

Coercive Appeasement: The Flawed International Response to the Serbian Rogue Regime

Paul R. Williams*

Karina M. Waller**

INTRODUCTION

In April 1987, Slobodan Milosevic addressed a crowd of Kosovo Serbs outside the Kosovo parliamentary building who had gathered to protest the treatment of the Serb minority by the Kosovar Albanians. Milosevic proclaimed to the crowd that "[n]obody has the right to beat Serbs." With this simple phrase, Milosevic began a long campaign characterized by the use of ethno-nationalism and ethnic aggression to accomplish his objective of a mono-ethnic greater Serbia.

During the course of his war of ethnic aggression, Milosevic was predictably aided in his efforts by radical Serbian intellectuals, nationalist paramilitary organizations, the Yugoslav National Army (JNA), Croatian Serb and Bosnian Serb protégées such as Radovan Karadzic and Ratko Mladic, and a generally passive Serbian population.

More surprisingly, however, was that Milosevic was substantially aided by an American and European policy response of coercive appeasement. This response, born out of a diplomatic deficit and based in part upon the approach of myopic accommodation and moral duplicity, coupled with a attempt to minimize the use of force and the norm of justice, enabled Mil-

* Rebecca Grazier Professor of Law and International Relations, American University. Ph.D., Cambridge 1998; J.D., Stanford Law School 1990; B.A., UC Davis 1987. From 1991-1993 Professor Williams served as an Attorney-Advisor in the U.S. Department of State's Office of the Legal Advisor for European Affairs. Professor Williams has also served as the legal counsel to the Bosnian delegation during the Dayton Peace Negotiations, the Kosovar Albanian delegation during the Rambouillet/Paris negotiations, the Macedonian Albanian delegation during the Lake Ohrid/Skopje negotiations, and the Montenegrin Government during the Belgrade/Podgorica negotiations on the future of the Federal Republic of Yugoslavia.

** Research Fellow, Public International Law and Policy Group. B.A., Colorado State University 1997; J.D., American University's Washington College of Law 2001; M.A., American University's School of International Service 2002.

osevic and forces under his control to initially capture and ethnically cleanse thirty percent of Croatia and seventy percent of Bosnia. The reliance on the approach of coercive appeasement during the negotiation of the Dayton Accords secured for Milosevic de facto control of half of Bosnia, created institutional mechanisms that enabled him to retain the ethnic purity of his share of Bosnia, and enabled him to structure a politically strategic withdrawal from indefensible areas in Croatia. This success emboldened him to take subsequent action in Kosovo designed to expel up to two million Kosovars from the province.

But for an 11th hour change in American and European policy brought about by British Prime Minister Tony Blair, U.S. Secretary of State Madeleine Albright and NATO Commander Wesley Clark, Milosevic would not now be in The Hague, but likely would have succeeded in his plan to ethnically cleanse Kosovo, and potentially move on to cleanse Vojvodina and other non-Serb parts of Serbia.

The consequences of the approach of coercive appeasement for the people of the former Yugoslavia have been over 200,000 murdered, tens of thousands raped and nearly four million Bosniacs, Croats, Serbs and Kosovars displaced from their homes, many of whom will never be able to return. With a devastated infrastructure and a largely destroyed housing stock, the region has been plunged into an economic abyss in which it will remain for a number of decades to come.

The consequences for America and Europe are wide-ranging and include a costly diversion and degradation of U.S. and NATO military forces resulting in reduced preparedness to confront direct threats to national security, a steady erosion of the credibility of NATO as a deterrent force, the near institutionalization of dissension between America and its European allies, and a direct financial cost of nearly \$10 billion associated with the deployment of NATO forces and the reconstruction of Bosnia and Kosovo. This in addition to the billions allocated in social aid for Yugoslav refugees.

The constant diplomatic focus on Yugoslavia for the past decade has diverted both diplomatic attention and scarce resources from other regions of strategic importance. Milosevic has set the tone of international behavior in the post cold war era by effectively hindering American and European efforts to craft a new paradigm of relations based on mutual security and shared political responsibility. Most importantly, the constant attention on the Yugoslav crisis by top level American and European diplomats and key foreign policy staff likely diverted attention and resources from a comprehensive assessment and reaction to the emerging threat posed by al Qaeda, the consequences of which were demonstrated in the September 11 attacks against the World Trade Center and the Pentagon.

The near constant ethnic conflict and economic sanctions have under-

mined efforts to stabilize conflicts in the region and efforts to promote a rapid economic transformation in the former Yugoslavia and in neighboring states such as Romania and Bulgaria.

Many of these consequences could have been avoided had the American and European foreign policy institutions not so dogmatically embraced an approach of coercive appeasement. The objective of this article is to explain how and why the Americans and Europeans, followed by the United Nations and other important international organizations, initially crafted and then employed the approach of coercive appeasement from the spring of 1991 through the winter of 1999.

DEFINING THE CONCEPT OF COERCIVE APPEASEMENT AND ITS ROLE IN PEACEBUILDING

Coercive appeasement begins when politically and militarily powerful third-party states or peacebuilders, such as the United States and the European Union, seek to resolve a conflict by accommodating the primary interests of a rogue regime despite the regime's use of force and commission of atrocities to achieve its objectives. Coercive appeasement more fully develops when third-party states employ very limited force, or pseudo force to relieve public and/or international pressure to take action to curb the behavior of the rogue regime. This limited force is then accompanied by actions which grant that regime many of its primary objectives. Finally, coercive appeasement often entails coercing the victim of the aggression into accepting arrangements that enable the rogue regime to accomplish its objectives. Thus, by its very nature, coercive appeasement encourages further aggression by signaling to the rogue regime that it will suffer few political consequences for its actions.

As the foreign policy of national governments or coalitions is seldom monolithic, it is important to acknowledge that at all times during the Yugoslav peace process a variety of approaches were utilized. These included coercive appeasement, the meaningful use of force, economic inducement, justice based approaches, and coercive diplomacy. Although coercive appeasement remained the dominant approach throughout, at times other approaches significantly influenced the development of the peace process. Importantly, the approach of coercive appeasement was often adapted in order to co-opt the institutions or mechanisms created to further other approaches, including the International Criminal Tribunal for Yugoslavia (Yugoslav Tribunal), United Nations Protection Force (UNPROFOR), and the post-Dayton Implementation Force (IFOR).

It should also be noted that the peacebuilders did not necessarily intentionally set out to implement a strategic approach of coercive appeasement. In fact all of the initial peacebuilding efforts began along the traditional path of accommodation coupled with moderate political and eco-

conomic sanctions and the deployment of peacekeepers. While this approach was the standard operating procedure of diplomats and highly appropriate for many conflicts, it was an utterly inappropriate means by which to confront and contain a Serbian nationalist regime determined to create an ethnically homogeneous greater Serbia.

In the face of constant Serbian aggression, the peacebuilders made tactical decisions and undertook ad hoc actions designed to achieve short-term objectives. These decisions and actions began to cumulatively frame and perpetuate what became over time an approach of coercive appeasement. Because many of the key policy makers were categorically committed to the approach of accommodation they often undertook actions designed to minimize the influence of other approaches such as the meaningful use of force, or justice based initiatives such as the Yugoslav Tribunal, which might have served to divert the approach of accommodation from its slide into coercive appeasement. By minimizing the influence of these other approaches, the sponsors of the approach of accommodation soon found that they had become the sponsors of the approach of coercive appeasement. It was not until after hundreds of thousands of civilians had been slaughtered and the credibility of the U.N. and NATO seriously undermined that those opposed to the approach of coercive appeasement were able to change the American and European approach to one of diplomacy backed by force. Under the new approach, Milosevic was defeated, the atrocities in the former Yugoslavia came to an end, and Milosevic was eventually delivered by the people of Serbia to the Hague to stand trial for his crimes against humanity.

There are five core elements that characterize the approach of coercive appeasement. The first core element is a *diplomatic deficit*, which entails a failure to understand the motivations and objectives of the parties to the conflict coupled with the failure to create the conditions for effective leadership and the articulation of a clear policy objective. This initial deficit is frequently augmented by the inability to structure a coordinated or capable diplomatic process for peace building. Often the diplomatic deficit encompasses the unintentional misuse of diplomatic signaling and the readily transparent articulation of intentions and available means by the peacebuilders. This diplomatic deficit also produces deficient institutional learning whereby peacebuilders are unable to adequately undergo institutional and personal "learning" during the peace building process.

The second core element may be termed *myopic accommodation*. This element entails the pursuit of actions designed to meet the needs and interests of the aggressor, and is often accompanied by the intentional or unintentional obfuscation of the aggressor's objectives.

The third core element, *moral duplicity*, involves declarations and actions designed to create the perception of moral equivalence among the

parties, thereby eroding the distinction between aggressor and victim and spreading culpability among all parties. These official pronouncements are often designed to actively erode the moral and strategic imperative to adopt approaches other than accommodation. Moral duplicity also entails the application of political, economic and sometimes military pressure on the victims in order to compel their acquiescence to the primary demands of the aggressor. Moral duplicity is often seen as a necessary behavior by those interested in pursuing accommodation or appeasement as it enables the peacebuilders to create divisions within the coalitions representing the victims and thus deflates their ability to prevent the peacebuilders from accommodating the interests of the aggressor.

The fourth core element is *constrained force* and entails those activities designed to constrain and minimize the use of legitimate force. Constrained force is often utilized as a means of coercion calculated to set the stage for further accommodation and appeasement once the aggressor has been brought to submission. Constrained force is often the result of an unwillingness on the part of third-party states or peacebuilders to articulate and implement strong policy initiatives which are not politically viable, or are inconsistent with the policy approach previously adopted.

The final core element is the *marginalization of justice*, which requires actions designed to minimize the role of justice, including the political resurrection of culpable partners in peace. While the role of justice is essential to bringing about a long-term peace, it is often deemed expendable by peacebuilders who utilize it as a bargaining chip in order to negotiate with erstwhile aggressors in the name of peace.

CRAFTING A POLICY RESPONSE TO THE YUGOSLAV CRISIS: SEARCHING FOR AN APPROACH

From its inception, the international community's effort to resolve the Yugoslav crisis incorporated many of the core elements of coercive appeasement - moral equivalence, erosion of the moral or strategic imperative to get involved, and the lack of a coordinated or able diplomatic approach. As the crisis in Yugoslavia unfolded, the British, French and German governments, working formally through the European Community institutions and through more traditional bilateral relationships, took the lead in crafting a response to the conflict. The initial approach relied on a formula designed to accommodate the interests of Milosevic and Croatian President Franjo Tudjman while trying to prevent the widespread commission of atrocities by deploying E.U. and U.N. monitors.

A. Planting the Seeds of Coercive Appeasement

Diplomatic Deficit

Many factors contributed to the diplomatic deficit that plagued the American and European approach to the conflict. At the time the Yugoslav crisis began, Europe experienced monumental changes with the Maastricht Treaty and the reunification of Germany as it sought to create a united European community.¹ This geopolitical occurrence created a sense of euro-nationalism, which led the European states to possess an over-inflated view of the power of Europe and their ability to prevent atrocities through persuasion.² Moreover, the European peacebuilders also failed to adequately understand Milosevic's intention of creating an ethnically homogeneous greater Serbia and thus began with the fundamental miscalculation that the crisis could be resolved with minimal effort in a matter of weeks.

