.N. PEACE OPERATIONS IN THE 21ST CENTURY* (Paciarri International) 2000, p. 215. [hereinafter SHARP, *JUS PACIARII*] emphasis added.

⁶⁵ See SHARP, *JUS PACIARII*, p. 217.

⁶⁶ See SHARP, *JUS PACIARII*, p. 217.

⁶⁷ See SHARP, *JUS PACIARII*, p. 218.

⁶⁸ See Michael Newton, “‘A View from the Trenches’: The Military Role in the Pursuit of Justice’, *Case Western Reserve Journal of International Law*, Spring 2003, 35, 2, p. 297. Similar views are expressed by Gaeta and Lamb.

⁶⁹ See Article 29, Vienna Convention on the Law of Treaties, 1155 UN Treaty Ser 331, UN Doc A/Conf/39/27.25 ILM 562 (1969)

⁷⁰ See Susan Lamb, ‘The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia’, in *British Yearbook of International Law* (1999) pp.193-194.

territorial principle regarding treaty application is “a general, and not exclusive rule.”⁷¹ Orentlicher goes on to argue “That the Geneva Conventions and Protocol I are exceptions to the general rule is plain. These conventions, which establish rules principally governing the conduct of interstate armed conflict, *would be meaningless if their provisions applied only within the territory of contracting parties.*”⁷² Although Newton somewhat disparagingly suggests that some NGOs have attempted to stretch treaty-based obligations to pursue PIFWCs into “extraterritorial baggage that follows deployed military forces wherever they go and whatever the mission”⁷³, it is critically important to highlight that elements of the NATO force also held similar views. The NORDPOL Brigade⁷⁴ “viewed hunting down war criminals as an *obligation.*”⁷⁵ Although the report does not specify whether NORDPOL Brigade interpreted the *obligation* as arising from the Dayton Accord, Article 29 of the ICTY Statute, or due to customary international law status of the Geneva Conventions, it nevertheless indicates that some States *are willing* to accept such an *obligation* to arrest PIFWCs.

Clearly, the vigorous debate regarding whether international forces are under an *obligation* to arrest PIFWCs has yet to be decisively resolved. Perhaps the most appropriate analysis which characterizes the current prevailing view is provided by Lamb, who postulates “The argument that multinational forces are bound to arrest Tribunal indictees appears...to be a normative one....this has yet to crystallize into an explicit obligation to do so under customary international law.”⁷⁶ In many respects the

⁷¹ See Diane F. Orentlicher, ‘Responsibilities of States Participating in Multilateral Operations with Respect to Persons Indicted for War Crimes’, in MAKING JUSTICE WORK. THE REPORT OF THE CENTURY FOUNDATION/TWENTIETH CENTURY FUND TASK FORCE ON APPREHENDING INDICTED WAR CRIMINALS (The Century Foundation Press) 1998, p. 91.

⁷² See Diane F. Orentlicher, ‘Responsibilities of States Participating in Multilateral Operations with Respect to Persons Indicted for War Crimes’, in MAKING JUSTICE WORK. THE REPORT OF THE CENTURY FOUNDATION/TWENTIETH CENTURY FUND TASK FORCE ON APPREHENDING INDICTED WAR CRIMINALS (The Century Foundation Press) 1998, p. 91 (emphasis added)

⁷³ See Michael Newton, ‘“A View from the Trenches”: The Military Role in the Pursuit of Justice’, *Case Western Reserve Journal of International Law*, Spring 2003, 35, 2, p. 297.

⁷⁴ The Nordic/Polish Battle Group, comprising Finnish, Norwegian, Swedish and Polish forces.

⁷⁵ See ‘Law and Military Operations in the Balkans 1995-1998. Lessons Learned For Judge Advocates’, Center for Law and Military Operations (CLAMO), The Judge Advocate General’s School, United States Army, Charlottesville, Virginia, November 13, 1998, p. 125 [hereinafter Law and Military Operations in the Balkans 1995-1998] (emphasis added)

⁷⁶ See Susan Lamb, ‘The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia’, in *British Yearbook of International Law* (1999) p.194.

debate may be viewed as somewhat esoteric, particularly given that it will remain likely that the decision as to whether or not international forces will act to apprehend PIFWCs will be determined by motivations which are largely political rather than legal. However, this issue is not solely a matter of policy, but also one of law, and following Wheeler's discussion of a 'normative cascade'⁷⁷, normative arguments may be viewed as having the potential to become 'crystallized' into law. Sharp refers to the contention that international forces are under a duty to seek out and detain PIFWCs, as *an emergent legal paradigm for the 21st Century*.⁷⁸ It is likely that these issues will be revisited in relation to future international troop deployments to areas where PIFWCs may reside or pass through.⁷⁹

To conclude the discussion, it is worth considering Newton's caveat that the net effect of imposing a legal *obligation* on international forces to actively seek out and detain PIFWCs could be to "undermine the pursuit of justice by creating a disincentive for the very forces capable of restoring respect for the law [to take part in the proposed mission]."⁸⁰ Unfortunately, as the chapter aptly demonstrates, the alternative approach, of merely setting a nebulous mandate and hoping for a robust response, may also allow international forces to effectively avoid going after PIFWCs. Neither option is particularly satisfying from the perspective of achieving arrests.

It's Their Responsibility – The Fantasy of Expecting Domestic Cooperation

In an attempt to deflect criticism over its failure to pursue PIFWCs, IFOR (and its successor SFOR) and its political master the NAC, would regularly emphasise that the primary responsibility for arrests resided with the domestic authorities in Bosnia.⁸¹ As

⁷⁷ See WHEELER, SAVING STRANGERS, p. 5.

⁷⁸ See generally SHARP, JUS PACIARII,

⁷⁹ For further details see Conclusion.

⁸⁰ See Michael Newton, "'A View from the Trenches': The Military Role in the Pursuit of Justice', *Case Western Reserve Journal of International Law*, Spring 2003, 35, 2. p. 298.

⁸¹ For example, in July 1997, NAC declared "We call upon the leaders of the region to cooperate with the International Criminal Tribunal for the former Yugoslavia and fulfil their obligation to deliver those indicted for war crimes for trial at the International Tribunal in The Hague." cited in See DAVID S. JOST, NATO TRANSFORMED: THE ALLIANCE'S NEW ROLES IN INTERNATIONAL SECURITY (U.S. Institute of Peace Press) 1999 p. 221 [hereinafter JOST, NATO TRANSFORMED]

the legal counsel to the U.S. JCS opined “They are expected to police themselves.”⁸² This approach mirrored Anthony Lake’s assertion that the onus of implementing the Peace Treaty’s key provisions should be on the domestic parties. Whilst such assertions were technically correct, they were in reality, wishful thinking. As Cousens and Carter note, “having been brought to the table by varying forms of coercion, the parties had little more than a tactical commitment to settle, making any resulting accord dependent on more than the will of the parties for its implementation.”⁸³ Nowhere was this more apparent than the issue of cooperation with the Tribunal. As indicated in its 1995 Annual Report, the Tribunal stated it expected no cooperation from those authorities who may have been complicit in the commission of war crimes and did not anticipate that they would surrender any suspects to the Court.⁸⁴

For similar reasons, the prospect of initiating domestic prosecutions which conformed to the principles of impartiality and due process, was not viable in Bosnia. Consequently, Williams and Scharf’s critique of the Rules of the Road outlined above is largely flawed. Their assertion that the Rules of the Road had the effect of “*hampering domestic prosecutions*”, fundamentally underestimates the significant influence of individuals implicated in war crimes within the political, legal, and security structures, many of whom sought to frustrate cooperation with the ICTY and also either undermine or unduly influence domestic prosecutions. Whilst Williams and Scharf correctly highlighted that the Tribunal only allocated minor resources to the RoR issue, even where authorization was granted by the OTP, little progress was made by the domestic authorities. As Human Rights Watch noted, even where “hundreds” of cases were approved by the ICTY pursuant to the RoR procedure, the individuals outlined in the cases remained at liberty in the parts of Bosnia where the ethnic group to which they belonged remained the majority,

⁸² See Colonel John T. Burton “‘War Crimes.’ Operations Other Than War: Military Doctrine and Law 50 Years After Nuremberg and Beyond”, *Military Law Review*, Vol. 149, Summer 1995, p. 203.

⁸³ See ELIZABETH M. COUSENS & CHARLES K. CARTER, *TOWARDS PEACE IN BOSNIA. IMPLEMENTING THE DAYTON ACCORDS* (Lynne Rienner London) 2001, p. 27. [hereinafter COUSENS & CARTER, *TOWARDS PEACE IN BOSNIA*]

⁸⁴ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A 50/365 S 1995/728, 23 August 1995, para. 195.

due to either an absence of an indictment or the refusal of the police to carry out an arrest.⁸⁵

The war shattered Bosnia's justice system and demolished much of the physical infrastructure. Many members of the country's legal profession fled abroad during the conflict. Furthermore, members of the Bosnian Muslim community were in many cases singled out and killed along with local government officials⁸⁶ and other prominent figures, in a process referred to as "eliticide."⁸⁷ Consequently, the majority of the personnel in the legal profession were political appointees. Nationalist leaders had a strategic interest in maintaining the conditions by which their power thrived, including the subversion of the rule of law. Control of the police and judiciary allowed them to effectively perpetuate their political and economic activities with impunity.⁸⁸ As the International Crisis Group emphasized, local courts were in no position to resist both the power and undue influence of the executive, or the temptations of national solidarity.⁸⁹ Under such conditions, cooperation in the sphere of war crimes investigations would be highly problematic and legitimate domestic prosecutions an even less likely prospect. As one ICTY official remarked "I think that one should not underestimate the readiness of the parties to continue the war with different means, and war crimes trials were one of these means."⁹⁰ Subsequent trial monitoring within the region confirmed such fears, with prosecutions predominantly focusing on 'the other' ethnic groups.

⁸⁵ See *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, Human Rights Watch, Vol. 16, No. 7, October 2004, p. 13. [hereinafter *Justice at Risk*, Human Rights Watch]

⁸⁶ Interview with Muharem Murselovic former chairman of Prijedor's Municipal assembly and survivor of Omarska detention camp, Prijedor, 2003.

⁸⁷ See PETER MAASS, *LOVE THY NEIGHBOUR. A STORY OF WAR* (Papermac) 1996.

⁸⁸ See 'Reshaping International Priorities in Bosnia and Herzegovina. Part One – Bosnian Power Structures', European Stability Initiative (ESI) October 14, 1999 p. 5.

⁸⁹ See 'Courting Disaster: The Misrule of Law in Bosnia Herzegovina', International Crisis Group. Balkans Report No. 127, March 25, 2002, p. 1. [Hereinafter *Courting Disaster*, ICG]

⁹⁰ Interview with Refik Hodzik, (then) Outreach Programme Coordinator, ICTY. Similar views were also expressed by two prominent Bosnian figures working on war crimes issues. Interview with Srdjan Dizdarevic, Head of the Helsinki Committee for Human Rights in Bosnia and Herzegovina, Sarajevo; Interview with Jacob Finci, Chair, National Coordinating Committee for the Establishment of the Truth and Reconciliation Commission in Bosnia Herzegovina.

In 1999, the United Nations Mission in Bosnia and Herzegovina (UNMIBH) established Judicial System Assessment Programme (JSAP) documented “a grave lack of judicial independence, overt political interference and intimidation of judicial officials and substantial court inefficiencies”⁹¹ By 2002, serious concerns remained that the domestic parties were not doing enough to remove corrupt prosecutors and judges, leading to (then) High Representative Wolfgang Petritsch to re-direct the power to appoint and discipline legal officials to an International Judicial Commission (IJC).⁹² Even seven years after the end of the war, the domestic parties (particularly RS and Bosnian Croat authorities) were clearly unwilling to allow the rule of law to take hold. Another report written for the Office of the High Representative (OHR) in 2002, which assessed the viability of domestic prosecutions was unequivocal that domestic prosecutions of atrocity crimes under the [then] legal system were impossible, concluding “there appears to be little confidence that such cases can be tried impartially, independently, and free of political, criminal or other influence or without bias. There is little faith that mono-ethnic courts could deliver judgements.”⁹³ The International Crisis Group’s conclusions were even more blunt; “The current practice of trying indicted war criminals in cantonal or entity courts has proved inadequate. *Justice has neither been done nor been seen to be done.*”⁹⁴

Bosnia’s police forces also suffered from corruption and were equally susceptible to ethnic bias. An OSCE Ombudsman report characterized the forces as the main violators of human rights throughout the country and noted their active involvement in criminal activities.⁹⁵ A clear lack of inter-entity or intra-entity cooperation also prevailed, further complicating the arrest of PIFWCs (a situation which continued up to 2002 and beyond).⁹⁶ As of 2004, concern remained that the police continued to be unwilling to

⁹¹ See United Nations, Report of the Secretary-General on the United Nations Mission in Bosnia-Herzegovina, UN Doc. S/1999/1260, 17 December 1999, para. 11.

⁹² See Office of the High Representative, ‘High Representative Issues Decisions Strengthening Judicial Reform Across BiH’, Press Release, May 24, 2002.

⁹³ See War Crimes Prosecutions in BiH, Consultants Report to the OHR, p. 1.

⁹⁴ See *Courting Disaster*, ICG, p. 2. (emphasis added)

⁹⁵ See OSCE, Institution of the Ombudsmen of the Federation of Bosnia and Herzegovina. Semi-annual Report on the Situation of Human Rights, Sarajevo, July 1996.

⁹⁶ See Peter Bach, Kjell Bjornberg, John Ralston and Almiro Ridrigues, ‘The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina’, Consultants Report to the OHR, May 2002, p. 2.

investigate war crimes when those implicated were police officers or senior government figures.⁹⁷ The following sections illustrate the clear limitations in expecting domestic parties to actively cooperate in atrocity crimes investigations, or institute domestic prosecutions.

Republika Srpska – A Conspiracy of Silence

RS authorities were utterly intransigent regarding cooperation. As the Tribunal's 1996 Annual Report outlined, they failed to execute any of the scores of arrest warrants which had been addressed to it, or to explain their inability or failure to do so, as required by the Tribunal's rules.⁹⁸ The authorities also expressly refused to hand over any requested documents to the Court. In an attempt to resolve RS non-compliance, the OTP invited Justice Ministry officials to attend a meeting in The Hague, where the delegation attempted to justify their failure to cooperate on the basis of a blatantly spurious interpretation of the Dayton Accord, which they argued, actually prevented them from arresting PIFWCs until *after* the elections in BiH scheduled for September 1996.⁹⁹ The Accord contained no such provision, and the meeting only served to demonstrate the RS authority's delusions relating to their obligations to arrest PIFWCs. On January 2, 1997, another flawed justification for non-compliance was advanced by RS authorities, namely the failure to hand over Karadzic or Mladic was predicated on the belief that "any such trial now falls outside the scope of the Tribunal's constitutional framework."¹⁰⁰

NATO's insistence that domestic authorities lead the way in arrests was exposed as a sham by the reality that Karadzic received close protection (CP) details from Bosnian

[hereinafter War Crimes Prosecutions in BiH, Consultants Report to the OHR] In mid-2003 RS police transferred a Bosnian-Serb indictee to Federation authorities, to be tried in Zenica. However, as Human Rights Watch noted, such practices were the exception rather than the norm; *see* Justice at Risk, Human Rights Watch, p. 16.

⁹⁷ *See* Justice at Risk, Human Rights Watch, p. 3.

⁹⁸ *See* Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A/51/292/S/1996/665, 16 August 1996, para. 168.

⁹⁹ *See* Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991, A/51/292/S/1996/665, 16 August 1996, para. 173

¹⁰⁰ Quoted in Note of the Secretary General of the United Nations to the General Assembly and the Security Council, A/51/292/S/1997/729, September 18, 1997, para. 185.

Serb Police and Ministry of Interior Special Police (MUP),¹⁰¹ both of whom during the war had acted as instruments of population control and engaged in numerous atrocity crimes. Furthermore, in the early stages of the DPA's implementation, the police forces often acted as a subterfuge for armed forces, particularly RS 'Special Police', where instead of demobilization, forces were merely 'transferred' into police units.¹⁰² It was hardly likely that such forces, which had actively been involved in 'the Serbian Project', and remained deeply loyal to Karadzic, would carry out arrests. In a meeting with the IPTF Police Commissioner Peter Fitzgerald, Dragan Kijac, the Minister of Interior of Republika Srpska, calmly informed Fitzgerald that he did not recognize the Tribunal warrants as evidence that people in his force were war criminals and refused to "arrest anybody or transfer anybody to The Hague."¹⁰³ RS police authorities continued to obstruct the 'International Community's' efforts to reform its ranks, and refused to submit to the IPTF restructuring formula until late 1997.¹⁰⁴ In 1998, (then) ICTY Prosecutor, Louise Arbour, revealed that RS authorities were involved in "issuing false identification papers to those persons indicted by the Tribunal in an attempt to shield them."¹⁰⁵ Like Karadzic, Mladic continued to receive protection from RS authorities, particularly the RS army (VRS), and contrary to the express terms of the DPA, retained his official position. Documents obtained by the Tribunal revealed that the Bosnian Serb General was only officially released from military service in February 2002, and continued to receive a pension. Mladic regularly stayed in MoD facilities well into 2004, including the underground military complex near the town of Hans Pijesak where his bodyguards were reportedly recruited from.¹⁰⁶ As (then) High Representative Paddy

¹⁰¹ See Michael J. Dziedzic and Andrew Blair, 'Bosnia and the International Police Task Force' in ROBERT B. OAKLEY, MICHAEL J. DZIEDZIC AND ELIOT M. GOLDBERG, *POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY* (National Defense Uni. Press) 1998, p. 267.

¹⁰² See 'Law and Military Operations in the Balkans 1995-1998. Lessons Learned for Judge Advocates', Center for Law and Military Operations (CLAMO) The Judge Advocates General's School, U.S. Army, Charlottesville, Virginia, p101.

¹⁰³ See IFOR Press Briefing Transcript, November 29, 1996.

¹⁰⁴ See Jeremy King, A. Walter Dorn, Matthew Hodes, 'An Unprecedented Experiment: Security sector reform in Bosnia Herzegovina', Saferworld, September 2002, p. 18.

¹⁰⁵ See 'False Identifications', ICTY Press Release, CC/PIU/336-E, July 24, 1998.

¹⁰⁶ See 'Reliable Information That Bosnian Serbs Shield War Crimes Suspects', *AFP*, June 1, 2001; Nick Hawton 'Bosnian Serb army 'helps Mladic'', *BBC News*, December 12, 2004; 'Ashdown Criticises Bosnian Serb Authorities Over Mladic', *South European Times*, December 1, 2004; Nick Hawton 'Massacre general' kept from justice by old allies', *The Times*, December 10, 2004.

Ashdown remarked in 2004 “Rather than hunting down war criminals....certain Bosnian Serb institutions, as recently as this summer, are actively protecting war criminals.”¹⁰⁷

A culture of denial pervaded throughout the entity. Anyone who openly raised the subject of atrocity crimes committed by Bosnian Serbs was taking a serious risk. Both international journalists researching the issue, and the local sources they used, were threatened with death.¹⁰⁸ When the independent RS newspaper *Nezavisne Novine* published a detailed article outlining war crimes committed by Bosnian Serb forces at Koricani and Teslic, the newspaper’s editor was seriously injured in a car bombing losing both legs.¹⁰⁹ Another prominent Serbian freelance journalist was forced into hiding after a series of death threats against her for a report about PIFWCs in Foca.¹¹⁰ In fact, many sections of RS society openly revered those involved or implicated in war crimes. In Prijedor, scene of some of the worst ethnic cleansing and location of the notorious detention camps, the Bosnian Serb community has brought forward the date of the town’s annual festival from May, the anniversary of the town’s liberation at the end of the Second World War, to April 30, the date in 1992 when the Serb ‘Crisis Staff’ seized the town.¹¹¹ Whilst memorials have been erected throughout the town to commemorate ‘all war victims’, the most prominent is an orthodox cross¹¹², whereas any reference to atrocities committed against the region’s Muslim population, is conspicuous by its absence. As ICG noted, in all RS communities, indicted and suspected PIFWCs appear to enjoy respected status.¹¹³ The extent of the RS authority’s unwillingness to confront

¹⁰⁷ See Nick Hawton ‘‘Massacre general’ kept from justice by old allies’, *Times*, December 10, 2004.

¹⁰⁸ See ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOUR’S HOUSE. SEEKING JUSTICE IN BOSNIA AND RWANDA* (Bloomsbury) 2002, p. 207. [hereinafter NEUFFER, *THE KEY TO MY NEIGHBOUR’S HOUSE*.]

¹⁰⁹ See ‘An Editor Pays the Price in Republika Srpska’, Institute for War and Peace Reporting, *Balkan Crisis Report*, No. 86, October 23, 1999.

¹¹⁰ See Action Alert – Federal Republic of Yugoslavia, ‘Serbian Journalist Threatened With Death’, Committee to Protect Journalists, October 29, 1997.

¹¹¹ See ISABELLE WESSELINGH AND ARNAUD VAULERIN, *RAW MEMORY. PRIJEDOR, LABORATORY OF ETHNIC CLEANSING* (Saqi Books) 2005, p.79. [hereinafter WESSELINGH AND VAULERIN, *RAW MEMORY*] See Interview with survivor of Omarska detention camp, June 2003, Prijedor.

¹¹² Similar tactics were used in Herceg-Bosna where after destroying the regions mosques, “stark concrete crosses dot the valleys....intended to mark territory, and keep out Muslims”. see Nick Thorpe, ‘Croat town now a criminal haven. SAS investigator asks why gangsters and ethnic warriors live freely in Stolac, Bosnia’, *Guardian*, May 2, 2001.

¹¹³ See ‘War Criminals in Bosnia’s Republika Srpska. Who are the People in Your Neighbourhood?’, International Crisis Group, *Balkan Report No. 103*, November 2, 2000, p. 2. [hereinafter ‘War Criminals in Bosnia’s Republika Srpska’, ICG]

its involvement in war crimes was most starkly demonstrated by the publication of the 'Report about Case Srebrenica' published in September 2002 by the RS Government's office for relations with the ICTY. The Report "minimizes, coming very close to denial, the crimes committed against Bosniak men after the fall of Srebrenica."¹¹⁴ With primary emphasis on the victimization of Srebrenica's Serbs, the Report states that the overwhelming majority of Bosnian Muslims killed died during fighting in the woods, suggesting the number of summary executions to be less than 100.¹¹⁵ The report also suggested that a number of Bosnian Muslim men died merely of "exhaustion."¹¹⁶ It is widely accepted that between seven and eight thousand Bosnian Muslim men and boys were systematically massacred after the fall of the enclave, many of them civilians,¹¹⁷ and the report was roundly condemned. In 2003, the Bosnian Human Rights Chamber ordered RS authorities to conduct a full, meaningful and thorough investigation of events which took place around Srebrenica. The Commission's preliminary report highlighted systematic obstruction by the RS military, police and intelligence agencies, leading to (then) High Representative Paddy Ashdown to dismiss all of the Bosnian Serb members of the Commission. This abject refusal to confront the entity's recent past is perhaps not surprising. As Petrovic notes, it would be illusory to expect them to fulfil an obligation that runs contrary to their policies during the war.¹¹⁸ As Gow demonstrates, RS's founding basis was, 'a strategy of war crimes.'¹¹⁹ To admit complicity in such activities would bring into stark relief the entire repugnant basis for its creation, which could serve to increase pressure to dissolve the entity in favour of a single Bosnian state. In light of

¹¹⁴ See Ulrich Garms and Katharina Peschke 'War Crimes Prosecution in Bosnia Herzegovina (1992-2002). An Analysis through the Jurisprudence of the Human Rights Chamber', *Journal of International Criminal Justice*, 4, 2006, p. 273.

¹¹⁵ See Ulrich Garms and Katharina Peschke 'War Crimes Prosecution in Bosnia Herzegovina (1992-2002). An Analysis through the Jurisprudence of the Human Rights Chamber', *Journal of International Criminal Justice*, 4, 2006, p. 273.

¹¹⁶ See Anes Alic and Dragan Stanimirovic, 'Imaginary Massacres?', *Transitions*, September 9, 2002.

¹¹⁷ For more details on Srebrenica see JAN WILLEM HONIG AND NORBERT BOTH, *SREBRENICA. RECORD OF A WAR CRIME* (Penguin) 1996; DAVID RHODE, *ENDGAME. THE BETRAYAL AND FALL OF SREBRENICA: EUROPE'S WORST MASSACRE SINCE WORLD WAR II* (Farrar, Straus and Giroux) 1997; EMIR SULAGIC, *POSTCARDS FROM THE GRAVE* (Saqi Books) 2005.

¹¹⁸ See Drazen Petrovic 'The Post-Dayton Role of the International Criminal Tribunal for the Former Yugoslavia', in M. O'FLAHERTY AND G. GISVOLD (EDS.) *POST-WAR PROTECTION OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA* (Kluwer Law International) 1998, p. 207.

¹¹⁹ See generally GOW, *THE SERBIAN PROJECT*.

these considerations it is unrealistic to expect domestic cooperation on war crimes issues, making it imperative that international forces play the key role in apprehensions.

RS authorities have continued to frustrate the work of the Tribunal. In 2001, RS official documents were handed over to The Hague for the first time relating to Bosnian Serb war crimes suspects. However, even this exchange was carefully selective, comprising only cases where the RS authority argued there was “a reasonable doubt for the existence of war crimes committed by Serbs.”¹²⁰ In 2002, it emerged that BS military intelligence was conducting electronic surveillance against NATO forces, which may have enabled PIFWCs to evade SFOR raids.¹²¹ Elements of Karadzic’s protection network have also reportedly monitored ICTY investigators who arrived at Sarajevo airport, placing them under surveillance.¹²² Ten years after the end of the conflict RS authorities had failed to arrest a single PIFWC¹²³, leading to the Tribunal’s current Prosecutor Carla Del Ponte to castigate the “fundamental systematic weakness built into the law enforcement and security structures [of]...the RS.”¹²⁴ In June 2004, Ashdown removed 60 Bosnian Serb officials for their failure to apprehend Karadzic. Six months later several more police officers and officials were dismissed due to their failure to find indictee Gojko Jankovic.¹²⁵ Although a number of highly publicised raids have been carried out, they have largely been viewed as merely cosmetic by international officials, and a cynical attempt to placate demands for real action. In mid-April 2004, Bosnian Serb special

¹²⁰ See ‘Bosnian Serbs to Hand Over Documents to Hague War Crimes Court’, *AFP*, June 4, 2001.

¹²¹ See Senad Slatina, ‘New Claims in NATO Surveillance Scandal: Bosnian Serb tapping of NATO communications could have helped alleged war criminals evade capture’, *Balkan Crisis Report*, Institute for War and Peace Reporting, No. 344, June 20, 2002. In his memoirs, General Wesley Clark highlights the effectiveness of the Serbian intelligence system with reference to an encounter with Milosevic in September 1997. The Serbian President voiced his displeasure of Clark’s strategy of promoting a split between within the SDS and pushing for more PIFWC detentions and produced a copy of a personal and private memorandum the SACEUR had given to General Shinseki, U.S. Commander of SFOR, see GENERAL WESLEY K. CLARK, *WAGING MODERN WAR. BOSNIA, KOSOVO AND THE FUTURE OF COMBAT* (PublicAffairs Ltd, Perseus) 2002, p.p. 93-94 [hereinafter CLARK, *WAGING MODERN WAR*]

¹²² See Antony Barnett, ‘Most Wanted: Dr Death. The Hunt for Karadzic’, *Observer*, June 26, 2005.

¹²³ For example see ‘Arrest Warcrime Suspects, Envoy Tells Bosnia Serbs’, *Reuters* April 18, 2001; ‘Bosnian Serb Entity is Haven for War Crimes Suspects’, *AFP*, May 24, 2001; Robert McMahon ‘Bosnia-Herzegovina: Ashdown Presses Bosnian Serbs On War Crimes Cooperation’, *Radio Free Europe/Radio Liberty*, November 12, 2004. However, in early 2005, Bosnian Serb authorities did handover one suspect to the Tribunal who had *surrendered*, see ‘War crimes suspect surrenders’, *Reuters*, January 15, 2005.

¹²⁴ See Carla Del Ponte statement to the United Nations Security Council, November 23, 2004

¹²⁵ See Daria Sito-Sucic, ‘Bosnia Envoy Sacks Bosnia Serb Officials Over Hague’, *Washington Post*, December 16, 2004.

police units conducted a raid on the house of PIFWC Milan Lukic's parents. Lukic was not at the property, although his brother was fatally wounded after reportedly firing at the police. International authorities were initially supportive, viewing the raid as the first concrete signs of concerted efforts by RS authorities to carry out arrests. However, more sinister allegations soon began to surface, suggesting the raid was a shoot to kill operation aimed at silencing Lukic. Lukic, one of the Tribunal's most sought after indictees, had reportedly been meeting ICTY investigators and was passing on information relating to Karadzic's whereabouts. Relations between Lukic and Karadzic, who initially worked together running an extensive organized crime network in Eastern RS, were severed after Lukic was reportedly shot and wounded by Karadzic's bodyguards near the Montenegro border over a drug shipment dispute. Lukic reportedly subsequently made contact with undercover Hague operatives and was reportedly supplying information on Karadzic's whereabouts. RS intelligence, which regularly monitored the work of the Tribunal's investigators, reportedly intercepted a conversation outlining a proposed meeting with Lukic and subsequently engaged in a botched attempt to silence Karadzic's former ally.¹²⁶ Optimism that a new approach to cooperation by RS authorities was developing, appeared misplaced, and the cycle of non-compliance, international condemnation and associated sanctions continues.¹²⁷ It is worth noting that some commentators have suggested that placing the onus of responsibility on RS authorities to actively pursue and arrest senior PIFWCs is futile, as even if the requisite political will existed, the consequences for the authorities would be fatal. As (then) head of the ICG's Sarajevo office highlighted "The SDS can't handover Karadzic to the Hague. This is one of the little illusions the international community likes to maintain by saying responsibility for the arrest of [PIFWCS] particularly Karadzic lies with the [Bosnian]Serb authorities....they would commit political and real physical suicide if they themselves were to betray Karadzic and actively turn him in."¹²⁸

¹²⁶ See Nerma Jelacic, Tanja Matic & Hugh Griffiths, 'Bosnia: Serb Police Target Karadzic Informer', Balkan Crisis Report, Institute for War and Peace Reporting, No. 495, May 4, 2004.

¹²⁷ See 'Bosnian Serb police chief resigns under pressure', *Reuters*, April 7, 2006.

¹²⁸ Interview with Mark Wheeler, (then) head of ICG Sarajevo office, Sarajevo.

With individuals implicated in war crimes continuing to retain varying levels of influence throughout RS the prospect that legitimate domestic prosecutions could be initiated were equally unlikely. A 1997 UN Commission on Human Rights Report noted that all serving judges in RS were appointed for life by the RS Assembly, mainly in 1992. Consequently, many were merely lackeys of the SDS who could be assured to dispense politicized justice. The UN Special Rapporteur for human rights in Bosnia referred to the verdict in the notorious “Zvornik 7” case, where seven Bosnian Muslim men from Srebrenica were charged with murder, as a “judicial farce”, with the case violating minimum international fair trial standards.¹²⁹ In 1999, *Nezavisne Novine* published its investigation into war crimes allegedly committed by Bosnian Serb police in the Prijedor region. The newspaper discovered that when Banja Luka officials began investigating the alleged crimes, pressure emanated from the Centre for Public Security to frustrate progress. The (then) Bosnian Serb Public Prosecutor Vojislav Dimitrijevic openly acknowledged “the main reason for the lack of action in such [war crimes] cases is the lack of political will.”¹³⁰ Dimitrijevic went onto lament the failure to reform the judiciary promptly after the war, arguing such measures were imperative.¹³¹ In the *Matanovic* case, one of the other few war crimes cases which actually reached trial stage in the RS, the District Court in Banja Luka acquitted all eleven defendants.¹³²

The Federation

The Sarajevo authorities were the most cooperative towards the ICTY, surrendering all Bosnian Muslim indictees to The Hague promptly. Nevertheless, when Tribunal investigators working on allegations of war crimes committed by Bosnian Muslim forces, conducted a “consensual search” of the Bosnian military archive, it soon became clear it

¹²⁹ See ‘Situation of human rights in the territory of the former Yugoslavia Report on the human rights situation in Bosnia and Herzegovina, submitted by the Special Rapporteur Ms. Elisabeth Rehn, pursuant to Commission resolution 1997/57’, E/CN.4/1998/13 15 October 1997, para. 98.

¹³⁰ Comments made by then Bosnian Serb Public Prosecutor Vojislav Dimitrijevic to *Nezavisne Novine*, see ‘Tracking Down the Crimes at Koricani Near Knezevo in August 1992’, *Nezavisne Novine*, August 25, 1999.

¹³¹ Comments made by then Bosnian Serb Public Prosecutor Vojislav Dimitrijevic to *Nezavisne Novine*, see ‘Tracking Down the Crimes at Koricani Near Knezevo in August 1992’, *Nezavisne Novine*, August 25, 1999.

¹³² See Olga Lola Ninkovic, ‘Bosnian Court Acquits 11 Serbs in war Crimes Case’, *Washington Post*, February 12, 2005.

had been “weeded”, suggesting incriminating evidence was removed.¹³³ Tribunal investigators were also reportedly monitored by Bosnian government intelligence services, which included the search of their temporary residences.¹³⁴ With regard to domestic prosecutions in Federation territory, the scope has been limited due to the lack of inter-entity cooperation, with the majority of arrest requests issued to RS police not acted upon. Where prosecutions have taken place, although they have been less influenced by ethnic bias than in the RS, serious problems nevertheless remained, and even up until 2002, local courts in the Federations cantons remained “subject to substantial political interference.”¹³⁵ Additionally, Bosnia’s Human Rights Chamber jurisprudence illustrates that in some cases, Federation police tortured suspects detained on war crimes charges, in order to induce confessions.¹³⁶

In the area of Herceg-Bosna, Bosnian-Croat authorities were either grudgingly cooperative with The Tribunal, or in some cases, actively worked to frustrate its investigations. Prior to President Tudjman’s death in December 1999, the Croatian Government remained heavily involved in the area and was keen to minimize the scope of the Bosnian Croat authorities cooperation with the Tribunal due to concerns that its role in the Bosnian conflict would be further exposed, inculcating its officials in the crimes committed.¹³⁷ Incriminating archives of the Bosnian Croat military were spirited out of the country and passed onto the Croatian Ministry of Defence.¹³⁸ SFOR-led raids of four Bosnian Croat offices in Mostar revealed an extensive operation run by Bosnian Croat intelligence (SNA) and Croatian intelligence (HIS) to monitor ICTY activities.

¹³³ Interview with former Tribunal investigator.