This European position proved an ill fated mistake as the European Union's preoccupation with its internal operations left very little time and resources available for an effective strategy regarding the Yugoslav crisis.³ According to one European scholar, Europe "sacrificed the interests of peace in the region to their own desire to forge a semblance of foreign policy competence."⁴ This institutional egotism contributed to its shortsightedness, as evidenced by the E.U.'s continual misperception of

1. See Samantha Power, *The Reluctant Superpower*, in *WITH NO PEACE TO KEEP: UN PEACEKEEPING AND THE WAR IN FORMER YUGOSLAVIA* 148, 149 (Ben Cohen & George Stamkoski eds., 1999) (recounting the European Union's belief that it was the only power capable of restoring peace to Yugoslavia). Some of the member countries to the European Union believed that Yugoslavia would provide the needed incentive to create a common foreign and security policy. See *id.*

2. See Age Eknes, *The United Nations' Predicament in the Former Yugoslavia*, in *THE UNITED NATIONS AND CIVIL WARS* 109 (Thomas G. Weiss ed., 1995) (discussing the European Union's control of the Yugoslav situation during the early stages of the crisis).

3. See Philip Towle, *The British Debate About Intervention in European Conflicts*, in *MILITARY INTERVENTION IN EUROPEAN CONFLICTS* 94, 99 (Lawrence Freedman ed., 1994) (discussing Britain's internal debate over intervention in Yugoslavia); see also Lawrence Freedman, *Introduction*, in *MILITARY INTERVENTION IN EUROPEAN CONFLICTS* 1, 5 (Lawrence Freedman ed., 1994) (analyzing the dichotomy between the European Union's perceived role as the preeminent force in European conflicts and the reality of the European Union as a fledgling power). The European Union was unprepared for the task of intervening in a crisis that had the potential of escalating into an ethnic war because of its inability to create a security system capable of handling such conflicts. See *id.*

4. Jane M. O. Sharp, *Appeasement, Intervention and the Future of Europe*, in *MILITARY INTERVENTION IN EUROPEAN CONFLICTS* 49 (Lawrence Freedman ed., 1994).

the nature of the conflict, its adoption of a euro-centric view of the parties which assumed they would think and behave like their counterparts in the E.U., a historic bias toward the interests of Serbia, and simple anti-Muslim racism.⁵ These factors led the E.U. to become entrenched in a policy of coercive appeasement.⁶

Despite the apparent failings of the European approach during the early stages of the evolving Yugoslav crisis, the United States made a strategic decision to defer to the Europeans while supporting the efforts of the peace process undertaken by the E.U. and eschewing the use of force. The United States' reluctance to become involved during the initial stages of the Yugoslav crisis was the product of its focus on the breakup of the Soviet Union, its concern over its increasing military engagements,⁷ and the belief that the crisis could be resolved in a relatively quick fashion. As such, the United States felt that the United Nations and the European Union would project its sentiments that it would not allow the policies of ethnic cleansing to take place in Yugoslavia,⁸ and were capable of bringing peace to the region through whatever means necessary.⁹ This sentiment was consistent with United States' foreign policy that it would not continue to be the world's policeman. The United States was unwilling to "intervene and pay disproportionately to protect these principles when they seemed logically more salient in this case to her European allies."¹⁰ While in theory, such a policy of allowing those closest to the conflict to organize and intervene seems the best use of limited resources, in reality the international community was ill-equipped to take on such a task, as evidenced by the European Union's repeated mishandling of the crisis.

To leverage their capabilities and to minimize Germany's influence,

5. For a concise review of early European political efforts to resolve the crisis, see generally Stanley Hoffmann, *Yugoslavia: Implications for Europe and for European Institutions*, in *THE WORLD AND YUGOSLAVIA'S WARS 1* (Richard H. Ullman, ed., 1996); see also Sharp, *supra* note 4, at 34, 47 (discussing the less than competent response of the European Union to the Yugoslav crisis).

6. For a rare insight into the extent to which the approach of accommodation influenced by a perception of moral equivalence influenced the day-to-day operation of the E.U. Monitoring Mission and UNPROFOR, see generally BRENDAN O'SHEA, *CRISIS AT BIHAC: BOSNIA'S BLOODY BATTLEFIELD 1* (1998).

7. See Power, *supra* note 1, at 149 (examining the reasoning behind the United States' reluctance to become involved in Yugoslavia).

8. See Thomas Halverson, *Disengagement by Stealth: The Emerging Gap Between America's Rhetoric and the Reality of Future European Conflicts*, in *MILITARY INTERVENTION IN EUROPEAN CONFLICTS* 76, 90 (Lawrence Freedman ed., 1994) (discussing America's involvement at the initial stages of the Yugoslav conflict).

9. See *id.* (observing the United States' position regarding involvement in the Yugoslav crisis by the United Nations and European Union).

10. *Id.* at 91.

France and the United Kingdom brought the crisis within the purview of the United Nations. The United States readily consented to this approach as it initially desired to minimize its role in the peace process, while retaining the ability to exercise control over developments which might affect its national interest. Given the initial passivity of the Americans, the British and French were able to structure an approach framed by an arms embargo, which prevented the weaker parties from using force to protect their citizens, the imposition of limited economic sanctions to prod the aggressors, the deployment of lightly armed U.N. peacekeepers who represented an international presence, but who were generally prohibited from reporting on the atrocities they witnessed and who were insufficiently armed to protect the civilians in their areas of operation, a mediation initiative designed to mollify the aggressors, and a dual key requirement of NATO and U.N. approval for the use of force. The British¹¹ and French¹² were also able to deploy key commanders on the ground with instructions to carry out the central elements of what became the approach of coercive appeasement. The Secretary-General of the United Nations further entrenched the approach of coercive appeasement by narrowing the Security Council dictated mandate to the U.N. peacekeepers such that they were able to use force only in instances of their own self defense – and not to protect civilians from atrocities and crimes of genocide. This regime was then used successfully to blunt subsequent American efforts to change the approach from coercive appeasement to the legitimate use of force.¹³

This diplomatic deficit at the beginning of the Yugoslav conflict created

11. See generally JANE M. O. SHARP, *BANKRUPT IN THE BALKANS: BRITISH POLICY IN BOSNIA* 1 (1993); JANE SHARP, *HONEST BROKER OR PERFIDIOUS ALBION? – BRITISH POLICY IN FORMER YUGOSLAVIA* 1 (1997); MARK ALMOND, *EUROPE'S BACKYARD WAR: THE WAR IN THE BALKANS* 1 (1994); BRENDAN SIMMS, *UNFINEST HOUR: BRITAIN AND THE BOSNIAN WAR* 1 (2001).

12. For a review of French policy, see Olivier Lepick, *French Perspectives, in INTERNATIONAL PERSPECTIVES ON THE YUGOSLAV CONFLICT* 76 (Alex Danchev & Thomas Halverson eds., 1996). See generally DANIEL VERNET & JEAN-MARC GONIN, *GUERRE DANS LES BALKANS – LE MIROIR BRISÉ YOUGOSLAVE* 1 (1994); MARC BENDA & FRANCOIS CRÉMIEUX, *PARIS-BIHAC, LES TEMPS MODERNES* 1 (1995) (discussing an account by two French soldiers of the passivity of the French forces in the face of Serbian defiance); ALAIN FINKEILDRAUT, *THE CRIME OF BEING BORN* 1 (Graham McMaster trans., 1997); Jolyon Howorth, *The Debate in France over Military Intervention in Europe, in MILITARY INTERVENTION IN EUROPEAN CONFLICTS* 106 (Lawrence Freedman ed., 1994) (reviewing the debate in France concerning intervention in Bosnia).

13. For a candid interview with the Secretary-General concerning his preference for a negotiated outcome and his aversion to the use of force, see Georgie Anne Geyer, *How the Conscience of the West Was Lost, in THE CONCEIT OF INNOCENCE LOSING THE CONSCIENCE OF THE WEST IN THE WAR AGAINST BOSNIA* 107-08 (Stjepan G. Meštrović ed., 1997).

conditions ripe for the adoption of coercive appeasement as a policy approach. Rather than formulating a cohesive, long-term strategy for the resolution of the situation in Yugoslavia, the international community, with the E.U. and the U.N. at the forefront, reacted to the growing conflict on an ad hoc basis, whereby decision making was promulgated from a reactive rather than proactive stance. This created an environment that lacked any meaningful dialogue among the members of the international community, culminating in an inability to structure a coordinated diplomatic process for peace building. The consequences of this ad hoc approach to resolving the conflict resulted in an unintentional misuse of diplomatic signaling which Milosevic used to his advantage.

The misuse of diplomatic signaling began in 1991 when then U.S. Secretary of State James Baker visited Belgrade and warned of the "dangers of disintegration," urged that Yugoslavia maintain "territorial integrity," and stated that "the United States would not recognize unilateral declarations of independence."¹⁴ President Milosevic took this as a green light to use force to halt secession and to protect the Serbs living in Croatia and Slovenia. "What they read between the lines of the Baker visit," writes Ambassador Zimmermann, "was that the United States had no intention of stopping them by force."¹⁵

The effects of U.S. posturing were further exacerbated by the inconsistency by which the European Union dealt with Yugoslavia. By continually qualifying its statements and failing to project clear goals and a unified stance on the crisis, the E.U.'s actions may have contributed to the continued atrocities.¹⁶ According to one European commentator, "[t]he uncertainties that western policies created led each of the contending Yugoslav parties to believe that its actions would not be punished, but rather, that after a brief interval of time, they would be accepted and perhaps supported by the western governments."¹⁷ The European Union

14. LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION 150 (1996); Anthony Lewis, *War Crimes*, in THE BLACK BOOK OF BOSNIA: THE CONSEQUENCES OF BASIC APPEASEMENT 61 (Nader Mousavizadeh ed., 1996).

15. WARREN ZIMMERMANN, ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS DESTROYERS -- AMERICA'S LAST AMBASSADOR TELLS WHAT HAPPENED AND WHY 137 (1996).

16. See James Gow, *Nervous Bunnies: The International Community and the Yugoslav War of Dissolution, The Politics of Military Intervention in a Time of Change*, in MILITARY INTERVENTION IN EUROPEAN CONFLICTS 14, 22 (Lawrence Freedman ed., 1994) (stating that the actions of the European Union were ineffective because of its inability to portray a clear stance on the conflict).

17. Saadia Touval, *Lessons of Preventive Diplomacy in Yugoslavia*, in MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 407 (Chester Crocker, et al. eds., 1996) (discussing the tools utilized by the European Union to keep Yugoslavia together); see BOGDAN DENITCH, ETHNIC NATIONALISM: THE TRAGIC DEATH OF YUGOSLAVIA 7 (1994) ("Thus, all those who support the creation of

also failed to portray a clear stance on the fate of Yugoslavia. Throughout the crisis, the E.U. continually qualified its statements, adding more confusion as to its ultimate position. It insisted that Yugoslavia remain a unified state, while at the same time sympathized with the plight of those wishing to secede. The conflict within the E.U. regarding recognition, especially with regards to Germany's and Denmark's vocal support for an independent Croatia and Slovenia, also created confusion among the Yugoslav actors.

As explained by European historian Mark Almond, Europe was rife with national divisions and "remain[ed] bedeviled by national rivalries despite all the talk of common policies and a new united identity" and by a reliance on outdated political and historical perspectives.¹⁸ As a result,

The breakdown of Yugoslavia brought out deep-seated Anglo-French suspicions of Germany which were partly shared and partly played on by the Serbian regime. During this time, the British and French politicians revealed that in their heart of hearts they could not see Germany as anything other than a domineering and aggressive nation, thereby trapping them with an inherited vision of 'plucky little Serbia,' the ancient ally against the Boche.¹⁹

Instead of projecting clear goals and a well-defined stance on the crisis, the often conflicting messages portrayed by the E.U. only strengthened the resolve of the Croat, Slovenian, and Serb governments to push towards their individual ends.

Myopic Accommodation

Throughout this period, the E.U. and the U.N. held a perpetual international summit in Geneva to seek a negotiated resolution of the conflict.²⁰ In Geneva, recurrent efforts by the E.U. and U.N. mediators to broker a lasting cease-fire and a framework for peace met with little success.²¹ From 1991 to 1995 the U.N./E.U. peace conference proposed a series of peace plans for the de facto and de jure partition of Bosnia. Although occasionally a party would tentatively accept a plan as a tactical move to curry favor with the international community or to forestall international sanction, no proposed peace agreement was ever agreed to by the parties.

Throughout this time, the U.N./E.U. Co-Chairmen of the Peace

ethnic or national states, instead of states that will embrace all their citizens, support, consciously or unconsciously, policies of ethnic cleansing.").

18. ALMOND *supra* note 11, at xiii.

19. *Id.*

20. See SILBER & LITTLE, *supra* note 14, at 258.

21. On June 27, 1992, the European Community issued a declaration stating that while all parties were responsible for the continuing violence, the greatest share of responsibility for the crisis fell on the Serbian leadership and the JNA controlled by it. See Keesings, vol. 38, No. 6., p. 38943 (June 1992).

Conference squarely adopted the approach of accommodation, which quickly became one of appeasement. According to Ed Vulliamy, a journalist who followed the conflict for *The Guardian*,

The history of appeasement of the Serbs is the history of the entire war. There were countless moments when the Serbs were told not to cross a line, and that they faced dire consequences if they did; and every time the bluff was called, the West climbed down, and the handshakes resumed. Some of the Serbs' more infamous 'last chances' may be briefly recalled: the fall of Jajce in 1992; the revelations of systematic mass rape in December; successive water- and bread-queue massacres in Sarajevo; the shelling of orphanages and hospitals; the first debacle at Srebrenica and the farcical establishment of the 'safe havens' that came out of it; the Serbs' pretense of accepting the Vance-Owen plan; two bloody crises in Bihac and two even bloodier ones in Gorazde.²²

In response to growing public criticism, the E.U. Council of Foreign Ministers during the London Conference adopted the principle that it would not propose peace plans which ratified the gains of ethnic cleansing. The United States endorsed the same view.²³ Despite numerous similar public commitments, the Co-Chairmen of the peace process admittedly put forward proposals which legitimized territorial conquest involving ethnic cleansing and genocide. In fact, one of the Co-Chairmen, David Owen, expressly notes in his memoirs how he was irritated by the Dutch Foreign Minister's objection to a peace plan because it rewarded ethnic cleansing, but chose not to make an issue of it because it could be dismissed as purely moralistic and because he "personally liked" the Dutch representative.²⁴

Despite the myopic focus on accommodating the interests of Slobodan Milosevic, the U.N./E.U. peace process did not produce peace, and in fact actually encouraged the parties to commit ethnic cleansing and continue the conflict.²⁵ The most notable example of this was when the U.N./E.U. proposed the Vance-Owen Peace Plan, which divided Bosnia into ethnic cantons, the Serb and Croat parties began to ethnically cleanse those cantons to which they had been assigned authority.²⁶ In fact, the U.N./E.U.

22. ED VULLIAMY, *BOSNIA: THE CRIME OF APPEASEMENT* 80 (1998).

23. *See generally* Assistant Secretary of State John R. Bolton, Remarks at the U.N. Human Rights Commission Session on the Situation in the Former Yugoslavia (Aug. 13, 1993), *available at* <http://foia.state.gov/Documents/foiadocs/2af8.PDF>.

24. DAVID OWEN, *BALKAN ODYSSEY* 236 (1995).

25. For a comprehensive assessment of the effect of these proposals, see generally LEE BRYANT, *THE BETRAYAL OF BOSNIA* (1993). For a review of the numerous proposals for the territorial division of Bosnia, see generally MLADEN KLEMEN, *TERRITORIAL PROPOSALS FOR THE SETTLEMENT OF THE WAR IN BOSNIA-HERCEGOVINA* (1994).

26. For a pointed critique of the Vance-Owen peace plan, see generally RENE

accommodation approach permissively led to the commission of so many atrocities that even the U.N. Special Rapporteur for Human Rights Abuses in the Former Yugoslavia, Tadeusz Mazowiecki, felt obliged to resign in July 1995, charging that the failure of the U.N. and the international community to make any serious effort to stop atrocities in Bosnia made it impossible for him to continue.²⁷

Moral Duplicity

While the Europeans relied upon moral duplicity as a means for justifying its accommodation of Serbian interests, the United States relied upon moral duplicity as a means for justifying its continued disengagement from the conflict. These justifications resulted in the adoption of a number of platitudes utilized by the Americans and Europeans to defend their actions, including statements that the war was caused by the bubbling over of "ancient ethnic hatreds," that all the parties were in effect "warring factions" equally responsible for the commission of atrocities, that the conflict was a "civil war" not involving Serbia, and that the Bosnian government was prone to killing its own civilians in order to garner international sympathy and intervention. In particular, E.U. negotiator David Owen readily adopted the notion of warring factions equally responsible for atrocities as it promoted his objective of a negotiated settlement of the conflict without the complicated involvement of the norm of justice. Similarly, Secretary of State Warren Christopher adopted Milosevic's notion of ancient ethnic hatreds along with the notion of warring factions²⁸ to create the

LUKIC, THE WARS OF SOUTH SLAVIC SUCCESSION YUGOSLAVIA 1991-1993 1 (1993).

27. See Balkan Action Council, *Balkan Watch Week in Review*, July 17-23, Vol. 2.28 at <http://www.bosnet.org/archive/bosnet.w3archive/9507/msg00398.html>.

28. See, e.g., Secretary of State Warren Christopher, *New Steps Toward Conflict Resolution in the Former Yugoslavia* (Opening Statement at News Conference Feb. 10, 1993). Secretary Christopher proclaimed,

[t]hose circumstances have deep roots. The death of [Yugoslav] President Tito and the end of communist domination of the former Yugoslavia raised the lid on the cauldron of ancient ethnic hatreds. This is a land where at least three religions and a half-dozen ethnic groups have vied across the centuries. It was the birthplace of World War I. It has long been a cradle of European conflict, [and] it remains so today.

Id. See also Remarks by Secretary of State Warren Christopher at the Conference on Security and Cooperation in Europe, (Plenary Session Nov. 30, 1993):

[w]e call upon all warring parties to stop their unconscionable conduct that blocks the delivery of critically needed supplies through [Tuzla airport]. We also call upon the warring parties to live up to their recently signed agreements to permit secure land access for relief convoys. The warring parties must see that this is in their best interests. Full access will serve the vital needs of all Bosnia's factions.

Id. See also Presidential Exchange with Reporters, 1 PUB PAPERS 122 (Jan. 24, 1994) (adopting the notions of warring factions and civil war). President Clinton declared that "the killing is a function of a political fight between three factions. Until they

impression that the conflict was inevitable and that the American government could therefore not be faulted for failing to prevent the conflict or the continuing atrocities.²⁹ And the propensity for UNPROFOR Commander General Janvier to “believe Serb propaganda” according to his aides was in part responsible for his rejection of Close Air Support to defend the U.N.-declared safe area of Srebrenica, and the subsequent massacre of 7,000 civilians.³⁰ Not all those involved in seeking a resolution of the conflict fell victim to Milosevic’s propaganda ploys, as illustrated by General Clark’s assessment that “[a]bove all, I recognized that fundamentally, quarrels in the region were not really about age old religious differences but rather the result of many unscrupulous and manipulative leaders seeking their own power and wealth at the expense of ordinary people in their countries.”³¹

Beginning in 1992, the United States publicly disavowed the fact that atrocities were taking place in Yugoslavia as a strategy for waylaying growing public concern and to relieve the moral imperative for US involvement. To further this end, President Bill Clinton permitted Secretary Christopher to embark on a public campaign of declaring that all sides were responsible for the atrocities and that the conflict did not amount to attempted genocide against the people of Bosnia.

An illustration of this approach can be found in Secretary Christopher’s May 18, 1993 testimony before the House Foreign Affairs Committee. In response to pressing questions from Congressman Frank McCloskey, Christopher refused to acknowledge that the Serbian forces were committing genocide in Bosnia, asserting instead that “all sides” were responsible for the atrocities there -- thus removing the imperative for action.³² In fact, according to the

agree to quit doing it, it’s going to continue. I don’t think that the international community has the capacity to stop people within the nation from their civil war until they decide to do it.” *Id.*

29. See Geyer, *supra* note 13, at 91.

30. See DAVID ROHDE, *ENDGAME THE BETRAYAL AND FALL OF SREBRENICA, EUROPE’S WORST MASSACRE SINCE WORLD WAR II* 367 (1997). According to Mr. Rohde,

[a] key element in Janvier’s thinking was an apparent belief that he could do business with the Bosnian Serbs. Janvier may have turned down the crucial request for Close Air Support on the night before the town fell because he sincerely believed General Tolimir’s promise the Serb attack had stopped. Janvier was quick to believe Serb propaganda and Mladic’s complaints about Muslim provocations, according to aides. Janvier argued in the 9 June meeting in Split that the Serbs would no longer defy the U.N. if they were treated with respect.

Id.

31. WESLEY K. CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT* 68 (2001).

32. See Editorial, *Foreign Policy Focus*, CHRISTIAN SCIENCE MONITOR, May 26, 1993, at 18; see also Saul Friedman, *Christopher Assailed Official: U.S. Downplayed Bosnia Genocide*, NEWSDAY, Feb. 4, 1994, at 4 (describing the continued obfuscation

former Yugoslav desk officer, Richard Johnson, the evening before his testimony, Secretary Christopher's office "sought urgent information from the [State Department's] Human Rights Bureau on Bosnian Muslim atrocities only," and during the testimony "insinuat[ed] that Bosnian Muslims [were] suspected of genocide themselves."³³ Presumably, in the mind of Christopher, if all parties were equally culpable then the Clinton administration would not be morally at fault for failing to take adequate action to stop the atrocities.³⁴

Secretary Christopher's testimony was remarkable in that five months earlier, on January 11, 1993, a classified memorandum was prepared by the State Department's bureau of Intelligence and Research, the first sentence of which read, "[o]ver the past year Bosnian Serbs have engaged in a range of deliberate actions contributing to the attempted genocide of Bosnian Muslims."³⁵ The memorandum further stated that the Bureau of Intelligence and Research "believes there is substantial evidence indicating that Bosnian Serb efforts to eliminate Bosnian Muslim communities have been widespread, systematically planned, and ruthlessly implemented," and that "the results of well-organized genocidal activities are evident throughout Bosnia."³⁶ The memorandum also directly implicated the political leadership of Serbia in the planning and conducting of the campaign of attempted genocide.³⁷

Secretary Christopher's testimony was all the more detrimental to the peace process as it lent important credibility to the war rhetoric of Radovan Karadzic. For instance, in March 1993, two months before his testimony, a classified Department of State cable from Belgrade argued that unconfirmed

of the genocide issue by the Department of State).

33. Richard Johnson, *The Pinstripe Approach to Genocide*, in *THE CONCEIT OF INNOCENCE: LOSING THE CONSCIENCE OF THE WEST IN THE WAR AGAINST BOSNIA* 72, n. 13 (Stjepan G. Mestovic ed., 1997).

34. See Geyer, *supra* note 13, at 89 (noting that the position of moral equivalence adopted by the British government served the position that "everybody's guilty, so we're not guilty for doing nothing").

35. Information Memorandum Regarding Yugoslavia, *Bosnia: Actions Contributing to Genocide*, DEP'T ST. DECLASSIFIED DOC. (Jan. 11, 1993), at <http://www.foia.state.gov/Documents/foiadocs.PDF> [hereinafter Information Memorandum]. For a well documented account of the early stages of the campaign of genocide in Bosnia and the origins of this policy in the political and academic institutions of Serbia, see NORMAN CIGAR, *GENOCIDE IN BOSNIA: THE POLICY OF 'ETHNIC CLEANSING'* 48-61 (1995). For more information on the role of religion and myth in the Serbian nationalist movement, see MICHAEL SELLS, *THE BRIDGE BETRAYED: RELIGION AND GENOCIDE IN BOSNIA* ch. 2 (1996).