¹³⁴ Interview with former Tribunal investigator.

¹³⁵ See Gerald P. O. Driscoll Jr. Kim R. Holmes, Mary Anastasia O’Grady, *2002 Index of Economic Freedom* (The Heritage Foundation)

¹³⁶ See Ulrich Garms and Katharina Peschke ‘War Crimes Prosecution in Bosnia Herzegovina (1992-2002). An Analysis through the Jurisprudence of the Human Rights Chamber’, *Journal of International Criminal Justice*, 4, 2006, p. 263.

¹³⁷ See Mark B. Harmon and Fergal Gaynor, ‘Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings’, *Journal of International Criminal Justice*, Vol. 2., No. 2., June 2004, p. 415.

¹³⁸ For more details, see chapter five’s section on The Blaskic case.

'Operation Puma' had targeted ICTY investigators carrying out inquiries into alleged crimes in the Livno region of Bosnia.¹³⁹

The situation in Stolac was perhaps one of the clearest illustrations that domestic prosecutions were not viable. During the war, the town was taken over and occupied by Bosnian Croat militia forces. Over 2000 Muslim homes were destroyed along with the three Mosques. Muslim civilians were murdered, placed in detention camps or forcibly displaced. Post-Dayton, the situation improved little for returnees, who were regularly intimidated and threatened. During 1998 and 1999 Lieutenant-Colonel Hector Gullan of the British Special Air Service (SAS) led an undercover operation in the Town. Gullan discovered that Renner, an organized crime network comprising figures responsible for the war-time occupation, continued to control Stolac, profiting from various criminal ventures.¹⁴⁰ In October 1998, RPGs were fired at a Bosnian Muslim returnee's house, the 15th explosion in two months. Over 70 attacks against returnees were recorded throughout the year.¹⁴¹ Gullan soon identified the key figures in Renner and submitted a report to the ICTY and SFOR calling for the indictment and arrest of 22 individuals. However, it was determined that the cases would have to be dealt with through the domestic authorities. Gullan was incredulous; "No Bosniak will testify in the local courts."¹⁴² The Sarajevo authorities decided to take the case away from the Mostar cantonal authorities and in 1999, under the direction of the Bosnian Federation Minister of Interior, Joso Leutar, issued eight arrest warrants. The men were reportedly tipped off by local police, allowing several to escape. Although the alleged leader Jozo Peric was arrested, he was released after 60 days due to a "whitewash deal with the local police"¹⁴³ and fled the country. Several months later Leutar was assassinated in a car bombing, which Gullan linked to the Stolac case.¹⁴⁴

¹³⁹ See 'Croatian Operation Puma 'Targeted ICTY Investigators' In Bosnia', Tribunal Update, No. 156, December 13-18, 1999.

¹⁴⁰ For more details of Jozo Peric, the alleged leader of Renner and his involvement in organized crime see 'Lawless Rule Versus Rule of Law in the Balkans', United States Institute for Peace, Special Report 97, December 2002, p. 7.

¹⁴¹ See 'Explosions Rattle Three Towns in Bosnia', *New York Times*, July 30, 1998.

¹⁴² Interview with Lieutenant-Colonel Hector Gullan, Sarajevo, 2003.

¹⁴³ Interview with Lieutenant-Colonel Hector Gullan, Sarajevo, 2003.

¹⁴⁴ Interview with Lieutenant-Colonel Hector Gullan, Sarajevo, 2003. Today in Bosnia, the prospects for holding viable domestic war crimes prosecutions has improved significantly due to the establishment of the

Only If We Come Across Them During The Course Of Our Other Duties

In a move to circumscribe NATO's involvement in arresting PIFWCs, the NAC issued a policy which served to further narrow the scope of IFOR's authority set out in Dayton's annexes. The December 16, 1995 Directive promulgated that "IFOR should [only] detain any persons indicted by the International Criminal Tribunal *who come into contact with IFOR in its execution of assigned tasks*, in order to ensure the transfer of these persons to the International Criminal Tribunal."¹⁴⁵ Bildt saw the policy as a means by which IFOR could avoid any sort of involvement in the effort to send PIFWCs to The Hague.¹⁴⁶ General Joulwan, SACEUR was unequivocal: "...it is very clear what my instructions are. If we come into contact with them, we will detain them and turn them over to the proper authorities."¹⁴⁷

It soon became clear however, that the policy was actually leading to IFOR troops going to ridiculous lengths to stay within the scope of the new RoE. As Shattuck highlights "the U.S. commanders of IFOR were going out of their way to keep their troops from coming onto contact with war criminals or appearing to assist the tribunal in its investigative work."¹⁴⁸ Bildt was dismayed with the somewhat farcical state of affairs, dryly noting "While I tried to use IFOR to scare Karadzic away, it seemed as if the very risk of Karadzic turning up anywhere instead had the effect of scaring IFOR away."¹⁴⁹ An official U.S. Army report subsequently acknowledged that NATO "went out of our way to avoid them [PIFWCs]."¹⁵⁰ The report goes on to highlight that on one occasion

new War Crimes Chamber, which operates within the Criminal Division of the State Court of Bosnia, and is based in Sarajevo. The Chamber was established with direct assistance from the ICTY and the OHR and includes enhanced provisions for witness protection and judicial independence.

¹⁴⁵ See The Rules of Engagement on the Detention and Transfer of Persons Indicted by the ICTY in Bosnia and Herzegovina, adopted by the North Atlantic Council, December 16, 1995.

¹⁴⁶ See BILDT, PEACE JOURNEY, p. 170.

¹⁴⁷ See General Joulwan quote, cited in Dick A. Leurdijk, 'Arresting War Criminal: The establishment of an international arresting team: fiction, reality or both?' in VAN DIJK AND HOVENS, ARRESTING WAR CRIMINALS, p. 63.

¹⁴⁸ See SHATTUCK, FREEDOM ON FIRE, p. 213.

¹⁴⁹ See BILDT, PEACE JOURNEY, p. 170.

¹⁵⁰ See Law and Military Operations in the Balkans 1995-1998, p. 125.

where IFOR knew an indicted war criminal was in a building that they were about to enter, they withdrew and waited until the PIFWC had departed.¹⁵¹

Furthermore, in clear contradiction to Joulwan's statement, NATO forces also failed to detain PIFWCs with whom they came into contact. Whilst driving to Banja Luka from Pale, Karadzic's motorcade passed through four IFOR checkpoints, two of them manned by U.S. forces.¹⁵² When confronted with the story by Holbrooke, Admiral Smith was scathing, remaining adamant that his forces would not arrest PIFWCs.¹⁵³ The ICTY's former liaison officer in Bosnia disparagingly recounted personally witnessing a group of Italian soldiers turn their backs on Karadzic's convoy so they would not "come into contact with him" under the terms of the NAC Directive.¹⁵⁴ Another indictee reportedly lived only one hundred metres away from a military post in the British Sector.¹⁵⁵ Other farcical encounters included NATO troops at checkpoints reportedly recognizing a PIFWC and ordering the individual to stand fast whilst headquarters was advised over a possible detention, providing the PIFWC the opportunity to leave the area.¹⁵⁶ Ultimately, as Cousens and Carter highlight, IFOR essentially abdicated its authorized responsibility to apprehend indictees with whom it was in effective contact.¹⁵⁷

In response to increasing media criticism over their failure to carry out arrests, NATO also maintained it did not know the whereabouts of indictees. As Kerr suggests "A major obstacle to carrying out detention of accused for the military was logistical, not political....even if the accused were sighted there the day before, and were officially

¹⁵¹ See Law and Military Operations in the Balkans 1995-1998, p. 125. Similarly, Amnesty International cited several reports of IFOR encountering PIFWCs and failing to arrest, see 'Bosnia-Herzegovina - The duty to search for war crimes suspects: An open letter from Amnesty International to IFOR commanders and contributing governments', Amnesty International, March 1, 1996.

¹⁵² See John Pomfret, 'Bosnia's Serb Leader Stages Show of Defiance', *Washington Post*, February 10, 1996.

¹⁵³ See HOLBROOKE, *TO END A WAR*, p. 339.

¹⁵⁴ See James Kitfield, 'No Sanctuary', October 1, 2000,

¹⁵⁵ See CAROL OFF, *THE LION, THE FOX AND THE EAGLE: A STORY OF GENERALS AND JUSTICE IN YUGOSLAVIA AND RWANDA* (Random House) 2000, p. 296, [hereinafter OFF, *THE LION, THE FOX AND THE EAGLE*]

¹⁵⁶ See Law and Military Operations in the Balkans 1995-1998, p. 124.

¹⁵⁷ See COUSENS & CARTER, *TOWARDS PEACE IN BOSNIA*, p. 118.

residing there, it did not follow that they would be there the next day, if at all.”¹⁵⁸

However, given the extensive intelligence gathering capabilities NATO possessed, such claims may be viewed as ill-founded. As a collaborative report by the U.S. Department of Defense and National Defence University highlighted “IFOR through its intelligence operation (supported by significant national contributions, especially from the United States), was able to make clear to the FWF [Former Warring Factions] that they *could monitor them at any time of the day or night and under all weather conditions.*”¹⁵⁹ U.S. military intelligence officers also subsequently conceded that Mladic was easy to track, travelling with a radio in his vehicle, which was monitored.¹⁶⁰ Furthermore, the British and French contingents of IFOR had developed extensive HUMINT capabilities during their time serving with UNPROFOR,¹⁶¹ and a large number of PIFWCs were highly visible, active players within their local communities, making no effort to conceal their whereabouts.

Indeed, several journalists appeared to have little trouble finding them.¹⁶² Some commentators have dismissed these encounters as no more than journalistic sensationalism¹⁶³ although the fact remains that with minimal effort, PIFWCs could be located, with many taking no steps to hide their presence. Furthermore, it was not only the media looking to generate stories who successfully located many of the indictees. In July 1997, Amnesty International, the Coalition for International Justice, Human Rights Watch and the International Helsinki Federation launched their Arrest Now! Campaign, which listed a variety of details relating to PIFWCs, including their locations in relation

¹⁵⁸ See RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* (Oxford Uni. Press) 2004, p. 157, [hereinafter KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*]

¹⁵⁹ See Larry Wentz (contributing editor) *Lessons from Bosnia: The IFOR Experience*, A DoD Command and Control Research Program (CCRP), NDU Collaboration, 1997, p. 57.

¹⁶⁰ See Colin Soloway and Stephen J. Hedges ‘How not to Catch a War Criminal’. *U.S. News and World Report*, December 9, 1996.

¹⁶¹ See Larry Wentz (contributing editor) *Lessons from Bosnia: The IFOR Experience*, A DoD Command and Control Research Program (CCRP), NDU Collaboration, 1997, p. 60.

¹⁶² See Vanessa Vasic Janekovic, ‘Mission Creep: IFOR is under pressure to support the tribunal’, *Tribunal Update*, Institute for War and Peace Reporting, March/April 1996; Johanna McGearry and Alexandra Stiglmeier, ‘Face to Face with Evil’, *Time International*, May 13, 1996.

¹⁶³ See CHUTER, *WAR CRIMES*, p. 195.

to NATO bases. U.S. and NATO officials were reportedly humiliated.¹⁶⁴ Similarly, ICTY officials managed to locate and identify eighty percent of the indictee list within the space of two weeks.¹⁶⁵

Arrests Will Threaten a Fragile Order

Consequently, NATO came under sustained media criticism for its failure to arrest PIFWCs, with many commentators increasingly questioning the credibility of the organization. Lack of information relating to PIFWCs whereabouts could hardly be maintained as an adequate justification in light of the Arrest Now! Campaign, and IFOR was clearly failing to arrest those indictees it did encounter. Thus, NATO attempted to justify their inaction by arguing arrests would threaten the fragile order achieved under Dayton. As Newton recounts, “The North Atlantic Council (NAC)...determined that military apprehension of suspects indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) would destabilize the region and undermine overall operational goals by *enhancing the status of the radical nationalist parties*.”¹⁶⁶ Similarly, a senior British Ministry of Defence official was reportedly “worried about the impact [arrests would have] on the broader peace process, *the process of reunification and nation building would be even more difficult*.”¹⁶⁷ Initial proposals to launch an arrest operation to lift Karadzic were reportedly denounced by the British Foreign Office, which refused to provide SAS personnel to support US snatch teams; “There will be casualties, *the peace deal will be dead in the water* and our forces will be attacked in retaliation.”¹⁶⁸ Elements of the U.S. military made equally ominous predictions: “Precipitous military action by SFOR could easily inflame the already deep ethnic hatred....[if] Karadzic and Mladic were [arrested]....The certain result in Serbska would be to further radicalize the population....A likely result would be hostage-taking by the Serbs and increasing military

¹⁶⁴ See SAMANTHA POWER, “A PROBLEM FROM HELL.” AMERICA IN THE AGE OF GENOCIDE (Basic Books) 2002, p. 493.

¹⁶⁵ See James Kitfield, ‘No Sanctuary’, GOVEXEC.COM, October 1, 2000.

¹⁶⁶ See Michael Newton ‘Harmony or Hegemony? The American Military Role in the Pursuit of Justice’, Connecticut Journal of International Law, Spring 2004, p. 237 emphasis added.

¹⁶⁷ See BASS STAY THE HAND OF VENGEANCE, p. 249, emphasis added.

¹⁶⁸ See senior British official quote in MICHAEL SMITH, KILLER ELITE. THE INSIDE STORY OF AMERICA’S MOST SECRET SPECIAL OPERATIONS TEAM (Weidenfeld & Nicolson) 2006, p. 195, emphasis added [hereinafter SMITH, KILLER ELITE]

confrontation with SFOR troops.”¹⁶⁹ Similarly, Kerr notes “there was a *very real concern* that carrying out arrests before the peace in Bosnia had achieved at least some measure of stability might provoke a recommencement of the war.”¹⁷⁰

Were Such Concerns Warranted?

Whilst the “concern” that arrests “might provoke a recommencement of the war” may have been “real”, was it warranted? Like the associated premise outlined in chapter three, which posits that atrocity crimes indictments have the potential to undermine the attainment of a political settlement, the contention that arrests may imperil a fragile peace, is not without merit, and in certain instances, concerns that vigorously pursuing post-conflict justice could undermine fragile order, may be legitimate. Again it is instructive to examine recent developments in Liberia relating to placing former President Charles Taylor on trial. Taylor’s arrest on the Nigeria/Cameroon border led to his rapid transfer to Sierra Leone’s Special Court for War Crimes, where on April 3, 2005, the former President pleaded not guilty to 11 counts of war crimes and crimes against humanity. However, the relief that Taylor was prevented from slipping the net was tinged by serious concerns that holding the trial in Sierra Leone could have destabilizing consequences for the country and the wider region. On a visit to the U.K. Liberian president Ellen Johnson-Sirleaf, called for a trial outside Africa, noting “There are too many risks associated with an overbearing presence.”¹⁷¹ Consequently, it was proposed that Taylor’s trial be moved to the premises of the ICC in the Netherlands.¹⁷² A number of Sierra Leonean and international NGO’s passionately argued the trial should take place in Freetown, suggesting the move would distance the people of Sierra Leone from the process.¹⁷³ However, with several of Taylor’s loyalists retaining office in

¹⁶⁹ See Colonel F. M. Lorenz, ‘War Criminals – Testing the Limits of Military Force’, JFQ, Summer 1997, p. 63.

¹⁷⁰ See KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, p. 157. emphasis added.

¹⁷¹ See Ayesha Kajee, ‘Trying Times for Special Court’, Africa Reports, No. 66, Institute for War and Peace Reporting, June 9, 2006.

¹⁷² The trial will still fall under the jurisdiction of the SCSL, which, under Article 4 of its statute, allows the venue to be moved.

¹⁷³ See ‘Why the Trial of Taylor Should Hold in Sierra Leone - Amnesty International’, *All Africa.com*, April 7, 2006; Taylor Trial Should Be Moved from Sierra Leone Only as Last Resort, International Center for Transitional Justice, Press Release, April 3, 2006.

Liberia¹⁷⁴, reports of NPFL fighters slipping into Sierra Leone from Liberia¹⁷⁵, and a series of arrests linked to a plot to help Taylor escape¹⁷⁶, the threat of instability was deemed too great to hold the trial locally, and the SCSL requested the case be moved to The Hague. The Court's Deputy Chief Prosecutor, Christopher Staker, revealed that many political leaders in the sub-region contacted the Court asking for Taylor to be transferred to the ICC.¹⁷⁷ In light of the specific dynamics (Sierra Leone and Liberia's security forces are still in the early stages of restructuring and retraining and are both relatively weak, and international troop draw-downs are occurring in both countries) the transfer appears to be a prudent decision. As a British Diplomat in Freetown cautioned "It is clear to us that Charles Taylor still does command massive support in the sub-region. We need to build on the hard-won peace here rather than prepare its collapse."¹⁷⁸

Similar concerns have been aired relating to prosecuting atrocity crimes in Afghanistan, where the issue has remained controversial during the initial years of the nascent Afghan government after the fall of the Taliban in late 2001. Human Rights Watch and Amnesty International have regularly called for trials to commence against individuals implicated in atrocity crimes.¹⁷⁹ In September 2005, prior to the Wolesi Jirga and Provincial Council elections, Amnesty International criticized the prevailing climate of impunity and urged the judiciary to "bring to justice all those who have committed human rights abuses in Afghanistan."¹⁸⁰ However, given the small number of international troops in country (who were also either primarily focused on counter-insurgency operations, or engaged in very restrictive peacekeeping due to national caveat restrictions), the limited capacity for domestic security forces to maintain order, and more importantly, the ability

¹⁷⁴ See Adam Wolfe, 'The effects of the arrest of Liberia's Taylor' *Power and Interest News Report*, April 21, 2006.

¹⁷⁵ See Salifu Conteh, 'Liberia: Charles Taylor Should Be Watched', *Standard Times (Freetown)* posted on *All Africa.com*, May 12, 2006.

¹⁷⁶ See 'Sierra Leone charges American in Taylor plot. Accused of helping ex-Liberian president attempt escape from court', *Associated Press*, May 19, 2006.

¹⁷⁷ See Moses Kargba, 'Sub-Regional Leaders Call: Take Charles Taylor Away', *Concord Times (Freetown)* posted on *All Africa.com*, May 19, 2006.

¹⁷⁸ See Lansana Fofana, 'Mixed Feelings Over Charles Taylor's Transfer to the Hague', *Inter Press Service*, posted on *All Africa.com*, June 21, 2006.

¹⁷⁹ See 'Blood-Stained Hands. Past Atrocities in Kabul and Afghanistan's Legacy of Impunity', Human Rights Watch, 2005.

¹⁸⁰ See 'Afghanistan Human rights challenges facing Afghanistan's National and Provincial Assemblies - an open letter to candidates', Amnesty International, September 15, 2005.

of many of the senior powerful figures implicated to remobilize their militias,¹⁸¹ arrests and prosecutions at that time had the very real potential to lead to serious disorder. Consequently, although the United Nations Independent Expert on the situation of human rights in Afghanistan highlighted it was essential for the Afghan government to engage in an open process of facing past atrocities and seeking public accountability, he also recognized “the significance of current security concerns and continued political uncertainty.”¹⁸² In late January 2005, The Afghan Independent Human Rights Commission (AIHRC) approached the issue in a similarly pragmatic manner. ‘A Call for Justice’, the unprecedented domestically initiated national consultation process focusing on how to adequately respond to the issue of the commission of atrocity crimes, proposed a national strategy on transitional justice which acknowledged Afghanistan’s “current socio-political realities,”¹⁸³ and set out a sequenced strategy including criminal trials, *but with no explicit timetables*. The report was particularly cognizant of the challenges facing the country including the absence of security, the limited reach of the government and the problems associated with the judiciary.¹⁸⁴

Both Liberia and Afghanistan illustrate that the specific dynamics and context within a country will necessarily dictate whether it is prudent to proceed with post-conflict justice initiatives. Where there is a genuine likelihood that arrests and prosecutions will lead to significant disorder, justice may well have to be deferred. However, in the case of

¹⁸¹ Although, the UN instituted a large-scale Disarmament, Demobilization and Reintegration Programme (DDR) leading to the demobilization of some 63,000 fighters, many senior commanders handed in old or obsolete weapons. Furthermore, the DDR Programme was less successful in breaking up the recruitment structure, and instances of rapid remobilization have occurred during periods of tension in Northern Afghanistan. Critically, DDR only focused on military forces with some formal association with the State, ignoring illegal armed groups. Although an associated Programme has been established (the Disarmament of Illegal Armed Groups - DIAG) progress has been slow. Consequently, the arrest and prosecution of, for example, Abdul Rashid Dostum, or Abdul Rabb al-Rasul Sayyaf, both of whom have been regularly accused by various human rights NGOs of being implicated in war crimes, and retain considerable levels of power and influence, would likely have resulted in serious disorder, which the Afghan government may not have been able to contain.

¹⁸² See ‘Report of the independent expert on the situation of human rights in Afghanistan, M. Cherif Bassiouni’, E/CN.4/2005/122 11 March 2005, at 41. The author worked for M. Cherif Bassiouni in Afghanistan and assisted in writing the U.N. Report.

¹⁸³ See ‘A Call for Justice. Conclusions of AIHRC’s National Consultation on Transitional Justice in Afghanistan’, AIHRC Press Release, January 29, 2005.

¹⁸⁴ See ‘A Call for Justice. A National Consultation on Past Human Rights Violations in Afghanistan’. The Afghan Independent Human Rights Commission, January, 2005, p. 42.

Bosnia, the chapter demonstrates that, given the specific circumstances, the contention that the arrest of PIFWCs would have seriously threatened the incipient peace, was significantly overplayed by NATO. Although (as highlighted by Mark Wheeler) arrest missions launched earlier that July 1997 may have caused some disorder, the (then) head of the International Crisis Group's Sarajevo office, was keen to point out that "with the 60,000 and 35,000 NATO troops [IFOR and SFOR levels] around, these would have been *containable disorders*."¹⁸⁵ Similarly, Holbrooke was unconvinced of the 'threat to order' argument and felt the military's predictions were based on "another misreading of the Bosnian Serbs...the military viewed the Serbs as a potent military force that would threaten IFOR as it had the U.N. Our negotiating team, including two generals, Clark and Kerrick, believed these fears were greatly exaggerated.... We believed that if sent to Bosnia, the U.S. military and NATO would be able to control the situation on the ground with little difficulty or challenge from the Serbs."¹⁸⁶ Recently declassified U.S. government documents reveal that other senior officials within the Clinton administration were also confident that IFOR would not face a significant challenge. In a memo to William Perry and Walt Slocombe, James Pardew predicted "force will prevail quickly in Bosnia. We can expect localized resistance on a limited scale to test the IFOR but not major confrontation with the Serbs."¹⁸⁷ Marcus Cox, (then) head of the European Stability Initiative (ESI) Sarajevo Office, was even more emphatic "IFOR had the security situation locked down in Bosnia and the argument that arrests would threaten the peace was tenuous"¹⁸⁸

The attempt to invoke UNPROFOR's difficult experiences with the Bosnian Serb military, and the hostage taking incidents as a likely indicator of reaction to NATO arrest operations, may also be viewed as particularly misguided. Unlike their lightly armed, limited in number, and precariously deployed predecessors, I/SFOR were heavily armed and endowed with robust rules of engagement, empowering them to use massive firepower to deter any attacks. In the U.S. 1st Armoured Division area, the commanders

¹⁸⁵ Interview with Mark Wheeler, Sarajevo, (emphasis added.)

¹⁸⁶ See HOLBROOKE, *TO END A WAR*, p. 218.

¹⁸⁷ See Pardew memorandum to Perry and Slocombe, 'Military Roles in a Post-Settlement Bosnia,' October 13, 1995, in 'The Road to Dayton,' U.S. Department of State, Ch. 7, p. 172.

¹⁸⁸ Interview with Marcus Cox, European Stability Initiative (ESI) Sarajevo, 2003.

quickly established 22 live firing ranges.¹⁸⁹ Representatives from all the former ‘warring factions’ were ‘invited’ to witness overwhelming firepower exercises which acted as a clear demonstration as to NATO’s response to any challenge it received. The former ‘warring parties’ generally left under no uncertain terms as to the consequences of them confronting the international forces.¹⁹⁰ A number of incidents showed that whilst still prepared to challenge international forces, BS forces would relent after their bluff had been called. In April a U.S. platoon commander was ordered to move his forces at a BS checkpoint. Instead, reinforcements were deployed. General Nash recalled “[W]e just said, ‘You want to fight? Today’s a good time, this is a good place.’”¹⁹¹ The BS forces soon backed down in the face of a determined and un-intimidated opponent. In another encounter a U.S. officer deployed within IFOR recalled “the [Bosnian] Serbs had their headquarters on the wrong side of the street. They had had twenty days to move it to the right side of the street, as stipulated by Dayton, and they hadn’t. I told the [Bosnian] Serbs we would bomb their headquarters with an Apache if they didn’t move it. I called in an Apache to do a flyover.”¹⁹² The Bosnian Serb forces quickly complied with the order. Critically, General Zdravko Tolimir, deputy military commander of the Bosnian Serb army informed the NATO ground force commander that the arrest of Karadzic “*would not provoke a violent reaction among his people*”¹⁹³

In light of these considerations, the argument that I/S/FOR arrests would have seriously undermined the peace appears tenuous. More importantly, as the following section will clearly demonstrate, rather than arrest operations serving to “destabilize the region and undermine overall operational goals” of the internationally led peacebuilding forces, leading to the peace deal being the “*dead in the water*”, the *failure* to institute a more

¹⁸⁹ See A force for peace, p. 45.

¹⁹⁰ See Larry Wentz (contributing editor) Lessons from Bosnia: The IFOR Experience, A DoD Command and Control Research Program (CCRP), NDU Collaboration, 1997, p. 57.

¹⁹¹ See General William Nash quote, in, BASS, STAY THE HAND OF VENGEANCE, p. 252.

¹⁹² Comments of Lieutenant Colonel Tom Wilhelm in ROBERT D. KAPLAN, IMPERIAL GRUNTS. THE AMERICAN MILITARY ON THE GROUND (Random House) 2005, p. 122 [hereinafter KAPLAN, IMPERIAL GRUNTS]

¹⁹³ See Eve-Ann Prentice. ‘Serb Forces ‘Would Not Resist Arrest of Karadzic’, *Times*, July 22, 1996, (emphasis added.)

robust arrest policy earlier in the post-conflict environment *actually undermined the quality* of the order established in Bosnia.

The Consequences of “Minimalism” – What Price Order?

In the absence of any arrests by NATO forces during the first eighteen months of its deployment many PIFWCs exerted a pervasive negative influence on the peacebuilding process, particularly due to their actions related to frustrating minority return and their involvement in organized crime. As the Report Of The Century Foundation/Twentieth Century Fund Task Force On Apprehending Indicted War Criminals highlighted, the continued presence of PIFWCs “helped consolidate Bosnia’s ethnic partition, exacerbated the political and economic tensions in the country, poisoned its social and cultural institutions and entrenched its ultranationalist and ethnic-supremacist forces.”¹⁹⁴ The United States Institute of Peace (USIP) noted that a “considerable overlap” existed between the power brokers responsible for violence-prone networks in each ethnic community and perpetrators of war crimes.¹⁹⁵ Many PIFWCs also maintained and sought to extend their organized criminal networks, which flourished during the wars. Colonel Peter Lambrechste of the EU police section working in Bosnia noted “The old warlords have simply shifted their activities....and in this postwar period. crime is flourishing.”¹⁹⁶ Similarly, the U.S. Special Representative to Bosnia stressed to the Legal Affairs and Human Rights Committee of the Council of Europe that “Wartime underground networks have turned into political criminal networks involved in massive smuggling, tax evasion, and trafficking of women and stolen cars.”¹⁹⁷ Proceeds from these activities helped fund parallel institutions intent on undermining and subverting the DPA¹⁹⁸, and were also used to fund the protection of senior PIFWCs.¹⁹⁹

¹⁹⁴ See ‘Making Justice Work. The Report of The Century Foundation/ Twentieth Century Fund Task Force On Apprehending Indicted War Criminals’, p.4

¹⁹⁵ See ‘Lawless Rule Versus Rule of Law in the Balkans’, United States Institute for Peace. Special Report 97, December 2002, p. 3.

¹⁹⁶ See Colonel Peter Lambrechste quote in NEUFFER, THE KEY TO MY NEIGHBOUR’S HOUSE, p. 187.

¹⁹⁷ See Harold J. Johnson, ‘Bosnia: Crime and Corruption Threaten Successful Implementation of the Dayton Peace Agreement’ Testimony before The Committee on International Relations, House of Representatives, United States General Accounting Office, July 19, 2000, p. 3.

¹⁹⁸ See Amra Festic and Adrian Rausche, ‘War by Other Means: How Bosnia’s Clandestine Political Economies Obstruct Peace and State Building’, *Problems of Post-Communism*, May-June, 2004, pp. 27-34.

Nowhere is the nexus between PIFWCs, organized crime and obstruction to post-conflict peacebuilding more apparent than with Radovan Karadzic and his protection entourage. After lying low during the Dayton negotiations, Karadzic made a defiant re-entry onto Bosnia's political scene, staging a show of authority by touring Banja Luka in early February 1996. One of his first public announcements related to the introduction of a new law in RS which would allow Bosnian Serb refugees and IDPs to keep Bosnian Muslim and Bosnian Croat property they had occupied throughout the entity.²⁰⁰ Karadzic's supporters also played a key role in orchestrating a Bosnian Serb exodus from the Grbavica suburbs of Sarajevo in early 1996, extinguishing any hopes of the city retaining its multi-ethnic character.²⁰¹ The Bosnian Serb neighbourhoods were due to revert to Governmental control, but many residents wished to remain. As Srdjan Dizdarevic, President of the Helsinki Committee for Human Rights in Bosnia Herzegovina recounted "we know that in the period from January to April 96 that there was more than 60% of the Serbs that wanted to stay and we know the kind of pressures they had [faced] to leave."²⁰² Karadzic supporters threatened, intimidated and physically attacked any citizens who attempted to stay. Mark Wheeler, (then) Director of the International Crisis Group Sarajevo office, described the episode as "[Bosnian] Serb active self cleansing." He continued "it was a calculated decision....that no [Bosnian] Serbs should be allowed to remain in a [Bosnian] Muslim dominated entity....[It] consolidated [Bosnian] Serb ethnic cleansing in the RS, making it plain that [Bosnian] Serb war-time propaganda that they and the [Bosnian] Muslims couldn't live together any more was true."²⁰³ In addition to actively frustrating elements of the DPA, Karadzic controlled an extensive organized crime network, which continues to thrive today. Paddy

¹⁹⁹ See 'Lawless Rule Versus Rule of Law in the Balkans', United States Institute for Peace, Special Report 97, December 2002, p. 7.

²⁰⁰ See John Pomfret, 'Bosnian Serbs' Leader Stages Show of Defiance. Karadzic Tour end Months of Seclusions', *Washington Post*, February 10, 1996.

²⁰¹ See Michael J. Dziedzic and Andrew Blair, 'Bosnia and the International Police Task Force' in ROBERT B. OAKLEY, MICHAEL J. DZIEDZIC AND ELIOT M. GOLDBERG, *POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY* (National Defense Uni. Press) 1998, p. 300.

²⁰² Interview with Srdjan Dizdarevic, Helsinki Committee for Human Rights, Sarajevo, July 2003.

²⁰³ Both Dizdarevic and Wheeler acknowledged that the Bosnian Muslim authorities could have done more to encourage the Bosnian Serb residents to stay. Furthermore, they noted that the International response was woeful, with the IPTF being overwhelmed and SFOR flatly refusing to intervene to stop the Bosnian Serb gangs. Nevertheless, they both agreed that the overwhelming responsibility lay with forces under the control of Karadzic.

Ashdown, former High Representative, is quoted as describing him as “the head of a vast criminal organisation” that thrives on corruption and extortion. Visits are paid to businessmen from dark forces who ask for contributions for the ‘doctor in the forest’. These organised crime networks make vast sums from smuggling drugs, petrol and tobacco as well as trafficking young girls for the sex trade.”²⁰⁴

Although some U.S. military commentators acknowledged that certain senior PIFWCs may pose a problem, they were dismissive over the impact lower level indictees. Colonel Lorenz agreed “There is a major distinction between Karadzic and the lesser known indicted war criminals who wield little power and influence. [Although] *A strong argument can be made that Karadzic is an obstacle to peace....that argument weakens for most of the others.*”²⁰⁵ This perspective dramatically underestimates the considerable negative impact such “lesser known” PIFWCs exerted on peacebuilding efforts. Many acted to frustrate the civilian components of the Dayton agreement, particularly minority return. This obstruction was even more acute where they continued to occupy positions of authority, especially within the security sector. As Human Rights Watch noted with regard to Prijedor, “The police authorities and officers charged today with protecting the public good....are in many cases the same individuals who have been accused by numerous witnesses of participation in war crimes.”²⁰⁶ Mark Wheeler emphasised “Their continued presence as middle-level policemen or bureaucrats is a tremendous disincentive to refugee [and IDP] return.”²⁰⁷ Similarly, Wesselingh and Vaulerin noted that for refugees and IDPs “Fears of insecurity remain one of the *principal* obstacles to returning”²⁰⁸ Civilian and police authorities in many towns throughout RS organized or incited violence against minorities; houses were firebombed and property ownership records destroyed in a concerted attempt to create a climate of fear and hostility.

²⁰⁴ See Antony Barnett, ‘Most Wanted: Doctor Death. The Hunt for Karadzic’, *Observer*, June 26, 2005.

²⁰⁵ See Colonel F. M. Lorenz, ‘War Criminals – Testing the Limits of Military Force’, *JFQ*, Summer 1997, p. 64. (emphasis added.)

²⁰⁶ See Bosnia and Herzegovina. The Unindicted: Reaping the Rewards of “Ethnic Cleansing”. Human Rights Watch, Vol. 9, No. 1, January 1997, Summary.

²⁰⁷ Interview with Mark Wheeler, International Crisis Group, Sarajevo, July, 2003.