36. Information Memorandum, *supra* note 35.

37. See *id.* Secretary Christopher subsequently undertook similar efforts to downplay the genocidal nature of crimes being committed in Rwanda despite assessments from the Office of the Legal Advisor and the Bureau of Intelligence and Research finding that genocide was in fact occurring in Rwanda. See Neil A. Lewis, *Papers Show U.S. Knew of Genocide in Rwanda*, N.Y. TIMES, Aug. 22, 2001, at A5.

accounts of atrocities against Serbs “have been widely publicized and embellished as part of a propaganda campaign in support of Serbian war aims in Eastern Bosnia,”³⁸ which were characterized by crimes of genocide. The cable then pointed out that Radovan Karadzic himself was using the “all sides are responsible” argument to justify the Serbian offensive against Srebrenica.

The element of moral duplicity was also embraced when the peace-builders sought to politically legitimize those responsible for atrocities in order to secure their participation in the peace process. For instance, David Owen repeatedly legitimized Radovan Karadzic by embracing him as a legitimate partner in peace during the Geneva negotiations, and lauding him as a “gracious host,” with “excellent English,” while failing to mention his clear culpability for attempted genocide. It was only when Judge Richard Goldstone, the Yugoslav Prosecutor for the International Tribunal, indicted Karadzic for genocide that he was effectively delegitimized. Similarly, Ambassador Richard Holbrooke’s now famous quote just before the negotiation of the Dayton Accords, in which he stated that “you can’t make peace without President Milosevic,”³⁹ re-established Milosevic as a legitimate partner in peace despite his orchestration of genocide against non-Serbs. Slobodan Milosevic (subsequently indicted for genocide) was also characterized by Secretary Christopher as “though unscrupulous and suspected of war crimes, Milosevic has a rough charm and he appealed to some Western European leaders as a bulwark against an Islamic tide.”⁴⁰ Most damaging was the legitimization of war criminals by those who were sent to protect civilians from atrocities. For instance, one British Army officer characterized General Mladic (also subsequently indicted for genocide) in the following terms, “he has presence, and when he had power he wielded it ruthlessly. That brought him some grudging respect, if not admiration.”⁴¹

Constrained Force

After fighting broke out in Slovenia and Croatia in 1991, Belgrade requested that the Security Council impose an arms embargo on Yugoslavia

38. Information Memorandum Regarding Yugoslavia, *American Embassy in Belgrade Dispatch to Secretary of State*, DEP’T ST. DECLASSIFIED DOC. (Mar. 1993), at <http://www.foia.state.gov/documents/foiadocs/54ec.PDF>.

39. Jurek Martin, *Holbrooke Sees "Tough Slog" to Peace in Bosnia*, FIN. TIMES, Nov. 2, 1995, at 3.

40. WARREN CHRISTOPHER, IN THE STREAM OF HISTORY: SHAPING FOREIGN POLICY FOR A NEW ERA 352 (1998).

41. Unnamed British UNPROFOR officer, REUTERS, Nov. 10, 1996. See CLARK, *supra* note 31, at 40 (“[Mladic] carried a reputation among the U.N. forces for cunning and forcefulness, I found him coarse and boastful. He knows far less than he thought about NATO, airpower, and the capabilities of the United States.”).

to prevent an escalation of the conflict.⁴² Initially, such a measure was consistent with the dictates of international law due to the fact that Milosevic's brutality and the unknown nature of the conflict itself had yet to be realized. However, once the methods employed by Milosevic's forces were being executed against the Bosnian Muslim populace, the Security Council refused to reassess its earlier position and reaffirmed that its arms embargo would continue to apply to all parts of the former Yugoslavia, "any decisions on the question of the recognition of the independence of certain republics notwithstanding."⁴³ The only state truly affected by the arms embargo was Bosnia, which was left with no means to defend itself, while Serbia had all it needed in terms of military equipment and supplies. President Clinton had campaigned on a pledge to lift the arms embargo on Bosnia, but backed down under pressure from the United Kingdom and Russia.

Despite the failure of the Geneva talks to produce a peace agreement or even a lasting cease-fire, the negotiators did manage to obtain permission from the conflicting parties to send in UNPROFOR to secure the Sarajevo airport in order to open a humanitarian aid pipeline into the besieged city, an important concession given that the main thrust of early Security Council action in Bosnia was to provide humanitarian aid. UNPROFOR, however, proved unable to keep the pipeline open on a sustained basis due to frequent attacks on aircraft bringing in humanitarian aid.

In response to frequent Serb attacks on United Nations humanitarian aid convoys, on August 13, 1992, the Security Council adopted Resolution 770, which authorized governments to take "all measures necessary" to ensure the safe delivery of relief aid in Bosnia. This was the same formula contained in Resolution 678, authorizing the use of massive military force to expel Iraq from Kuwait. International expectations were high for a corresponding response in Bosnia. But, unlike Resolution 678, Resolution 770 led to no military intervention. There was no attempt to launch air strikes and no plan to send in coalition forces. As U.S. Secretary of State Lawrence Eagleburger explained two weeks after the adoption of the resolution, such action would not be stomached on either side of the Atlantic.⁴⁴

The Security Council soon found itself faced with a new challenge when Bosnian Serb aircraft began to attack civilian targets.⁴⁵ The Bosnians, who had

42. See S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., at 42-43, U.N. Doc. S/RES/TB (1991).

43. S.C. Res. 727, U.N. SCOR, 47th Sess., 3023 mtg., at 7, U.N. Doc. S/RES/727 (1992).

44. See John M. Goshko, *Eagleburger Debuts on the Balkan Crisis Acting Secretary Gives Major Credit for Pact*, WASH. POST, Aug. 29, 1992, at A15.

45. In 1992, the European Community issued a declaration stating that while all

no air force, were extremely vulnerable to such “ethnic cleansing by air” and the casualties quickly mounted. In response, on October 9, 1992, the Security Council adopted Resolution 781, which imposed a “no-fly zone” over Bosnia. At the urging of the British and French, the clause providing for enforcement of the no-fly zone was omitted from the Resolution. Instead, the Resolution called only for monitors to report on violations. During the next six months, there were over 465 documented violations of the no-fly zone.⁴⁶ Yet it was not until March 31, 1993, that the Security Council adopted Resolution 816, authorizing NATO to enforce the no-fly zone, and it was not until over a year later on February 8, 1994, that NATO would finally take action to shoot down Serb aircraft violating the ban.⁴⁷

By far the most controversial of all of the acts of constrained force taken by the Security Council was the creation of and subsequent failure to defend so-called “safe areas” in response to the sustained Serb attacks on the Bosnian population centers at the beginning of 1993. The attacks in the eastern Bosnian town of Srebrenica were particularly ruthless in the spring of 1993 and the city was on the brink of collapse by the beginning of April.⁴⁸ On April 16, the Security Council adopted Resolution 819, which demanded that all parties treat the city as a “safe area” free from armed attack. A week later, the Council adopted Resolution 824, designating the predominantly Bosnian cities of Sarajevo, Tuzla, Zepa, Gorazde, and Bihac as additional safe areas. As a *quid pro quo* for the withdrawal of Serb forces, UNPROFOR was assigned the task of overseeing the demilitarization of the safe areas. Yet the Council provided no real enforcement component to the safe area concept. While the UNPROFOR commander indicated that it would take 35,000 troops to protect the safe areas, the Security Council authorized only a 7,500-troop reinforcement to accomplish the mandate. When the Serbs attacked the safe areas, the UNPROFOR forces retreated, and thousands of defenseless civilians were massacred and carted off to mass graves in the nearby countryside.⁴⁹

parties were responsible for the crisis, the greatest share of responsibility for the crisis fell on the Serbian leadership and the JNA controlled by it. *See* Keesings, *supra* note 21.

46. *See* The United Nations and the Situation in the Former Yugoslavia, U.N. DEPT. OF PUBLIC INFO 13 (1993).

47. *See* OWEN, *supra* note 24, at 355.

48. *See generally* ROHDE, *supra* note 30; CHUCK SUDETIC, BLOOD AND VENGEANCE: ONE FAMILY’S STORY OF THE WAR IN BOSNIA 1 (1998) (providing compelling accounts of the Srebrenica massacre and the passive role of the international community).

49. *See generally* LAURENCE DE BARROS-DUCHÊNE, SREBRENICA: HISTOIRE D'UN CRIME INTERNATIONAL 1 (1996); JAN WILLEM HONIG & NORBERT BOTH, SREBRENICA: RECORD OF A WAR CRIME 1 (1996); BOB VAN LAERGOVEN, SREBRENICA: GETUIGEN VAN EEN MASSAMOORD 1 (1996); ROHDE, *supra* note 30; ERIC STOVER & GILLES PERESS, THE GRAVES: SREBRENICA AND VUKOVAR 1 (1998); Report to the Secretary General

"Historians will show," wrote the editors of *The New Republic* shortly after the Srebrenica massacre, "that the most important allies of the Bosnian Serbs have been the peacekeeping forces of the United Nations."⁵⁰

From 1991-1995, the primary rationale for a preference of accommodation over the use of force was that if the international community employed air strikes against the Bosnian Serb forces, the Yugoslav Army would enter the war in support of the Bosnian Serb army. Although this view was publicly stated by the primary peace negotiators, a then classified Department of State cable unequivocally reported on February 17, 1994 that, in light of the February 9, 1994 NATO ultimatum threatening air strikes, "there is, so far, no indication that the Yugoslav Army is planning to initiate a general mobilization in Serbia either in anticipation of or reaction to NATO air strikes."⁵¹ In fact, the cable reported that in light of the perceived seriousness of the threat and the perception of western resolve, the Bosnian Serbs would comply with the NATO demand after a period of brinkmanship.⁵²

As confirmed by a complex time-series statistical analysis conducted by political scientists Joshua Goldstein and Jon Pevehouse, the threat or actual use of force by NATO produced compliance and cooperation by Serbian forces. The research further demonstrated that "Serb forces were more responsive to American actions than European ones."⁵³ According to the authors, "the results thus support the assumptions of the aggressor-victim school of thought that the international use of force could induce Serbian cooperation in this regional conflict."⁵⁴ Importantly, the authors also note, "[b]y contrast, the warring-factions school of thought, with its preferred policy of using international cooperation to elicit Serbian cooperation toward Bosnia, receives little support."⁵⁵

Marginalization of Justice

During this time, the primary actors sought to marginalize any role for

pursuant to General Assembly resolution 53/35, the Fall of Srebrenica.

50. Lewis, *supra* note 14, at 175.

51. Information Memorandum Regarding Yugoslavia, *Belgrade Press Focused on UN Investigation of Sarajevo Massacre, Mladic*, DEP'T ST. DECLASSIFIED DOC. (Feb. 17, 1994), at <http://www.foia.state.gov/documents/foiadocs/5557.pdf>.

52. *See id.*

53. Joshua S. Goldstein & John C. Pevehouse, *Reciprocity, Bullying, and International Cooperation: Time-Series Analysis of the Bosnia Conflict*, 91 AM. POL. SCI. REV. 515, 527 (1997).

54. *Id.*

55. *Id.*

justice on the basis that it would inhibit their efforts to attain peace.⁵⁶ As explained by an anonymous U.N. official, the quest for “justice and retribution” is traditionally believed to hamper the search for peace, which in turn prolongs the conflict, enables the continuation of atrocities, and increases human suffering. The U.N. official also asserted that the intrusion of fact-finding missions seeking to investigate crimes committed by one side may complicate the task of peace negotiations to the point where they become prolonged or impossible.⁵⁷ According to Payam Akhvan of the Office of the Prosecutor of the Tribunal,

From its very inception in 1993, the International Criminal Tribunal for the former Yugoslavia was surrounded by the so-called ‘peace versus accountability’ controversy It was argued that indicting political and military leaders such as Radovan Karadzic and Ratko Mladic would undermine the prospects of a peace settlement because they were indispensable to on-going negotiations, and because they would have no incentive to put an end to the fighting without assurances of immunity or amnesty.⁵⁸

In fact, during his tenure as Co-Chairman of the Yugoslav Peace Conference, David Owen expressly opposed the prosecution of Serbian officials engaged in the peace negotiations on the basis that this would undermine his efforts to craft a settlement.⁵⁹

Even after the massacres in Srebrenica and the clear pattern of genocide, policy makers doubted the compatibility of justice and accommodation. As noted by Richard Goldstone, the Yugoslav Prosecutor for the Tribunal, “[p]articularly at the time of the negotiations at Dayton, Ohio, in September 1995, there were many astute politicians and political commentators who suggested that, in fact, peace and justice were in opposition, and that the work of the Yugoslav Tribunal was retarding the peace process in the Balkans.”⁶⁰ Some commentators even noted that because Radovan Karadzic's alleged approval rating among Bosnian Serbs was seventy-nine percent, any NATO efforts to capture him would undermine the im-

56. See Jean E. Manas, *The Impossible Trade-off: “Peace” versus “Justice” in Settling Yugoslavia’s War*, in *THE WORLD AND YUGOSLAVIA’S WARS* 42 (Richard H. Ullman ed., 1996).

57. See Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 255-56 (1996).

58. Payam Akhvan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737, 738 (1998).

59. See Laurie A. Cohen, Comment, *Application of the Realist and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia*, 2 UCLA J. INT’L L. & FOREIGN AFF. 113, 154 (citing Mirko Klarin, *The Moral Case for a War Crimes Tribunal*, WALL ST. J. EUROPE, Mar. 17, 1994, at 8).

60. Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT’L L. & POL. 485, 488 (1996).

plementation of the Dayton Peace Accord and foster the Serbian people's belief that they were subject to perpetual injustice and persecution.⁶¹ Goldstone rightly expressed surprise at this view, especially in light of the atrocities, which had been committed over four years, and the clear view of the Security Council when it established the Tribunal in May 1993.⁶²

The initial decision to create the Yugoslav Tribunal was borne less out of a conscious decision to shift from the approach of appeasement to one of justice, but was in fact the result of increasing and intense public pressure to take some action to stop the atrocities in Croatia and Bosnia. By the middle of 1993, the Americans and Europeans had tried every other approach, including mediation, the deployment of UNPROFOR, economic inducements and economic sanctions as a means to de-escalate the conflict. As the peacebuilders remained unwilling to use substantial force, the creation of a Tribunal presented itself as the only remaining approach not taken.

The full story of the establishment of the Yugoslav War Crimes Commission in October 1992, and the Yugoslav War Crimes Tribunal seven months later, suggests that the members of the Security Council embraced the norm of justice mainly as a public relations device, while giving breathing room for the other approaches to peace building to succeed.⁶³ There was little expectation that the approach of accountability would succeed where the other approaches had failed. Indeed, some of the members of the Security Council saw the various approaches as fundamentally incompatible, and would work behind the scenes to undermine the Tribunal. Other members saw the Tribunal as useful for isolating offending leaders and marshaling support for more aggressive responses.

B. Consequences of Coercive Appeasement and a Temporary Course Correction

With the green light from the Americans and Europeans and the increasing support of the Russians, Milosevic and his forces were able to capture and ethnically cleanse 30% of Croatia and 70% of Bosnia early in the con-

61. See Charles G. Boyd, *Making Bosnia Work*, FOREIGN AFF. Jan.-Feb. 1998, at 50, 51.

62. See Goldstone, *supra* note 60, at 488; see also Floyd Abrams & Diane F. Orentlicher, *In Cambodia, as in Bosnia, Issue Is Punish or Pardon*, L.A. TIMES, Sept. 15, 1996, at 1M.

63. For a more detailed argument of the hypothesis that the Tribunal was established in part to relieve pressure to take more direct action to prevent atrocities, see generally ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE (1998).

flict. By the time of the Dayton negotiations, less than 1% of Bosnia's pre-war Muslim population remained in the territory controlled by Milosevic's forces. To encourage the non-Serbs to flee Serbian controlled territory, Milosevic's forces established rape and torture camps, laid siege to and shelled towns and villages, and massacred large numbers of unarmed civilians.⁶⁴

Milosevic's plans only became seriously threatened when his protégés, Radovan Karadzic and Ratko Mladic, failed to heed his instructions for moderation in the commission of atrocities and intensified their siege of Sarajevo and massacred over 7,000 unarmed civilians in Srebrenica in the summer of 1995. While these atrocities highlighted the continued failure of the European led efforts to quell the growing public perception of a weak and ineffectual international effort, they also presented an opportunity for greater U.S. involvement in the Yugoslav conflict. Given the heretofore ineffectiveness of the Europeans, NATO credibility was seriously eroded, forcing the United States to demand an increased role in the Yugoslav peace process. Congressional involvement in the foreign affairs prerogative of President Bill Clinton and increasing calls for action by the public represented a crucial juncture in the process and a turning point in the peace process. As a result of the massacres and active United States involvement, the international community was forced to take action in the form of limited air strikes. Milosevic's forces responded by seizing U.N. peacekeepers as hostages and chaining them to potential targets. After negotiating their release and redeploying UNPROFOR, the United States persuaded its allies to accept a more sustained bombardment of Bosnian Serb targets.

This action signaled to Milosevic the heightened willingness of the international community to resort to the use of force, compelling Milosevic to change his strategy. Ever cognizant of the fact that the actions of the

64. See CIGAR, *supra* note 35, at 56-57; see generally ZLATKO DIZDAREVIC, SARAJEVO - A WAR JOURNAL 1 (1993) (describing the siege of Sarajevo); JANINE DI GIOVANNI, THE QUICK AND THE DEAD: UNDER SIEGE IN SARAJEVO 1 (1994); ADRIANO SOFRI, LO SPECCHIO DI SARAJEVO 66 (1997). For additional information on the extent and nature of atrocities committed in the Yugoslav conflict, see generally VAHIDA DEMIROVIC, VISAGES FROM THE WASTELAND: A COLLECTION OF TRUE WAR STORIES FROM BOSNIA 1 (1999); LAURENCE DE BARROS-DUCHÊNE, SREBRENICA: HISTOIRE D'UN CRIME INTERNATIONAL 1 (1996); ILSE BAUMGARTNER & WOLFGANG BAUMGARTNER, DER BALKAN-KRIEG DER 90ER 1 (1997); CLAIRE BOULANGER, ET AL., L'ENFER YUGOSLAVE: LES VICTIMES DE LA GUERRE TÉMOIGNENT 1 (1994); THE GOLDEN APPLE: WAR AND DEMOCRACY IN CROATIA AND BOSNIA 1 (Nick Ceh & Jeff Harder eds., 1996); SMAIL C KIC, THE AGGRESSION ON BOSNIA AND GENOCIDE AGAINST BOSNIACS: 1991-1993 1 (1995); FRANCOIS CHASLIN, UNE HAINE MONUMENTALE: ESSAI SUR LA DESTRUCTION DES VILLES EN EX-YOUGOSLAVIE 1 (1997); BOŽICA ERCEGOVAC-JAMBROVIC, GENOCIDE: ETHNIC CLEANSING IN NORTH-WESTERN BOSNIA 1 (1993).

Bosnian Serb army was jeopardizing his reputation with the West⁶⁵ and threatening his tenuous hold on power, Milosevic abandoned his Greater Serbia idea⁶⁶ and began to distance himself from Karadzic and Mladic in the hopes of regaining favor with the international community.⁶⁷ This demonstrated willingness to use force, coupled with a Bosnian-Croat offensive that had freed the Krajina region of Croatia and approximately twenty percent of Bosnia from Serb control (and which was poised to re-take most of the western Bosnia territory held by the Serbian forces) provided the turning point in the Yugoslav conflict, with Milosevic realizing the necessity for consolidating his gains through negotiations.⁶⁸ This shift-

65. Information Memorandum Regarding Yugoslavia, *Codel Hall Tells Pale Leadership It Should Improve Humanitarian Access*, DEP'T ST. DECLASSIFIED DOC. (July 31, 1995), at <http://foia.state.gov/Documents/foiadocs/2af8.PDF> [hereinafter *Declassified Documents, Hall Memorandum*]. The declassified document noted that "[Congressman] Hall urged Jovanovic to 'show the world that the Serbs had hearts and were not monsters.'" *Id.* He went on to state that "Serbian President Milosevic could play a major role in changing the brutal behavior of the Bosnian Serbs." *Id.*

66. See Mihailo Markovic Interview, *NIN*, Feb. 24, 1995. Mr. Markovic observed that

[o]ne Serbian perspective (Milosevic's) thus clashed with another (Karadzic's), while a third (the Krajina Serbs) went along with Milosevic down the road towards a progressive normalization of relations with Croatia. (A comprehensive cease-fire between the Krajina Serbs and Croatia was agreed in March 1994, followed by the re-establishment of certain economic relations in December 1994.) The interface between the three in all directions is complex and makes the search for a solution extremely complicated. To simplify, Milosevic and others originally launched/provoked the 'trans-Drina' Serbs into their 'independence adventure'. Since then Milosevic has attempted to reverse the process, abandoning the project of a 'Greater Serbia' — which was always more of an instrumental goal, to help him to retain power, though many of his nationalist confederates may have seen it differently.

Id.

67. See *Declassified Documents, Hall Memorandum*, *supra* note 65. The document stated that "[name withheld] told us that there was a lack of command and control at every level in the Serbian/Bosnian Serbian relationship. [Name withheld] was convinced that Milosevic wanted desperately to avoid direct conflict with NATO and was twisting Karadzic's arm in order to force compliance with the February 9 decision. Milosevic was pressuring the Bosnian Serbs in 'every way he could' to withdraw their heavy weapons or place them under UN control." *Id.* "A journalist for the semi-independent Belgrade daily Borba told us that Milosevic's efforts to project an image of normality and create distance between himself and the Bosnian Serbs, has succeeded in keeping most Belgraders relatively blasé about the possibility of air strikes on Bosnian Serb positions." *Id.*

68. See International Crisis Group, *Serbia - The Milosevic Factor*, at <http://www.crisisweb.org/projects/sbalkans/reports/yu01rep.htm> (last visited Feb. 23, 2002) ("Milosevic has radically altered his professed beliefs and loyalties and abandoned his strategies on several occasions. Once again, the common denominator lying

ing of alliances would guarantee the international community's compliance with his demands throughout the Dayton negotiations, thereby ensuring his continued place as the leader of the now defunct Yugoslavia.⁶⁹

Another turning point in the conflict was the Bosnian government's absolute rejection of continued European leadership. This rejection enabled the United States to assume the leadership role in the Yugoslav peace process, and to initiate a new round of mediation. Importantly, this change in leadership provided a momentary opportunity for the international community to discard the failed coercive appeasement approach and to adopt a more decisive and coherent strategy for resolving the conflict.

Several factors contributed to the decline of coercive appeasement and the reinvigorated international effort in the summer of 1995. These include: the July massacre of over 7,000 civilians in Srebrenica; the displacement of the European architects of coercive appeasement by the U.S., which assumed the mantle of chief negotiator; the demonstrated effectiveness of air strikes after the August Sarajevo market place massacre, which confirmed the applicability and utility of the use of force; the success of the Bosnian-Croat offensive, which validated the approach of lift and strike; and the growing dependence of Russia on international political and financial assistance, which moderated its negative influence on the peace process.

Unfortunately, rather than capitalizing on Milosevic's weakened position and its new found leadership role by employing the use of force to defeat Milosevic and his protégées, the United States opted to continue the approach of coercive appeasement in the hopes of reaching a quick settlement and pressured all parties to commit to the Dayton negotiations. Had the former approach been adopted, it is likely the gains of ethnic cleansing in Bosnia could have been reversed, the war in Kosovo avoided, and possibly the democratic transformation in Serbia accelerated. What ensued, however, was a U.S. peace initiative encompassing a summer of shuttle diplomacy and preliminary negotiations in Geneva and New York, culminating in a three-week negotiation at the Wright-Patterson Air Base in Dayton, Ohio. To create parity among the parties, the U.S. actively undermined the effectiveness of the Bosnian-Croat offensive by telling each

beneath each of these shifts has been a hunger for power or an acute fear of losing it.”).