²⁰⁸ See WESSELINGH AND VAULERIN, *RAW MEMORY*, p.93. (emphasis added)

Simo Drljaca provides a classic example of a so-called ‘small fish’ PIFWC involved in activities designed to frustrate the implementation of Dayton’s civilian components. Drljaca was a key member of the “Krizni Stab” or Crisis Committee, which organized and implemented the take-over of Prijedor. As Chief of Police, he played a major role in the organization and management of the detention camps in the area, where many non-Serbs were tortured, sexually assaulted, raped and murdered. After the war he continued to exert significant influence. Although ‘removed’ from his official position, Drljaca remained firmly in control, issuing orders directly to his supposed successor.²⁰⁹ He controlled the local Property Commission and the Commission on Displaced Persons and Refugees, threatened Tribunal witnesses, and was implicated in the dynamiting of ninety Bosnian Muslim returnee homes. Local Bosnian Serbs who interacted with NATO soldiers were also threatened and intimidated.²¹⁰ Furthermore, as a logistics assistant to the RS’s Interior Minister, Drljaca was in charge of providing false documents and safe houses to other Bosnian Serbs wanted on war crimes charges.²¹¹ Another indictee, Zeljko Mejakic, continued to serve as Deputy Station Commander of Omarska police station, exerting a repressive hold over the community, intimidating political opponents and destroying evidence.²¹² In Eastern RS, Milan Lukic continued to control an extensive organized crime network with links to both Karadzic and Serbia’s criminal elite and security services, and was involved in drug smuggling and extortion. In Foca, a particularly hard line town in the area, with little refugee or IDP return, indictee Janko Janjic issued death threats against OSCE election observers and attempted to extort money.²¹³

Similarly in Herceg-Bosna, the criminal and paramilitary forces involved in atrocity crimes retained a tight grip on power. As an ESI report highlighted, “having used these illegal networks for military and economic ends during the war, the HDZ in some parts of the country is hostage to the criminal underworld, both because of threats of violence and

²⁰⁹ See Bosnia and Hercegovina. *The Unindicted: Reaping the Rewards of “Ethnic Cleansing”*. Human Rights Watch, Vol. 9. No. 1, January 1997, Summary.

²¹⁰ See NEUFFER, *THE KEY TO MY NEIGHBOUR’S HOUSE*, p. 188.

²¹¹ See Richard H. Curtiss, ‘As U.S. Shifts in Bosnia, NATO Gets Serious About War Criminals’, *Washington Report*, October/November 1997.

²¹² See NEUFFER, *THE KEY TO MY NEIGHBOUR’S HOUSE*, p. 187.

²¹³ See Takis Michas, ‘Appeasing Criminals in Bosnia’, *Wall Street Journal Europe*, September 24, 1997.

for fear that the war-time role played by key HDZ figures will become public.”²¹⁴ Such figures played a part in violently obstructing minority returns to Bosnian Croat areas. Bosnian Croat veterans associations were particularly noted for their capacity to assemble violent “rent-a-mobs” at a moment’s notice, and a number of PIFWCs were directly involved in orchestrating these forces. In Jajce during mid-July 1997, a Bosnian Croat mob blocked Bosnian Muslims returning to their homes. The mob was personally directed by PIFWC, Dario Kordic.²¹⁵ Another paramilitary-type group involved in similar activities around Mostar was founded and controlled by Mladen Naletilic “an indicted war criminal and notorious underworld figure.”²¹⁶

The failure to pursue a robust policy towards PIFWCs in the early stages of peacebuilding in Bosnia only served to embolden many, allowed them to consolidate, strengthen and extend their organized crime networks and frustrate minority return. International peacebuilding initiatives have largely failed to recognize the links between PIFWCs and organized crime, with the latter particularly receiving scant attention. As USIP highlights; “Organized crime was regarded as having no relevance to military peace enforcement until relatively recently.”²¹⁷ A recent RAND Corporation report focusing on restoring law and order after conflict highlights there is a “golden hour” time frame of several weeks to several months to establish the rule of law, noting that in this period potential spoilers may have insufficient time to organize.²¹⁸ However, International peacebuilding practitioners have only recently begun to belatedly acknowledge the grave consequences of failing to establish the rule of law at an earlier juncture. (Then) High Representative Paddy Ashdown conceded “In hindsight, we should have put the

²¹⁴ See ‘Reshaping international priorities in Bosnia and Herzegovina. Part One. Bosnian Power Structures’, European Stability Initiative (ESI) October 14, 1999, p. 10.

²¹⁵ See HOLBROOKE, *TO END A WAR*, p. 351.

²¹⁶ See ‘Lawless Rule Versus Rule of Law in the Balkans’, United States Institute for Peace, Special Report 97, December 2002, p. 7.

²¹⁷ See ‘Lawless Rule Versus Rule of Law in the Balkans’, United States Institute for Peace, Special Report 97, December 2002, p. 3. The author acknowledges that organized crime in the Balkans extends beyond the control of PIFWCs. Nevertheless, a clear nexus exists between many PIFWCs and organized crime, and by acknowledging the links and acting to apprehend such PIFWCs, the International Community may have been able to break up some of the networks in the initial post-Dayton stage. Furthermore, the ICTY presented an ideal mechanism to remove PIFWCs who were involved in this activity.

²¹⁸ See Seth G. Jones, Jeremy M. Wilson, Andrew Rathmell and K. Jack Riley, ‘Establishing Law and Order after Conflict’, RAND Corporation, 2005, pp. xi-xii.

establishment of the rule of law first, for everything else depends on it....Failure to acknowledge the criminal threat earlier and develop the means to address it retarded Peacebuilding in Bosnia.”²¹⁹

Conclusions

Chapter four demonstrates that the contention that domestic authorities can be the main forum to investigate and prosecute atrocity crimes is seriously flawed. As the activities of the Republika Srpska and Bosnian-Croat authorities imply, where individuals implicated in the commission of atrocity crimes retain influence in government, there will be little in the way of support for investigations, transfer of indictees, or credible domestic prosecutions.

The chapter also highlights how the prospects of international criminal tribunals obtaining the custody of PIFWCs will be particularly affected by whether the troop-contributing States to a peacekeeping/peace enforcement mission are willing to engage in such arrest operations. Where the dominant troop-contributing State is opposed, it will often be very difficult to obtain the necessary cooperation. The chapter also shows how this inaction may be predicated on elaborate justifications advanced by States in order to respond to criticism of their failure to adequately respond to atrocity crimes by affecting arrests. In the case of Bosnia, the claim that NATO did not possess the requisite authority, or have the necessary intelligence to locate and detain PIFWCs, was clearly inaccurate. Similarly, whilst the contention that the arrest of individuals implicated in the commission of atrocity crimes may (as in the case of Liberia and Afghanistan) be a potentially destabilising dynamic, in the case of Bosnia, such fears were overplayed and largely unwarranted. Indeed, as the following chapter demonstrates, NATO’s inaction was in reality predicated on considerations which went beyond a belief that arrests would threaten the nascent peace established in Bosnia.

²¹⁹ See Paddy Ashdown, ‘What I learned in Bosnia’, *New York Times*, October 28, 2002. Similar sentiments were expressed by the former U.N. Special Representative of the Secretary General in Kosovo, Michael Steiner, who emphasised “First and foremost, it is essential to establish security and the rule of law – the very basis for all other progress” see Michael Steiner ‘For Example Kosovo: Seven Principles for Building Peace.’ Speech delivered at the London School of Economics, January 27, 2003.

Chapter Five: Between Order and Justice? An exploration of the reasons behind NATO's reluctance to arrest PIFWCs and an examination of strategies adopted by the Tribunal in order to induce cooperation.

Chapter five commences with an examination of the reasons why NATO and many of its troop contributing states were so reluctant to arrest PIFWCs.¹ Within the literature relating to the ICTY, this unwillingness has been largely attributed to two factors. Firstly, the fear by several Western States that indictees had the potential to uncover damaging revelations relating to so-called 'deals' made either during or after the war, and secondly; the overriding concern that arrest operations would have led to military casualties similar to those experienced by the U.S. during an operation to seize key members of Mohammed Farah Aideed's Somali National Alliance in Mogadishu, Somalia.² After critically assessing these two factors, the author will demonstrate that another dynamic, which has hitherto received minimal focus in the associated literature, was also critical in influencing NATO's unwillingness to apprehend PIFWCs: namely the wider reluctance (particularly within the U.S. military) to engage in Operations Other Than War (OOTW).

The chapter also focuses on the progress of the OTP, highlighting the difficulties atrocity crimes investigators may face in relying on domestic intelligence services to facilitate their work. It also reveals the tensions within the Tribunal over the OTP's investigative strategy, relating to whether indictments should *only* focus on senior figures. The chapter goes on to explore whether the negative impact that lower-level indictees may play in frustrating peacebuilding initiatives has been adequately recognised by those advocating indicting only senior figures implicated in the planning and ordering of atrocity crimes. Building on the theme discussed in previous chapters, the Tribunal's continued struggle to obtain intelligence material (both from the States whose nationals were the subject of

¹ Chapter four highlighted how the NORDPOL Brigade of ISFOR viewed arresting PIFWCs as an *obligation*. However, such views were clearly a minority within the wider force structure.

² Many commentaries on the Mogadishu operation suggest that the U.S. operation was aimed at arresting Aideed. However, accounts supported by inside sources indicate that there was no specific intelligence to suggest Aideed would be present at the meeting, although two 'Tier One Personalities' (senior Aideed aides) Omar Salad Elmi and Mohammed Hassan Awale were to be present, see SMITH, *KILLER ELITE* pp. 178-204.

investigations, and Western States in possession of potentially valuable information) is further discussed. The competing demands of placating States' appeals for confidentiality versus the interests of justice in obtaining vital information to ensure a fair trial are explored, and the *Blaskic* subpoena case is used to illustrate the potential consequences of a State's refusal to disclose information on the grounds of national security.

With the support of key external actors and a new OTP strategy towards arrests, NATO forces gradually assumed a more active role in apprehending PIFWCs, and the chapter will demonstrate how these arrests were a crucial factor in facilitating refugee and IDP return, removing obstructionists and improving the security climate. However, as will be illustrated, the extent and nature of key Western States' cooperation remained uneven, with the OTP's senior legal advisor characterizing it as varying from, "operations carried out with great enthusiasm and skill, to downright resistance and obstruction."³ The chapter will conclude by highlighting how the Tribunal's continued endeavours to obtain the custody of the remaining PIFWCs has been dramatically affected by the emergence of other global strategic priorities.

Why were NATO forces and their Political Superiors so Reluctant to arrest PIFWCS?

1. A Fear of Potentially Damaging Information Emerging During The Trial

Some commentators have suggested that the French refusal to arrest either Mladic or Karadzic was linked to a "concern for the damage they could inflict on Chirac's presidency, the French government, and the army during the Trial in The Hague."⁴ Specific concern reportedly related to the potential exposure of the reasons behind General Janvier's (the French Commander of UNPROFOR) failure to call air-strikes in response to the VRS attack on the Srebrenica enclave, and the negotiations between Chirac, Janvier and Bosnian Serb officials (Janvier met with Mladic⁵) to secure the release of the two French mirage pilots who were shot down over Bosnian Serb

³ See Gavin F. Ruxton 'Present and future record of arresting war criminals; The view of the Public Prosecutor of ICTY', in VAN DIJK AND HOVENS, *ARRESTING WAR CRIMINALS*, p. 20.

⁴ See Chuck Sudetic, 'The Reluctant Gendarme. Why is France protecting indicted war criminals in the sector of Bosnia it controls?' *Atlantic Monthly*, April 2000.

⁵ See HOLBROOKE, *TO END A WAR*, p. 146.

controlled territory by the VRS. Sudetic highlights “despite French government denials, ever since the pilots’ release, on December 12 1995, there has been speculation in Paris and abroad that the French negotiators made promises not to arrest Serbs indicted for war crimes.”⁶

Similarly, allegations have been made that Richard Holbrooke made a deal during a meeting with Karadzic in July 1997⁷ whereby if the Serb President stepped down from the RS Presidency and leadership of the SDS, he would not be arrested by NATO forces.⁸ Current Prosecutor Carla Del Ponte acknowledged she was aware of the allegations, stating the Tribunal even carried out an investigation to verify the claims, although the investigation did not arrive at any definitive conclusions⁹ and Holbrooke has strenuously denied any such deal was made. Former ambassador-at-large for war crimes issues, Richard Pierre Prosper admitted “there obviously was *an understanding* that he has to step down from power, but there never was a deal that would allow him to avoid the responsibility for his actions.”¹⁰ When pressed over the allegation, a former senior Pentagon official evasively stated “let’s just say we may have misled him.”¹¹ Without access to French and U.S. government records, the allegations are difficult to verify, but therefore cannot be discounted. Nevertheless, even if true, such somewhat sensationalist revelations seem only to apply to senior indictees (Karadzic and Mladic) and fail to account for NATO’s wider reluctance to apprehend lower-level PIFWCs who, for the most part, were not in the position to reveal potentially embarrassing details.¹²

⁶ See Chuck Sudetic, ‘The Reluctant Gendarme. Why is France protecting indicted war criminals in the sector of Bosnia it controls?’ *Atlantic Monthly*, April 2000.

⁷ For more details of the strategy of removing Karadzic from office *see below*

⁸ See Nedim Dervisbegovic, ‘West Pushes Serbia on Mladic, But Where’s Karadzic?’, *Reuters*, June 16, 2006; Nick Hawton, ‘Karadzic wife denies helping husband’, *BBC News*, March 16, 2004.

⁹ See Jennifer Glasse, ‘Bosnia: The Men Who Got Away. Interview with Carla Del Ponte’, *PBS*, March 28, 2006.

¹⁰ See Richard Pierre Prosper quote in ‘The Hunt is Still On’, *Nezavisne Novine*, March 5, 2004, translated and posted on *TOL wire*, March 10, 2004, emphasis added.

¹¹ Interview with former Senior Pentagon official. Similarly, Mark Wheeler speculated that such a deal was in fact made. Interview with Mark Wheeler.

¹² The Gagovic incident presents an exception to this principle, *see below*.

2. Fear of Casualties

Considerations of Force Protection have also been highlighted by numerous commentators as another reason behind NATO's resistance to conduct arrest operations.¹³ These considerations were heavily influenced by the U.S. experience in Mogadishu, Somalia, when on October 3, 1993, 18 servicemen were killed and 84 injured during an operation to arrest senior members of Aideed's Somali National Alliance which went disastrously wrong.¹⁴ The spectre of Somalia is thus viewed as a significant factor as to why there was a distinct lack of political will from NATO and the major troop contributing States to go after PIFWCs. A former senior State Department official acknowledged that force protection was always a factor raised by opponents of a more "maximalist" approach by NATO forces in Bosnia.¹⁵

Learning the Wrong Lessons from Somalia

Whilst the failed operation in Somalia may have been influential in determining NATO's attitude to arrests, the author posits that the disaster at Mogadishu represented an inappropriate template to base likely outcomes of the majority of PIFWC operations in Bosnia, for several important reasons. Firstly, the environments were completely different. Large parts of Somalia, including the capital, had descended into lawlessness making it an extremely high risk, hostile environment for operations. A former mid-level Pentagon official working on Somalia issues in 1993 noted "There is a popular conception that [up until the failed arrest operation] the mission went smoothly. In fact the warlords were constantly engaging us [militarily] and testing us to see how serious we were."¹⁶ Mogadishu was a sprawling, urban morass where forces could quickly be surrounded and cut off, as subsequently occurred. Furthermore, the international military presence comprising U.S. and U.N. forces was limited in size, operated under separate chains of command, and had a strained relationship. U.S. officials had charged that secret plans relating to operations aimed at Aideed's forces were deliberately leaked to

¹³ *See for example* BASS, *STAY THE HAND OF VENGEANCE*, p. 240; HAZAN, *JUSTICE IN A TIME OF WAR*, p. 68.

¹⁴ For further details *see generally*. MARK BOWDEN, *BLACK HAWK DOWN*. (Corgi) 1999.

¹⁵ Interview with former senior State Department official.

¹⁶ Interview with former mid-level Pentagon official involved in DoD Somalia policy.

Aideed by Italian troops in July 1993.¹⁷ That the targets of one U.S. snatch operation actually turned out to be members of the U.N. mission and their Somali assistants, did little to improve things.¹⁸ Another target, Osman Ato, had also formed strong ties with UN officials and was one of their leading building contractors.¹⁹ When things started to go badly wrong during the fateful snatch operation, U.S. requests for U.N. reinforcements were refused for several crucial hours.²⁰ Intelligence support for the Somalia operations was also limited and in some cases of dubious quality. Crucial human intelligence (Humint) was sparse, local agents were “deeply unreliable”²¹ and Aideed did not use radio, instead passing messages via courier in order to minimize detection.²² Finally, the element of surprise had largely been squandered after the administration publicly announced it was sending Special Operations Forces to Somalia.²³ General Bill Garrison, commander of Task Force Ranger, the unit involved in the arrest operations, acknowledged “There is no question that we lost strategic surprise when we moved the force in the country.”²⁴ Task Force Ranger had already conducted several snatch operations, all following the same template: Black Hawk helicopters would transport forces to the target location, remaining to provide fire support; a combined force of U.S. Army Rangers (to provide perimeter security) and Delta Force (to carry out the arrests) would descend via ropes; a helicopter would land to pick up the Delta Force team and the target(s). Consequently, the routine became easy to predict. As Colonel Ali Aden, one of Aideed’s Soviet-trained commanders highlighted “If you use one tactic twice, you should not use it a third time....and the Americans already had done basically the same thing six times.”²⁵

¹⁷ See Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’, *New York Review of Books*, May 9, 1996, p. 12.

¹⁸ See SMITH, KILLER ELITE p. 185.

¹⁹ See SMITH, KILLER ELITE p. 186.

²⁰ The fact that UN forces had suffered significant losses in Mogadishu throughout the mission, no doubt increased their reluctance to deploy in the capital.

²¹ See SMITH, KILLER ELITE p. 185.

²² See SMITH, KILLER ELITE p. 186.

²³ Interview with former Mid-level Pentagon official involved in DoD Somalia policy.

²⁴ See General Bill Garrison quote in SMITH, KILLER ELITE p. 188.

²⁵ See Colonel Ali Aden quote in SMITH, KILLER ELITE p. 188.

In comparison, Bosnia represented a totally different operating environment. Whilst significant numbers of belligerent military forces were still on the ground, the VRS had recently witnessed the devastating potential of NATO military capability during Operation Deliberate Force, and as chapter four illustrated, for the majority of operations (Mladic excluded) were unlikely to react adversely. Similarly, it was unlikely that the Bosnian Croat military (HVO) would have been prepared to act adversely and undermine their proportionately successful status achieved via the Dayton agreement by responding aggressively to the arrest of Bosnian Croat indictees. These contentions were subsequently confirmed when arrests of PIFWCs led to minimal reaction. With PIFWCs residing in several areas throughout Bosnia, including cities, towns and villages, NATO was presented with a less complicated theatre than the Somali capital and increased options. Furthermore, intelligence capabilities were incomparably better. As the 'Lessons from Bosnia: The IFOR Experience' Report highlighted, NATO forces had the ability to monitor the former 'warring parties' at all times.²⁶ Unlike Aideed, several PIFWCs were less vigilant regarding their communications, and were easily detected by NATO military intelligence and Western intelligence services. Humint was also much more developed on the ground, particularly within the British and French forces, whose UNPROFOR contingents had established contacts during the war.²⁷ Critically, the unity of command of the NATO-led force meant that any violent response to an arrest operation would have been addressed with overwhelming and decisive force, without having to rely on the dubious support of other forces with separate agendas and priorities.

Nevertheless, despite these factors, the fear of a repeat of Mogadishu continues to be influential vis-à-vis perspectives on the achievability of active apprehensions. Chuter argues that due to the potential risk of casualties, such operations should largely be avoided, noting "It is simply not realistic – or acceptable in a democracy – to suppose that a nation that deployed an infantry battalion to a cease-fire monitoring mission will learn from the media one morning that two dozen of its troops have died in an ill-

²⁶ See Larry Wentz (contributing editor) *Lessons from Bosnia: The IFOR Experience*. A DoD Command and Control Research Program (CCRP), NDU Collaboration, 1997, p. 57.

²⁷ See Larry Wentz (contributing editor) *Lessons from Bosnia: The IFOR Experience*. A DoD Command and Control Research Program (CCRP), NDU Collaboration, 1997, p. 60.

conceived plan to snatch an ICC indictee.”²⁸ However, Chuter’s contention is based on a totally pessimistic, worst case scenario. Rather than utterly discount the possibility of using the military to arrest PIFWCs, it may merely be necessary *not to follow* “an ill-conceived plan.” Many of the indictees residing in Bosnia had little or no close protection. NATO military forces supported by Intelligence assets successfully apprehended a number of indictees in meticulously planned operations, with minimal casualties or loss of life. As Marks, Meer and Nilson highlight in their study ‘Manhunting: A Methodology for Finding Persons of National Interest’²⁹, intensive planning and surveillance allows weaknesses in suspects’ protection regimes to be uncovered, dramatically reducing the risk associated with apprehension operations. For example, General Stanislav Galic, under sealed indictment for command responsibility for the shelling of Sarajevo, was covertly tracked for several days via a combination of electronic eavesdropping devices and cameras planted near his residence by Special Operations Forces. Spy satellites monitored his car journeys and covert human surveillance logged his routes and close protection routine. When Galic broke his routine and dismissed his bodyguards (reportedly to visit a lover) an SAS team boxed in his car using two other vehicles, smashed the driver window and dragged him out.³⁰ Such operations clearly demonstrate that arrests can be achieved without incurring the loss of “two dozen” soldiers.

It is important to highlight that there were elements within the NATO force, who were clearly frustrated with what they perceived as an undue deference to Force Protection. As one senior U.S. officer lamented “we should have posted a tank battalion in Pale/Banja Luka from day one”³¹ Lieutenant General William Carter succinctly

²⁸ See DAVID CHUTER, *WAR CRIMES. CONFRONTING ATROCITY IN THE MODERN WORLD* (Lynne Rienner) 2003, p. 197-8

²⁹ See Steven Marks, Thomas Meer and Matthew Nilson, ‘Manhunting: A Methodology for Finding Persons of National Interest’, Naval Postgraduate School Thesis, Monterey, California, June 2005.

³⁰ See Philip Jacobson, ‘War crimes court wants SAS to trap Karadzic’, *Daily Telegraph*, March 12, 2000. Similarly, Dragoljub Prcac’s car was forced to a halt by three vehicles whilst driving through the British controlled sector, and soldiers smashed the windows, dragging him out of the car at gunpoint. Again, the operation was over within minutes without incurring any NATO casualties.

³¹ See anonymous senior U.S. army officer quote in BASS, *STAY THE HAND OF VENGEANCE*, p. 252. Unfortunately, this robust proactive prospective did not receive enough support, and U.S. military was generally reluctant to provide area security. It was not until 2001, that the U.S. established a military base

highlights the frustration existing within elements of the military who feel, in some cases, an overemphasis on Force Protection inhibits their performance; "Military leadership is about loyalty, commitment and sacrifice....But it is also about fulfilling goals and attaining objectives. Every single military leader who commented on the political community's "aversion to casualties" contended that it was excessive and even counter productive to their mission and their effectiveness."³² Carter goes on to argue "Congress has to get over it and say if we're going to send a force we're going to have to incur a casualty or two."³³

3. The Wider Issue – A Reluctance to Engage in Operations Other Than War (OOTW)

Whilst the concern of incurring casualties was clearly influential, in light of the above factors, the author suggests it cannot adequately explain the failure to go after *any* PIFWCs in the first two years post-Dayton. Consequently, the author submits that NATO's refusal to conduct arrests was also symptomatic of the wider reluctance prevalent within the military to engage in OOTW. Such reluctance is particularly apparent within the senior echelons of the U.S. DoD and military. With the U.S. exerting dominance in NATO generally and U.S. forces representing the centre of gravity of the specific mission (a U.S. General would control the overall force and its troops made up the bulk of IFOR personnel) this perspective was heavily influential within the context of the Bosnia mission.³⁴

General Anthony Zinni, a U.S. Marine and former member of the Joint Chiefs of Staff and Commander in Chief of U.S. CENTCOM highlights that the U.S. was both unprepared and resistant to adopting to the changing dynamics of "the new world disorder" of the post-Cold War. "The military leadership did not expect or welcome a

in Bratunac, a hardline area of Eastern Republica Srpska's which had seen little refugee return *see* 'U.S. Builds New Base in Hardline Bosnian Serb Area' April 5, 2001, *Reuters*.

³² *See* Lieutenant General William Carter comments *in* 'A Force For Peace. U.S. Commander's Views of the Military's Role in Peace Operations', A Project of the Peace through Law Education Fund, 1999, p. 37.

³³ *See* Lieutenant General William Carter comments *in* 'A Force For Peace. U.S. Commander's Views of the Military's Role in Peace Operations', A Project of the Peace through Law Education Fund, 1999, p. 37.

³⁴ For more details of the extensive U.S. influence over the NATO operation in Bosnia *see* Richard M. Swain, 'Neither War Nor Not War. Army Command in Europe During the Time of Peace Operations: Tasks Confronting USAREUR Commanders, 1994-2000', Strategic Studies Institute, U.S. Army War College, May, 2003.

sudden plunge into non-traditional missions. In taking on the new challenge, they decided to follow the path of least effort. The easiest solution was to play down these new missions”³⁵ In his farewell remarks at the U.S. Naval Institute in March 2000, Zinni recounted “We even had an earlier Chairman of the Joint Chiefs of Staff who said “real men don’t do OOTW.” That just about says it all. Any Army Commander worth his salt wanted to take his unit....for live-fire maneuver and combined arms work, rather than stay at their bases and confront a bunch of troops in civilian clothes, throwing water balloons and playing the role of an angry overseas mobs.”³⁶ He later noted, “To the military, the business of war was about major conventional combat operations, and that was where it wanted to stay focused. They looked at these new missions as a temporary nuisance, not worthy of more than minor adjustment in doctrine, training, education, and organization.”³⁷

Similarly Brigadier Aylwin-Foster highlights that whilst the U.S. Army is “indisputably the master of conventional warfighting, it is notably less proficient in....what the U.S. defence community commonly calls Operations Other Than War (OOTW).”³⁸ Aylwin-Foster goes on to suggest the U.S. military’s reluctance to engage in OOTW is “symptomatic of a trend rooted in U.S. army historical development: the Army has consistently seen itself more or less exclusively as a conventional warfighting organization, and prepared for operations accordingly.”³⁹

Part of the reluctance relates to the perception that that OOTW are inimical to U.S. interests, with noncombat operations threatening “to diminish U.S. national security by keeping military personnel away from combat training for months and creating

³⁵ See ANTHONY ZINNI, *THE BATTLE FOR PEACE: A FRONTLINE VISION OF AMERICA'S POWER AND PURPOSE* (Palgrave Macmillan) 2006, p. 68 [hereinafter ZINNI, *THE BATTLE FOR PEACE*]

³⁶ See General Anthony C. Zinni, U.S. Marine Corps, Commander in Chief U.S. Central Command (CENTCOM) ‘Farewell Remarks at the U.S. Naval Institute, March 2000.

³⁷ See ZINNI, *THE BATTLE FOR PEACE*, p. 68.

³⁸ See Brigadier Nigel Aylwin-Foster, ‘Changing the Army for Counterinsurgency Operations’, *Military Review*, November-December 2005, pp. 2-3.

³⁹ See Brigadier Nigel Aylwin-Foster, ‘Changing the Army for Counterinsurgency Operations’, *Military Review*, November-December 2005, p. 7.

operations tempo that undercuts the U.S. military readiness.”⁴⁰ Consequently, the views of Lieutenant Colonel Charles Dunlop (USAF) are shared widely throughout the military: “armed forces [should] focus exclusively on indisputably military duties [and] not diffuse our energies away from our fundamental responsibilities for war-fighting.”⁴¹ In remarks made in the month before the U.S. deployment into Bosnia, General Powell alluded to his displeasure at U.S. armed forces becoming engaged in operations which detracted from what he perceived to be their most important function. Powell argued “we have a value system and a culture system within the armed forces of the United States. We have this mission: to fight and win the nations wars.”⁴²

In addition to the dominant view expressed within the DoD and military that U.S. forces should primarily focus on ‘war fighting’, reluctance to embrace OOTW also relates to the military’s, and to a lesser extent the Pentagon’s, “remarkable resistance to doctrinal change.”⁴³ Nagal highlights a key difference between the U.S. and British military, suggesting the culture of the British army encourages a rapid response to a changing situation whereas “the culture of the American army does not, unless the changed situation falls within the parameters of the kind of war it has defined as its primary mission.”⁴⁴ Furthermore, as Aylwin-Foster notes, the U.S. military tends to “discourage adaptation to roles deemed outside its primary mission.”⁴⁵ A former senior Pentagon official acknowledged “the American military is very wary of going beyond what they regard as their core competence. They need to develop methods to do so, whether they will is another issue.”⁴⁶

⁴⁰ See Gary Dempsey ‘Rethinking the Dayton Agreement. Bosnia Three Years Later’, CATO Institute Policy Analysis, December 14, 1998. p. 26.

⁴¹ See Lieutenant Colonel Charles I. Dunlop Jr, ‘The Military Coup of 2012’, *Parameters*, Winter, 1992/93, p. 287.

⁴² See Colin Powell presentation ‘The United Nations Financial Crunch: the US Role in Creating the Crisis’, Washington D.C.: Council for a Livable World Education Fund, Project on Peacekeeping and the United Nations, October 1995.

⁴³ See A. NAGAL, *COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM: LEARNING TO EAT SOUP WITH A KNIFE* (Praeger) 2002, p. 8. [hereinafter NAGAL, *COUNTERINSURGENCY*]

⁴⁴ See NAGAL, *COUNTERINSURGENCY* p. 218.

⁴⁵ See Brigadier Nigel Aylwin-Foster, ‘Changing the Army for Counterinsurgency Operations’, *Military Review*, November-December 2005, p. 10.

⁴⁶ Interview with former Senior Pentagon official.

Particular resistance related to the potential use of military forces in rule of law operations, including the arrest of PIFWCS. Clinton's Chairman of the Joint Chiefs of Staff, General Henry Shelton was unequivocal, "I do draw a line between what I would call nation building and what I would call sustaining a safe and secure environment.....we don't do law enforcement."⁴⁷ Similarly Clinton's Secretary of Defense William J. Perry was at pains to emphasize that at NATO a "clear distinction [was made] between the police functions, which are not a function of SFOR, and providing the secure environment, which is a function of SFOR."⁴⁸ Perry's successor Senator William Cohen was even more opposed to U.S. forces assuming a more expansive role in Bosnia, arguing "Peacekeeping is not [our] primary mission. Peacekeeping involves a different kind of training and capabilities."⁴⁹ Cohen also emphasised that arresting war criminals placed NATO forces "at great risk...They are not police officers, they are not people trained to arrest. Their function is quite different."⁵⁰ For many in the U.S. military, engaging in supportive work for the Tribunal was viewed as completely outside their competence. Richard Butler, a former U.S. army officer and intelligence specialist, who was seconded to the ICTY notes "To most of the US Army, the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has little bearing on their pursuits in the profession of arms."⁵¹ Similarly, a senior pentagon official admitted "There were a lot of things we could have done [in Bosnia], but we elected not to do them because we were simply not interested in justice."⁵²

The reluctance to engage in rule of law operations was not only limited to the U.S. however. When pressed on their failure to arrest PIFWCs whom they encountered, a French SFOR soldier retorted "we are not competent to make arrests...we are an army."

⁴⁷ See Associated Press 'Shelton: Peacekeeping Missions Unavoidable', *Washington Post*, November 17, 2000 (emphasis added).

⁴⁸ See William J. Perry quote in VAN DIJK AND HOVENS, *ARRESTING WAR CRIMINALS*, p. 63.

⁴⁹ See William Cohen quote in Alice Hills, 'The Inherent Limits of Military in Policing Peace Operations', *International Peacekeeping*, Vol. 8, No. 3, Autumn, 2001, p. 88.

⁵⁰ See William Cohen quote in BASS, *STAY THE HAND OF VENGEANCE*, p. 265.

⁵¹ See Richard Butler, 'Modern War, Modern Law, and Army Doctrine: Are We in Step for the 21st Century?' *Parameters*, Spring, 2002, p. 45.

⁵² See NEUFFER, *THE KEY TO MY NEIGHBOUR'S HOUSE*, p. 177.

not the police.”⁵³ Similar sentiments have also been expressed by elements within the British Ministry of Defence. For example, Chuter contends “Another basic problem is that *arresting war criminals is not a military function, nor should it be*. Few military forces in the world possess such skills, even in their military police components, much less soldiers send on peacekeeping missions.”⁵⁴ Chuter continues “There are *only modest prizes for getting it right* and potentially horrendous penalties for getting it wrong....no individual’s arrest, no matter how high profile, is worth hazarding the success of the mission as a whole and the political objectives of the international community.”⁵⁵

Given the numerous successful arrest operations carried out by NATO forces (generally Special Operations Forces) in Bosnia, it is clear that the military *can* carry out such operations successfully. As Lieutenant-Colonel R. A. Hardenbol of the Dutch Royal Marines (Special Forces) highlights, given the required manpower and equipment, the risk of escalation, and the complexity of such operations, military (preferably SOF) should take the lead role.⁵⁶ Arguably, some of the lower-level PIFWCs could even have been detained using infantry soldiers, or paramilitary-style Carabinieri units, rather than always relying on SOF. Infantry troops have been used on occasion in Iraq to successfully detain suspected insurgents and criminal elements. In many respects such operations are little different than those aimed at detaining PIFWCs. Lieutenant Colonel Hector Gullan is unequivocal; “Arresting PIFWCs and those involved in Crimes against Humanity or War Crimes is very much the job of the military. No one should have any illusions about this.”⁵⁷

As for “only modest prizes for getting it right”, Chuter either ignores or fails to recognize the pervasive negative influence PIFWCs often exert on post-conflict peacebuilding. As chapter four illustrated, obstructing minority return, supporting parallel institutions and involvement in organized crime, all significantly contribute to undermining stability,

⁵³ See French SFOR soldier quote in Garodana Igric and John Swain ‘War-crimes suspects roam free in Bosnia’, *Times*.

⁵⁴ See CHUTER, WAR CRIMES, p. 196, (emphasis added.)

⁵⁵ See CHUTER, WAR CRIMES, p. 196, (emphasis added.)

⁵⁶ See ‘Workshop 3: Requirements, Conditions, Supplies and Feasibility of an Operational International Arrest Team’ in VAN DIJK AND HOVENS, ARRESTING WAR CRIMINALS, pp. 55-56.

⁵⁷ Interview with Lieutenant Colonel Hector Gullan.

retarding international efforts to institute reform, and may also undermine and delay any viable exit strategy for international forces. The impact of the Prijedor operations (highlighted below) indicates that in many cases, the arrest of indictees may be critically important.