69. *See id.* (noting that “[a]fter the international community accepted Milosevic as a ‘peacemaker’ at the Dayton talks, the Serbian leader immediately began exploiting his new-found international prestige to shore up his political position at home”); *see also* Press Conference, Special Representative Robert S. Gelbard, U.S. Department of State (Feb. 23, 1998) *available at* http://www.state.gov/www/policyremarks-/1998/980223_gelbard.html (holding Milosevic out as a partner in peace). “Milosevic played such an important role in reaching the Dayton Agreement . . . we have been particularly encouraged by the support we received from . . . Milosevic.” *Id.*

party they could not trust the other, and by intentionally misrepresenting to the Bosnian and Croatian governments that the Bosnian Serbs were preparing a counter-offensive which would likely roll back their recent gains.

THE DAYTON NEGOTIATIONS: SAVING FACE WHILE
INSTITUTIONALIZING COERCIVE APPEASEMENT

In November 1995, the parties to the Yugoslav conflict, including Milosevic, President Franjo Tudjman of Croatia, and President Alija Izetbegovic of Bosnia, and representatives of the Contact Group (which consisted of the United States, France, Germany, Russia and the United Kingdom) gathered in Dayton, Ohio to negotiate a series of accords designed to bring about the end to the war and the peaceful re-integration of Bosnia. Given the calculated effort to legitimize Milosevic as a reliable partner in peace, seasoned journalist David Rieff observed that the only issue for Dayton negotiators was to determine how unjust the agreement between those who instigated the genocide and those who were its intended victims would turn out to be.⁷⁰

A. Changing Horses, but Continuing on the Path of Coercive
Appeasement

Despite the success of the air campaign and the successful Croat/Bosnian ground offensive, the United States, like the Europeans before them, calculated that it was necessary to “get to yes” with war criminals, and that the only means for doing so would be to re-deploy the approach of coercive appeasement. Thus, during the Dayton negotiations, the U.S., accompanied by its European allies, continued to actively pursue the approach of coercive appeasement, and relied upon many of the core elements that had played a central role in the earlier efforts to resolve the Yugoslav crisis with disastrous consequences.

The ultimate goal of any peace process is the attainment of a durable, lasting peace. To achieve this, it is usually necessary for the negotiators to bargain with the parties to the dispute in order to reach a compromise settlement. However, this type of negotiation in situations where one party is clearly the aggressor and the other is a devastated victim often lends itself to the approach of coercive appeasement.

In fact, some commentators might even contend that negotiations by their very nature undermine the real chances for peace. As noted by Helen Fein, “whereas intervention is required against acts already deemed crimi-

70. David Rieff, *Reconciliation at a High Price*, N.Y. TIMES, Nov. 23, 1995, at A27

nal in international law, 'conflict-resolution or mediation model[s]' may only be appropriate before the commission of crimes against humanity and sends the 'wrong message when invoked during genocide, overlooking or rewarding crime and aggression.'"⁷¹ According to Fein, "if we view genocide as state crime rather than 'ethnic conflict,' we are constrained to prevent, deter and stop it, rather than to negotiate in the middle with its perpetrators."⁷²

Herein lies the conundrum of peace building faced by the Dayton negotiators: If you exclude those responsible for war crimes, then you are unlikely to secure a negotiated peace. If you include them in the process, you legitimize their actions as well as their agenda, and likely increase the possibility of continued atrocities or the ratification of a fundamentally flawed peace agreement that encourages additional ethnic aggression. The solution to this conundrum would have been to build the political will to continue with the use of force against those responsible for war crimes and to limit contact with these individuals to the extent necessary to secure the implementation of dictated terms of peace. As evidenced by the Dayton peace initiative, this approach was not taken.

Diplomatic Deficit

The American delegation assembled at Dayton was of the highest caliber and thus did not suffer from a deficit in intellectual capacity or experience. Despite the ability of the American delegation, the circumstances and decisions made early in the planning stages did, however, result in the re-emergence of the diplomatic deficit that plagued earlier European efforts.

From the beginning, the tension between those in support of a peace deal and those in support of a peace package laid the foundation for re-establishing the approach of coercive appeasement. Those in favor of the peace deal, most notably the American and French delegations, clashed with the British and European Union delegations who sought to appease various parties, who in turn clashed with the Bosnian and German delegations who sought a peace package. This peace package consisted of a structured set of proposed commitments that, if fulfilled, could promote the peaceful reintegration of Bosnia.

Some members of the Contact Group recognized that to secure a just peace, it would have been necessary to reverse the gains of ethnic cleansing and attempted genocide, and to weave throughout the agreement vari-

71. Helen Fein, *Genocide As State Crime: Examples from Rwanda and Bosnia* (Paper Prepared for the Annual Meeting of the American Sociological Association, Toronto, Ontario Aug. 9-13, 1997), at 10.

72. *Id.* at 11.

various mechanisms of justice that would delegitimize and remove from power those responsible for the war and its atrocities, and those most likely to inhibit the return to a multi-ethnic society and the creation of a democratic state. The main negotiators, however, feared that an attempt to craft a peace agreement based on these principles would not be accepted by Milosevic, and thus were unwilling to further threaten the use of force to accomplish these objectives.

Importantly, many U.S. officials now believe that it would have been possible to pressure Milosevic at Dayton into accepting a more just peace than what was ultimately drafted at Dayton. Historians will likely reflect that the American and European habit of negotiating with Milosevic had become so strong that they were unable to correctly assess that Milosevic was desperate for a peace agreement in order to secure his political situation within Serbia, and that by embracing him as a peacemaker at Dayton and providing him with the attainment of his main objectives they sealed the fate of a perpetually divided Bosnia and set the stage for future crimes against humanity in Kosovo.

The second aspect of the diplomatic deficit was the inability of the Dayton negotiators to understand the relationship between all aspects of the conflict. In an effort to resolve the conflict between the Bosnians and the Croats, the American and German teams negotiated a modification of the existing Federation agreement which devolved significant powers from the central government to the Federation. This back door partition orchestrated under the umbrella of strengthening the Bosnian-Croat Federation created an opportunity for the Serbian delegation to reap the benefits of Bosnian and Croat differences without having to spend any of its own political capital. By permitting the negotiations to unfold in such a manner, the international community demonstrated to Milosevic its inability to grasp both the larger dimensions of his plan for a greater Serbia and to orchestrate its own diplomatic efforts in a manner sufficient to build the necessary coalitions to confront and stymie these plans. Moreover, the Federation negotiations during Dayton laid the foundation for a Bosnian constitution which drastically limited the authority of the central government and enabled the Bosnian Serbs to consolidate their power over the territory already under their control and to prevent the significant return of refugees.

Myopic Accommodation

As a result of the perceived need to accommodate the interests of Milosevic, the text of the proposed agreement minimized the future role of force in promoting refugee return and the reintegration of Bosnia, limited the ability of justice-based mechanisms to cull war criminals from civil society, legitimized an ethnically pure Republika Srpska while creating a

constitutionally dysfunctional Bosnian state, and divided territory in a manner that rewarded rather than reversed ethnic cleansing. In essence, the agreement was merely a vehicle, which provided the international community with an opportunity to affix the delegations' signatures to the document.

Consequently, the international community was able to declare that it had brought peace to Yugoslavia, while Milosevic was able to consolidate many of his objectives and prepare for the next round of ethnic cleansing in Kosovo. Moreover, by diplomatically engaging and, at times, toasting Milosevic, the international community confirmed that so long as Milosevic committed ethnic cleansing in moderation, the Americans and Europeans would not prevent him from accomplishing his objectives, and might even confirm his gains in a peace agreement.

The myopic accommodation of Milosevic during Dayton also undermined the real chance for the long term survival of a multi-ethnic Bosnia and set a precedent for what Milosevic could expect from the international community even after it has used force against him. Rather than rolling back the gains of ethnic cleansing, the international community at Dayton formally ratified these gains. Most importantly, the international community permitted the Republika Srpska to retain control of the villages of Srebrenica and Zepa after it was known that the Serbian forces had massacred over 7,000 unarmed civilians from these villages. In fact, the international community allowed Milosevic to force the Bosnian delegation to negotiate the return to Bosnia of the residents of Zepa who had fled into Serbia and were being held in camps. It also required the Bosnian delegation to turn over to the Serbian forces twenty percent of Bosnian territory that had been freed from Serb occupation in order to maintain the 49/51 territorial split. This split was premised on the principle of equivalence among the parties.

Finally, by completely excluding the issue of Kosovo from the Dayton negotiations, the international community signaled to Milosevic that they were unprepared to constrain his actions against the people of Kosovo and that they would permit him to exercise a free hand in the continuation of his regime of oppression and near-apartheid as long as it did not amount to the scale of atrocities seen in Bosnia. Thus, with the tacit acquiescence of the international community, Milosevic continued his suppression of the basic human rights of the people of Kosovo and accelerated their disenfranchisement from civil society. This laid the foundation for the Kosovo war in 1998 and set the stage for yet another Balkan conflict and confrontation with Slobodan Milosevic.

Moral Duplicity

Whereas a basic moral compass would require the presence of truthful declarations concerning Milosevic's culpability, resulting in his prosecution for war crimes, the perceived necessity of Milosevic's participation at Dayton negated the peacebuilders' willingness to follow such an approach. Instead, the peacebuilders, led by Secretary Christopher, legitimized Milosevic as a partner in peace and obfuscated his culpability by arranging for the now famous "handshake" among the three presidents of Serbia, Croatia and Bosnia.⁷³ This reinforced the perception of the moral equivalence amongst the parties, and rehabilitated Milosevic. If President Izetbegovic was willing to shake his hand, then there would be no bar to full American and European engagement with Milosevic as a legitimate partner. Christopher, however, characterized the handshake in these terms:

Before my opening statement, I walked around the table to these three, encouraged them to shake hands. Although they had done so before, I believed that such an act – like the Rabin-Arafat handshake on the White House's South Lawn – would provide an important boost symbolically, not only for the delegates in Dayton, but for the millions watching around the world.⁷⁴

The rehabilitation and legitimization of Milosevic was particularly important in this respect because despite the significantly weakened position of Milosevic, much of the American and European efforts were directed at persuading Milosevic to accept a plan favorable to his interests, while maintaining a minimum threshold of provisions that would allow them to declare they had brought peace to Yugoslavia while maintaining Bosnia's status as an independent state.⁷⁵ Similar efforts were directed at Tudjman, whose sole goal seemed to be a fixed timetable for the re-establishment of Croatian government control over all Croatian territory, and the creation of an opportunity for the future erosion of Bosnian sovereignty. Most of the diplomatic squeeze was saved for the Bosnian delegation, which on numerous occasions was threatened with closure of the talks and the withdrawal of international support. In order to pressure the victim, it was necessary to both minimize Milosevic's role as the aggressor and Bosnia's as the aggrieved.

As a direct result, the proposed Bosnian governmental structure was characterized by the institutionalization of ethnicity and plagued by numerous mechanisms capable of being utilized by ethnic nationalists to

73. See Keith Doubt, *We Had to Jump Over the Moral Bridge: Bosnia and the Pathetic Hegemony of Face-Work*, in *THE CONCEIT OF INNOCENCE: LOSING THE CONSCIENCE OF THE WEST IN THE WAR AGAINST BOSNIA* 123-24 (Stjepan G. Meštrovic ed., 1995).