British army officer Andrew G. Marriot emphasised that within the U.S. military, whilst the senior echelons may be primarily focused on a specific military task, an awareness and appreciation of issues beyond 'war fighting' exists within the lower ranks⁵⁸ (a trend which probably exists in many other States' militaries). Although Admiral Smith was steadfastly opposed to conducting arrests, Reuters reported that subordinate officers were "champing at the bit for a chance to grab Radovan Karadzic and Ratko Mladic."⁵⁹ Even some senior U.S. personnel have assumed a more 'maximalist' outlook. Lieutenant General William Carter argued "The Military should have gone after the war criminals....I was an advocate of guarding the mass graves."⁶⁰ Carter continued, "I think had we gone in [to Bosnia] with that attitude, in the first 90 days we could have gone after the war criminals and taken them down....They were scared to death of us at that time....We could have taken Karadzic and Mladic and I think that would have gone a long way to solving the problem. We're paying the price daily for not having done that."⁶¹ The legal counsel to the U.S. Joint Chief of Staff was even more forthright, suggesting "Although it is very difficult to do, it can be done. Everyone of these people [PIFWCs] could be delivered to The Hague within two weeks."⁶²

⁵⁸ See Andrew G. Marriot remarks in 'Rule of Law. Conference Report', United States Army Peacekeeping and Stability Operations Institute of the Center for Strategic Leadership, United States Army War College, July 6-9, 2004, p. 47.

⁵⁹ See Reuters quote cited by Tom Warrick, Coalition for International Justice in 'The War Crimes Trials for the Former Yugoslavia: Prospects and Problems', Briefing of the Commission on Security and Cooperation in Europe, U.S. Congress, May 28, 1996.

⁶⁰ See comments made by Lieutenant General William Carter in 'A Force For Peace. U.S. Commander's Views of the Military's Role in Peace Operations', A Project of the Peace through Law Education Fund, p. 34.

⁶¹ See comments made by Lieutenant General William Carter in 'A Force For Peace. U.S. Commander's Views of the Military's Role in Peace Operations', A Project of the Peace through Law Education Fund, p. 38.

⁶² See Colonel John T. Burton "'War Crimes.'" Operations Other Than War: Military Doctrine and Law 50 Years After Nuremberg and Beyond', *Military Law Review*, Vol. 149, Summer 1995, p. 206.

Furthermore, as Marriot points out, divorcing combat operations from a more comprehensive approach (which would include utilizing military forces for rule of law operations) “suggests a willingness to accept the proposition that “someone else” will address the “other” task. However, often there will be no “someone else.”⁶³ Bosnia clearly illustrated this challenging reality, where other international forces in theatre were clearly unsuited to carry out the task in hand. The International Police Task Force (IPTF) established under the Dayton Accords was patently unable to do so. Major Hendrickx, Commander of the Dutch Special Security Missions Brigade noted, “IPTF could not force local enforcement personnel to pursue a particular policy or engage in certain actions....In cases where the local police is not able or not willing to act, the IPTF lacked the mandate of enforcement.”⁶⁴ Indeed, the IPTF were not even mandated to carry weapons, and sending unarmed personnel to arrest PIFWCs would definitely represent an “ill conceived plan.”⁶⁵ Consequently, NATO’s attempts to pass off apprehension as a “police function” was to effectively decide that no arrests would be made.⁶⁶ As Leurdijk bluntly stated “There was only one organisation available who could perform the job, and that was [IFOR/]SFOR.”⁶⁷

The Karadzic Strategy – Departure from Public Political Life Will Solve the Problem: A Flawed Approach

In light of the sustained resistance to carry out arrest operations, the U.S. administration instead advocated and pursued an alternative policy of pressuring Karadzic to step down both as President of RS and head of the SDS. A former senior Pentagon official acknowledged “our focus was not on catching him. This was a tactical political

⁶³ See Andrew G. Marriot remarks in ‘Rule of Law. Conference Report’, United States Army Peacekeeping and Stability Operations Institute of the Center for Strategic Leadership, United States Army War College, July 6-9, 2004, p. 47.

⁶⁴ See Major M. M. L. A. Hendrickx, ‘An Operational Blueprint for Arresting War Criminals; a Low Risk and a High Risk Scenario’, in W. A. M. VAN DIJK AND J. L. HOVENS (EDS.) ARRESTING WAR CRIMINALS, (Special Publication by the Royal Dutch Constabulary) 2001, pp. 25-26.

⁶⁵ In contrast, the 1000 civilian police deployed to East Timor and the 5,000 deployed to Kosovo possessed arrest authority and were required to carry a sidearm, see James Dobbins ‘The UN’s Role in Nation-building: From the Belgium Congo to Iraq’, *Survival*, Vol. 46, No. 4 Winter, 2004, pp. 81-102.

⁶⁶ See Kenneth Roth, ‘Why Justice Needs NATO’, *The Nation*, September 22, 1997, p. 22.

⁶⁷ See Dick A. Leurdijk ‘Arresting War Criminals: The establishment of an international arresting: fiction, reality or both’, in VAN DIJK AND HOVENS (EDS.) ARRESTING WAR CRIMINALS, p. 65.

decision...[there was] more emphasis on isolating him at that stage.”⁶⁸ Similarly, a former senior State Department official outlined “we looked at ways to marginalize him, essentially render him impotent in Bosnian politics....There was a lot of tension within the inter-agency discussions. We [the pro-justice elements in the State Department] wanted to charge ahead with apprehension versus those who were concerned apprehensions would result in a backlash.”⁶⁹ Holbrooke was again dispatched to Bosnia, holding a series of meetings, and on July 18, 1996, an agreement was reached between Holbrooke, Milosevic, Aleska Buha and Krajisnik that Karadzic be removed “immediately and permanently [from] all public and private activities.” Karadzic was replaced as RS President by Bijana Plavsic and as head of the SDS by Buha.

Goldstone was particularly scathing of the policy: “it is really like saying....if murderers keep quiet and don’t get in the way of the political process, well, we will get on with our work and leave them as free men.”⁷⁰ The Chief Prosecutor was essentially right: the policy had the direct effect of muting calls for Karadzic’s arrest, as recounted by (then) NSC staffer, Ivo Daalder, “once Karadzic was out of power, they [the Clinton Administration] didn’t care [about his arrest].”⁷¹ A senior State Department official expressed frustration that “There was clearly a trade-off between apprehension and neutering Karadzic.”⁷²

Although sections of the media presented the move as “another success”⁷³, in reality, the strategy was largely unsuccessful. Whilst Karadzic’s public appearances were reduced, the impact of his removal from the official positions was extremely limited, and his pervasive influence over RS and the SDS remained undiminished. Given the specific dynamics of the region and his control of an extensive organized criminal network, it was perhaps unsurprising that the strategy failed to achieve the desired affects. As the U.S. Institute of Peace (USIP) Special Report stated, “[the] mere removal from formal

⁶⁸ Interview with former senior Pentagon official.

⁶⁹ Interview with former senior State Department official.

⁷⁰ See Richard Goldstone, ‘Prosecuting International Crimes: An Inside View’, *Transnational Law and Contemporary Problems*, No. 7, 1997, p. 8.

⁷¹ See Ivo Daalder quote in NEUFFER, *THE KEY TO MY NEIGHBOUR’S HOUSE* p. 179.

⁷² Interview with former senior State Department official.

⁷³ Holbrooke refers to the *Financial Times*, see HOLBROOKE, *TO END A WAR*, p. 343.

positions had only cosmetic impact since their power [is] derived from informal networks involving family and interlocking business and foundation relationships.”⁷⁴ Holbrooke lobbied the Principals Committee, arguing it was imperative to move immediately against Karadzic in the event of *any* violation of the July 18 agreement. However, it soon became apparent that no firm action would be taken, and “by the beginning of 1997, these admonitions and proposals would be forgotten or ignored, and Karadzic, sensing another opportunity, would emerge once more.”⁷⁵ The former Head of Bosnia’s Customs Intelligence Unit and former Deputy Head of the OHR’s Anti-Fraud Department succinctly highlighted the strategies failure, noting “Karadzic’s ability to raise funds and consequently engage in political activity never really declined.”⁷⁶ Similarly, an ICG report indicated that even up to 2000, Karadzic continued to control the day to day operations of the SDS, creating party policy and selecting individuals to stand as candidates.⁷⁷

Investigations on the ground and the Dispute over OTP Strategy

The contrast with their predecessors at Nuremberg, where ninety percent of the evidence consisted of the Third Reich’s governmental files,⁷⁸ could not be starker. Whilst Nazi archives had provided a documentary outline of the Reich’s plans⁷⁹, without such material to guide them, the Tribunal’s investigations teams faced a much more challenging task. Furthermore, the Allied military occupation of Germany provided the Nuremberg prosecution team direct access to witnesses, whereas NATO forces were reluctant to support Tribunal investigators and in the early stages there were few ‘insider’ witnesses willing to cooperate.

⁷⁴ See ‘Lawlessness Rule Versus Rule of Law in the Balkans’, United States Institute for Peace (USIP) Special Report 97, (2002), p. 8.

⁷⁵ See HOLBROOKE, TO END A WAR, p. 344.

⁷⁶ See Amra Festic and Adrian Rausche, ‘War by Other Means: How Bosnia’s Clandestine Political Economies Obstruct Peace and State Building’, *Problems of Post-Communism*, May-June, 2004, p. 28.

⁷⁷ See ‘War Criminals in Bosnia’s Republika Srpska’, ICG p. 78. Although Karadzic control over the SDS has lessened since 2000, the former High Representative, Paddy Ashdown’s dismissal of 60 Bosnian Serb officials for allegedly protecting PIFWCs, including Karadzic, suggests the former Bosnian Serb leader retains a level of influence, see Dario Sito-Sucic, ‘Bosnia Envoy sacks Bosnia Serb Officials over Hague’, *Washington Post*, December 16, 2004.

⁷⁸ See Jorg Friedrich, ‘Nuremberg and the Germans’ in BELINDA COOPER (ED), WAR CRIMES. THE LEGACY OF NUREMBERG (TV Books) 1999, p. 91.

⁷⁹ See Ruth Wedgwood, ‘The International Criminal Tribunal and Subpoenas for State Documents’, in MICHAEL N. SCHMITT & LESLIE C. GREEN (EDS.) THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM. INTERNATIONAL LAW STUDIES VOL. 71 (Naval War College, Newport Rhode Island) 1998, p.483.

Although access to some witnesses had been secured outside the region from the various refugee communities spread all over the world, finding sources inside Bosnia remained a serious problem and placed investigators in an invidious position. As one former investigator noted “without local assistance you can’t track down witnesses.”⁸⁰ Such “local assistance” would often turn out to be the local intelligence services.⁸¹ In the initial post-Dayton years, Bosnia’s various intelligence agencies remained outside any international reform and restructuring efforts,⁸² and continued to largely comprise of figures appointed during the war, some of whom were implicated in crimes. Consequently, the Tribunal’s investigators interaction with the Bosnian Muslim Agency for Investigation and Development (AID) and the Bosnian Croat National Security Service (SNS) was always a delicate affair. As one former investigator noted, although such local assistance may be crucial, it also “generally carries a health warning”, and investigators had to be cautious of the domestic agendas.⁸³ As the previous chapter demonstrated, both Bosnian Serb and Bosnian Croat intelligence Services were involved in extensive surveillance operations against international authorities, including Tribunal investigators. In one such instance, part of an investigation team conducting interviews in the Prijedor region was monitored from the adjoining room by a Bosnian Serb unit.⁸⁴

In an attempt to cope with the ever-increasing workload, the Sarajevo based section of the Tribunal was expanded from 3 to 12 persons and a Fugitive Intelligence Support Team was established in an attempt to coordinate fugitive tracking and intelligence gathering.⁸⁵ One Tribunal investigator referred to 1996 as “the year of finding crime

⁸⁰ Interview with former Tribunal Investigator.

⁸¹ This was less common with Bosnian Serb intelligence, who even if contacted by Tribunal investigators to discuss alleged crimes committed against Bosnian Serbs, were reluctant to cooperate. As one former Tribunal investigator explained “everything is seen through the template of Karadzic and Mladic....any form of cooperation with the Tribunal was frowned upon.” – Interview with former Tribunal Investigator.

⁸² See Jeremy King, A. Walter Dorn & Matthew Hodes, ‘An Unprecedented experiment: Security sector reform in Bosnia and Herzegovina’, Saferworld (2002) ‘Intelligence reform: Too tough to tackle?’ pp. 30-31.

⁸³ Interview with former Tribunal Investigator.

⁸⁴ Interview with former Tribunal Investigator.

⁸⁵ See Report Of The International Tribunal For the Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991. A/51/292/S/1996/665. 16 August 1996, para 80.

scenes⁸⁶ which also including secondary graves, where Bosnian Serb authorities had attempted to conceal their crimes by digging up mass graves and reburying them in more remote areas. The process would make victim identification much more difficult, with many bodies breaking up in the process. Satellite imagery and aerial photographs were used in conjunction with witness statements, and in some cases massacre survivors were brought back to crimes scenes,⁸⁷ allowing investigators to gradually locate and pin point grave locations. Again, tensions existed between the investigators and IFOR during such work. One IFOR commander expressed frustration at what the military perceived as Hague operatives working on an “ad-hoc basis....They didn’t know exactly where they wanted to go, they wanted to kind of explore. They would hear a rumour and suddenly decide they wanted to go and check out an area. We’d explain to them....we needed 24 hours to brief our soldiers and make a reconnaissance, organize security, and....*coordinate with the local police authorities.*”⁸⁸ Such a perspective aptly illustrates the lack of understanding many in the military had of the dynamics of investigations. In the early days when intelligence material and leads were limited, exploration and responding to rumours could be critically important. Furthermore, given their involvement in war crimes, providing advance notification to local police authorities could actually *undermine and further complicate* investigations. On a more positive note, the Tribunal managed to negotiate a series of agreements with some States whereby investigators could operate within their territory to gather evidence (witness testimony etc) *without* going through the national authorities.⁸⁹ A concerted effort was also made to establish a structured database in an attempt to cope with the “blizzard of information” that the Tribunal was now receiving.⁹⁰

⁸⁶ See HAGAN, JUSTICE IN THE BALKANS, p. 140.

⁸⁷ See HAGAN, JUSTICE IN THE BALKANS, p. 141.

⁸⁸ See quote by anonymous IFOR commander in BASS, STAY THE HAND OF VENGEANCE, p. 254. emphasis added.

⁸⁹ Off-record comment made by former judge of ICTY during presentation at Salzburg law school international criminal law summer course. The judge did not provide details of which states made such agreements, although it is reasonable to assume that it extended to certain Western European States which supported the Tribunal, rather than the states of the former Yugoslavia, with the exception of the Federation authorities in Bosnian Muslim majority areas.

⁹⁰ Interview with former Tribunal Investigator.

Despite some progress on the ground for investigators, serious disputes had emerged within the OTP and the judiciary over the prosecution strategy. Some complained of a failure of strategic vision.⁹¹ Dismay was expressed at Goldstone's decision to indict a number of middle ranking Bosnian Croats. As one investigator pointed out, "from an investigative point of view, you either start at the top, or at the bottom, [and] starting with middle ranking HVO seriously impeded the Tribunal's investigations and resources to go after senior HVO."⁹² Goldstone had undoubtedly played a fundamentally important role garnering financial and logistical support for the Tribunal in its early days and also conducted a tireless public relations campaign. However, he lacked a criminal law background, and some of judges began to express disquiet over the OTP's initial strategy. In a meeting between the Judges, the Prosecutor and the Chief of Investigations the latter revealed that a 'pyramid strategy' would be pursued by the OTP. The strategy entailed focusing on lower-level figures and then moving up the pyramid or chain of command to the military commanders and political leaders. The Judges were vigorously opposed to this, arguing instead that the Tribunal should focus immediately on the senior figures.⁹³ As one judge fumed "we are not here to judge the Tadic."⁹⁴ Admittedly, Tadic, the 'freelance thug' and the first indictee to be received by the Tribunal after his transfer from Germany, may not have been the ideal focus. However, as outlined in chapter two, with pressure mounting on the Tribunal to be seen to be doing something, and an absence of other indictees, Goldstone had little choice but to place Tadic on trial.

Furthermore, the chapter posits that much of the criticism (which appears to emanate largely from international lawyers and judges) that the Tribunal wasted its time and resources on 'small fish', is to some extent misguided, reflecting an apparent failure to recognize that it is potentially critically important to focus on *certain* lower-level figures. As the International Crisis Group has consistently pointed out "small fish are the real

⁹¹ See NEUFFER, *THE KEY TO MY NEIGHBOUR'S HOUSE*, p. 301.

⁹² Interview with former Tribunal investigator.

⁹³ See Antonio Cassese, 'The ICTY: A Living and Vital Reality', in *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Vol. 2, No. 2, June 2004, p. 586.

⁹⁴ See HAZAN, *JUSTICE IN A TIME OF WAR*, p. 57

problem,⁹⁵ particularly where they continue to retain a pervasive influence within the security, political and judicial circles and act as barriers to post-conflict peacebuilding (as aptly illustrated by the activities of Simo Drljaca in chapter four.) Additional evidence presented in chapter four also indicates that domestic prosecutions for atrocity crimes in the early post-conflict stages are generally not viable. Thus, the chapter posits that the investigation, indictment, arrest and trial of *certain* ‘small fish’ (i.e. those acting as ‘spoilers’ undermining post-conflict peacebuilding) is *as important* as focusing on the so-called ‘big fish’, whom many commentators on the operation of the Tribunal appear to be overly fixated with. The author recognizes that the finite resources allocated to international criminal tribunals and courts affects indictment strategy and limits its focus. Nevertheless, it is critically important to consider the impact of ‘spoilers’ on post-conflict peacebuilding, rather than completely focus on the accolade of trying ‘those most responsible’ i.e. senior military and political figures.

Continued Western Reluctance

Lack of cooperation from a number of key Western states remained a serious problem for the Tribunal. The organizers of a London Conference focusing on the post-Dayton Balkans scheduled for December 1996, failed to extend an invitation to representatives from The Hague. Under pressure from the German Government, the U.K.’s Foreign and Commonwealth Office begrudgingly relented. However, the Tribunal representative was merely accorded the status of “observer” and tellingly, any reference to the obligation of States to cooperate with the Court, was removed from the meeting’s agenda.⁹⁶ Evidently, the Tribunal remained an awkward issue for the British. As one U.K. Foreign Office official who worked on Balkan issues readily acknowledged, “the ICTY wasn’t viewed as a credible institution in the early days”⁹⁷, and the government reportedly rejected the OTP’s requests for evidence gathered by its contingent of UNPROFOR.⁹⁸ Cassese met with several senior foreign government officials in an attempt to improve cooperation,

⁹⁵ See generally ‘War Criminals in Bosnia’s Republika Srpska: Who Are the People in Your Neighbourhood?’, International Crisis Group, Balkan Report No. 102, November 2, 2000.

⁹⁶ See HAZAN, JUSTICE IN A TIME OF WAR, p. 93.

⁹⁷ Interview with U.K. Foreign and Commonwealth Office official.

⁹⁸ See Mirko Klarin, ‘The Tribunal’s Four Battles’, Symposium, The ICTY 10 Years On: The View from Inside’, *Journal of International Criminal Justice*, Volume 2, No. 2, June 2004, p. 549.

but with little success. Italy, France and the U.K. were all dismissive, either making promises to send investigators who never arrived, or refusing to make any commitments of wider support. Cassese's meetings in Russia were even worse, with the Prime Minister accusing the Court of being anti-Serb and a Western Tribunal.⁹⁹

The Ongoing Struggle Over Access To Intelligence

The Tribunal continued to be involved in a protracted battle to obtain intelligence material from a number of States. Some commentators have argued that the purported use of intelligence for war crimes prosecutions has been overplayed by journalism, popular fiction and Hollywood, suggesting that most intelligence reports are of little "probative value."¹⁰⁰ Whilst it may be true that intelligence may sometimes be inaccurately viewed as the 'magic bullet' which can determine a case, its importance for the purposes of atrocity crimes prosecutions should not be so disparagingly dismissed. U.S. spy satellite imagery of the area around Srebrenica presented to the U.N. Security Council by Madeline Albright on August 10, 1995, assisted tribunal investigators in locating some of the mass graves. Furthermore, the Signals intelligence (Sigint) evidence presented by the OTP during the *Krstic* case illustrates the potentially critically decisive impact such material may have. General Krstic was accused of genocide relating to his role as commander of the Bosnian Serb Drina Corps during 'Operation Krivija 95', the Srebrenica offensive, and was placed on trial in March 2000. An early intercept relayed an operator from Drina Corps saying "I can just put you through...to General Krstic. He's in charge of this attack." Although a former high-ranking U.S. intelligence official noted that generally, "Nobody sends detailed, lengthy orders to create massacres"¹⁰¹ the *Krstic case* illustrates that even if crude codes are used in an attempt to mask intentions, intercepts of such conversations, when combined with other evidence, can provide valuable insights for the purposes of prosecution. In one recorded conversation, a subordinate officer discussed with Krstic an outstanding "3500 parcels that I have to distribute." The OTP argued that "parcels" referred to Muslim men and "distribution"

⁹⁹ See HAZAN, JUSTICE IN A TIME OF WAR, p. 97.

¹⁰⁰ See CHUTER, WAR CRIMES, pp. 177-178.

¹⁰¹ See Charles Lane and Thom Shanker, 'Bosnia: What the CIA Didn't Tell Us', *New York Review Of Books*, May 9, 1996, p. 10.

referred to their impending execution. Furthermore, although individuals may usually refrain from discussing such issues over non-secure communications, or instead use codes, it is inevitable that, due to human fallibility, indiscretions will occur.¹⁰² One intercept, allegedly of Krstic and a subordinate officer (Major Obrenovic) presented by the Prosecution late in the trial, was particularly damning:

O: We`ve managed to catch a few more, either by gunpoint or in mines.

K: Kill them all. God damm it.

O: Everything, everything is going to plan. Yes.

K: [not a] single one must be left alive.

O: Everything is going to plan. Everything.

K: Way to go Chief. The Turks [derisory reference to Bosnian Muslims] are probably listening to us. Let them listen.¹⁰³

The OTP maintained at the trial that the conversation was intercepted at two Bosnian government listening sites, and submitted as evidence late in the trial (after Krstic`s cross-examination) as it had only been located when the corresponding log book of the intercept had been happened upon in the Tribunal`s archive, allowing the tapes to be subsequently found.¹⁰⁴ However, it has been recently suggested that the intercepts may have actually been recorded by a U.S. Sigint. unit, covertly operating on the ground during the war, and merely packaged as Bosnian government *Armija* material at U.S. insistence, in an attempt to cover their methods and sources.¹⁰⁵ Although this incriminating exchange was ultimately ruled inadmissible due to its late admission, the episode nevertheless illustrates that such intercepts may (where admissible) provide decisive evidence for atrocity crimes trials. Indeed, in finding the General guilty of

¹⁰² A former intelligence officer and former Tribunal official recounted to the author a case during their time as an intelligence official, of a monitored telephone conversation where one of the participants used a crude code in reference to concealed explosives. The other participant was clearly confused by the code, and in exasperation the other participant openly discussed the explosives and their location.

¹⁰³ The above three *Krstic* trial intercepts are cited in *See HAGAN, JUSTICE IN THE BALKANS*, p. 164-169.

¹⁰⁴ *See HAGAN, JUSTICE IN THE BALKANS*, p. 171-172.

¹⁰⁵ *See SMITH, KILLER ELITE* p. 204.

genocide and sentencing him to 46 years imprisonment, the *Krstic* judgment noted that evidence from intercepted communications played an important role in the verdict.¹⁰⁶

However, many of the key Western States, whose forces made up a large part of the NATO contingent in Bosnia, continued to refuse to hand over material. Despite receiving assurances, during his November 1995 meetings in Washington, that cooperation with the Tribunal would be enhanced, within two months Goldstone would again be exasperated by the delays in gaining access to classified information.¹⁰⁷ The U.S. remained concerned that the Tribunal lacked the proper facilities to store classified material, although the Tribunal actively responded by building secure premises to house confidential material.¹⁰⁸ Other specific barriers arose relating to evidence gathered by U.S. forces (either as part of the I/SFOR contingent, or from the small covert Special Operations Forces which were deployed during the war). Although U.S. military doctrine dictates that U.S. forces must collect evidence of suspected or known atrocity crimes,¹⁰⁹ there are invariably conflicting demands for the information, with priority generally being accorded to it being processed for military intelligence value. Once the information is processed into military channels it legally becomes the equivalent of intelligence and the property of the government which obtained it,¹¹⁰ resulting in a myriad of classification procedures which made dissemination to external sources (such as the Tribunal) time consuming and problematic. Furthermore, U.S. domestic legislation further served to complicate the transfer of material. The National Security Revitalization Act 1995 stipulated that the transfer of U.S. intelligence to the U.N. required prior congressional approval.¹¹¹ Similarly, a basic provision of the National Security Act (2000) established that information cannot be released to "any organization

¹⁰⁶ See HAGAN, *JUSTICE IN THE BALKANS*, p. 173.

¹⁰⁷ See Charles Lane and Thom Shanker, 'Bosnia: What the CIA Didn't Tell Us', *New York Review of Books*, May 9, 1996, p. 15.

¹⁰⁸ See Richard Goldstone, 'A View from the Prosecution' in *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Vol. 2, No. 2, June 2004, p. 381.

¹⁰⁹ See Michael Newton, 'Harmony or Hegemony? The American Role in the Pursuit of Justice', *Connecticut Journal of International Law*, Spring, 2004, p. 255.

¹¹⁰ See Michael Newton, 'Harmony or Hegemony? The American Role in the Pursuit of Justice', *Connecticut Journal of International Law*, Spring, 2004, p. 255.

¹¹¹ See RYAN C. HENDRICKSON, *THE CLINTON WARS. THE CONSTITUTION, CONGRESS, AND THE WAR POWERS* (Vanderbilt Uni. Press) 2002, p. 81

affiliated with the United Nations” unless a presidential certification affirms procedures to protect U.S. sources and methods are in place.”¹¹²

Beyond such logistical and legal constraints however, lay more ingrained institutional barriers. For many within the U.S. intelligence community (and other Western states) “sharing information with international human rights investigators was viewed not as a morally urgent matter but as a potential threat to jealously guarded sources.”¹¹³ A former senior Pentagon official acknowledged that requests to disclose information were not generally viewed positively by many in the U.S. intelligence community noting: “If you’re in the business of keeping secrets, your business is to keep them....there’s no question that the intelligence people keep too many secrets.”¹¹⁴ As previously outlined in chapter one, a number of commentators working in Intelligence Studies have questioned whether disclosure would necessarily mean jeopardising either methods or sources.¹¹⁵ Several former U.S. intelligence officials also confirmed that most of the visual information from Bosnia possessed by the DoD and CIA could have been made public [or at a very minimum passed onto the Tribunal] “*without seriously compromising the secret methods of intelligence-gathering.*”¹¹⁶ Even the White House spokesperson acknowledged that although theoretically some information could not be provided for national security reasons, there were “ways of repackaging the information” to avoid revealing sources and methods.”¹¹⁷ Similarly, Wedgwood pointed out that in the U.S., concerns over the handling of intelligence material during a domestic trial process were allayed by the Classified Information Procedures Act (1980) which introduced a series of safeguards relating to disclosure. Wedgwood went on to posit similar procedures could have been instituted at the international level.

¹¹² See Michael Newton, ‘Harmony or Hegemony? The American Role in the Pursuit of Justice’, *Connecticut Journal of International Law*, Spring, 2004, p. 256.

¹¹³ See Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’ *New York Review Of Books*, May 9, 1996, p. 10.

¹¹⁴ Interview with former senior Pentagon official.

¹¹⁵ e.g. Cees Wiebes.

¹¹⁶ See Charles Lane and Thom Shanker, ‘Bosnia: What the CIA Didn’t Tell Us’, *New York Review Of Books*, May 9, 1996, p. 15. (emphasis added)

¹¹⁷ See SMITH, *KILLER ELITE*, p. 204.

A former senior State Department official stressed the need for perspective when assessing the intelligence community's reluctance to cooperate with the Tribunal: "Remember, our intelligence agencies were being asked to engage in a very unconventional practice....Many line officers in the [intelligence] agencies were concerned about cooperating with a foreign body – which U.S. domestic laws forbid."¹¹⁸ However, Republican Senator Arlen Specter, then chairman of the Senate Intelligence Committee, was so concerned about the U.S. intelligence communities stonewalling of the Tribunal that he made a several trips to The Hague during 1996 and lobbied for assurances from the U.S. spy agencies to expedite the transfer of material. In a series of still-classified letters, to the CIA, Pentagon, and State Department, Specter called for enhanced U.S. cooperation with the Tribunal.¹¹⁹

As a former senior State Department official outlined, after painstaking negotiations between U.S. and Tribunal officials, "[W]e got over this problem – the psyche of non-cooperation, we jumped the hurdle by negotiating an agreement between the U.S. government and the ICTY which ironed out procedures for sharing intelligence information."¹²⁰ The agreement included considerations such as whether the information disclosed by the U.S. was to be stored in Tribunal premises, or at another location (the U.S. Embassy) and who on the Tribunal staff had clearance for accessing the material (with the U.S. vetting the Tribunal personnel for clearance). Similar arrangements were made by the Tribunal with several other States and organisations, although generally, via less formal means than a Memorandum of Understanding (MOU).¹²¹

In addition to the agreement between the U.S. and the Tribunal, a number of U.S. intelligence personnel were also seconded to The Hague in an attempt to allay DoD and intelligence community concerns. These officials knew how to structure requests for

¹¹⁸ Interview with former senior State Department official.

¹¹⁹ See Charles Lane and Thom Shanker, 'Bosnia: What the CIA Didn't Tell Us' *The New York Review Of Books*, May 9, 1996, p. 15.

¹²⁰ Interview with former senior State Department Official involved in negotiating the agreement.

¹²¹ See Nancy L. Paterson, 'Protecting National Security Information And Other Confidential Information', in RODRIGO YEPES-ENRIQUEZ AND LISA TABASSI (EDS.) *TREATY ENFORCEMENT AND INTERNATIONAL COOPERATION IN CRIMINAL MATTERS. WITH SPECIAL REFERENCE TO THE CHEMICAL WEAPONS CONVENTION* (T.M.C. Asser Press) 2002, p

intelligence material from the U.S. and acted to resolve some of the problems associated with initial Tribunal requests.¹²² A former U.S. intelligence officer and Tribunal investigator acknowledged that some Investigators and lawyers in the OTP “don't know how to ask the right questions because they don't understand the intelligence community.”¹²³ Similarly, a former senior State Department official highlighted how, during the early stages of intelligence sharing, the U.S. would receive “very difficult requests, such as ‘could you please provide *all* intelligence on ethnic cleansing in Northern Bosnia between 1992 and 1994’.” Such nebulous “global requests” were considered a bureaucratic nightmare to respond to and practically unworkable as they would generally include certain material which the intelligence agencies were opposed to releasing. Consequently “there would always be a discussion of how to ‘clean up the request bidding’.” However, the former official also conceded “To be fair, it wasn't that we were always doing a perfect job [in responding to the Tribunal's requests for information]. Part of the challenge was getting the staff to go through the material, which was very labor intensive....Delays were often based on ‘do we divert personnel from other priorities?’ We only had a few Serbo-Croat speakers in the U.S. intelligence community, and their priority was to focus on issues concerning Force Protection...[even after Dayton] A great amount of intelligence resources focused on troop movements of Croatia and Serbia.”¹²⁴ Competing priorities would be a constant thorn in the side of the Tribunal, as highlighted by Newton; “an infantry company that is guarding a mass grave is not patrolling and performing other duties. An unmanned Aerial Vehicle tasked to look for groups of civilian victims of the crimes against humanity is not seeking out enemy equipment or personnel.”¹²⁵ As a former senior State Department official and long-time supporter of the Tribunal acknowledged “I was constantly battling to divert these personnel to war crimes issues.”¹²⁶

¹²² Interview with former senior State Department official.

¹²³ See William Stuebner quote in Raymond Bonner, ‘Crimes Court Not Ready to Punish Kosovo Violence’, *New York Times*, March 31, 1999.

¹²⁴ Interview with former senior State Department official.

¹²⁵ See Michael Newton, ‘Harmony or Hegemony? The American Role in the Pursuit of Justice’, *Connecticut Journal of International Law*, Spring, 2004, p. 253.

¹²⁶ Interview with former senior State Department official.

In some instances, U.S. willingness to cooperate with the Tribunal was blocked by other States. In 1996 the U.S. NSA reportedly wanted to hand over to the Tribunal intercepts made by the U.K.'s GCHQ which allegedly established a connection between Milosevic and Serb atrocities in Bosnia. The proposal was reportedly blocked by U.K. Foreign Secretary, Malcolm Rifkind.¹²⁷ Whilst the secondment of U.S. intelligence personnel to the Tribunal may have acted to allay U.S. fears over disclosure, the prospect of foreign intelligence operatives working for the Court only heightened tensions of other States concerned over foreign 'specialists' gaining access to their material. Herein lay one of the central dilemmas confronting the Tribunal: intelligence analysis requires specialist personnel to interpret it properly, the majority of whom have been trained within a particular State's intelligence service. Once deployed to the international court or tribunal, a residual concern will no doubt linger as to whether such personnel continue to 'work' for their national intelligence service, passing on information disclosed by other States.

In an attempt to assuage States concerns over such issues, the Tribunal amended its rules of Procedure and Evidence (RPE). Thus, a further sub-paragraph was added to Rule 66 ('Disclosure by the Prosecutor') which stipulated:

"Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further on-going investigations....or affect the security interest of any state, the Prosecution may apply to the Trial Chamber sitting in *camera* to be relieved from the obligation to disclose."¹²⁸

Similarly, the following provision was added to Rule 70 ('Matters Not Subject to Disclosure'):

"If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of

¹²⁷ See D. Leigh & J. Calvert, 'Rifkind put paid to war crimes inquiry', *The Observer*, May 18, 1997

¹²⁸ See Rule 66, RPE, ICTY.

generating new evidence, that initial information and its origins shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information."¹²⁹

Rule 70 went some way to placating States' concerns over disclosure and "created a comfort zone that granted investigators access to materials so out of reach that their very existence might not otherwise have been acknowledged."¹³⁰ However, the procedure also had significant drawbacks, and as Arbour notes, for some information providers Rule 70 "became an addiction. Virtually nothing would be released except under its protection, with the result that the Prosecutor could never assess with any certainty the strength of the case for trial. Everything depended on what information would be released for trial purposes, if and when an arrest was effected."¹³¹ Consequently, Arbour became increasingly concerned that the systematic recourse to Rule 70 "was not in the interests of justice."¹³² In some instances OTP officials were at a loss as to why States had even bothered to use the Rule 70 provisions, given the quality and source of the information. One western State reportedly permitted the OTP to examine "highly classified military intelligence information" on the condition that no notes be taken, that no use be made of the documents before obtaining prior consent of the State, and that the cooperation extended be confidential and not subject to any public report. However examination of the material revealed that "the top secret dossiers were nothing but summaries of newspaper articles and radio broadcasts!"¹³³

Rule 66 and Rule 70 also presented the OTP with the specific difficult dilemma of reconciling their substance with the conflicting requirement stipulated in Rule 68 (Disclosure of Exculpatory Evidence) to:

¹²⁹ See Rule 70, RPE, ICTY.

¹³⁰ See Louise Arbour 'The Crucial Years', Symposium, *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Volume 2, No. 2, June 2004, p. 399.

¹³¹ See Louise Arbour 'The Crucial Years', Symposium, *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Volume 2, No. 2, June 2004, p. 399.

¹³² See Louise Arbour 'The Crucial Years', Symposium, *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Volume 2, No. 2, June 2004, p. 400.

¹³³ See Mohamed Othman, 'Briefing Note – ICC – OTP Questions', Expert consultation process on general issues relevant to the ICC Office of the Prosecutor, February 3, 2003, p. 5.

“as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may Affect the credibility of prosecution evidence.”¹³⁴

In order for International Criminal Tribunals and Courts to retain credibility, the rights of the accused must be protected and given full meaning. Admittedly, the issue is particularly complicated. The insistence by certain States on using the Rule 70 disclosure procedure directly affected the release of certain exculpatory evidence to indictees defense counsel. However, given that many defendants in war crimes cases were agents of the state, it is virtually inconceivable that States would be willing to release sensitive information which could then be passed onto the defendant’s State.

Bad Neighbours: Croatian and Serbian Non-Compliance

Unsurprisingly, Croatia and Serbia were resistant to the Tribunal’s ‘requests’ for cooperation. Prior to the official signing ceremony of the Dayton Accords in Paris in mid December 1995, President Clinton had met with Izetbegovic, Milosevic and Tudjman at U.S. Ambassador Harriman’s residence. Clinton urged the three Balkan Presidents to adhere to every aspect of Dayton and stressed the importance for “the work of the War Crimes Tribunal to go forth and be respected.”¹³⁵ Despite Clinton’s message, it soon became clear that, like the authorities in Republika Srpska and Herceg-Bosna, Croatia and Serbia would continue their policy of obfuscation, opposition and tactical non-compliance.

In Croatia, Tudjman’s nationalist and authoritarian regime vigorously pursued “anti-ICTY policies” and designed a rhetorical strategy which sought to equate the Tribunal’s indictments against Croatians as an attack on the dignity and legitimacy of its military

¹³⁴ See Rule 68, RPE, ICTY.

¹³⁵ See ‘Memorandum of Conversation: Quadrilateral Meeting with Presidents Franjo Tudjman of Croatia, Alija Izetbegovic of Bosnian-Herzegovina, and Slobodan Milosevic of Serbia, December 14, 1995,’ NSC, in ‘The Road to Dayton’ U.S. Department of State, Epilogue, p. 258.

offensives in 1995, the so-called Homeland War (*domovinski rat*).¹³⁶ Additionally, the Tudjman regime sought to undermine the Tribunal's investigations into crimes committed by Bosnian Croats in Bosnia, due to concerns that its extensive involvement in Bosnia would emerge.

Tudjman's response to the indictment of General Blaskic was indicative of the challenge the Tribunal would face in gaining cooperation. Rather than arresting the General, the Croatian President merely shuffled him from head of the Bosnian Croat army (HVO) to Inspector of the Army, which was subsequently reported as a promotion.¹³⁷ Others disagreed with this media characterization, with David Galbraith, (then) U.S. Ambassador to Croatia remarking "Since when is being the commander of your own army a less important job than *inspector* of the army?"¹³⁸ Regardless of whether the move constituted a promotion or demotion, the response clearly contravened the duty to cooperate as articulated in Article 29 of the Tribunal's statute. Attempts by 'pro-prosecution' elements within the U.S. administration to induce compliance were initially rebuffed by Tudjman's bluster that he couldn't promise to cooperate with the Tribunal unless Serbia acted accordingly.¹³⁹

In the face of increased U.S. pressure, The Croatian President changed tactics claiming he had no knowledge of the whereabouts of Kordic or any other of the indictees. After threats that the U.S. would veto a substantial IMF loan, Tudjman backed down and ten Bosnian Croats were transferred to The Hague from Croatia. The transfers were referred to as 'Voluntary surrenders' meaning Croatia set no extradition precedent, which served to somewhat placate a public largely hostile towards the Tribunal. In giving a defiant press conference at Zagreb airport, Dario Kordic was assisted by Tudjman's personal interpreter, indicating the extent of their relationship.¹⁴⁰

¹³⁶ See Victor Peskin and Mieczyslaw P. Boduszynski, 'Croatia's Moment of Truth: The Domestic Politics of State Cooperation with the International Criminal Tribunal for the Former Yugoslavia', Berkeley Program in Soviet and Post-Soviet Studies Working Paper Series, January 2003, p. 3-4.

¹³⁷ See 'Justice Collides with Peace: Bosnia', *Economist*, November 18, 1995.

¹³⁸ See David Galbraith quote in BASS, *STAY THE HAND OF VENGEANCE*, p. 244

¹³⁹ See MADELINE ALBRIGHT, *MADAM SECRETARY* (Miramax) 2003, p. 267.

¹⁴⁰ See HOLBROOKE, *TO END A WAR*, p. 351.

In January 1997, with a team of Tribunal investigators working in-country, members of Croatian intelligence (then headed by Tudjman's son) reportedly exhumed a series of bodies (allegedly the victims of a massacre in 1991 committed by Croatian forces in the village of Paulin Dvor) in an attempt to evade detection.¹⁴¹ Tudjman was particularly assiduous in his obstruction of investigators efforts to uncover evidence relating to Operations Flash and Storm, and persistently refused to recognize the Tribunal's right to investigate war crimes linked to the offensives.¹⁴² Between 1997 and 2000, Croatian intelligence authorized two operations: Operation Hague and Operation Truth, designed to protect four members of the military police and intelligence services from investigation and their possible transfer to The Hague.¹⁴³ The details were revealed by Anto Nobile, a Croatian defence lawyer who defended a number of indictees. Nobile recounted, "The secret services gave them new names, houses, and cars, and new names for their family members"¹⁴⁴ and went on to suggest the motive for the operation was to cover up the extent of the Croatian state's involvement in war crimes in Bosnia. Similarly to the situation in Republika Srpska, addressing the issue of war crimes and actively cooperating with the Tribunal could prove fatal to Croatian citizens. In August 2000, Milan Levar who had been interviewed by investigators relating to the killing of forty Serb civilians by Croatian forces in the town of Gospic in 1991 was assassinated when a bomb exploded at his house.¹⁴⁵ The earlier publication of an account by a former Croatian Ministry of Interior soldier of his unit's involvement in the murder and rape of Serb civilians and the torture and execution of Serb prisoners, led to death threats being issued against the newspaper's editors.¹⁴⁶

¹⁴¹ See Drago Hedl, 'Croatian Massacre Inquiry Fears', Tribunal Update, No. 283, Institute for War and Peace Reporting, August 26-31, 2002

¹⁴² See Victor Peskin and Mieczyslaw P. Boduszynski, 'Croatia's Moment of Truth: The Domestic Politics of State Cooperation with the International Criminal Tribunal for the Former Yugoslavia', Berkeley Program in Soviet and Post-Soviet Studies Working Paper Series, January 2003, p. 16.

¹⁴³ The four men were Pasko Ljubicic, Vlado Cosic, Ante Sliskovic and Tomislav Vlajic

¹⁴⁴ See Anto Nobile quote in Nicholas Wood, 'Croatian turnaround led to general's arrest', *International Herald Tribune*, December 27, 2005.

¹⁴⁵ See 'Potential Witness Dies in Croatia – Explosive device kills Milan Levar outside his home', Tribunal Update, No. 188, Institute for War and Peace Reporting, August 28-September 2, 2000; 'Croatia Struggles to Protect Witnesses', Tribunal Update, No. 361, Institute for War And Peace Reporting, June 4, 2004.

¹⁴⁶ See 'How We Killed for Croatia', *Transitions*, November 1997, p. 22.

Showdown Over Intelligence Material: The Blaskic Case

Croatia's most dramatic confrontation with the Tribunal related to its refusal to hand over documents which the Prosecutor requested relating to crimes committed at Ahmici, Bosnia. The refusal was predicated on the grounds that the disclosure of the documents would be prejudicial to Croatia's national security. The *Blaskic Subpoena* case brought to the fore a key dilemma which lies at the heart of the workings of international criminal justice mechanisms. Arbour saw the issues surrounding the case as "critical....to the very conception of our mandate and to our ability to discharge it in a fair and timely fashion."¹⁴⁷

Blaskic had been charged with crimes against humanity and grave breaches and violations of the laws of war arising out of the principle of command responsibility. In order to prove grave breaches had been committed, the Prosecution had to establish that the crimes had been committed in the context of an *international* armed conflict, and thus needed to prove direct military involvement of Croatian forces alongside the HVO forces in Bosnia. During 1995 and 1996, the Prosecution made a series formal 'requests for assistance', in an attempt to obtain relevant documents. Croatia largely failed to comply and consequently, on January 15, 1997, at the request of the OTP, the lead Judge in the Blaskic case, Gabrielle Kirk McDonald, issued a *subpoena educes tecum* to the Republic of Croatia, the Croatian Defence Minister Gujko Susak, the Federation of Bosnia Herzegovina and the defense authorities of the Croatian Community of Herceg-Bosna. The subpoena included requests for Blaskic's notes which had been transferred to the Croatian Ministry of Defence (Ministarstvo Obrane) and the defense authorities of Herceg-Bosna, communications between the Croatian MoD and other officials of Herceg-Bosna and records on Croatia's contribution of weapons, supplies and military units to the Bosnian conflict.¹⁴⁸ The acquisition of many of the subpoenaed records were

¹⁴⁷ See Louise Arbour 'The Crucial Years', Symposium, *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Volume 2, No. 2, June 2004, p. 400.

¹⁴⁸ See Ruth Wedgwood, 'The International Criminal Tribunal and Subpoenas for State Documents', in MICHAEL N. SCHMITT & LESLIE C. GREEN (EDS.) *THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM*, INTERNATIONAL LAW STUDIES VOLUME 71 (Naval War College, Newport Rhode Island) 1998, p. 485.

viewed by the OTP as central to its strategy of establishing proof of command responsibility in the case.

In response to the Subpoena, the Bosnian Federation authorities in Sarajevo indicated their willingness to cooperate. However, in reality, this cooperation could only be limited given their restricted access to most of the material and their lack of control over the Herceg-Bosna authorities which had acted to spirit many documents out of the country into the custody of the Croatian MoD. Croatia immediately contested the subpoena, arguing it had “no legal grounds as a form of communication between the Tribunal and sovereign States and their government officials.”¹⁴⁹ Furthermore, it argued that even if the Tribunal possessed such powers, a State still had the right to limit its compliance in order to protect its national security interests.¹⁵⁰ Croatia maintained that the Tribunal did not have the power to judge or determine its national security claims, and relying on the *Corfu Channel case* contended that “[t]he determination of the national security needs of each State is a fundamental attribute of its sovereignty.”¹⁵¹

In contrast, the OTP averred that the Croatian position would “prevent the Tribunal from fulfilling its Security Council mandate to effectively prosecute persons responsible for serious violations of international humanitarian law and thus, defeat its essential object and purpose.” Furthermore, it was not only the OTP which had an interest in obtaining the documents. As Blaskic’s lawyer highlighted, “[I]f the court can’t request records, then I can’t defend my client.”¹⁵² In an attempt to persuade the Trial Chamber, the Prosecutor highlighted that the notion of an international tribunal ordering a state to produce documentary evidence was not without precedent. In 1988 in the *Velasquez Rodriguez Case*, the Inter-American Court of Human Rights ordered the Government of

¹⁴⁹ See Brief of the Republic of Croatia on *Subpoenae Duces Tecum*, Prosecutor v. Blaskic, T. Ch. II, Case No. IT-95-14-PT, (ICTY 1, April, 1997)

¹⁵⁰ See Brief of the Republic of Croatia on *Subpoenae Duces Tecum*, Prosecutor v. Blaskic, T. Ch. II, Case No. IT-95-14-PT, April 1, 1997)

¹⁵¹ See Brief of the Republic of Croatia on *Subpoenae Duces Tecum*, Prosecutor v. Blaskic, T. Ch. II, Case No. IT-95-14-PT, April, 1 1997 (emphasis added.)

¹⁵² See Blaskic’s defence lawyer quote in Robert Marquand, ‘Bosnia Trial Shows Court’s Rising Clout’, *Christian Science Monitor*, October 1, 1997.

Honduras to produce documents relating to the organization and structure of the country's armed forces.¹⁵³

The Trial Chamber ruled that the Tribunal did have the power to issue subpoenas against States *and* named government officials. It also recognised that many of the crimes the Tribunal was investigating involved military operations, holding that military records “may constitute *vital evidence*.”¹⁵⁴ Consequently, it was ruled that the Tribunal must have “the inherent power to compel the production of documents necessary for a proper execution of its judicial function.”¹⁵⁵ As Sluiter highlights, although customary international law largely protects the national security of States by preventing other States from intruding into the realm of domestic jurisdiction, Article 2 (7) of the U.N. Charter, “provides for a significant exception to the impenetrability of the realm of domestic jurisdiction in respect of Chapter VII enforcement measures.”¹⁵⁶ With the Tribunal being established under Chapter VII of the Charter, it thus possessed (in the legal sense at least) the power to penetrate that realm. The Trial chamber concluded that “[A] State invoking a claim of national security as a basis for non-production of evidence requested by the International Tribunal, may not be exonerated from its obligation by a blanket assertion that its security is at stake. Thus, the State has the onus to prove its objection.”¹⁵⁷

The Croatian government appealed against the decision, which also attracted *amicus curiae* briefs from several governments, clearly indicating the international importance attached to the issue. On October 29, 1997, the Appeal Chamber delivered its decision and retreated from the Trial Chamber's earlier decision, holding that the Tribunal could only issue binding orders or requests (as opposed to subpoenas which, if not acted upon, may be sanctioned as a contempt of court). It also held that such binding orders or

¹⁵³ See Judgment *Velasquez Rodriguez Case*, July 29, 1988, Inter-Am. Ct HR (Ser. C). No. 4 (1989)

¹⁵⁴ See Decision on the Objections of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, Prosecutor v. Blaskic, Case No. IT-95-14-PT, Trial Chamber II, July 18, 1997, para. 34, emphasis added [hereinafter Blaskic Subpoena Trial Chamber Decision]

¹⁵⁵ See Blaskic Subpoena Trial Chamber Decision

¹⁵⁶ See ANDRÉ KLIP AND GORAN SLUITER, ANNOTATED LEADING CASES OF THE INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: V. 1 (Intersentia Publishers) 1999, p. 272.

¹⁵⁷ See Blaskic Subpoena Trial Chamber Decision, para. 147.

requests could not be addressed to named government officials, but only to States. Critically, however, the Appeals Chamber agreed with the earlier Trial Chamber's decision, dismissing Croatia's contention that an *absolute* national security privilege should be recognised, holding that: "to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials *would be tantamount to undermining the very essence of the International Tribunal's function.*"¹⁵⁸ However, the Appeals Chamber was not unmindful of legitimate State concerns relating to national security, suggesting that a *single* Judge presiding over *in camera, ex parte* proceeding, could scrutinize the disputed documents to assess the claim as to whether their disclosure would be prejudicial to national security. If it was consequently determined to be prejudicial to national security, the redaction of parts of a document could also be permitted before their use at trial.

A Pyrrhic Victory?

Ultimately however, the rulings would largely be a pyrrhic victory for the OTP. Despite both the Trial and Appeals Chamber affirming the principle that a State *should not* be able to rely on the blanket exemption of documents on the grounds of national security, both rulings were emphatic in their judgment that the Tribunal did not have the power to enforce compliance. Instead, when a State failed to comply with its obligations under the Statute, the Prosecutor could merely inform the Tribunal's President that the State was in non-compliance. The President would then report the non-compliance to the Security Council. Harmon and Gaynor caustically highlight the limited effectiveness of the procedure, noting, "The remedy of reporting state non-cooperation to the Security Council is hardly a remedy at all."¹⁵⁹ Indeed, as Tavernier points out, despite numerous reports of non compliance, the Security Council "has never gone further than a simple reminder to States of their obligations by means of new resolutions or declarations by the

¹⁵⁸ See Appeals Chamber Transcript in ANDRE KLIP AND GORAN SLUITER, ANNOTATED LEADING CASES OF THE INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: V. 1 (Intersentia Publishers) 1999, p. 151 (emphasis added).

¹⁵⁹ See Mark B. Harmon and Fergal Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings', *Journal of International Criminal Justice*, Vol. 2., No. 2., June 2004, p. 420.

President.”¹⁶⁰ Despite the Blaskic case subpoena rulings, Croatia continued to withhold disclosure of the requested documents. The Security Council’s failure to act on the Tribunal’s declarations of non-compliance (by e.g. imposing sanctions) merely emboldened both Croatia and Serbia to continue to flout their obligations. On March 3, 2000, General Blaskic, was found guilty on all charges and sentenced to forty five years imprisonment, the stiffest sentence ever handed down by the Tribunal.

However, the Trial and Appeals Chamber’s observations relating to potential implications of a State’s non-disclosure of documents on the grounds of national security would prove prophetic. Following Tudjman’s death in 1999, the new reformist government ordered open the files of the Croatian intelligence agency in 2000, allowing access to both the Tribunal and Blaskic’s defence team to important material, some of which provided the grounds for an appeal against the General’s conviction. Critically, a number of the documents implicated other political leaders with direct links to the Tudjman regime who ran a *parallel chain of command* which used military police units to terrorize and kill civilians as part of their ethnic cleansing campaign.¹⁶¹ In light of the new evidence, the Appeal Chamber rejected much of the lower court’s conclusions, including the ruling that Blaskic was guilty of crimes against humanity under the principle of command responsibility relating to the atrocities committed at Ahmici. Blaskic’s sentence was slashed to nine years, and due to time already served, the former General was immediately released. The case provides a sobering example of the very real potential that States may attempt to mask or obfuscate their culpability in the commission of atrocity crimes by withholding crucial evidence on the grounds of national security.

The Tribunal also had a difficult relationship with Serbia’s ruling authorities, who were in many respects even less cooperative than Croatia, and refused to transfer any indictees to The Hague. Ratko Mladic and Veselin Sljivancanin turned up at Djukic’s funeral in

¹⁶⁰ See Paul Tavernier, ‘The Experiences of the International Criminal Tribunals for the former Yugoslavia and Rwanda’, *International Review of the Red Cross*, No. 321, 1997.

¹⁶¹ See Marlise Simons, ‘Hague War Crimes Tribunal Frees a Convicted General’, *New York Times*, July 30, 2004.

Belgrade in mid 1996, in full glare of the media, and a number of other indictees continued to remain in their official positions. The OTP faced protracted delays in the opening of a liaison office in Belgrade and the authorities even failed to take the most elementary step of implementing legislation enabling it to cooperate with the Tribunal, a clear signal of their intentions. When the U.S. pressed Milosevic to arrest and transfer three PIFWCs whom they believed were still serving in the Yugoslav army, the Serbian President deflected the request, suggesting instead that he would study the indictments and if the evidence was strong, prosecute them in the domestic courts. Milosevic was adamant that he would not authorize the men's extradition.¹⁶²

A New Prosecutor: Enter Arbour

In October 1996, Justice Goldstone departed the Tribunal and returned to South Africa to take up his position on the Supreme Court. He had played a critical role in the Tribunal's difficult early life, keeping the issue of war crimes on the agenda during the Dayton negotiations, tirelessly promoting the court's message and ensuring that crucial funding was obtained. However, the empty cells at the U.N. Detention Centre in Scheveningen could only be a source of deep frustration for the Tribunal's first Prosecutor. Out of the seventy four indictments issued, only seven were in Tribunal custody, none of whom had been arrested by international forces. Serbia and the authorities in Republika Srpska were effectively ignoring the Tribunal's indictments and the situation was little better in Croatia or Herceg-Bosna. IFOR and their political masters continued to be resolutely opposed to carrying out arrests. Prospects remained bleak for the Tribunal.

The appointment of Louise Arbour in place of Goldstone came at a time the Tribunal was at a critical juncture. Arbour, a Canadian jurist who had made a name for herself in the human rights community leading an inquiry into prison riots in Canada, arrived in The Hague to find morale amongst staff low, and discussions had started over whether to launch trials in absentia. The new Prosecutor was stridently against the proposal stressing "if that [decision had] passed, I would have left. I didn't go there for theater

¹⁶² See MADELINE ALBRIGHT, *MADAM SECRETARY* (Miramax) 2003 p. 268.

purposes.”¹⁶³ Rather than dwell on its apparent impotence, she viewed the Court as a powerful legal entity. Endowed with Chapter VII authority, Arbour felt the Tribunal “should behave as such...we had to assert ourselves as strong legal (hence moral) actors...I believe, we were strong, not weak.”¹⁶⁴ One of her first missions was a visit to the exhumation of the mass grave site at Ovchara which had been mapped out by the Commission and Physicians for Human Rights. During the day she met with Jaques Klein, the Head of the U.N. in Eastern Slavonia (UNTAES).¹⁶⁵ Klein was a strong supporter of the Tribunal, and in contrast to the experiences of the Commission faced from the U.N. personnel on the ground back in 1993, was keen to support and assist in the exhumation. Critically, Klein also informed the new Prosecutor that he was willing to arrest any PIFWCs found inside UNTAES administered territory.¹⁶⁶

Sealed Indictments: Levelling the Playing field

In contrast to her Predecessor’s formidable public relations efforts, Arbour decided to cool the Tribunal’s relationship with the media and the various NGOs. Her strategy to break the deadlock over arrests required a level of secrecy and a more low-key approach. The previous policy of publicly issuing indictments had proved to be both impracticable and unworkable. Based on the (perhaps naive) assumption that the ICTY would be dealing with cooperating states,¹⁶⁷ in reality, this assumption had proved misguided. The domestic authorities were generally reluctant to act on them and indictees were merely given advance notice and a head start in avoiding arrest.¹⁶⁸ Consequently, Arbour decided to embark on a new strategy of issuing sealed indictments. The prospect of not disclosing the name of the accused caused consternation amongst certain members of the judiciary, who saw it as violating the rights of defendants. The OTP responded that it

¹⁶³ See Louise Arbour quote in HAGAN, *JUSTICE IN THE BALKANS*, pp. 99-100.

¹⁶⁴ See Louise Arbour ‘The Crucial Years’, Symposium, *The ICTY 10 Years On: The View from Inside*, *Journal of International Criminal Justice*, Volume 2, No. 2, June 2004, p. 397.

¹⁶⁵ UNTAES was established on January 15, 1996 by Security Council Resolution 1037 (1996). It acted as a transitional authority for Baranja, Eastern Slavonia and Western Sirmium and was supported by some 5,000 UN peacekeeping troops. Its mandate expired January 15, 1998.

¹⁶⁶ See HAGAN, *JUSTICE IN THE BALKANS*, p. 102

¹⁶⁷ See ‘Workshop 1: The need for an international arresting team: UN-or not UN led?’, in VAN DIJK & HOVENS, *ARRESTING WAR CRIMINALS*, p. 39-40

¹⁶⁸ See Gavin F. Ruxton, ‘Present and future record of arresting war criminals: The view of the Public Prosecutor of ICTY’, in VAN DIJK & HOVENS, *ARRESTING WAR CRIMINALS*, p. 20.

was the only way to respond positively to the climate non-compliance, and after direct lobbying by Arbour, the judges warily agreed.¹⁶⁹ In addition to giving the OTP the element of surprise, sealed indictments were also viewed as a strategic device to break the dead-lock over international forces' refusal to make arrests. Arbour was scathing over the inaction, acerbically recounting, "The politicians said that the military did not want to proceed with arrests, because it was too dangerous...The military said that they were obeying orders and that the political leadership did not give instructions to do anything. When countries were criticized for their passivity, they hid behind....SACEUR. Everyone was passing the buck."¹⁷⁰ When informed of the new strategy of sealed indictments, many of the NATO governments were opposed, "They did not want secret indictment, because they realized that this was pushing them to act."¹⁷¹ However, Arbour was unmoved, letting the politicians and military know that their refusal to cooperate would have consequences. "if something doesn't start to happen at some point we will unseal these indictments and reveal [that] you're not meeting the responsibility of arrests."¹⁷²

The first sealed indictment was issued against Slavko Dokmanovic, the former Serb Mayor of Vukovar who was linked to alleged crimes committed at the Ovchara massacre site. Dokmanovic had allegedly beaten some of the Croatian POWs and was present during the executions. After the war he had moved across the border into Serbia to Sombor, and Tribunal investigators were tasked with the challenge of luring him back into UNTAES administrated territory in order to affect the arrest. Klein was keen to support and assisted in planning an operation with Polish Special Forces troops who were assigned a key role and began numerous rehearsals.¹⁷³ Investigators made contact with the former Mayor after he had approached the OTP to discuss crimes committed against Serbs by Croats in Vukovar. Although willing to talk, Dokmanovic was initially reluctant to enter into Croatia. After several months, a British Tribunal investigator re-

¹⁶⁹ See HAZAN, JUSTICE IN A TIME OF WAR, p. 95-96.

¹⁷⁰ See Louise Arbour quote in HAZAN, JUSTICE IN A TIME OF WAR, p. 94

¹⁷¹ See Louise Arbour quote in HAZAN, JUSTICE IN A TIME OF WAR, p. 96.

¹⁷² See Louise Arbour quote in HAZAN, JUSTICE IN THE BALKANS, p. 104.

¹⁷³ See Jaques Klein interview, PBS, available at

<http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/interviews/klein.html>

established contact and the former Mayor indicated his desire to meet Klein to discuss compensation for his property. The meeting provided the opportunity the investigation team had been waiting for. On June 27, 1997, Dokmanovic was picked up on a bridge at the border by two Polish Special Forces soldiers in a vehicle, and ostensibly, driven to the Klein meeting. On arrival at the base he was quickly disarmed, handcuffed and hooded whilst Tribunal officials read him his rights. Klein had organized a Belgian Air Force plane under his authority to deliver the indictee to The Hague.¹⁷⁴ Contrary to the apocalyptic claims by NATO forces that arresting PIFWCs would shatter the fragile peace, there was no violent reaction from the local population. As one legal advisor to the OTP recalled, “We’d been fed all these arguments, if you do this, there will be sniping, the war will break out, massive disruptions and problems, and it didn’t happen.”¹⁷⁵ Dokmanovic challenged the legality of his arrest arguing it violated the Sovereignty of the FRY. However, the Trial Chamber ruled the means to arrest Dokmanovic “neither violated principles of international law nor the sovereignty of the Federal Republic of Yugoslavia.”¹⁷⁶

Albright, Cook and Clark: Critical Support

After securing a second term of office in early November 1996, President Clinton unveiled a new foreign policy team, appointing Madeline Albright as the new Secretary of State. Albright had been a keen supporter of the Tribunal during her tenure as U.S. ambassador to the U.N., and sought to continue this stance in her powerful new position. In her first major foreign policy address at Harvard University, Albright emphasized the moral basis of American global leadership, devoting nearly half the speech to the importance of the ad hoc tribunals and called on PIFWCs to be arrested in Bosnia. She

¹⁷⁴ See HAGAN, JUSTICE IN THE BALKANS, p. 103. For more details of the arrest mission see HAGAN, JUSTICE IN THE BALKANS, pp 101-104. A more recent discussion of the role Polish Special Forces played in the operation alleges that several of Dokmanovic’s bodyguards were killed see CHRISTIAN JENNINGS, MIDNIGHT IN SOME BURNING TOWN. BRITISH SPECIAL FORCES OPERATIONS FROM BELGRADE TO BAGHDAD (Weidenfeld & Nicolson) 2004, p. 212. However, most other sources confirm the account in HAGAN. Although details of the operation were kept deliberately to a minimum (Hagan notes that personnel from the U.S. State Department and U.S. intelligence were also involved). However, it seems likely that more details would have emerged from Dokmanovic’s associates if the alleged killings had occurred.

¹⁷⁵ See legal advisor OTP, anonymous quote in HAGAN, JUSTICE IN THE BALKANS, p. 104.

¹⁷⁶ See Decision on the Motion for Release by the Accused Slavko Dokmanovic, IT-95-13a, October 22, 1997, at 88.

was also the driving force behind the establishment of the new ambassador-at-large for war crimes issues post in the State Department. David Scheffer, a tireless advocate of the Tribunal who worked for Albright at the U.N. took up the post and recalled it was Albright's lobbying which ensured the positions creation, "it would not have happened had she not been Secretary of State."¹⁷⁷ With Clinton's re-election, the "Maximalists" within the State Department sought to steer the Administration towards endorsing a more expansive role in Bosnia. Although the requirements of the military Annexes of Dayton (separation of forces, cantonment of weapons etc) had been successfully met with few problems, implementation of the civilian side of the Agreement had lagged, running into sustained difficulties. Little had occurred in the way of refugee return and the nationalists had consolidated their powerbases in the September 1996 elections. The "Maximalists" argued that progress could only be achieved if NATO assumed a more robust and interventionist stance, including arresting PIFWCs.

The White House however, initially failed to support the suggested policy change. As Holbrooke recounts, "by April [1997] there was a general impression that "Clinton II" was downgrading Bosnia."¹⁷⁸ Although the Administration had abandoned its initial one year deadline for the withdrawal of U.S. troops, in November 1996, it merely replaced it with another. The President pledged that IFOR's successor, SFOR, would complete its mission by June 1998. Similarly, Clinton's new Secretary of Defense, the Republican Senator, William Cohen stated in early January that the U.S. troop presence in Bosnia would be withdrawn by June 1998.¹⁷⁹ With SFOR engaging in what Albright referred to as "reverse mission creep, taking no risks and doing little to help achieve civilian-related goals,"¹⁸⁰ and Clinton and Cohen apparently committed to withdrawing U.S. forces by mid-98, the anti-Dayton forces were emboldened, viewing the growing unease in Washington as an indication that they could merely sit out the apparently fleeting international military presence.

¹⁷⁷ Interview with David Scheffer.

¹⁷⁸ See HOLBROOKE, *TO END A WAR*, p. 346.

¹⁷⁹ See JOST, *NATO TRANSFORMED*, p. 218.

¹⁸⁰ See MADELINE ALBRIGHT, *MADAM SECRETARY* (Miramax) 2003 p. 265.

However, the 'Maximalists' and the Tribunal gained further important supporters with the election of a Labour Government in Britain in May 1997. Under Prime Minister Tony Blair, the new Government set out to be more internationalist than its Conservative predecessors.¹⁸¹ The New Foreign Secretary, Robin Cook, was determined to transform the U.K.'s foreign policy into a more principled one which would "restore Britain's pride and influence as a leading force for good in the world....not least by making the protection and promotion of human rights a central part"¹⁸² Cook focused on three specific areas regarding the U.K.'s Bosnia policy which he regarded the previous Conservative government as being weak on; a more principled approach to distribution of humanitarian aid; the engagement of moderate political forces in an attempt to weaken the nationalist elements, and; enhanced support and cooperation with the ICTY.¹⁸³ Critically, and reversing the earlier U.K. policy, Special Air Service (SAS) soldiers were made available for PIFWC apprehension missions.¹⁸⁴ With the U.K. now pushing for movement on arrests an agreement was made between France, Germany, the Netherlands, the U.K. and the U.S. to provide their Special Operations Forces (SOF) to actively pursue and apprehend PIFWCs.¹⁸⁵

In addition to Albright and Cook's activism, the appointment of Wesley Clark as Supreme Allied Commander Europe (SACEUR) provided the necessary senior military support for a more robust approach. As Scheffer noted, "during the first term of Clinton's Presidency Wes was part of the Pentagon staff and 'on Pentagon message', but once he got SACEUR he became a tremendous ally on war crimes issues."¹⁸⁶ (Then) Under-Secretary of Defence, Walter Slocombe, acknowledged "there's no question that Clark was much more sympathetic to a more aggressive stance for such operations." Slocombe did however, emphasize that his predecessor Joulwan "had set the ground. He

¹⁸¹ See DAVID COATES AND JOEL KRIEGER, *BLAIR'S WAR* (Polity Press) 2004, p. 11

¹⁸² See Labour Party, General Election Manifesto, 'New Labour, Because Britain Deserves Better, 1997, pp.37-39. The vision was endorsed in the July, 1998 Strategic Defence Review, which again called for Britain's military forces to be a 'force for good' see Strategic Defence Review. Modern Forces for the Modern World', July 1998.

¹⁸³ See Jane Sharp, 'Prospects for Peace in Bosnia: The Role of Britain', Chaillot Paper 32, May 1998.

¹⁸⁴ See SMITH, *KILLER ELITE*, p. 197.

¹⁸⁵ See SMITH, *KILLER ELITE*, p. 197.

¹⁸⁶ Interview with David Scheffer.

[Clark] was operating in an environment allowing for this [position].”¹⁸⁷ Clark recognized that unless PIFWCs were arrested, the successful implementation of the DPA could be imperilled or seriously dragged out, resulting in large numbers of NATO troops remaining bogged down in a costly mission.¹⁸⁸ In fact, with increasing support for the “Maximalist” position growing, a belated acknowledgment that PIFWCs were an obstacle to real progress began to emerge. As David Scheffer’s military advisor conceded “After almost two years of criticism from human rights groups and the glare of the international media, NATO accepted that the low prioritization of military support to justice efforts *hampered overall efforts to achieve the purposes prescribed in Annex IA* [of the DPA].”¹⁸⁹

The success of the Dokmanovic arrest operation in Western Slavonia in June increased the pressure on NATO to act. As one of the Tribunal staffers involved in the operation noted, the credibility of NATO’s excuses could now be directly challenged, “Look this can be done, they just did it in Vukovar and this wasn’t a well armed UN force up there. You’ve got all the might of NATO behind you, certainly you can do the same in Bosnia.”¹⁹⁰ The OTP issued its next sealed indictment against Simo Drljaca for ‘complicity in genocide’ relating to crimes committed in Omarska detention camp. Aware that SFOR had been in contact with Prijedor’s former police chief, Blewitt pushed for action; “[we] said, well, we know you were encountering this guy, and you can set up the encounter in a way that’s not going to cause any loss of life. You’re in the driving seat. The guy doesn’t know he’s indicted.”¹⁹¹ The request was initially resisted and there was pressure for the OTP to “back off.”¹⁹² Undeterred, Arbour laid down the gauntlet, informing NATO authorities “when it becomes apparent to me that there is no real

¹⁸⁷ Interview with Walter Slocombe.

¹⁸⁸ See Chuck Sudetic, *Reluctant Gendarme. Why is France protecting indicted war criminals in the sector of Bosnia it controls?* *Atlantic Monthly*, April 2000.

¹⁸⁹ See Michael Newton, ‘Harmony or Hegemony? The American Role in the Pursuit of Justice’, *Connecticut Journal of International Law*, Spring, 2004, p. 240, (emphasis added.)