74. CHRISTOPHER, *supra* note 40, at 353 n.6.

75. See *id.* at 366.

create political gridlock. This was done in order to give credence to Milosevic's rejection of the notion of a Yugoslav or Bosnian identity, while also creating a political structure, which allowed his protégées to work to undermine the effective reintegration of Bosnia. The political system also disenfranchised individuals, such as members of the Jewish community, who did not belong to one of the three dominant ethnic groups, or individuals who refused to define themselves in ethnic terms. The institutionalized gridlock was subsequently compounded by the failure of Carl Bildt, the former Swedish Prime Minister who served as Bosnia's High Representative — and subsequent High Representatives, to actively utilize their authority to impose legislative initiatives when these mechanisms were abused for the purpose of undermining the Dayton Accords. The willingness of the international community to craft an ethnic-identity based form of government signaled to Milosevic its acceptance of his framework for resolving the Yugoslav conflict and indicated its willingness to sanction arrangements based upon principles of ethnicity as opposed to pluralism and human rights.

Constrained Force

The aversion to the adequate use of force manifested itself numerous times throughout the Dayton negotiations. Most relevant was the refusal of the mediators to create an armed international police force or to provide IFOR with the authority and obligation to create the necessary conditions for the return of refugees and the protection of basic human rights. The failure to include sufficient authority for the police and military forces in the Dayton Accords was compounded by the very limited interpretation given to the authority that was incorporated, and the military's high degree of concern with mission creep. This situation permitted Milosevic and his forces to cement their territorial and political gains accomplished through ethnic cleansing, and signaled that even if force was used against his troops and heavily armed peace enforcers were deployed, they would not take the actions necessary to roll back gains accomplished through ethnic cleansing and widespread and systematic crimes against humanity. Recently the Office of the High Representative (OHR) and the European Union have both called for the deployment of an armed international police force to provide protection for returning refugees and to combat organized crime.

Importantly, during the Dayton negotiations, the American military did not want to be subject to undue constraints on the potential use of force during its deployment in Bosnia, thus ensuring that the Accords provided wide authority for the use of force when IFOR thought it necessary. While providing extensive authority to use force, the Accords actually assigned IFOR forces few obligations other than separating the militaries of the

opposing parties and patrolling the inter-entity boundary line. Thus, while the Accords did not constrain the use of force during the implementation phase of the peace building process, they did not serve to increase the possibility that force or the threat of force would actually be used to ensure the fulfillment of the stated objectives of the Accords.

Marginalized Justice

Immediately prior to the Dayton negotiations, a number of prominent international leaders raised expectations for the chance to craft a lasting peace. Many of these leaders involved in the peace process made a number of public and private declarations concerning the need to incorporate justice into the process -- statements which were missing from earlier attempts to negotiate a peace in the former Yugoslavia. While on their face supportive of the norm of justice, these statements were part of an effort to set the stage whereby justice would be largely (and possibly unnecessarily) sacrificed in order to reach a political settlement with Milosevic. By publicly proclaiming their support for justice in the negotiations, the negotiators satisfied public calls for justice, while creating negotiating space. Sensing the erosion of the influence of the norm of justice and recognizing its potential sacrifice in a negotiated settlement, Justice Goldstone, prior to the Dayton negotiations, indicted the two primary Bosnian Serb culprits, Radovan Karadzic and Ratko Mladic, for genocide on July 24, 1995 and again on November 16, 1995 for the Srebrenica massacre. With these indictments Judge Goldstone effectively prohibited their participation in the Dayton negotiations.

During the actual negotiations, tension developed between the need to establish a variety of mechanisms to cull war criminals from civil society, and the need to accommodate the interests of the aggressors. Unfortunately, as noted by Kenneth Doubt, "at Dayton, the more the Bosnian delegation insists on justice, the less the Bosnian delegation is viewed as being interested in peace."⁷⁶

Out of its desire to ensure that the Accords sufficiently obliged the parties and the international community to arrest, extradite and prosecute war criminals, the Bosnian delegation proposed a number of specific provisions relating to the creation of vetting mechanisms in the police and military and civil authorities as well as the automatic reimposition of sanctions against Serbia and the Republika Srpska for failure to cooperate with the Tribunal.⁷⁷ Driven by the need to secure a peace deal, the members of the

76. Doubt, *supra* note 73, at 125.

77. See Paul C. Szasz, *The Dayton Accord: The Balkan Peace Agreement*, 30 CORNELL INT'L L.J. 759, 762 (1997).

Contact Group generally objected to the inclusion of such specific obligations as proposed by the Bosnian delegation on the basis that they were unnecessary. More specifically, the Contact Group, led by the British and French, rejected any attempt to require the reimposition of sanctions on parties not cooperating with the International Tribunal, and indicated to the Bosnian delegation that they had personal assurances from Slobodan Milosevic that he would ensure cooperation with the Tribunal -- including compelling the surrender of Ratko Mladic and Radovan Karadzic. In fact, as recounted by General Clark, Milosevic expressly avoided making any commitment to ensure the arrest and extradition of Karadzic and Mladic.⁷⁸ The failure to create a mechanism for the automatic reimposition of sanctions proved a crucial strategic mistake as subsequent to Dayton, Slobodan Milosevic expressly refused a personal request by Ambassador Holbrooke to fulfill his "promise" to have Karadzic and Mladic removed to The Hague.⁷⁹ Without the meaningful ability to reimpose sanctions, there was simply no incentive for Milosevic to cooperate with the Tribunal. And, as discussed below, the International Crisis Group has concluded that the single most important factor relating to the non-implementation of the Dayton Accords and the continued *de facto* partition of Bosnia was the continued presence of Karadzic in Bosnia.⁸⁰

Concerning the creation of a vetting mechanism, the Contact Group feared this would involve E.U. and International Police Task Force personnel too deeply in the operation of the military and police structures of the sub-state entities and that they might be perceived as biased in the event that they removed a disproportionate number of officials from one of the parties. With respect to the participation of IFOR in the vetting mechanism, the Contact Group military representatives at Dayton steadfastly refused to commit to any involvement in activities associated with the apprehension of war criminals, including the assignment of staff to assist in the identification of those likely responsible for war crimes.

The one concession the Contact Group did make to the Bosnian delegation was to accept the premise that those indicted for war crimes could not stand for elected office or hold other public office after the Dayton Accords were signed.⁸¹ Ambassador Holbrooke would subsequently claim that this second provision was a major success in limiting the ability of

78. See CLARK, *supra* note 31, at 65.

79. See RICHARD HOLBROOKE, *TO END A WAR* 320 (1997).

80. See International Crisis Group, *War Criminals in Bosnia's Republika Srpska*, available at <http://intl-crisis-group.org/projects/balkans/bosnia/reports-A400001-02112000.pdf> (last visited Feb. 23, 2002) [hereinafter ICG, *War Criminals*].

81. Dayton Peace Agreement, Annex 4, art. IX (Nov. 21, 1995), available at <http://dosfan.lib.uic.edu/ERC/bureaus/eur/dayton/07Annex4.html>.

war criminals to influence the implementation of the Dayton Accords and to poison the development of civil society in Bosnia. Yet this provision did little to inhibit publicly indicted war criminals from exercising significant influence over the electoral process, or from blocking meaningful implementation of the Dayton Accords.

Somewhat ironically, the formal remarks of Secretary Christopher at the initialing ceremony at Dayton were titled, "The Dayton Peace Agreement: Building Peace with Justice[.]" and in his first paragraph, he proclaimed that "the time has come to build peace with justice[.]" arguing that the agreement represented "a victory for all those in the world who believed that with determination, a principled peace is possible."⁸²

B. The Consequences of a Faustian Bargain: Empowering War Criminals

Rather than building upon the successful use of force, creating peace through justice and rolling back the gains of ethnic cleansing, the international community at Dayton returned to its preference for accommodation and formally ratified these gains. As a result, the norm and institutions of justice were only minimally present in the agreement, and as a consequence indictable war criminals maintained positions of power and influence and exercised their ability to stall any meaningful implementation of the Dayton Accords.

Compounding this appeasement, the international military forces consistently refused to provide the security necessary for the remaining former residents of Srebrenica to return to their homes, or to discover the whereabouts of the remains of their murdered family members. Such actions clearly signaled to Milosevic that he could generally retain territory conquered through ethnic aggression and that this territory would remain mono-ethnic. Undoubtedly, these perceptions influenced Milosevic's calculation to expel 1.5 million Kosovars during the NATO air campaign in the hopes that the international community would not have the political will to ensure their return. Over time small numbers of mostly elderly refugees began to return to their homes on both sides of the inter-entity boundary line, but there has been no significant return over the past seven years.

The extent of the failure of the Dayton Accords to form the basis for a meaningful peace was illustrated in November 2000, when the International Crisis Group (ICG) documented that over seventy-five individuals indictable for major war crimes have held important positions of power and influence in nearly all the municipalities and political party structures

82. CHRISTOPHER, *supra* note 40, at 366-67.

across the Republika Srpska.⁸³ For instance, paramilitary leader Ljubisa Savic, whose forces were responsible for numerous acts of ethnic cleansing, was supported in his assumption of the position of Deputy Minister of the Interior; Biljana Plavsic, later indicted for genocide,⁸⁴ was supported in her position as the President of Srpska, and at one time received the protection of British SFOR troops; Petar Cancar, responsible for the ethnic cleansing of Foca and the establishment of rape camps, served with international support for a time as the Srpska Minister of Justice; and Momcilo Krajisnik, who, with international backing, was elected as the Serbian representative to the Bosnian Presidency, was subsequently indicted for genocide against the people of Bosnia.⁸⁵ According to the ICG, these individuals also include the President of the Supreme Court, the Minister of Defense, the second highest ranking police officer,⁸⁶ at least seventeen individuals of the Republika Srpska police force, and eleven holding seats on municipal councils – which were acquired in the OSCE-supervised and certified elections.⁸⁷ Almost all of these individuals are reported to meet regularly with key members of the international community operating in Bosnia despite the international community's awareness of their culpability for serious crimes committed during the conflict. Interestingly, these indictable war criminals have been allowed and even encouraged by the international community to assume positions of power because they were perceived as important to the implementation of the Dayton Accords.⁸⁸

The widespread presence of indictable war criminals in the institutions of power in the Republika Srpska and the failure of the international community to secure the arrest of those who were indicted emboldened the forces interested in continuing the campaign for ethnic partition during the post-conflict phase of the Yugoslav crisis.⁸⁹ In particular, "[t]he failure to arrest Karadzic himself has sent a message to his wartime colleagues and political successors that they can obstruct return, actively work against Dayton implementation, exploit nationalist sentiments, and remain untouchable."⁹⁰

The importance of securing the arrest of Mladic and Karadzic early in the implementation phase of the peace process was essential because, according to

83. See ICG, *War Criminals*, *supra* note 80, at ii-iii.

84. See *Krajisnik Amended Indictment*, Mar. 21, 2000, IT-00-39; *Plavsic Initial Indictment*, Apr. 7, 2000, IT-00-40.

85. See ICG, *War Criminals*, *supra* note 80, at 69.

86. See *id.* at 2.

87. See *id.* at 69, 78.

88. See *id.* at 68.

89. See ICG, *War Criminals*, *supra* note 80, at 69.

90. *Id.* at iii.

a Serbian judge interviewed by the ICG, "Karadzic and Mladic represent the single knot holding together a twisted thread of collective and individual guilt that must be untied for Bosnia to begin the reconciliation process."⁹¹ According to the judge, "[f]or the 'small-time' ethnic cleansers of Bosnia, Karadzic demonstrates that ethnic cleansing worked and that they can continue to rule over their fiefdoms, waiting for the weak resolve of the international community to dissipate entirely."⁹²

Those interested in securing the ethnic separation of Bosnia actively used their power and influence to undermine the conditions necessary for the fulfillment of the Dayton Accords by obstructing the return of refugees, inhibiting freedom of movement, and denying basic human rights to non-Serb minorities. In many instances, the public institutions themselves have actively prevented the fulfillment of these obligations,⁹³ as "[o]ften, those individuals who are meant to be protecting and supporting returning minorities are exactly the same individuals who expelled them in 1992-95."⁹⁴

Individuals who were culpable for the atrocities committed during the war have continued the *de facto* partition of Bosnia and the denial of basic human rights to non-Serbs because they are allowed to control essential political and economic institutions. According to the ICG, "[t]hey function as pillars of their respective communities, dispensing political and economic patronage. Many control the local economies, both legal and illegal, while others continue to control illegal paramilitary groups."⁹⁵ In fact, the ICG asserts, "[i]n all [Republika Srpska] communities, indicted and suspected war criminals appear to enjoy respected status,"⁹⁶ and many receive protection from the Republika Srpska police force.⁹⁷

In May 2001, a British SAS officer made public a report prepared under his command, which called upon the international authorities in Bosnia to arrest twenty-two Croatian individuals who had committed crimes during the war and were engaged in "the violent intimidation of refugees trying to return to Stolac, in south-eastern Bosnia, in 1998 and 1999."⁹⁸ According to the officer, while some war-crimes suspects were in hiding, most of

91. *Id.* at 77.