¹⁹⁰ See Tribunal staffer quote in HAGAN, *JUSTICE IN THE BALKANS* p. 105.

¹⁹¹ See Graham Blewitt quote in BASS, *STAY THE HAND OF VENGEANCE*, p. 266.

¹⁹² See Graham Blewitt quote in BASS, *STAY THE HAND OF VENGEANCE*, p. 266.

intention to apprehend anybody and that your mandate is just a fraud, then I will expose it."¹⁹³

Fortunately, Prijedor lay in the British sector of SFOR operations. *Operation Tango* aimed to arrest two indictees: Drljaca and Milan Kovacevic, the Director of Prijedor's hospital and former 'Mayor' during the Bosnian Serb takeover of the town, who was also placed under sealed indictment for 'complicity in genocide' in running Omarska. Covert surveillance of the men was conducted by members of Britain's 14 Intelligence Corps (14 Int.) and members of America's 'The Activity'¹⁹⁴ and intelligence revealed that Drljaca regularly went fishing with friends at a lake near Gradine. The active involvement of intelligence services in atrocity crimes investigations (CIA and NSA personnel also contributed to later operations) represented a significant shift in policy from their earlier reluctance to cooperate with the Tribunal. The mission was finally approved during a private meeting with Blair and Clinton during the NATO summit in Madrid and two SAS teams who had conducted training exercises in the U.K. were flown into Bosnia. On the morning of July 10, 1997, after determining that the police escort which sometimes accompanied Drljaca was not present, a U.S. Black Hawk helicopter flew one of the SAS teams to the lake. Drljaca resisted arrest, shooting one of the soldiers in the leg and was subsequently fatally shot in the exchange.¹⁹⁵ In Prijedor the second SAS team entered the hospital by an elaborate ruse¹⁹⁶ and retaining the element of surprise quickly arrested Kovacevic, moving him to the U.S. military base in Tuzla. There, U.S. Judge Advocate General's (JAG) supervised him being read his rights, took witness statements from the troops and turned him over to ICTY representatives who flew him to The Hague.¹⁹⁷

¹⁹³ See Louise Arbour quote in HAGAN, JUSTICE IN THE BALKANS p. 108.

¹⁹⁴ See SMITH, KILLER ELITE, p. 200. For further details of the U.S. Intelligence Support Activity see generally SMITH, KILLER ELITE.

¹⁹⁵ See 'A War Criminal is shot', *New York Times*, July 13, 1997.

¹⁹⁶ Disapproval was expressed by some U.N. and ICRC officials working in Bosnia (over the SAS reportedly posing as ICRC officials) who argued the practice could undermine the neutrality and reputation of the Red Cross.

¹⁹⁷ See Law and Military Operations in the Balkans 1995-1998, p. 126

The Impact of the Arrests

The arrests led to a series of Bosnian Serb small arms and grenade attacks on several isolated SFOR outposts (mostly Civil Affairs and Intelligence detachments)¹⁹⁸ Civilian members of the various international organizations were threatened and an unoccupied U.N. car was burned. Milosevic also issued a series of ominous threats during a meeting with Clark suggesting future operations should not be countenanced.¹⁹⁹ However, NATO stood firm and Clinton was prepared to respond to any reprisals with a massive show of force, (the option of launching retaliatory strikes, including the use of air power against Bosnian Serb targets was discussed.) Ultimately, it was decided not to respond. “After all, the Serb response had carefully avoided serious harm to any members of the international community.”²⁰⁰ Like so much of the Bosnian’s Serbs actions over the past five years, it was mostly bluster, which rapidly faded in the face of a determined opponent. As Wheeler had suggested, the reaction was merely a “containable disorder,”; one U.N. CIVPOL vehicle was damaged and several small improvised, explosive devices (IEDs) were detonated, in a response which Clark viewed as designed *not* to cause casualties.

Furthermore, rather than the oft stated apocalyptic scenarios (hostage taking, mass reprisals, a break down of the nascent peace) occurring, the removal of PIFWCs had a dramatically positive impact in the area. Other indictees who had been living openly with little concern now went underground. As one OSCE official working in Prijedor recounted, “the [19]97 arrests was a key moment....[PIFWC Milomir] Stakic fled. The [subsequent] municipal elections allowed the vacuum to be filled with a strong component of Bosniaks....Every two or three months there were arrests [by the SAS] and no adverse public reaction. Once the top guys were removed, this allowed for returns. After the critical mass of returnees occurs, it has a significant effect.”²⁰¹ Similarly in January 1998, the ICG credited the SAS arrests operations with transforming the political

¹⁹⁸ See Law and Military Operations in the Balkans 1995-1998, p. 126.

¹⁹⁹ See CLARK, WAGING MODERN WAR, p. 82.

²⁰⁰ See CLARK, WAGING MODERN WAR, p. 83.

²⁰¹ Interview with former OSCE fieldworker working on minority return issues. Stakic would later surface in Belgrade, and was arrested by Serbian authorities in March 2001 and transferred to The Hague.

atmosphere in western Republika Srpska, making it possible for the emergence of non-nationalists leaders.²⁰²

The tide was beginning to turn and SFOR continued to assume a more robust posture and pursue a more expansive interpretation of its mandate.²⁰³ Patrols increased and Area Security was provided around the towns and villages of returning refugees and IDP's. British area security around Prijedor in conjunction with the arrest operations helped to bolster confidence. Although expressing dismay that more individuals living in Prijedor had not been indicted and arrested for their wartime actions, Muharem Murselovic, a former Omarska detainee acknowledged that the arrest operations had encouraged Bosnian Muslims to return.²⁰⁴ Former UNPROFOR Dutch Battalion interpreter and Srebrenica survivor, Emir Sulagic, would later compare the stark differences in the atmosphere of Western and Eastern RS, "In Prijedor, people are coming back and picking up their lives because they feel safer knowing that their torturers are no longer physically present near their homes. The situation in Srebrenica is in flagrant contrast. The survivors are refusing to come back because up to now only two of the people responsible have been tried. A lot of people directly involved in the massacre are living there today without being disturbed."²⁰⁵ This pattern did not merely extend to Srebrenica but *generally throughout* Eastern RS.²⁰⁶

²⁰² See generally 'A Review of the Dayton Peace Agreement's Implementation', International Crisis Group, November 1997.

²⁰³ Furthermore, in an apparent admission of a flawed policy, Clinton announced in December 1997 that U.S. forces would remain in Bosnia after the June 1998 deadline, acknowledging that it had been an "error" to impose a specific deadline for the mission's duration, See JOST, NATO TRANSFORMED, p. 230.

²⁰⁴ Interview with Muharem Murselovic former Omarska detention camp survivor, Prijedor. Mark Wheeler, former head of the ICG Sarajevo Office, also highlighted that many of the initial returnees to Prijedor had been refugees in various Scandinavian States and had secured nationality status. This was viewed as a form of "insurance policy" "I mean if you have a Norwegian or Swedish passport the police are not going to rub you out, you have some protection." Furthermore, those returning from Scandinavian countries in many cases returned financially solvent and could start businesses, placing them in a stronger position. Interview with Mark Wheeler.

²⁰⁵ See WESSELINGH AND VAULERIN, RAW MEMORY, p. 94.

²⁰⁶ Tim Judah highlights that in Eastern RS, where fewer people have been indicted or arrested, the rate of return is far lower, see Tim Judah, 'Half-Empty or Half-Full Towns?', *Transitions*, February 5, 2004. The author acknowledges that refugee and IDP return rates in Bosnia are affected by other issues as well as insecurity and the presence of PIFWCs. As an OSCE fieldworker working on minority return issues highlighted, certain areas of Eastern RS such as Foca and Visegrad were historically places of migration. (Interview with OSCE fieldworker). Furthermore, the decision to return also relates to considerations of access to employment, utilities, education and health. Nevertheless, the presence of PIFWCs remains a key

More Arrests and Active Support for the Tribunal

Under Clark's direction, NATO's initial policy of avoiding confrontation with the RS Special Police was also reversed. Now classified as a military force they were actively confronted, disarmed and disbanded by SFOR troops, which effectively resulted in the removal of one layer of Karadzic's protection force. After Bosnian Serb TV broadcast a doctored interview with a Tribunal Official designed to make it appear complimentary to Karadzic, SFOR seized control of four TV towers, blocking subsequent transmissions.²⁰⁷ On December 18, 1997 Dutch army commandos from the 108th Special Operations Corps, supported by SAS troops, arrested two Bosnian Croats indicted for crimes against humanity committed in the village of Ahmici. Vlatko Kupreskic had initially been part of the group which were to 'voluntarily surrender' in Zagreb, but had backed out of the deal, returning to live in Ahmici. After smashing down the door and firing tear gas into his apartment Dutch commandos stormed the building, shooting and wounding Kupreskic who resisted arrest. Anto Furundzija leader of the Bosnian Croat paramilitary group 'The Jokers' was arrested without a struggle outside his home after returning home.²⁰⁸ With Drljaca shot dead and Kupreskic wounded, NATO forces were sending a clear message of their willingness to use lethal force. (Then) NATO Secretary General, Javier Solana emphasized "This action stands as a warning to all those indicted for war crimes who are still at large that they, too, will be held accountable. They should take steps immediately to surrender themselves voluntarily to the ICTY."²⁰⁹ In late 1997 and early 1998 several Bosnian Serb indictees residing in RS voluntarily surrendered to the Tribunal.²¹⁰ The new strategy received strong criticism from the Russian government, which maintained that

factor. As the President of the Helsinki Commission for Human Rights in Bosnia Herzegovina emphasized "Minority return groups and refugee families' representatives have *specifically said we will not go back when these people are there.* (Interview with Srdjan Dizdarevic). Similarly, Wesselingh and Vaulerin extensive research in Prijedor established that "The imprisonment of leading faces from the ethnic cleansing campaign in Prijedor has made the refugees feel considerably safer" see WESSELINGH AND VAULERIN, RAW MEMORY, p. 93.

²⁰⁷ See CLARK, WAGING MODERN WAR, pp. 101-102.

²⁰⁸ See 'NATO Arrests Two Bosnian Croat Indictees', Tribunal Update, Institute for War and Peace Reporting, December 15-20, 1997.

²⁰⁹ See Javier Solana quote in 'NATO Arrests Two Bosnian Croat Indictees', Tribunal Update, Institute for War and Peace Reporting, December 15-20, 1997.

²¹⁰ See KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, p. 170.

arrest operations were not within the remit of SFOR,²¹¹ characterising the operations as “cowboy raids which may jeopardize the entire process of the Bosnian settlement.”²¹² Such statements were not surprising given Russia’s strong support for the Bosnian Serbs, but had little influence on the new policy.

Despite British and Dutch willingness to pursue operations against PIFWCs, clear divisions still existed within the U.S. Administration over whether to move beyond its narrow military mission. General Clark’s September 1997 presentation to the Secretary of Defense of his plans to continue the more robust approach, was met with barely veiled hostility from Cohen with Clark being informed the following day that Cohen was uncomfortable with the briefing.²¹³ Undeterred, Clark forged ahead with the more active policy in the continued belief that without the strategy U.S. forces could not be reduced.²¹⁴ As Scheffer recounted “Clark made it his mission in life to make the U.S. sector a PIFWC free zone.”²¹⁵ Throughout 1997 ‘The Activity’ had been conducting intelligence gathering and surveillance operations against PIFWCs, and reported directly to Clark, operating outside the normal NATO channels.²¹⁶ In early December, 65 commandos from SEAL team 6 were secretly deployed to Tuzla military base in shipping containers in order to avoid detection by the Russian SFOR contingent due to concerns over potential leaks. Their mission was to arrest five PIFWCS and teams were then divided and deployed to CIA-run safe houses spread throughout Bosnia.²¹⁷ However, the operations came up against stiff resistance from U.S. General Eric Shinseki, commander of all NATO forces in Bosnia, who argued there was not enough “actionable” intelligence to guarantee success. Tensions were running high with some of the intelligence officials viewing Shinseki’s requests for additional information as excessive. Ultimately, the

²¹¹ See Speech of the Representative of the Russian Federation to the Plenary Session of the United Nations General Assembly on the Report of the International Criminal Tribunal for the former Yugoslavia (Item 49 on the Agenda) November 4, 1997.

²¹² See ‘SFOR Apprehends War Criminals’, *Balkan Watch*, The Balkan Institute, Week in Review, December 16-23, 1997.

²¹³ See CLARK, *WAGING MODERN WAR*, pp. 99-100.

²¹⁴ See CLARK, *WAGING MODERN WAR*, p. 100.

²¹⁵ Interview with David Scheffer.

²¹⁶ See Richard J. Newman, ‘Hunting War Criminals. The first secret account of U.S. missions in Bosnia’, *U.S. News and World Report*, July 6, 1998.

²¹⁷ See Richard J. Newman, ‘Hunting War Criminals. The first secret account of U.S. missions in Bosnia’, *U.S. News and World Report*, July 6, 1998.

mission was cancelled after Bosnian Serb authorities became aware of the planned raid. One month later a SEAL team arrested Bosnian Serb Goran Jelisic, indicted for crimes committed in the Luka detention camp in Brcko. Three more Bosnian Serbs indicted for crimes committed in Bosanski Samac (Simo Zaric, Milan Simic and Miroslav Tadic) were detained by U.S. forces over the following three weeks.

One of the most controversial arrests was carried out in late September 1998, when Stevan Todorovic, indicted for the murder, torture and sexual assault of Bosnian Muslims and Bosnian Croats in Bosanski Samac, was apprehended inside the territory of FRY, without the knowledge of the domestic authorities. Although some commentators have suggested the arrest was most likely carried out by bounty hunters,²¹⁸ more recent accounts allege the operation was conducted by an SAS snatch team.²¹⁹ Todorovic was reportedly located by 'The Activity', which tracked his mobile telephone calls to the remote Zlatibor region. Overpowered, blindfolded and gagged, he was brought back to the border, covertly transported over the River Drina and taken by helicopter to Tuzla. "One British officer described it as 'a classic mission', adding that the authorities were happy for the Serbs to know that the SAS had carried out the raid."²²⁰ However, the arrest led to an awkward confrontation between the Tribunal and NATO forces. Like Dokmanovic, Todorovic challenged the legality of his arrest and requested SFOR provide documents pertaining to the operation. A senior Pentagon official noted the incident nearly led to subsequent arrest operations being suspended, arguing "How he [Todorovic] got to The Hague was irrelevant to his innocent or guilt. We [the U.S.] said [to the Tribunal] if you issue an order for us to disclose, we'll stop hunting PIFWCs."²²¹ Nonetheless, on October 18, 2001, The Trial Chamber issued such a binding order to SFOR to release relevant material, including reports relating to the apprehension and copies of videos of the arrest. The governments of Canada, Germany, the Netherlands, Norway, the U.K. and the U.S. and NATO immediately appealed against the decision.

²¹⁸ See KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, p.166.

²¹⁹ See SMITH, KILLER ELITE, p. 203.

²²⁰ See SMITH, KILLER ELITE, p. 203.

²²¹ Interview with former senior Pentagon official.

Fortunately (from the perspective of the OTP) the potential crisis was averted after a plea agreement was made with Todorovic and the unlawful arrest motion dropped.²²²

In addition to assuming a more proactive approach to arrests, NATO forces were also more supportive of the work of Tribunal investigators, being actively involved in a series of search and seizure operations carried out in RS and Bosnian Government facilities. The strategy involved either informing the authorities only half an hour before the operation began²²³, or sending Tribunal representatives to the site with the authorizing documents *immediately* before the search team entered.²²⁴ NATO forces provided important area security and close protection escorts security during the operations²²⁵ which, as Hagan highlights, were crucially important in assisting offender identification, “[They were] the difference between knowing of the crimes and knowing who at higher levels planned, prepared and executed them.”²²⁶

“The Reluctant Gendarme”²²⁷

Whilst British, Dutch and U.S. forces had carried out several missions to arrest PIFWCs, French forces failed to act in their sector. This reluctance was merely one example of the French government’s wider lack of cooperation with the Tribunal. Firstly, no intelligence material was provided to the Court²²⁸ and a former senior official in the OTP castigated France’s failure even to disclose intelligence under the Rule 70 procedure.²²⁹

Investigators were also frustrated by the convoluted, time-consuming process of obtaining information from French former peacekeepers. Questions had to be made in writing, which would then be checked by French legal officials before a response could

²²² See Mr. Drs. Elies van Sliedregt, ‘Arresting war criminals; Male catus bene detentus, human rights and the rule of law’, in VAN DIJK & HOVENS, *ARRESTING WAR CRIMINALS*, p. 79.

²²³ See ‘Workshop 1: The need for an international arresting team; UN- or not UN led?’ in VAN DIJK & HOVENS, *ARRESTING WAR CRIMINALS*, p. 42.

²²⁴ See HAGAN, *JUSTICE IN THE BALKANS* p. 148.

²²⁵ Again, like the PIFWC arrest operations, SOF were sometimes used, interview with Tribunal Investigator involved in search and seizure operation.

²²⁶ See HAGAN, *JUSTICE IN THE BALKANS* p. 149.

²²⁷ The subheading title is taken from the title of Chuck Sudetic’s article focusing on French resistance to arresting PIFWCs, see *The Reluctant Gendarme: Why is France protecting indicted war criminals in the sector of Bosnia it controls?* *Atlantic Monthly*, April 2000.

²²⁸ See HAZAN, *JUSTICE IN A TIME OF WAR*, p. 98.

²²⁹ Interview with former senior Official of OTP, ICTY.

be made.²³⁰ The process could take weeks, and was hardly conducive to assisting prompt investigations. That government and military personnel would potentially have to testify before the Tribunal was particularly sensitive. On December 7, 1997, French Defence Minister Alain Richard rebuked the Tribunal for carrying out a “spectacle of justice” and declared he would “never go to the Hague.” Richard also flatly rejected that French military officers would testify.²³¹

On the arrests front, Madeline Albright reveals in her autobiography that, in 1997, the U.S. working with 4 other nations, planned a major operation, a Bosnia-wide sweep designed to net Karadzic and 15 to 20 other PIFWCs in a single day. Albright recounts, “I was angered when, at the last minute, a key country – whose identity remains secret – opted out.”²³² Media reports at the time alleged that France had been the State which pulled out of the mission considering it too risky.²³³ The sector where French troops were deployed included Pale, where Karadzic was regularly seen, and Foca and Visegrad, also areas where indicted PIFWCs were said to be openly residing.

Concern also existed over elements in the French military compromising operations against PIFWCs. Liaison officer, Major Herve Gourmelon was known to have close links with Karadzic and when the Former Bosnian Serb President went underground days before a joint U.S., British and French operation to detain him was launched, U.S. sources suggested he had been tipped off by elements in the French military.²³⁴ U.S. intelligence were so concerned over links to Karadzic that a surveillance operation was mounted against a French army officer, bugging her car and monitoring her cell phone conversations.²³⁵ As a former senior State Department official recounted, “we went through a period of time where sharing intelligence with France became difficult. We

²³⁰ See HAZAN, *JUSTICE IN A TIME OF WAR*, p. 100.

²³¹ See HAZAN, *JUSTICE IN A TIME OF WAR*, p. 100. After protracted negotiations, the French government in 1998 allowed French officers to testify before the Tribunal.

²³² See MADELINE ALBRIGHT, *MADAM SECRETARY* (Miramax) 2003 p. 270.

²³³ See Steven Erlanger, ‘France Said to Balk at 2nd Raid, Calling It Too Risky’, *New York Times*, July 16, 1997.

²³⁴ See R. Jeffrey Smith, ‘Secret Meetings Foiled Karadzic Capture Plan; US Says French Jeopardized Mission’, *Washington Post*, April 23, 1998; Thomas Sancton and Gilles Delafon, ‘The Hunt for Karadzic’, *Time*, August 10, 1998.

²³⁵ See David Scheffer quote in SMITH, *KILLER ELITE*, p. 194.

were concerned how intelligence was being used...there was a problem over who was being party to it. If you have doubts about how partners are handling the information, you have problems.”²³⁶

U.S. frustration led to Scheffer, the ambassador-at-large for war crimes issues, to damningly refer to the French sector as a “sanctuary”, and highlight that, “Karadzic is generally known to be in the French sector....the means [to arrest him] exist.”²³⁷ Arbour assumed a similarly critical approach noting “it is in the French sector that many war criminals are found, but they feel absolute security there....There are considerable opportunities for action in the French sector, yet we confront complete inertia. Thus we conclude that this inertia constitutes a concerted policy.”²³⁸

In late 1998 the Tribunal placed Milan Lukic under sealed indictment. Lukic, a senior figure in the Serbian criminal underworld personally involved in the murder of dozens of Bosnian Muslim civilians was regularly seen driving around Visegrad, often without close protection, and frequently visited cafes in the town. However, French forces did not move to arrest him, informing the Tribunal they could not positively identify him.²³⁹ In response to increasing media criticism²⁴⁰ the French government attempted to justify its failure to capture indictees, emphasising the area’s mountainous topography made operations difficult.²⁴¹ However, the justification was revealed to be somewhat disingenuous by French TV footage, which revealed French SFOR troops drinking with indictee Janko Janjic.²⁴² As the (then) executive director of the Coalition of International Justice remarked, “whilst U.S. troops in the past may have turned a blind eye to PIFWCs,

²³⁶ Interview with former senior State Department official.

²³⁷ See HAZAN, *JUSTICE IN A TIME OF WAR*, p. 103.

²³⁸ Louise Arbour quote in Craig R. Whitney, ‘Prosecutor Says French Balk at Seizing War Criminals in Bosnia’, *New York Times*, December 16, 1997.

²³⁹ See Chuck Sudetic, ‘The Reluctant Gendarme. Why is France protecting indicted war criminals in the sector of Bosnia it controls?’ *Atlantic Monthly*, April 2000.

²⁴⁰ For example see Christopher Lockwood, ‘French ignore indicted Serbs’, *Daily Telegraph*, August 2, 1999.

²⁴¹ See Philip Shenon, ‘Much of Bosnia still a haven for war criminals’, *New York Times*, December 12, 1999.

²⁴² See OFF, *THE LION THE FOX AND THE EAGLE*, p. 307. Janjic was later killed on October 13 after detonating a grenade whilst resisting arrest by German forces.

“you didn’t see them fraternizing with them.”²⁴³ Some commentators have made more serious allegations relating to French motivations for failing to arrest PIFWCs. On January 9, 1999, French soldiers established a checkpoint to detain Dragan Gagovic, a Bosnian Serb under sealed indictment for crimes committed in Foca. Gagovic, who was returning from a karate tournament with five children in the car, reportedly failed to stop, accelerated at the soldiers, and was shot dead. NATO’s (then) Secretary General, George Robertson, defended the troops, highlighting that under the rules of engagement SFOR was permitted to use lethal force where its soldiers were in a life-threatening situation. However, some sources began to question why Gagovic was not merely detained in Foca, where he was regularly seen walking alone. Western diplomatic sources pointed out that Gagovic was only weeks away from surrendering to the Tribunal and had discussed this openly on the telephone, which, given their close monitoring of phone communications in their sector, French forces would likely have been aware.²⁴⁴ Sources close to the ICTY have reportedly alleged that the action was taken to prevent Gagovic, who was in contact with the Tribunal at the time of his death, from voluntarily surrendering. His wartime activities reportedly included business dealings with the French UNPROFOR contingent, and he reportedly received anonymous threats that surrendering to The Hague would cost him his life.²⁴⁵ The French military’s refusal to handover a video recording of the checkpoint shooting to NATO authorities only served to fuel speculation that a cover up had ensued.²⁴⁶ Arbour has been to some extent, philosophical over France’s ‘minimalist’ stance towards the Tribunal. Despite her searing critique over the lack of arrests, she has also acknowledged; “the French feared that the ICTY could turn on them and investigate decisions made by General Janvier or others, while Washington was unthreatened, having no troops in the war. I am convinced that the United States would have slammed on the

²⁴³ See Nina Bang-Jensen quote in Philip Shenon, ‘Much of Bosnia still a haven for war criminals’, *New York Times*, December 12, 1999.

²⁴⁴ See Philip Shenon, ‘Much of Bosnia still a haven for war criminals’, *New York Times*, December 12, 1999.

²⁴⁵ See ‘War Criminals in Bosnia’s Republika Srpska: Who Are The People in Your Neighbourhood?’, International Crisis Group, Balkans Report No. 103, November 2, 2000, p. 72.

²⁴⁶ See Chuck Sudetic, ‘The Reluctant Gendarme. Why is France protecting indicted war criminals in the sector of Bosnia it controls?’ *Atlantic Monthly*, April 2000.

brakes too, if the Americans had been implicated like the French and if their testimony could embarrass their own authorities."²⁴⁷

With arrests being carried out by British, Dutch, German and U.S. forces, and sustained media and Tribunal criticism for their failure to act, the French were ultimately "shamed into active cooperation."²⁴⁸ When Chirac visited the Tribunal in 2000 to discuss enhancing support, Arbour's successor, Carla Del Ponte handed him a sealed indictment issued against Momcilo Krajisnik. On April 3, 2000, GCMC commandos blew the door off Krajisnik's house, dragging the former Bosnian Serb Prime Minister ignominiously out in his pyjamas.²⁴⁹ However, the arrest did little to allay suspicions that the French continued to retain inappropriate links to Karadzic. In late February 2002 a U.S. special forces arrest operation was reportedly foiled after a French officer tipped off the Bosnian Serb authorities who informed Karadzic's bodyguards, allowing the former Serb President to move across the border into Montenegro (the conversation was reportedly intercepted by British intelligence).²⁵⁰

The Situation Today

NATO's change of policy towards PIFWCs was crucial in providing the Tribunal with many of its indictees. Without this active support, The Hague clearly would have struggled to obtain custody of such figures, particularly given Croatia, RS and Serbia's frequent non-compliance. Obtaining cooperation from the governing authorities in the region has remained a constant problem for the Tribunal. As Tribunal staffer Florence Hartmann noted, war crimes prosecutors in Serbia faced the problem of working with the

²⁴⁷ Louise Arbour quote in HAZAN, *JUSTICE IN A TIME OF WAR*, p. 100.

²⁴⁸ See HAGAN, *JUSTICE IN THE BALKANS*, p. 129.

²⁴⁹ See Andrew Purvis, 'Under Arrest. NATO busts Bosnian Serb leader Momcilo Krajisnik to show it is serious about nabbing suspected war criminal', *Time Europe*, April 17, 2000, Vol. 155, No. 15. Although French authorities claimed to have "participated" in five arrests, Sudetic notes that they initially refused to accept the surrender of Dragljub Kunarac until obtaining agreement from RS authorities; killed Gagovic in suspicious circumstances; were on the sidelines when German forces carried out an arrest, and; whilst actively arresting Mitar Vasiljevic, in whose apartment French forces were staying, actually acted counter-productively by effectively making public the sealed indictment of Milan Lukic during the operation, see Chuck Sudetic, 'Excuse me, may we arrest you?', translated from *Dani*, April 2000.

²⁵⁰ See Daniel McGrory, 'Phone trap for French 'traitor' who saved Karadzic', *Times*, March 4, 2002. Similar concerns were expressed over the leaking of intelligence material to Serbian sources by a French officer during NATO's Kosovo air campaign, see Stuart Jeffries, 'French major faces trial for leaking war plan to Serbs', *Guardian*, October 19, 2001.

police and intelligence services that had not been significantly reformed since the fall of the Yugoslav President, Slobodan Milosevic, in October 2000.²⁵¹ Moves by the reformist Prime Minister, Zoran Djindjic, to increase the tempo of cooperation effectively cost him his life, when on March 12, 2003 he was assassinated outside the entrance to his office in central Belgrade.²⁵² Since Djindjic's death Serbian cooperation with the Tribunal has remained mixed,²⁵³ and gaining access to documentary evidence has been a particular challenge. For example Minutes of the meetings held by the Supreme Defence Council, the body which oversaw Serbia's military actions in Kosovo, were only disclosed to the prosecutor "after protracted negotiations and are subject to strict confidentiality clauses."²⁵⁴ Furthermore, as chapter four illustrated, elements of Serbia's security services have continued to protect Mladic.

Following the death of Tudjman in 1999 and the ousting of the HDZ, a new centre-left government attempted to institute more progressive policies. The country's new President Stipe Mesic informed Bosnian Croats that they should look to Sarajevo for governance rather than Zagreb, and Prime Minister Ivica Racan advocated enhancing support and cooperation with The Hague. However, there was deep popular resistance to such moves with the HDZ retaining a considerable influence. In 2001, the Party's leader, Ivo Sanader (who would become Croatia's Prime Minister in 2003) swore that he would not allow any Croatian war crimes suspects to be handed over to the Tribunal²⁵⁵, referring to retired general Mirko Norac, whom investigators wanted to question over alleged involvement in atrocity crimes, as "a hero."²⁵⁶ Consequently, Croatia's attitude towards cooperation remained uneven, resisting the arrest and transfer of General Janko

²⁵¹ See Nicholas Wood, 'Croatian turnaround led to general's arrest', *International Herald Tribune*, December 27, 2005.

²⁵² For further details see Ian Traynor, 'Murder shows warlords still rule in Serbia', *Guardian*, March 13, 2003; Ian Traynor & Dejan Anastasijevic, 'Death of a Balkan Hero', *Observer*, March 16, 2003.

²⁵³ With the E.U. making Serbia's entry conditional on cooperation with the ICTY the level of cooperation increased during 2005, with Serbian authorities offering generous financial incentives to indictees who 'voluntarily surrender' to the Tribunal, see Rod Nordland, 'Pensions for War Criminals', *Newsweek*, July 25, 2005. Nevertheless, the Tribunal's Prosecutor continues to castigate the failure to apprehend Ratko Mladic.

²⁵⁴ See 'Command Responsibility Under Fire', Tribunal Update, Institute for War And Peace Reporting, No. 445, March 24, 2006.

²⁵⁵ See Nicholas Wood, 'Croatian turnaround led to general's arrest', *International Herald Tribune*, December 27, 2005.

²⁵⁶ See Ian Traynor, 'Croats turn on leaders for hunting 'war criminals'', *Guardian*, February 12, 2001.

Bobetko²⁵⁷, and only acting to facilitate the arrest General Gotovina in late 2005²⁵⁸ after several years of inaction or even opposition by elements of the security services to international attempts to locate him.

In early 2003, British Secret Intelligence Service (SIS) or MI6, launched Operation Cash.²⁵⁹ Working from the British Embassy with support from ICTY investigators and elements of Croatia's intelligence service (POA), the operation aimed to locate and detain General Gotovina. Focusing on Zadar, the hard-line nationalist city where much of the network of organized crime and military figures which protected Gotovina resided, British intelligence shipped in three specialist surveillance vans from the U.K. to monitor telephone communications. The operation was dramatically compromised however, after the identities of the British, ICTY and Croatian police officers involved were leaked to the Croatian media, reportedly by Franjo Turek, the former head of the POA.²⁶⁰ Although the mission was ultimately unsuccessful the episode nevertheless illustrates how certain intelligence agencies, which initially had little regard for the Tribunal and its work, over time became actively involved in assisting the Tribunal. However, the fact that Gotovina's support network was suspected of being involved in shipping weapons to Irish Nationalist paramilitary groups, was reportedly an influential factor in the decision to launch the operation.²⁶¹

Despite such instances of active support, the Tribunal's relationship with NATO and its key Member States²⁶² has remained strained, particularly since mid 2000, with less and less credible arrest operations taking place. The Tribunal's current Prosecutor Carla Del

²⁵⁷ See Chris Stephen, 'Bobetko "Mastermind" of Medak Horrors. Ageing Croatian general at the centre of an extradition dispute is said to have played a vital role in the Medak atrocities', Tribunal Update, No. 286, Institute for War and Peace Reporting, October 21-26, 2002.

²⁵⁸ See Nicholas Wood, 'Croatian turnaround led to general's arrest', *International Herald Tribune*, December 27, 2005; Ian Traynor, 'The Fugitive who stands in the way of Croatia's EU Entry', *Guardian*, March 18, 2005.

²⁵⁹ The Croatian word for cash is "gotovina", the surname of the target of the Operation.

²⁶⁰ See Ian Traynor, 'The fugitive who stands in the way of Croatia's EU entry. Brussels has shelved talks with Zagreb after renegade intelligence officials wrecked a UK-led effort to capture its chief war crimes suspect', *Guardian*, March 18, 2005.

²⁶¹ See Ian Traynor, 'The Fugitive who stands in the way of Croatia's EU entry' *Guardian*, March 18, 2005

²⁶² In early December, 2004, EU forces took over from NATO forces, although a small NATO force remained to focus on PIFWC and counter-terrorism issues. The Tribunal has applied similar criticisms to EUFOR's failure to apprehend remaining indictees in Bosnia.

Ponte has regularly lambasted NATO's failure to do more to arrest the remaining PIFWCs, going so far as warning that the Tribunal was considering raising the issue of SFOR's mandate at the U.N. Security Council "if they are not arresting fugitives....in the next few months."²⁶³ Del Ponte went on to request that the Tribunal be allowed to establish a specialist tracking force to go after Karadzic and Mladic, although the proposal was met with resistance by NATO and ultimately came to nothing.²⁶⁴

Admittedly, obtaining the necessary intelligence (particularly human intelligence) remains a considerable challenge without the participation of reliable local collaborators²⁶⁵, particularly when PIFWCs begin to take more protective measures. Recruiting such sources is a considerable challenge with many suspects living in insular communities almost impossible to penetrate.²⁶⁶ As one former senior OHR official pointed out; "you can't pay men who make the same amount off their illegal activities and who feel they can't be protected by the international community."²⁶⁷ The official also highlighted that Bosnian Serb counter intelligence was particularly good, acknowledging "they know the country much better than we do."²⁶⁸ Nevertheless, the Tribunal has developed a number of established contacts over the years in Bosnia, and officials have expressed frustration that SFOR has in some cases failed to respond to intelligence passed on relating to Karadzic's whereabouts²⁶⁹ The six month rotation of SFOR intelligence personnel also did little to improve its capacity for building up a strong team to focus on PIFWC's.²⁷⁰ The most serious problem the Tribunal faces however, relates to obtaining the necessary military and intelligence support to achieve arrests in the face of the emergence of what is largely perceived as more important

²⁶³ See Carla Del Ponte quote in 'Bosnian Serb Entity is Haven for War Crimes Suspects', *Agence France Press*, May 24, 2001.

²⁶⁴ See Tom Walker, 'War crimes court seeks agents to track down Karadzic', *Time Europe*, May 27, 2001.

²⁶⁵ See 'Workshop 3: Requirements, Conditions, Supplies and Feasibility of an Operational International Arrest Team' in VAN DIJK & HOVENS, *ARRESTING WAR CRIMINALS*, p. 58.

²⁶⁶ See Major M. M. L. A. Hendrickx, 'An Operational Blueprint for Arresting War Criminals; a Low Risk and High Risk Scenario', in VAN DIJK & HOVENS, *ARRESTING WAR CRIMINALS*, p. 31.

²⁶⁷ Interview with former senior OHR official.

²⁶⁸ Interview with former senior OHR official.

²⁶⁹ See Nerma Jelacic and Hugh Griffiths, 'Karadzic Raid: Not Even Close', *Tribunal Update*, No. 351, Institute for War and Peace Reporting, April 03, 2004.

²⁷⁰ See Nerma Jelacic and Hugh Griffiths, 'Karadzic Raid: Not Even Close', *Tribunal Update*, No. 351, Institute for War and Peace Reporting, April 03, 2004.

strategic priorities since September 11, 2001. A clear illustration of this reality was revealed in June 2002, when it was revealed that for more than six months live pictures from U.S. aerial spy missions were broadcast in real time, to commercial satellite viewers throughout Europe and the Balkans. The material recorded by manned aircraft and unmanned predator drones had previously been encrypted, but had subsequently been broadcast through a commercial satellite transmission allowing anyone in the region with normal satellite TV receiver to watch the surveillance operations. Former British Army Intelligence officer Adrian Weale noted “I think I’d be extremely irritated to find that the planning and hard work that had gone into mounting an operation against, for instance a war crime suspect....was being compromised by the release of this information.”²⁷¹ A U.S. intelligence source admitted “we seem to be transmitting this information straight to our enemies....I would be worried that using this information, the people we are tracking will see what we are looking at and, much more worryingly, what we are not looking at.”²⁷² The BBC’s current affairs program *Newsnight* reported that the material had been transferred onto commercial satellite as a result of a competing demand which took precedence of classified satellites for U.S. led Coalition Force operations in Afghanistan following the invasion in late 2001.²⁷³ Similarly, although British troops were heavily involved in arrest operations in Bosnia, intelligence agents and Special Forces needed for such missions have been prioritized for operations in Iraq, Afghanistan and other associated missions relating to ‘the Global War on Terror.’ British officials dismissed the high-profile NATO operations including the three day search of Pale in 2004 as a “public relations show” and have expressed growing concerns that unless a new and concerted “serious intelligence-led effort” is made, Karadzic may never be apprehended.²⁷⁴ Del Ponte’s declaration to the U.N. Security Council in June 2006 that no one is actively searching for Karadzic, suggests that such concerns may well prove to be correct.²⁷⁵

²⁷¹ See Adrian Weale quote in Duncan Campbell, ‘Now showing on satellite TV: secret American spy photos’, *Guardian*, June 13, 2002.

²⁷² See anonymous U.S. intelligence source quote in Duncan Campbell, ‘Now showing on satellite TV: secret American spy photos’, *Guardian*, June 13, 2002.

²⁷³ See *Newsnight*, June 22, 2002.

²⁷⁴ See Richard Beeston, ‘Karadzic could escape as NATO deadline looms’, *Times*, January 20, 2004.

²⁷⁵ See Paul Burkhardt, ‘U.N. Official: No One Looking for Karadzic’, *Washington Post*, June 7, 2006.

Conclusions

The conclusion aims to fulfil two specific aims. Firstly, it will provide a summary of the main findings of the thesis. Secondly it seeks to review these findings and explore their potential relevance to the International Criminal Court (ICC), the permanent judicial institution established to investigate and prosecute atrocity crimes under the Rome Treaty in 1998, which became operational on July 1, 2002.¹

The thesis demonstrates that the issue of international investigations and criminal prosecutions of atrocity crimes represents a rich research agenda for the purposes of English School inquiry, particularly regarding the debate surrounding the tensions between the norms of order and justice. The introduction highlights how many English School scholars have tended to focus on the issue of humanitarian intervention because “it poses the conflict between order and justice in international relations in its starkest form.”² The English School has focused less however, on the issue of instituting international criminal prosecutions against individuals alleged to have either committed or ordered the commission of atrocity crimes. The thesis demonstrates how international institutions mandated to investigate and prosecute atrocity crimes *also poses the conflict between order and justice in international relations in an equally stark form.*

Like humanitarian intervention, international justice mechanisms represent a challenge to the cardinal tenet of pluralism that a State should be protected from external inquiry and sanction by virtue of territorial integrity and the associated principle of non-intervention. Furthermore, international criminal prosecutions may represent a significant challenge to the pursuit and maintenance of order. The goal of achieving a negotiated diplomatic settlement to an armed conflict may be fatally undermined where individuals deemed

¹ For further details on the Rome Negotiation Process and the ICC see M. Cherif Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’, *Cornell International Law Journal*, Vol. 32, No. 3, 1999; ROY LEE (ED.), *THE INTERNATIONAL CRIMINAL COURT. THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS*, (Kluwer Law International) 1999; LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (Transnational Publishers) 2002

² See Nicholas J. Wheeler ‘Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention’ *Millennium: Journal of International Studies*. Vol. 21, No. 3, 1992. p. 463.

critical to attaining such a settlement are under investigation for atrocity crimes and are indicted, leading to their withdrawal from negotiations. Similarly, the arrest of persons indicted for war crimes (PIFWCs) in post-conflict environments may in certain cases undermine order where the PIFWCs supporters have the capacity to react in a manner which threatens the fragile, nascent peace.

Order versus Justice: Ending Conflicts (What Price Justice?)

The thesis demonstrates that although the English School has largely overlooked how international investigations and prosecutions of atrocity crimes may result in tensions between order and justice, the issue has received significant focus within the international law and international human rights discourse, in the context of the Peace versus Justice debate. In this debate two perspectives may be discerned, which have been defined in this thesis as ‘pro-negotiation’ and ‘pro-prosecution.’ The former, at its most extreme, supports the use of amnesties to facilitate negotiations³, whilst the latter, at its most extreme, advocates the “pursuit of justice without compromise”⁴ and the use of military force in order to remove the necessity of having to negotiate with potential indictees.⁵

It is highly questionable whether the potential ‘carrot’ of an explicit *de jure* amnesty offer designed to induce a negotiated settlement would now be a viable option to international mediators. Contemporary practice appears to suggest that the offer of an amnesty relating to the commission of atrocity crimes is contrary to international law. As Campbell highlights, “the suggestion that blanket non-prosecution is a legitimate policy option....runs counter to the direct imperative in the Geneva Conventions to repress grave breaches.”⁶ Furthermore, although the U.N. brokered Lome Peace Accord, concluded between the government of Sierra Leone and the Revolutionary United Front (RUF) on July 7, 1999, included a blanket amnesty to all combatants, the U.N.’s Special

³ See Jack Snyder and Leslie Vinjamuri, ‘Trials and Errors. Principle and Pragmatism in Strategies of International Justice’, *International Security*, Vol. 28, No. 3, Winter 2003/4.

⁴ See M. Cherif Bassiouni & Marcia, ‘Sexual Violence. An Invisible Weapon of War in the Former Yugoslavia’, Occasional Paper No. 1, International Human Rights Law Institute, DePaul University College of Law, 1996, p. 2.

⁵ See for example WILLIAMS AND SCHARF, PEACE WITH JUSTICE?

⁶ See Colm Campbell, ‘Peace and the laws of war: the role of international humanitarian law in the post-conflict environment’, *International Review of the Red Cross*, No. 839, September 30, 2000, pp.627-651.

Representative of the Secretary General for Sierra Leone inserted an appended disclaimer stating that the amnesty clause “shall not apply to the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”⁷ Additionally, it is clear that the traditional ‘pro-negotiation’ strategy of attaining “peace at any price”⁸ has fundamental limitations. As Hannum notes, “Blind adherence to diplomatic traditions and the elite-based context of diplomatic negotiations may not be appropriate when the task is to end widespread violence *and* create the conditions under which sustainable and just peace can be achieved.”⁹

Despite recognition of the potential limitations associated with the ‘pro-negotiation’ approach, the empirical material presented and discussed throughout the thesis indicates that the more extreme facets of the ‘pro-prosecution’ approach, including the contention that justice should be pursued “without compromise”, represent an equally problematic response. Furthermore, the potential ‘stick’ of military force, which many in the ‘pro-prosecution’ perspective argue should be relied on as an alternative to negotiation or accommodation, in order to achieve a more just peace, is often a much more complicated dynamic than many ‘pro-prosecution’ advocates acknowledge.

The thesis posits that the ‘pro-prosecution’ suggestion that Milosevic should have been indicted at Dayton was both impractical or imprudent. Firstly, the Tribunal *did not* possess the requisite evidence to issue a *credible* indictment against the (then) FRY President, particularly given the non-disclosure of pertinent intelligence material from the key States of the ‘International Community’ and the complete absence of ‘insider’ witnesses. The thesis further proposes that *even if such evidence was available at the time of the negotiations*, considerations of prudence should have dictated that an indictment be deferred until the peace deal had been secured. Chapter three’s discussion

⁷ See ‘Report of the secretary General on the establishment of a Special Court for Sierra Leone’, 4 October, 2000, U.N. Doc. S/2000/915.

⁸ See Hurst Hannum, ‘Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding’, *Human Rights Quarterly*, 28, (2006) p.

⁹ See Hurst Hannum, ‘Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding’, *Human Rights Quarterly*, 28, (2006) p. 50.

of the timing of the Charles Taylor indictment for atrocity crimes in 2003 provides a compelling illustration of the dangers of zealously pursuing indictments at the time of delicate peace negotiations and the grave consequences civilians may face when a resurgence of fighting occurs if peace negotiations break down.

Furthermore, the thesis illustrates that the purported 'pro-prosecution' alternatives to negotiating with individuals implicated in atrocity crimes, are also fraught with their own limitations and potentially negative consequences. The use of force does not take place in a vacuum, and it will be highly likely that in an environment where atrocity crimes have been committed, if the military tide turns, a level of reciprocal atrocity crimes will occur. The atrocity crimes committed during the Croatian offensive to retake the Krajina region, and the recent video footage allegedly showing the Bosnian government commander Ante Dudakovic ordering entire villages to be burned¹⁰, provide a stark illustration of this. Even if the military forces are prepared to conduct a military campaign which conforms to principles of international humanitarian law, it is highly likely that where a civilian population who have been in many cases, sympathetic, tacitly supportive, or even complicit in the commission of atrocity crimes, it will not take the risk of waiting to see whether this will be borne out. Consequently, massive population displacement is likely, increasing the potential for widening the conflict. Finally, the 'pro-prosecution' perspective which advocates "rolling back ethnic cleansing" by military force, fails to sufficiently acknowledge the possibility that the pursuit of justice may be the last strategic objective of a potential military victor. As chapter three highlights, rather than serving to 'reunify Bosnia', the Croatian military offensives merely served to replace one form of aggressive expansionism, one form of ethnic cleansing, with another.

In light of such considerations the thesis posits that ultimately, the pursuit of international criminal prosecutions for atrocity crimes needs to take into account the particular dynamics of each situation: is it viable? will it lead to greater harm? Where the 'International Community' is unwilling to *enforce* a peace, and continued military

¹⁰ See 'Serbs see new 'war crimes' tape', *BBC News*, August 9, 2006.

offensives will lead to greater suffering for civilians and also the threat of more atrocity crimes, it may be necessary, however unpalatable, to negotiate with individuals implicated in the ordering of or commission of such crimes in order to secure a negotiated settlement. Nonetheless, the thesis does not advocate that justice be *foregone* and impunity be allowed to prevail, merely that in certain instances justice in the form of international prosecutions may have to be *deferred*. Again it is instructive to examine the Taylor case. Despite the Prosecutor of the Special Court for Sierra Leone issuing an indictment, Taylor was granted political exile in Nigeria. Nevertheless, over time, and after sustained international pressure, Taylor's position in Nigeria became untenable, and he now has the opportunity to respond to the indictment in an appropriate legal forum. Ultimately, the issue may be viewed as one of appropriate sequencing. As the Center for International Transitional Justice highlights "The debate now revolves around issues of timing, strategy and tactics, more than around stark either/or choices."¹¹

No doubt advocates of the 'pro-prosecution' perspective would deride such an approach as merely "a semblance of peace win[ning] out over justice"¹², and posit that the longer-term goal of assuring accountability should be accorded a greater priority by the 'International Community.' However, such advocates have consistently failed to propose *credible* means of achieving this laudable goal, particularly in circumstances where the 'International Community' is clearly unwilling to enforce a peace, or where alternative military options may merely lead to a prolonging or even exacerbation of the armed conflict and the possibility of more atrocity crimes being committed.

Order versus Justice: The International Criminal Court

During the 1998 Rome Conference convened to finalize the statute of the ICC, a vigorous debate took place in the negotiations relating to the extent of the scope of the U.N. Security Council's relationship with the Court. A number of State Parties and 'pro-prosecution' NGO's expressed concern over the potential 'politicization' of the Court if mechanisms were included in the Statute which allowed the Security Council to interpose

¹¹ See Coalition/Centre for International Transitional Justice – Article on ICC and Peace Negotiations.

¹² See HAZAN, JUSTICE IN A TIME OF WAR, p. 69.

and block the Court's work. Conversely, other State Parties delegations argued that given the Security Council's eminent role as the ultimate arbitrator on issues of international peace and security, the body should be accorded some level of influence over the Court. The Security Council's relationship with the Court is shaped in two ways. Firstly, Article 13 of the Statute stipulates that the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 (genocide, crimes against humanity, the crime of aggression¹³) where a 'situation'¹⁴ is referred to the Prosecutor by the Security Council acting Under Chapter VII.¹⁵ (The Court can also exercise its jurisdiction where a 'situation' is referred to the Prosecutor by a State Party,¹⁶ or where the Prosecutor has initiated an investigation in respect of such a crime.¹⁷). In addition to the Security Council's power to refer 'situations' to the Court under Article 13(b), Article 16 of the Statute enables the Council to defer investigations or prosecutions; "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."¹⁸ Thus, where the Security Council determines that an investigation or prosecution would interfere with efforts to maintain or restore *international peace and security*, it may require the Court to suspend action. In many respects, Article 16 may be viewed as a prudent mechanism to address 'situations' where potential tensions between peace and justice arise, enabling the Security Council to retain an influence in addressing circumstances where international peace and security may be threatened. However, it also avoids the spectre of the

¹³ States failed to agree on a workable definition of aggression at the Rome Conference and until this has been adopted, the Court will only focus on the other three categories).

¹⁴ Rather than addressing 'cases' the Court is mandated to address 'situations.'

¹⁵ See Article 13(b) Rome Statute of the International Criminal Court. Hereafter referred to as Rome Statute.

¹⁶ Either the State on the territory of which the conduct in question occurred, or the State of which the person accused is a national, or a Non State Party which agrees to accept the jurisdiction of the Court. *see generally* Article 12 Rome Statute. State Parties whose nationals were the victims of the crimes outlined in Article 5 *were not* however, granted the power to *refer* a situation to the Prosecutor.

¹⁷ See Article 13(c) Rome Statute. However, the Prosecutor requires the consent of a panel of pre-trial judges before s/he can proceed, *see* Article 15. Furthermore, the Court will determine that a case is inadmissible (e.g. if initiated by the Prosecutor) if it is being investigated or prosecuted by a State which has jurisdiction over it, *unless the State is unwilling or unable genuinely to carry out the investigation or prosecution* *see* Article 17(a).

¹⁸ See Article 16, Rome Statute.

permanent member veto serving to halt investigations or prosecutions, and thus seeks to minimise a single permanent member's attempts to unduly influence the pursuit of international justice for narrow self-interest reasons. Instead, a majority must be obtained within the Council in order to suspend the ICC's involvement in a particular situation for an additional 12 months. Furthermore, the suspension is not indefinite, but valid for a twelve month period, although it may be renewed if a majority in the Council agrees. Nevertheless, some commentators have raised legitimate concerns that, rather than Article 16 merely serving to *defer* justice, the provision could actually result in justice being *foregone*. A Belgian proposal, submitted during the Rome Conference, that a limited form of investigation be allowed to continue *even in the event* of an Article 16 deferral, was not included in the final Treaty. As Bassiouni notes "the consequences of postponing an investigation may well be profound. Forensics will decay, mass graves may be tampered with, witnesses may be intimidated."¹⁹

Another element of the Rome Statute which may also be viewed as a potential mechanism the Court may rely on where potential tensions between peace and justice arise, is Article 53(2)(c), which provides that the Prosecutor may conclude that there is not a sufficient basis for a prosecution because a Prosecution "is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, *the interests of victims* and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."²⁰ Where an indictment and prosecution of any individual(s) may seriously undermine diplomatic negotiations focusing on bringing an end to an internal or international armed conflict, or lead to a resurgence in fighting where a fragile peace has been established, it could be argued that such an indictment or prosecution *is not in the interest of the victims* if it will actually lead to further fighting and the possibility of more atrocity crimes being committed. Consequently, Article 53(2)(c) could provide the grounds for *deferring* a referral by a State Party, where the Security Council cannot muster the requisite consensus to institute a deferral on the basis of Article 16. A debate is currently taking place within the Court as to what actually constitutes "in the interests

¹⁹ Interview with Professor Bassiouni.

²⁰ See Article 53(2)(c) Rome Statute. (emphasis added)

of justice”. with a number of policy discussion documents revolving around this issue to be published.²¹ It will be instructive to see how the Court seeks to approach this challenging and controversial subject.

The issue of peace/order versus justice currently confronts the ICC regarding its indictments issued against six senior figures within the Lords Resistance Army (LRA), a Ugandan rebel force led by Joseph Kony, alleged to have committed crimes against humanity within Uganda. There appears to be a recognition within the Court that the “pursuit of justice without compromise”²² is neither prudent nor viable, particularly given the reality that the Court is even more reliant on active State cooperation to ensure progress in investigations and apprehensions than its ad hoc predecessors. Consequently, as stressed by an ICC OTP official, the LRA indictments were delayed in recognition of the ongoing peace process and released *only after* OTP officials concluded that the peace process between the Ugandan authorities and the LRA was “going nowhere.”²³

Nevertheless, key players in the peace negotiations including the highly respected chief peace negotiator Betty Bigombe and Catholic archbishop John Baptist Odama, have been critical of the timing of the indictments, arguing that they undermined efforts to induce the rebels to lay down their arms and enter into serious negotiations. Bigombe argued “In principle, the ICC is good but the time the ICC came here is wrong. They came during an ongoing war.” The chief peace negotiator went on to posit that it was unlikely that the issuing of ICC arrest warrants for the LRA rebel leaders would bring the war to an end. “The question is: if you arrest Kony, will that end the war?...We are talking about ending the war and you cannot end the war if the LRA leadership is not involved in the process.”²⁴ Similarly, a number of humanitarian aid organizations operating on the ground including World Vision have suggested the primary focus should be to “push

²¹ Interview with OTP official, ICC.

²² See M. Cherif Bassiouni & Marcia, ‘Sexual Violence. An Invisible Weapon of War in the Former Yugoslavia’, Occasional Paper No. 1, International Human Rights Law Institute, DePaul University College of Law, 1996, p. 2.

²³ Interview with OTP official, ICC.

²⁴ See Betty Bigombe quote in Apolo Kakaire, ‘Ugandan Mediator Critical of ICC Indictments’, Africa Reports, Institute for War and Peace Reporting, No. 60, April 14, 2006.

forward with the peace process *and then call for international judicial action.*"²⁵ The situation has become further complicated by Yoweri Museveni, the Ugandan President's July 4, 2006 offer of an amnesty to LRA leader Joseph Kony. Museveni stated the offer was made due to a frustration that he had "no partners" to arrest the LRA leader, who has reportedly been residing with his forces in the neighbouring Democratic Republic of the Congo (DRC); "The UN don't have the capacity to hunt for Kony. They don't allow us to hunt for him [in the DRC]."²⁶ It will be interesting to see how the issue is resolved. Amnesties for atrocities are now widely considered to be contrary to established principles of international law, and the ICC's Prosecutor Luis Moreno-Ocampo has insisted that the ICC is under no obligation to respect an amnesty issued by the Ugandan Government.²⁷ However, if Kony returns to Uganda and Museveni refuses to initiate a prosecution, the ICC will remain reliant on the 'International Community', particularly the Security Council, to exert pressure on the regime to transfer him to The Hague. Alternatively, will the Security Council move via an Article 16 deferral to suspend the ICC's endeavours to have Kony arrested? An ICC OTP source suggested that given the gravity of the crimes Kony is accused of, and the message it would convey, it was highly unlikely that the members of the Security Council would attempt to invoke such a deferral.²⁸ Indeed it seems likely that in future cases where tensions between peace/order and justice arise, the Security Council will have more scope to act where the Court remains at the stage of considering issuing indictments or where indictments remained sealed from the public. In such situations international public opinion may be more accepting of the Council's efforts to protect the wider peace process from 'potential' indictments, than it would of the Council acting to seemingly insulate specific indictees who have already been publicly indicted of atrocity crimes. Whatever the outcome, these

²⁵ See Rory Anderson, Africa Policy Advisor, World Vision, comments made at 'War Crimes in Uganda: Seeking Peace through Accountability', Citizens for Global Solutions Event, May 12, 2004. (emphasis added)

²⁶ See President Museveni quote in Apolo Kakaire, 'Uganda: Amnesty Offer Blow for Rebel Chief Arrest Plans', Africa Report, No. 70, Institute for War and Peace Reporting, July 6, 2006.

²⁷ See Amy Ross and Chandra Lekha Sriram, 'Catch 22 in Uganda: The LRA, the ICC, and the Peace Process', *Jurist Legal News and Research*, University of Pittsburgh School of Law, July 17, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/07/catch-22-in-uganda-lra-icc-and-peace.php>

²⁸ Interview with OTP official, ICC.

highly controversial issues are likely to be a regular theme which the ICC will have to address.

Order versus Justice: Post-Conflict Peacebuilding (What Price Order?)

The thesis demonstrates that pursuing international criminal prosecutions in the post-conflict peacebuilding stage also poses the conflict between order and justice in a particularly stark form. Nowhere is this tension more acute than with regard to the issue of arresting persons indicted for war crimes (PIFWCs). Two perspectives are clearly discernable relating to the dilemma:

Firstly; the arrest of PIFWCs, particularly those who retain significant levels of popular support and critically, the support of armed forces (including paramilitary, military, interior ministry, police and intelligence services), may result in the deterioration and possible breakdown of a fragile, nascent peace, if the indictee's supporters respond to the arrest with sustained violence.

Secondly and conversely; failing to arrest PIFWCs serves to reinforce the culture of impunity, undermining the potential deterrent effect of international criminal prosecutions. Furthermore, the failure to apprehend PIFWCs may have a detrimental impact on the *quality* of the order attained in post-conflict environments. PIFWCs are in many instances involved in actively undermining international peacebuilding efforts, acting as spoilers, frustrating attempts at rebuilding communities, and opposing refugee and minority returns, the latter of which generally constitutes a key policy of international peacebuilding. An explicit nexus between atrocity crimes and organized crime often exists, with those implicated in the former often heavily engaged in the latter, providing additional grounds for their apprehension.

The thesis demonstrates that elements of both of the above premises have validity. Consequently, the thesis posits that post-conflict justice strategies, particularly relating to the delicate issue of apprehensions, should be conditional upon the *specific dynamics* of each particular case. Chapter four highlighted the situation in Afghanistan as a means of

demonstrating this principle, where in light of the specific dynamics after the U.S. led invasion in late 2001, considerations of prudence dictated that justice in the form of criminal prosecutions against individuals implicated in atrocity crimes needed to be deferred. The ‘International Community’s’ peacekeeping presence in Afghanistan has been comparatively small, whereas the bulk of the Coalition Force has been overwhelmingly preoccupied with counter-insurgency operations. Furthermore, many of the individuals who have been identified by ‘pro-prosecution’ sources²⁹ as potential indictees for the active commission, ordering of, or liability under the principle of command responsibility for atrocity crimes, have retained significant power within Afghanistan. Would the arrest of, for instance Abdul Rashid Dostum (of whom considerable evidence exists to suggest his implication in the commission of atrocity crimes) who retains significant support throughout parts of Northern Afghanistan, and whose *Junbish* military forces retain the capacity to rapidly remobilize and significantly threaten an uneasy peace which prevails in the region, be a prudent strategy, particularly in light of the “war”³⁰ currently taking place in several Southern and South Eastern Afghan provinces? In such circumstances the “pursuit of justice without compromise”³¹ could well prove devastating for Afghanistan’s civilians, resulting in a return to fighting, widespread loss of lives and associated population displacement.

Ultimately, such predictions and scenarios are no more than speculation. Indeed, perhaps ‘factional commanders’ such as Dostum are in reality paper tigers, who could be confronted and prosecuted for their alleged culpability for atrocity crimes without necessarily resulting in the dire suggested consequences. Having to make a choice as to which strategy should be pursued represents a succinct example of the ‘terrible choices’³²

²⁹ See Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001. Documentation and analysis of major patterns of abuse in the war in Afghanistan, The Afghan Justice Project, July 2005; Blood Stained Hands: Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity. Human Rights Watch, July 2005

³⁰ In a refreshing dose of candour, NATO’s commanding officer Lt Gen David Richards acknowledged in 2006 that the engagements between NATO forces and Taliban fighters constituted a “war”, something the military organization’s political masters have been much less willing to admit.

³¹ See M. Cherif Bassiouni & Marcia, ‘Sexual Violence. An Invisible Weapon of War in the Former Yugoslavia’, Occasional Paper No. 1, International Human Rights Law Institute, DePaul University College of Law, 1996, p. 2.

³² See Hedley Bull quote in LINKLATER AND SUGANAMI, THE ENGLISH SCHOOL, p. 140.

Bull acknowledged confronted foreign policy makers in determining policy. Whilst the groundbreaking Afghan domestic consultation process ‘A Call for Justice’ indicated that many respondents wished to see prosecutions initiated against those implicated in atrocity crimes, it also acknowledged the country’s “current socio-political realities,”³³ particularly with regard to absence of security and the limited reach of the government. Consequently, whilst the issue of criminal prosecutions have been firmly placed on the agenda as a potential response, no specific timetables have been set.

Despite these observations, the thesis also illustrates that considerable negative consequences may ensue where the ‘International Community’ fails to act robustly in instituting the rule of law in post-conflict environments. Whilst Holbrooke’s ominous prediction that the continued freedom of Karadzic would mean “no peace agreement we create in Dayton can ultimately succeed”³⁴ has thankfully, not been realised, the presence of PIFWCs in post-conflict environments can clearly have an adverse impact on the *quality* of the order which materializes. Many PIFWCs in Bosnia were actively involved in undermining post-conflict peacebuilding initiatives, blocking minority and refugee return and frustrating international initiatives. Furthermore, Chapter four highlights that a nexus often exists between the commission of atrocity crimes and organized crime, with the latter tending to expand and flourish in post-conflict environments where there is an inadequate international response.

In light of these considerations, although the prevailing dynamics in certain cases will militate against instituting a more robust attitude towards enforcing the rule of law, particularly the arrest of PIFWCs (e.g. Afghanistan), *where the dynamics do allow for a more robust response, it should be instituted in the initial peacebuilding stages, given the significant negative consequences associated with failing to do so.* The thesis argues that post-conflict Bosnia represented a clear case where a more robust international response towards enforcing the rule of law, particularly the arrest of PIFWCs, *was possible, and should have been instituted earlier and in a more systematic manner.* Hence, the thesis

³³ See ‘A Call for Justice. Conclusions of AIHRC’s National Consultation on Transitional Justice in Afghanistan’, AIHRC Press Release, January 29, 2005.

³⁴ See HOLBROOKE, *TO END A WAR*, p. 226.

posits that in the case of post-conflict Bosnia, the claims made by States (as outlined in chapter four: NATO not having the requisite authority to arrest PIFWCs; not having enough information to locate PIFWCs; and critically, the contention that the arrest of PIFWCs would have imperilled the fragile post-conflict order) to justify their failure to actively pursue and apprehend PIFWCs, particularly during the initial eighteen months of NATO's deployment were not valid and were applied 'instrumentally.'

The presence of the robust international military force in Bosnia would have enabled NATO to have adequately responded to, and contained, any adverse reaction to apprehensions. Furthermore, the specific operating environment in Bosnia meant a repeat of the disaster which occurred in Mogadishu, Somalia, during the compromised operation to apprehend key figures associated with General Aideed, was for the majority of potential apprehensions, highly unlikely. Additionally, the statements by the domestic parties (particularly the Bosnian Serbs) that there would have been no significant adverse reaction to arrests, even of Karadzic³⁵, also demonstrates that NATO's suggestion that arresting PIFWCs would be too destabilizing was patently wrong. Instead, the thesis posits that the purported threat to order was applied instrumentally by NATO and its major troop contributing States, to mask ulterior motives for inaction, relating to considerations of force protection and the wider reluctance to engage in Operations Other Than War (OOTW).

Domestic Prosecutions

The thesis demonstrates that holding domestic prosecutions for atrocity crimes in the State/entity whose citizens are implicated in the crimes, is in many cases *not viable*. Chapters four and five highlight that individuals implicated in atrocity crimes are often feted as heroes by their fellow citizens and that dramatically varying perceptions exist within such communities relating to the cause of the conflict(s). In such cases, the acknowledgment within a particular ethnic community that atrocity crimes were committed, is often limited to the extent that the particular community was the victim of such crimes rather than an admission of their culpability in the commission of any such

³⁵ See Eve-Ann Prentice, 'Serb Forces 'Would Not Resist Arrest of Karadzic', *Times*, July 22, 1996.

acts. As a result, domestic prosecutions are vulnerable to ethnic bias and a disproportionate focus on 'the other'.

Chapters four and five also demonstrate that where individuals implicated in the commission of atrocity crimes retain a level of influence within the political, judicial or security spheres, domestic investigations and prosecutions relating to these crimes, which adhere to due process and international standards of fair trial, are highly unlikely. In such circumstances, credible witness protection schemes are also extremely difficult to institute, acting as a further barrier to trials. The experiences of the Bosnian Federation authorities in Sarajevo also suggests that even where States/entities are willing to conduct such prosecutions, their scope to do so is seriously inhibited where evidence and potential suspects reside within a State/entity which refuses to cooperate. Consequently, William's and Scharf's critique that the Rules of the Road Agreement (an agreement which made domestic prosecutions for atrocity crimes conditional on authorization from the ICTY), frustrated domestic prosecutions, as outlined in chapter four, is largely flawed. Whilst the ICTY may not have allocated sufficient resources to the Rules of the Road programme, Republika Srpska's abject failure to investigate crimes committed by Bosnian Serbs suggests that even if more cases had been authorised by the Tribunal, prosecutions would not have been instituted. Such factors throw into doubt the contention that "justice at the level of the state is more effective in rebuilding strong communities than justice implemented at cosmopolitan level"³⁶ It has become increasingly common within the human rights community to emphasise how international criminal prosecution initiatives based *outside* the area where atrocity crimes were committed, are too removed from the victims. Instead it is argued that domestic prosecutions provide a greater level of 'ownership' However, whilst this is a laudable aim *in principle*, the practices of the States/entities of the former Yugoslavia suggests that *in practice*, domestic prosecutions for atrocity crimes, without a sufficient level of international involvement are an unrealistic proposition. Thus, where an international presence is deployed in a post-conflict environment, it may be necessary to address these

³⁶ See Jason Ralph, International society, the International Criminal Court and American foreign policy', *Review of International Studies*, 31, 2005, p. 37.

concerns via the direct involvement of international rule of law specialists to ensure any domestic prosecutions adhere to internationally recognized fair trial standards. A process similar to the “Regulation 64” panels instituted in Kosovo, where cases relating to atrocity crimes were heard by a panel of three judges, two of whom were international personnel, may provide a potential template.

Domestic Prosecutions: The International Criminal Court

In contrast to the ICTY’s principle of primacy, which empowered the Tribunal to exercise jurisdiction to investigate and prosecute atrocity crimes *regardless* of whether a State of the former Yugoslavia wished to initiate domestic proceedings, the ICC’s Treaty is firmly grounded on the premise that States should assume the primary responsibility for adjudicating such crimes. Both the Statute’s preamble and Article 1 emphasize that the Court “shall be complementary to national criminal jurisdictions.”³⁷ Furthermore, Article 17 (1) of the Statute stipulates that the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

As the ICC is the product of an international Treaty rather than a U.N. Security Council Chapter VII Declaration, considerably more deference was accorded to States concerns and objections during the Treaty negotiation process. Consequently, the Court is endowed with considerably less power to exert its jurisdiction than the *ad hoc* tribunals, as a result of the cardinal principle of complementarity, and the Treaty’s deferential language of “requests” rather than “orders” regarding State cooperation. Ultimately, it is unlikely that the Treaty would have been successfully negotiated without such deference being afforded to States. Nevertheless, the implications for the Court may be

³⁷ See Preamble & Art. 1, Rome Statute.

considerable. The thesis demonstrates how States/entities are often unwilling to pursue credible domestic prosecutions, particularly relating to atrocity crimes in which the State/entity are implicated. However, a recalcitrant State/entity may seek to delay the ICC's involvement by embarking on a strategy of maintaining that it is instituting credible domestic prosecutions. Whilst the Court has, in principle, the potential power to intervene in cases where it determines a State is either unwilling or unable to carry out an investigation or prosecution, it remains unclear how the Court will make such a determination, and clear scope exists for the State to carry out lengthy stalling tactics. By keeping the ICC at bay in this way, the prospects for achieving a credible prosecution at a later date may well be imperilled; crime scenes could be tampered with, witnesses intimidated or killed etc. Although a non State Party to the ICC Treaty, Sudan nevertheless appears to recognize the potential value of stressing that domestic prosecutions are being initiated as a mechanism to deflect calls for the ICC to obtain a greater level of cooperation from the Sudanese authorities.

Intelligence Cooperation

Whilst some characterisations of the value of intelligence material for the purposes of investigating and prosecuting atrocity crimes are overstated, the thesis demonstrates that in many cases such material may often prove critically important. Satellite imagery of suspected mass grave sites, such as those presented by Madeline Albright to the Security Council in 1995 and subsequently passed on to the Tribunal, can be of significant assistance in locating crime scenes. Similarly, as chapter five illustrates, the signals intelligence (SIGINT) excerpts submitted by the Prosecution in the Krstic case highlights the potentially decisive impact such material may have in helping to prove individual criminal responsibility. Such intelligence becomes even more crucial where the State/entity in which the crimes have been committed refuses to cooperate. Nevertheless, despite the clear potential value of the material, the thesis also illustrates that the relationship between institutions of international criminal justice and intelligence agencies has been, and continues to remain, complex, delicate, challenging, and ultimately, conditional on considerations of wider geo-political imperatives.

Chapter two reveals how, historically, Western intelligence agencies have adopted conflicting attitudes towards the issue of atrocity crimes. Thus, the U.S. Office of Strategic Services (OSS) would play a key role in the Nuremberg trial, providing considerable logistical, strategic, evidentiary and diplomatic assistance to the prosecutors, with approximately one third of the senior staff of the U.S. prosecution team comprising OSS personnel. However, Western intelligence agencies attitudes towards suspected Nazi war criminals would also be influenced by considerations as to whether such individuals could play a positive role in addressing the threat of the Soviet Union. Consequently, U.S. intelligence agencies acted to exempt a number of suspected Nazi war criminals from prosecution at Nuremberg and subsequent prosecutions in exchange for their technical and espionage skills.³⁸ Thus, the U.S. Army Counter Intelligence Corps (CIC) in Germany recruited Klaus Barbie (an SS officer who would later be convicted for his role in rounding up Jews in France and for suppressing the French resistance) as an agent and smuggled him out of Europe, thereby facilitating his avoidance of justice for over 30 years. Similarly, the CIA's recruitment of General Reinhard Gehlen to establish West Germany's intelligence service enabled him to "promote and protect" [suspected] war criminals³⁹, and the agency also failed to inform the Israeli authorities after learning the pseudonym and whereabouts of Adolf Eichmann, due to fears that Hans Globke, one of their top agents would be exposed.⁴⁰

The thesis also demonstrates the acute challenges institutions of international criminal justice face in persuading key States of the 'International Community' (whose formidable intelligence gathering capabilities are often deployed to gather information where atrocity crimes are being committed), to disclose relevant material which could facilitate investigations, the drafting of indictments, and ultimately contribute to successful prosecutions. In some instances a State's refusal to supply intelligence may be predicated on the premise that such disclosure could undermine or disrupt diplomatic initiatives the

³⁸ See Bryan and Salter, 'War Crimes Prosecutors and Intelligence Agencies', p. 101.

³⁹ See Professor Timothy Naftali, consulting historian to The Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group (IWG) quote in RICHARD BREITMAN, NORMAN GODA, TIMOTHY NAFTALI, AND ROBERT WOLFE, U.S. INTELLIGENCE AND THE NAZIS. (National Archive Trust Fund Board) 2004, p. 406.

⁴⁰ See Scott Shane, 'C.I.A. Knew Where Eichmann Was Hiding. Documents Show', *New York Times*, June 7, 2006.

State is involved in or supports, which is aimed at facilitating a negotiated settlement between ‘warring factions.’ (as demonstrated by the refusal of the U.K. Conservative Government of John Major to disclose information to the Commission and Tribunal). Chapter one also highlights that intelligence material may also be withheld where a State determines that its publication could lead to increased pressure being placed on the disclosing State to respond to the atrocities more robustly (in this case the Bush Senior administration’s knowledge of the existence of Bosnian-Serb run detention camps throughout 1992).

Additionally, the thesis suggests that the Commission and the Tribunal’s struggle to gain access to intelligence material was affected by the deeply entrenched attitudes within many States intelligence agencies which informed their position of opposing such cooperation. This opposition was predicated on the belief that cooperation with international investigative and prosecutory bodies was often a one-way exchange, of limited benefit, and contrary to the principle of reciprocity which generally characterizes intelligence cooperation. Furthermore, the culture of non-disclosure imbued within most State intelligence services would serve to frustrate attempts by the Commission and Tribunal to obtain material. Nevertheless, when assessing this difficult relationship, it is important to appreciate that the intelligence agencies were confronted with an unprecedented situation in being requested to disclose information to an international judicial institution. Intelligence sharing *within* a State’s own intelligence community is often a fractious and limited affair. The process generally becomes even more complicated when disclosure is *between* States. For interaction with an international institution, staffed with multi-national personnel, these tensions will almost inevitably be increased.

Were States concerns legitimate? Sharing intelligence with multinational organizations may clearly increase the risk of leaks. The compromised arrest operations aimed at apprehending Radovan Karadzic outlined in chapter five, succinctly highlights the clear risks associated such intelligence sharing. In many respects, the ICTY’s personnel structure could only enhance concerns of many intelligence services. A large number of

the Tribunal's intelligence analysts were seconded from State intelligence services. Whilst this may allay the fears of those States with personnel working for the Tribunal, the prospect of specialists gaining access to material from States who do not have representatives working at the Court, may present a significant disincentive.

One of the main reasons advanced by key States of the 'International Community' for the non-disclosure of intelligence material often related to a purported concern that their methods and sources would be compromised. However, the thesis demonstrates that in many cases, appropriate ways and means *can be devised* in order to address such concerns. Rule 70 of the Tribunal's RPE allows States to hand over certain material *without* disclosing either its source or the method used to obtain it, and also provided the additional safeguard that any use of the material be conditional on the disclosing State's consent. Further provisions, such as enabling a single judge sitting *in camera* to assess the material to determine whether a State's concerns that disclosure during trial would be prejudicial to national security, also provide a means to facilitate cooperation in this sensitive area.

The above procedural safeguards do not come without consequences. Whilst Rule 70 may have acted to assuage State concerns relating to the disclosure of sensitive material, many States became almost totally reliant on the Rule as a means to provide information. Hence, serious questions have been raised as to whether the mechanism undermines wider 'interests of justice' issues. Can a defendant receive a fair trial if potentially critical evidence is withheld from his defence counsel due to a State's express refusal to allow the Tribunal to disclose? Conversely, where the defendant may be a senior agent of a State who continues to retain links with the regime implicated in atrocity crimes, can a State which possesses intelligence material be expected to agree to disclosure where a risk exists that the sensitive material may be fed back to the regime via the defendant's legal counsel?

Ultimately, even where processes such as Rule 70 are instituted, State cooperation relating to intelligence disclosure cannot be guaranteed. As Wedgwood noted, "The

ethical standards attending international judicial office and [such] procedural precautions....may not persuade national governments that they can afford the risks of complete disclosure."⁴¹ A U.S. Pentagon delegate to the Rome Conference which established the ICC Treaty, emphatically confirmed Wedgwood's observations, stating "we don't trust judges to make the proper decisions about U.S. national security interests and how important they are...these judges are not even trained in assessing intelligence."⁴²

Obtaining cooperation from the intelligence services of States/entities who are implicated in the commission of atrocity crimes may be even more challenging for international investigative and prosecutory bodies. In certain instances, domestic intelligence services which have established contact networks can provide vital support in locating witnesses. However, such support generally comes with the caveat that the domestic intelligence agencies may also be pursuing their own domestic agendas via such cooperation. Witnesses may have been 'planted' to present a particular version of events, or support in investigating one particular case may be offered as a mechanism to divert attention from other cases which the domestic intelligence service wishes to cover-up. Furthermore, while support may be offered in some instances, the security and intelligence services of a State/entity may play an active role in the commission of atrocity crimes. In such cases, the State/entity will "have little incentive to assist investigators and to disclose documents or other evidence which might inculcate them personally, their subordinates or their superiors."⁴³ Conversely, rather than assist, it is more likely that the intelligence services of a State/entity implicated in atrocity crimes will actively seek to frustrate and undermine international investigations. Chapters four and five highlight how *all* the domestic intelligence services in the region monitored the activities of the ICTY, with the Croats and Bosnia Croats also attempting to penetrate the Tribunal's investigative

⁴¹ See Ruth Wedgwood, 'The International Criminal Tribunal and Subpoenas for State Documents', in MICHAEL N. SCHMITT & LESLIE C. GREEN (EDS.) THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM. INTERNATIONAL LAW STUDIES VOLUME 71 (Naval War College, Newport Rhode Island) 1998, p. 494.

⁴² Interview with Pentagon member of the U.S. delegation to the Rome Conference.

⁴³ See Mark B. Harmon and Fergal Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings', *Journal of International Criminal Justice*, Vol. 2., No. 2., June 2004, p. 407.

support network by recruiting interpreters as informers. In light of these factors, the refusal of a State/entity whose forces have been directly implicated in the commission of atrocity crimes, to release documents on the grounds that such disclosure would constitute a threat to its national security, becomes all the more controversial. The Blaskic case discussed in chapter five, aptly illustrates the potential consequences of a State's refusal to disclose information on such grounds. The documentation which was not supplied to the Tribunal during the initial trial and subsequently released by the Croatian government after President Tudjman's death, revealed the existence of a parallel chain of command in relation to the forces operating in and around Ahmici. This critical development contributed to General Blaskic's initial conviction of crimes against humanity being overturned. The episode reveals how non-disclosure, based on a subjective determination by a State that the requested material threatens national security, may seriously inhibit an international criminal court's efforts to establish a credible case, or may lead to defendants being wrongly convicted on the basis of incomplete evidence.

Despite the difficulties the Tribunal has faced in gaining intelligence information, the thesis demonstrates that intelligence disclosure and wider cooperation by a number of key Western States did, in certain instances, improve over time. Chapter five illustrates how British and U.S. intelligence agencies played a critical role in tracking and monitoring PIFWCs, forming an integral part of the wider apprehension strategy. Furthermore, during the Kosovo crisis in 1999, the U.K. provided material to assist in the Tribunal's compilation of the Milosevic indictment in what the (then) Foreign Secretary Robin Cook described as "the biggest handover of British intelligence to an outside agency in history."⁴⁴ Similarly, Britain's MI6 or SIS were heavily involved in attempts to locate General Ante Gotovina. Nevertheless, the latter two examples suggest that *cooperation is heavily dependent on a synthesis of interests of the disclosing State(s) and the recipient of the information*. Thus, in the case of the U.K.'s handover of material reportedly to assist in the Milosevic indictment, former Prosecutor Goldstone's query as to why the information had not been released earlier, suggests that the material was only handed

⁴⁴ See Ed Vulliamy and Patrick Wintour, 'Hawks smell a Tyrant's blood; NATO's New Confidence Suggests That the Neck of Slobodan Milosevic, the Butcher of Belgrade, May Itself Be on the Block', *The Observer*, May 30, 1999.

over *after* the U.K., in conjunction with the U.S. had determined that Milosevic could no longer be viewed as part of the solution, but was in fact the major problem in the region, and consequently should be further de-legitimized. In the case of Britain's SIS tracking of General Gotovina, it appears that concerns that his support network may have been involved in trafficking weapons to the Real IRA was also a motivating factor in commencing the operation.⁴⁵

The principle that intelligence cooperation will be enhanced where common interests exist, is further illustrated in the case of the prosecution of senior Ba'ath Party personnel in Iraq after U.S.-led invasion in 2003. A former official of the Coalition Provisional Authority's (CPA) Crimes against Humanity Unit who had previously worked at the ICTY confirmed that a much closer relationship was developed with U.S. intelligence agencies. With the trial of Saddam Hussein and his senior associates representing a central element of U.S. post-war policy in Iraq, officials involved in the initial prosecution strategy were granted access to the 'High Value Detainee Conference', a round-up of pertinent information gathered by the intelligence community.⁴⁶ Ironically, the Crimes against Humanity unit would face obstruction from the very organization which has often criticized State's for failing to disclose intelligence information. Human Rights Watch refuse to pass on original documents in its possession relating to the Anfal Campaign, the Iraqi military campaign against the country's Kurdish population. This non-disclosure was premised on Human Rights Watch's objection to the Iraqi Special Tribunal's decision to include the death penalty as part of its potential sentences. The former CPA Crimes against Humanity Unit official highlighted how much of the information HRW possessed was provided by Kurdish organizations with the express intention that it could, one day, be used for the purpose of prosecution. The official went on to express frustration that the international human rights organization had ultimately

⁴⁵ See Ian Traynor, 'The Fugitive who stands in the way of Croatia's EU Entry', *Guardian*, March 18, 2005.

⁴⁶ Interview with former member of the CPA's Crimes against Humanity Unit. Despite this enhanced cooperation, the official also highlighted that the unit did face problems in some cases where material requested had to be declassified by the same individuals who originally classified it. The three month rotation of intelligence personnel from the field in some cases made this a time consuming process.

“imposed its own value system” to the detriment of the actual victims of the Anfal Campaign.⁴⁷

Intelligence Cooperation and The International Criminal Court

Similar to Rule 70 of the ICTY’s RPE, Article 54 (3) (e) of The ICC’s Statute seeks to assuage States’ concerns relating to the sharing of sensitive material with the Court. It stipulates the Prosecutor may “Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.”⁴⁸ An ICC OTP official confirmed that the Court had received information from a number of States via this mechanism, which was viewed as “providing a level of comfort”⁴⁹ for States. Whilst comforting for States, the provision will also impact upon a defendant’s potential to access exculpatory evidence, which may impair his/her right to a fair trial. However, like rule 70 of the ICTY’s RPE, it is difficult to imagine many States submitting information without such protective measures.

Article 72 of the Court’s statute also addresses the issue of the protection of national security information, and applies “in any case where the disclosure of the information or documents of a State would, *in the opinion of that State, prejudice its national security interests.*”⁵⁰ Thus, in contrast to the initial Trial Chamber judgment in the *Blaskic subpoena case*, the decision as to whether disclosure of the information would be damaging to the State’s national security rests on a subjective determination of the State. Such a blanket provision potentially opens up “sweeping opportunities for refusing cooperation.”⁵¹ In the *Blaskic subpoena case* Appeals Chamber judgment, Judge Cassese argued that Croatia’s claim of an unbounded national security privilege would shield “documents that might prove of decisive importance to the conduct of trials” and would

⁴⁷ Interview with former member of the CPA’s Crimes against Humanity Unit.

⁴⁸ See Article 54 (3) (e) Rome Statute.

⁴⁹ Interview with OTP official, ICC.

⁵⁰ See Article 72(1), Rome Statute.

⁵¹ See Roland Bank, ‘Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence’, in J. A. FROWEIN AND R. WOLFRUM (EDS.), MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, (Kluwer Law International) 2000, p. 247

“be tantamount to undermining *the very essence of the International Tribunal’s functions.*”⁵²

Article 72 effectively represents such an unbounded national security privilege. However, would an alternative, more robust provision, which granted the Court the power to order the disclosure of material, have been any more effective? Like the ICTY, the ICC lacks any real power to *enforce* such an order. In an event of non-compliance the Court may inform the Assembly of State Parties which may in turn refer the matter to the U.N. Security Council, which as Chuter acerbically notes “are no doubt terrifying punishments but which might not be wholly effective [in facilitating disclosure].”⁵³ It is unclear what coercive power, if any, the former body possesses and although the Security Council is endowed under Chapter VII of the U.N. Charter with considerable power to impose sanctions or authorize the use of military force, the ICTY’s experience of reporting non-compliance to the Council suggests the body will often be disinclined to act.

When a State seeks to invoke Article 72, the Court may find it particularly difficult to pursue credible prosecutions relating to command responsibility, where the existence of official sources of military documentation (likely to be determined by a State as falling under the cover of national security considerations) is often essential to establish the necessary chain of command. However, where a State refuses a request for assistance, in whole or in part, on the basis of concerns that the production of the requested documents or evidence is prejudicial to its national security, the Court may “make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances”⁵⁴ A defendant’s legal counsel may well rely on the Court’s ability to make such an inference, arguing that a State’s refusal to disclose the requested information may be based on the existence of critically important exculpatory evidence, and that any continuation of a trial without access to the withheld material

⁵² See Blaskic Subpoena Appeals Chamber Decision, para. 84.

⁵³ See CHUTER, WAR CRIMES, p. 220.

⁵⁴ See Article 72 (7) (a) (iii), Rome Statute.

would be contrary to the presumption of innocence set out in Article 66 of the Statute.⁵⁵ As Behrens highlights, under such circumstances a State “could shield wrongdoers simply by withholding relevant information, which is certainly not in conformity with the purpose of the Statute.”⁵⁶ In other instances, a State may not be interested in shielding wrongdoers, but nevertheless refuse to disclose information due to other concerns. Consequently, Schabas suggests that Article 72 “provides the Defence with a very intriguing strategic weapon. It will be in its interest to allege the existence of relevant facts in the possession of a State. This might for example, take the form of communications intercepts in the hands of the intelligence agencies of major world powers. A refusal to disclose is entirely predictable in such cases, and *for reasons totally irrelevant to the guilt or innocence of the accused.*”⁵⁷ Whatever the motivations are for a States refusal to disclose information, “some of the guilty will go free because of the effects of Article 72.” Schabas goes on to highlight that “it remains to be seen whether its terms will also lead to the conviction of the innocent.”⁵⁸

To date (August 2006) no State has invoked its right under Article 72 of the ICC’s Treaty to withhold requested information, although the Court has received material under the provisions of Article 54 (3) (e).⁵⁹ An official within the ICC’s OTP noted how, learning from the experiences of the ICTY, uncoordinated blanket requests for information are not being submitted to States. Furthermore, States’ intelligence services were not being specifically approached with requests for information. Instead, a limited number of OTP officials, with experience in liaising with States via traditional diplomatic channels, are

⁵⁵ Article 66 comprises three sub-sections: (1) Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law; (2) The onus is on the Prosecutor to prove the guilt of the accused; (3) In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

⁵⁶ See Hans-Jorg Behrens, ‘Protection of National Security Information in the ICC: A Guide to Article 72 of the Rome Statute’, in HERWIG ROGGMANN AND PETAR SARCEVIC (EDS.), NATIONAL SECURITY AND INTERNATIONAL CRIMINAL JUSTICE (Kluwer Law International) 2002, p. 125.

⁵⁷ See William Schabas, ‘National Security Interests and the Rights of the Accused’, in HERWIG ROGGMANN AND PETAR SARCEVIC (EDS.), NATIONAL SECURITY AND INTERNATIONAL CRIMINAL JUSTICE (Kluwer Law International) 2002, pp. 108-109.

⁵⁸ See William Schabas, ‘National Security Interests and the Rights of the Accused’, in HERWIG ROGGMANN AND PETAR SARCEVIC (EDS.), NATIONAL SECURITY AND INTERNATIONAL CRIMINAL JUSTICE (Kluwer Law International) 2002, p. 113.

⁵⁹ Interview with OTP official, International Criminal Court.

engaged in establishing constructive relationships in an attempt to facilitate productive information provision.⁶⁰

Obtaining Military Cooperation:

Investigations

Chapter one highlights how the Commission had difficulty persuading elements of UNPROFOR to provide assistance with its field missions, particularly the attempted mass grave exhumation at Ovchara, Croatia. This resistance was predicated on several grounds. Firstly, support of human rights investigations was distinctly viewed as not part of the force's mandate. Involvement in such issues was perceived as contrary to the cardinal principle of neutrality within U.N. peacekeeping operations. Considerations of force protection and fears of a backlash by the local Serbian forces also played a role, leading to UNPROFOR stressing that an alleged mass grave site of Serb victims should be investigated concurrently in order to maintain perceptions of parity. A reluctance to support the Commission's work was also linked to the more prosaic reason of limited resources. U.N. forces are often undermanned and under equipped. Diverting resources beyond the key mandated tasks to other roles, whatever they may be, will generally be met with opposition. Nevertheless, as illustrated by UNPROFOR's February 22, 1994 internal memo; 'War Crimes Investigation', some elements of the force, particularly the Military Police component, did conduct investigations into alleged atrocity crimes, and eventually guidelines were drafted providing that UNPROFOR personnel would, where possible, secure and preserve evidence relating to such crimes.

Chapter four illustrates that like UNPROFOR, IFOR displayed a similar reluctance to support the Tribunal's investigations, refusing to allocate forces for area security around suspected mass grave sites during the initial deployment in 1996. Nevertheless, over time SFOR began to adopt a more proactive stance, with SOF personnel providing close protection to Tribunal investigators during searches of a number of installations controlled by the former 'warring factions,' which resulted in critical documents being obtained.

⁶⁰ Interview with OTP official, International Criminal Court.

Since Bosnia, international military forces have adopted varying attitudes towards assisting attempts to investigate atrocity crimes. With regard to Kosovo, U.N. Security Council Resolution 1244 explicitly called for “full cooperation by all concerned, *including the international security presence*, with the International Tribunal for the Former Yugoslavia.”⁶¹ In stark contrast to IFOR’s initial reluctance to support the Tribunal with regard to investigations in Bosnia, KFOR agreed to provide a secure environment for ‘scene of crime’ teams, fourteen of which were rapidly provided by U.N. member States in response to the Tribunal’s request for assistance. These teams were on the ground two days after the NATO forces entered the province. Documentation teams quickly followed.⁶² Furthermore, ICTY investigative teams were “nestled within the command structure in each of the sector headquarters. Military teams secured mass graves....escorted [investigators] back and forth as they did the forensics work at the sites...and executed a myriad of other support functions.”⁶³ KFOR actively compiled a detailed database of over 150 crime scenes, together with available witness statements and digital photos, forwarding it to the Tribunal. Additionally, in one particular case in Pristina, “KFOR permitted ICTY investigators to take a truck of documents from a police station, allowing the Tribunal to process the material without additional time-consuming recourse to national governments.”⁶⁴

In East Timor however, international military forces deployed in 1999 reverted to the approach of IFOR, and were reluctant to become involved in supporting atrocity crimes investigations or guarding suspected mass grave sites. Similarly, in Iraq, U.S. forces refused to secure several mass grave sites, leading to their contamination by the desperate

⁶¹ See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. U.N. Doc. S RES/1244 (1999) (emphasis added)

⁶² See John Ralston ‘Investigating War Crimes. “The Role of Investigators In Crisis Intervention”’, Presentation given at the International Society for the Reform of Criminal law, 15th International Conference, Politics, Crime and Criminal Justice, august 30, 2001.

⁶³ See Michael Newton, ‘Harmony or Hegemony? The American Role in the Pursuit of Justice’, *Connecticut Journal of International Law*, Spring, 2004, p. 241.

⁶⁴ See Michael Newton, ‘Harmony or Hegemony? The American Role in the Pursuit of Justice’, *Connecticut Journal of International Law*, Spring, 2004, p. 255.

actions of Iraqis trying to locate family members who had been ‘disappeared’ under the Ba’ath regime.⁶⁵

Arrests

The thesis demonstrates that the most sensitive issue for international military forces relates to arresting PIFWCs. Where international forces are to be deployed into an operating environment where atrocity crimes have been committed and PIFWCs are residing, should the mission mandate explicitly obligate such forces to actively pursue and apprehend PIFWCs? Chapter three illustrates that the U.S. military would have refused to take part in the post-conflict peacekeeping mission to Bosnia had any such obligation been imposed upon them. Without U.S. participation, the mission would have been fatally compromised, with the potential European-troop contributing States making their involvement conditional on U.S. involvement. (With the scope of IFOR’s mandate essentially determined in Washington *before* Dayton, the European troop-contributing States did not have to respond to the issue. Nevertheless, it is likely the majority of them would also have been actively opposed to an explicit obligation to carry out arrests). Consequently, as Newton highlights, imposing an obligation on international forces within the mandate may actually “undermine the pursuit of justice by creating a disincentive for the very forces capable of restoring respect for the law [to take part in the proposed mission].”⁶⁶

However, chapter four demonstrates that where an international peacekeeping force’s mandate is nebulous over the issue of arrests, the force may well rely on such ambiguity to justify a ‘minimalist’ attitude towards the issue. With discussions intensifying over the possible deployment of a large U.N. peacekeeping force to take over from African Union forces in Darfur, Sudan,⁶⁷ where widespread atrocity crimes have taken place,⁶⁸ the debate over mandate scope is likely to be revisited. In future, where a mandate omits

⁶⁵ See Rory McCarthy, ‘US accused of failing to protect mass grave’, *Guardian*, May 15, 2003.

⁶⁶ See Michael Newton, “‘A View from the Trenches’: The Military Role in the Pursuit of Justice”, *Case Western Reserve Journal of International Law*, Spring 2003, 35, 2, p. 298.

⁶⁷ See ‘Annan says more than 18,000 troops would be needed for UN mission in Darfur’, *UN News Centre*, August 4, 2006.

⁶⁸ See ‘Sudan: ICC finds evidence of Darfur massacres, prepares prosecution’, *IRIN*, June 16, 2006.

imposing an active obligation on international forces, it is nevertheless highly likely that if deployed into environments where atrocity crimes have been committed and where the ICC has issued indictments, demands will be made on the force to carry out apprehensions on the basis of customary law obligations. Chapter four highlights how a number of ‘pro-prosecution’ advocates argued that NATO forces were obliged to actively seek out and detain PIFWCs in order to satisfy the requirements of the Grave Breaches provisions of the Geneva Conventions, although the contention has been robustly contested, particularly by military lawyers. Whilst obligations vis-à-vis the Grave Breaches provisions would not arise in relation to the conflict taking place in Darfur, Sudan, due to its non-international character, demands that arrests be conducted in order to satisfy the provisions of the Genocide Convention, may well be advanced.

Burying the Ghost of Mogadishu?

The thesis illustrates how NATO’s reluctance to carry out arrests was in part linked to an association of such missions with the disaster at Mogadishu, Somalia in 1993, where 18 U.S. servicemen were killed during an operation to apprehend members of General Aideed’s militia. However, chapter five demonstrates that Mogadishu should not be so readily invoked as a potential template for future arrest operations. Again the specifics of each particular case will need to be assessed on their own merits. Nevertheless, the numerous successful apprehension missions conducted in Bosnia (e.g. Galic, Krstic) illustrates how success can be achieved without incurring disproportionate casualties.

Beyond the issue of a State’s concern about incurring casualties, the thesis demonstrates how the reluctance to carry out arrests also relates to an unwillingness, apparent within a number of States military forces (particularly the U.S.), to engage in Operations Other Than War (OOTW). This reluctance is particularly acute with regards to what the military construe as quasi-police functions and law and order issues. However, the thesis also highlights how international military forces may be the *only* forces with the capacity to conduct such operations. Internationally deployed police units are often not sufficiently robust to carry out arrests, and the domestic parties are either unwilling or unable to do so. Nevertheless, despite the clear practical reasons which suggest that

international military forces *need* to engage in such areas, strong resistance towards OOTW remains. As Richard Holbrooke highlighted, for many within Washington Nationbuilding is considered “a dirty word”⁶⁹, as illustrated by Condoleezza Rice’s view that “Carrying out civil administration *and police functions is simply going to degrade the American capability to do the things America has to do.*”⁷⁰ Similarly, U.S. reluctance to engage in OOTW was further demonstrated by Secretary of State for Defense, Donald Rumsfeld’s, (“an implacable opponent of using US troops in peace operations”⁷¹) 2002 attempts to close the U.S. Army’s Peacekeeping Institute at the U.S. Army War College in Carlisle, Pennsylvania.⁷² This trenchant opposition to OOTW however, does not reflect the operational future or the new world disorder that produced these challenges. Fortunately, there appears to be an emerging recognition by some policymakers within the ‘International Community’, that where international forces are deployed into post-conflict environments, it is critically important for them to play an active role in restoring law and order, and that this should be done sooner rather than later.⁷³

Obtaining State Support for Arrests: A New Emphasis

Consequently, this thesis posits that in future cases where international forces deploy in a peacekeeping or peace enforcement capacity to an environment where atrocity crimes have been committed and the ICC is investigating, ‘pro-prosecution’ advocates and the ICC should actively engage in this debate as a means to induce cooperation from the troop-contributing States. This thesis contends that *in situations where there is a sufficient international military force to contain any negative reaction to the arrest of PIFWCs, and where an overall assessment determines that such arrests will not threaten the nascent peace*, the ICC should emphasise that a mutual interest exists between the

⁶⁹ See Richard Holbrooke comments made during presentation ‘Achieving Peace – Lessons from Shuttle Diplomacy – Ending Military Conflict’, Lessons Learned and Best Practices from the Western Balkans, Conference Proceedings No. 1, Folke Bernadotte Academy, Stockholm, October 8-9, 2003, p. 23.

⁷⁰ Condoleezza Rice, quote *in*, William Drozdiak, ‘Bush Plan Worries Europeans; Removing US Troops from Balkans is Seen as Divisive’, *The Washington Post*, October 24, 2000.

⁷¹ See William G. O’Neill, ‘A New Challenge for Peacekeepers: The Internally Displaced.’ Occasional Paper, The Brookings Institution – John Hopkins SAIS Project on Internal Displacement, April 2004. p. 44.

⁷² See Jim Lobe, ‘Pentagon to close only U.S. Peacekeeping Institute’, *Inter Press Service*, June 4, 2002.

⁷³ See Seth G. Jones, Jeremy M. Wilson, Andrew Rathmell, K. Jack Riley, *Establishing Law and Order After Conflict*, Rand Corporation, 2005; *In The Wake Of War: Improving U.S. Post-Conflict Capabilities*, Report of an Independent Task Force, Sponsored by The Council on Foreign Relations, 2005.

Court and international forces engaged in peacebuilding. By highlighting the negative impact many PIFWCs exert in post-conflict environments (who act as spoilers through their involvement in obstructing refugee and IDP return, and their links to organized crime), it may be contended that the ICC stands a greater chance of obtaining cooperation from the troop-contributing States than by merely emphasising a purported nexus between prosecutions and deterrence and reconciliation, which remains highly disputed and unproven.

Indeed, the existence of the ICTY did little to prevent the mass execution of over seven thousand Bosnian Muslim men and boys from the Srebrenica enclave in 1995, or Milosevic's campaign of ethnic cleansing in Kosovo. As Snyder and Vinjamuri highlight, The Tribunal's case against Milosevic noted that he ignored Western diplomats' face-to-face warnings that he would be prosecuted if he failed to stop the Serbian abuses in Kosovo.⁷⁴ Similarly, despite claims that reports of ICC investigators operating in the Ituri region of the Democratic Republic of the Congo had a potential deterrent effect in 2004,⁷⁵ the numerous atrocities committed since then⁷⁶ indicate that this assessment was overly optimistic. Despite the ICC's public announcements that it is actively investigating, the continued commission of atrocity crimes by "Janjaweed" militias within the Darfur region of Sudan and within the border region of Eastern Chad, further illustrates that the threat of prosecution may have little or no deterrent effect.⁷⁷

Thus, 'pro-prosecution' advocates would do well to confront the uncomfortable reality that the commission of atrocity crimes may, in certain instances, actually make tactical, strategic sense to the perpetrators. Bryan and Salter posit that "*Few would dispute the*

⁷⁴ See Jack Snyder and Leslie Vinjamuri, 'Trials and Errors. Principles and Pragmatism in Strategies of International Justice', *International Security*, Vol. 28, No. 3 Winter 2003 2004, p. 20.

⁷⁵ See generally 'In Uncharted waters: Seeking Justice Before the Atrocities Have Stopped. The International Criminal Court in Uganda and the Democratic Republic of the Congo'. Citizens for Global Solutions, June 2004.

⁷⁶ See Human Rights Overview, Democratic Republic of the Congo, Human Rights Watch. available at <http://hrw.org/english/docs/2006/01/18/congo12237.htm>

⁷⁷ See 'Chad: Sudanese Militia Massacre Chadian Civilians. More Than 100 People Killed in Recent Attacks in Eastern Chad', Human Rights Watch Press Release, May 26, 2006. As recently as mid-August 2006, the U.N. has warned that Sudan appears to be preparing for a major military offensive in Darfur see Glen Kessler, 'U.N. Official Warns of Major New Sudanese Offensive in Darfur', *Washington Post*, August 18, 2006.

irrational nature of the motivations that drive communities to participate in, or at least tacitly support, vicious campaigns of ethnic, religious or racial genocide against their neighbours”⁷⁸ However, such “vicious campaigns” may actually be grounded in clear, pragmatic reasoning. Take for example, the leader of a militia group, largely comprised of child soldiers. A former child soldier himself, the leader maintains his position by a culture of fear predicated on the commission of demonstrable atrocities. In such cases, carrying out atrocities may well take precedence over considerations that the acts may, one day, lead to an indictment being issued by an international criminal court located in some distant country which has minimal capacity to obtain the custody of suspects. Similarly, Chuter notes, “the best way to ensure control over territory is to persuade representatives of other groups to leave it, and the best way to do that is to kill a few of them and threaten the rest with similar treatment unless they leave.”⁷⁹ Chuter continues “atrocities are a good way of intimidating and disciplining populations when your forces are too weak to expel them....*Though brutal, these tactics are by no means senseless.*”⁸⁰

Finally, ‘pro-prosecution’ advocates who argue that international criminal prosecutions actively contribute to reconciliation within communities have produced little in the way of solid empirical evidence to support the contention. Despite Lloyd Axworthy warning, that “Without firm action on war crimes, reconciliation is doomed”⁸¹, the presumption that *any action* relating to atrocity crimes will necessarily enhance the prospects of reconciliation needs to be further explored and critically assessed. In post-war Germany, many Germans viewed the Nuremberg trials as an “injustice”⁸² as highlighted by a confidential State Department Memo which noted “The Germans have not accepted the underlying principle of the trials and do not believe in the guilt of those who have been convicted.” Indeed, it is questionable whether, particularly in the short term, the trials facilitated reconciliation between Germany and its former adversaries (Russia and the Allies). In the former Yugoslavia, the Tribunal’s impact on fostering reconciliation

⁷⁸ See Ian Bryan and Michael Salter ‘War Crimes Prosecutors and Intelligence Agencies: The Case for Assessing their Collaboration.’ *Intelligence and National Security*, Vol. 16, No. 3 (Autumn 2001) p. 107. (emphasis added)

⁷⁹ See CHUTER, WAR CRIMES, p. 11.

⁸⁰ See CHUTER, WAR CRIMES, p. 12. (emphasis added)

⁸¹ See Lloyd Axworthy quote in WILLIAMS AND SCHARF, PEACE WITH JUSTICE? p. 222.

⁸² See PETER H. MAGUIRE, LAW AND WAR: AN AMERICAN STORY (Columbia Uni. Press) 2000, p. 229.

between the States involved in the conflicts, and within the communities in the respective States, has also been limited. As the IWPR Special Report on The Hague Tribunal and Balkan Reconciliation stresses, “the violence is over but the Balkans remains very much divided,”⁸³ a perspective reiterated by Branko Todorovic, the president of the Helsinki Committee for Human Rights in the Republika Srpska; “What we have in Bosnia, unfortunately, is a continuing process of division and differentiation, instead of reconciliation.”⁸⁴

In light of these considerations, the thesis submits that the ICC would be better advised to appeal to the pragmatic considerations of troop-contributing States as a mechanism to induce greater cooperation regarding arrests. Thus, an emphasis on the mutual interests in detaining PIFWCs may be viewed as the most prudent strategy for the ICC to pursue.

⁸³ See ‘The Hague Tribunal and Balkan Reconciliation’ Special Report, Tribunal Update, No. 462, Institute for War and Peace Reporting, July 21, 2006.

⁸⁴ See Branko Todorovic quote *in* ‘The Hague Tribunal and Balkan Reconciliation’ Special Report, Tribunal Update, No. 462, Institute for War and Peace Reporting, July 21, 2006.

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The following individuals were interviewed by the author. A number of other individuals who either worked for or continue to work for the ICTY, U.S. Department of Defense, U.S. Department of State and UK Foreign and Commonwealth Office were also interviewed, but requested their names be withheld from the thesis.

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