92. *Id.*

93. See International Crisis Group, *Is Dayton Failing?: Bosnia Four Years After the Peace Agreement*, at <http://www.intl-crisis-group.org/projects/showreport-cfm?reportid=58> (last visited Apr. 16, 2002).

94. ICG, *War Criminals*, *supra* note 80, at 77.

95. *Id.* at 2.

96. *Id.*

97. See *id.*

98. Nick Thorpe, *Goat Town Now a Criminal Haven*, GUARDIAN (May 2, 2001), available at <http://www.guardian.co.uk/print/0,3858,4179182.html> (last visited Feb. 23, 2002).

those identified as torturers at the Dretelj, Heliodrome and Gabela concentration camps still held power and were often sighted in public by their former victims, who had begun to return in small numbers and who were still subject to gross violations of human rights. Despite the report, none of the individuals identified were ever indicted or arrested.

The manner in which the international community engaged Milosevic during the Dayton negotiations, and the concessions forced upon the Bosnians as a condition for Serbian acquiescence and the deployment of NATO troops, significantly bolstered and encouraged Milosevic's continued influence over the nature of the Yugoslav conflict. By elevating Milosevic to a partner in peace and by permitting him to use the Dayton negotiations as a means for accomplishing many of his objectives, the international community tacitly sanctioned Milosevic's use of ethnic aggression as a means for achieving his political objectives, confirmed to Milosevic and the people of Serbia the unwillingness and inability of the international community to deny Milosevic the means to continue his program for a greater Serbia, and signaled that they would be unlikely to respond in a forceful manner to actions in Sandzak or Kosovo.

Unfortunately for the people of Yugoslavia, as the approach of coercive appeasement was validated during the Dayton negotiations as a method which could ultimately produce perceived results, it became the template for the approach of Dayton implementation, and reconfirmed for Milosevic the utility of this strategy of ethnic aggression. Seeking to capitalize on his gains in Bosnia, Milosevic undertook a modified approach in Kosovo in 1998.

THE KOSOVO CRISIS: FROM BOSNIA REDUX TO DIPLOMACY BACKED BY FORCE

From 1995 to 1998, while the international community turned implementation of the Dayton Accords over to European bureaucracies, Milosevic continued his campaign of ethnic separation and ethnic terror against the majority Kosovar Albanian population of Kosovo. Frustrated with the lack of progress that Ibrahim Rugova's peaceful resistance was having on Milosevic's regime, and acutely aware of his failure to attract the interest of the United States and its European allies, a segment of the Kosovar Albanian population began to engage in armed attacks against Serbian police and perceived Albanian collaborators. These armed groups soon formed themselves into the Kosovo Liberation Army (KLA), which established independence for Kosovo as its primary political objective. The efforts of the KLA had their intended effect as the international community began to take notice of the growing crisis in the region.

A. The Legacy of Dayton: Treating Milosevic as a Peacemaker

The initial approach to the Kosovo conflict mimicked the approach to the Bosnia conflict – that of coercive appeasement. Importantly, however, under the stewardship of Prime Minister Tony Blair, Secretary of State Madeleine Albright and General Wesley Clark, the British and Americans slowly steered the policy to one of diplomacy backed by force, and were able to finally bring an end to Milosevic's reign of terror in the Balkans.

It is important to note that even after the Americans and their European allies adopted the approach of diplomacy backed by force and undertook an air campaign to deter Milosevic's aggression, the proponents of accommodation sought to significantly limit the scope of the air campaign. As will be discussed below, the limited nature of the air campaign created a situation where the Americans and Europeans were forced to commit to the deployment of ground troops in order to protect the Kosovar Albanians. Had the ground troops actually been deployed in combat, there would have been significant casualties among these forces as well as among Serbian forces. If the Clark doctrine of overwhelming force had been adopted at the outset of the air campaign, it is unlikely that the United States and its European allies would have been forced to contemplate the deployment of ground troops. It is thus the case that coercive appeasement had become so ingrained in American and European policymaking that it created a situation where the only option remaining became one which was likely to involve large casualties among allied and Serbian troops.

Diplomatic Deficit

In 1997, the United Nations' General Assembly began calling for an end to Serbian repression in Kosovo.⁹⁹ This failed to bring an end to the violence as both the KLA and Serbian forces intensified their efforts, resulting in the deaths of numerous civilian Albanians and Serbs. In response to the ongoing skirmishes, NATO began air exercises in Macedonia and Albania as a show of force to the warring parties, and the United Nations continued to debate possible military action. The opposition to the use of force by Russia and China, however, stymied the U.N.'s efforts and effectively eliminated the possibility of the use of force as a tool of negotiation.¹⁰⁰

The need for consensus with its allies and within NATO also restrained

99. See Ted Baggett, *Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo*, 27 GA. J. INT'L & COMP. L. 457, 464 (1999).

100. See *id.* at 458, 461-62.

the international community from taking the action promised by the Bush administration in the infamous Christmas warning, which threatened American use of force if Milosevic used force against the Kosovar population.¹⁰¹ According to Ambassador Holbrooke, the Clinton administration was reluctant to propose threatening the use of force at this stage given its multinational foreign policy approach, which was designed to maintain cooperative relations with its European allies.¹⁰² Given that the British, French and Germans believed it necessary to obtain United Nations Security Council authorization prior to using force, the United States acquiesced and tailored its foreign policy accordingly.¹⁰³ Thus, the international community embarked on a two-pronged foreign policy approach of limited economic inducement and accommodation from the autumn of 1997 to the early winter of 1998.

With primary responsibility for resolving the crisis, the Contact Group adopted the position of mediator and facilitator, encouraging the parties to "join in a peaceful dialogue,"¹⁰⁴ challenging the parties to "assume their responsibility to promote stability and a solution,"¹⁰⁵ indicating that it would "support a mutually agreed solution that respects democratic standards,"¹⁰⁶ and offering its support in implementing an Education Agreement.¹⁰⁷ The unintended effect of these statements only served to undermine the Contact Group's credibility and authority, as it was clear to the parties that it would not become politically involved in the negotiation process beyond facilitating dialogue.

The result of the international community's abdication of primary responsibility for the handling of the Kosovo crisis to the Contact Group was the perpetuation of hostilities throughout 1997 and 1998. In response,

101. See David Binder, *Bush Warns Serbs Not to Widen War*, N.Y. TIMES, Dec. 28, 1992, at A6; Elaine Sciolino & Ethan Bronner, *How a President, Distracted by Scandal, Entered Balkan War*, N.Y. TIMES, Apr. 18, 1999, at A6.

102. See CECIL V. CRABB, JR., ET AL., CHARTING A NEW DIPLOMATIC COURSE: ALTERNATIVE APPROACHES TO AMERICA'S POST-COLD WAR FOREIGN POLICY 138 (2001).

103. See Ambassador Richard Holbrooke & Ambassador William Walker, On the Record Briefing on the Kosovo Situation (U.S. Dep't of State, Oct. 28, 1998).

104. Contact Group Foreign Ministers, Press Statement on Kosovo (Sept. 24, 1997), available at <http://www.ohr.int/other-doc/contact-g/default.asp?content-id=3543>; see also Contact Group Foreign Ministers, Press Statement on Kosovo (Feb. 25, 1998), available at <http://www.ohr.int/other-doc/contact-g/default.asp?content-id=3549>.

105. U.S. Dept. of State Office of the Spokesman, Press Statement on Kosovo (Jan. 8, 1998), available at <http://secretary.state.gov/www/briefings/statements-1998/ps980108.html>.

106. *Id.*

107. See *id.*

the international community, working through the Contact Group, modified their approach in late February and early March 1998 to incorporate the approaches of economic inducement and enhanced diplomatic engagement. Secretary of State Madeleine Albright also publicly proposed that the Contact Group establish a working group to study how best to "implement an asset freeze and a ban on foreign direct investment, should that prove necessary."¹⁰⁸ The Contact Group and the U.N.¹⁰⁹ then called upon the United Nations High Commissioner for Human Rights (UNHCHR) to send a mission to Kosovo; expressed support for the return of the OSCE long-term mission and the establishment of a Kosovo specific OSCE mission; encouraged OSCE member states to intensify visits to Kosovo; and proposed the creation of an international consortium including NGOs that would promote civil-society building in Kosovo and the distribution of humanitarian assistance.

The problematic aspects of such a stance were identified by the United States' lead member of the Contact Group, Secretary Albright, who expressed concern that the group was "meeting for the sake of meeting, rather than resolving something."¹¹⁰ These ineffective meetings were the result of allied concerns over the legality of intervention beyond mediation and negotiation. Without definitive leadership, nor a coherent, long-term strategy for resolving the crisis, the crisis continued to escalate. In fact, these diplomatic measures were seen as "diplomacy light," and had the effect of signaling that the Contact Group and the international community, particularly the United States, were not entirely serious about involving themselves in the mediation of the Kosovo conflict. In particular, by calling upon enhanced roles for the UNHCHR, the OSCE and even NGOs, the Contact Group and the UN signaled that they were unwilling to take a leading role in resolving the conflict, setting the stage for the same type of institutional competition and disarray that had hampered efforts to achieve peace in Bosnia.

These concerns were well reflected during the Rambouillet/Paris negotiations. The selection of Rambouillet as the site of the peace talks was an important concession to America's European allies. Despite the fact that the American component of the Contact Group had been responsible for

108. Secretary of State Madeleine K. Albright, Statement at the Contact Group Meeting on Kosovo (Mar. 25, 1998), *available at* <http://secretary.state.gov/www/statements/1998/980325.html>.

109. *See* U.N. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998).

110. *PBS Frontline: The War in Europe*, Interview with Madeleine K. Albright, Secretary of State [hereinafter Albright Interview], *at* <http://www.pbs.org/wgbh/pages-frontline/shows/kosovo/interviews/albright.html> (last visited May 13, 2002).

much of the diplomacy prior to the peace talks, the British and French representatives insisted on holding the talks in Europe. This was done in part to compensate for the perpetual political slight of having had the Bosnian peace declared in Dayton, Ohio after the massive investment of European resources and political capital in the peace process, as well as to signal that Europe would take the political lead in implementing any Kosovo peace arrangement.

Just as the Europeans had earlier declared that the United States would manage the dissolution of the Soviet Union while the EU managed the dissolution of Yugoslavia, the Europeans were now declaring that the United States would manage the Bosnian peace process, while the Europeans would take on responsibility for the Kosovo process. The dramatic entrance of President Jacques Chirac in a wheezing and battered Presidential helicopter, which landed on the front lawn terrace of the Rambouillet Chateau on the first evening of the peace talks, was symbolic of the European desire to re-establish their political control over events in the European theater despite their tangible lack of credible resources to accomplish the task of peace building in the Balkans without the overwhelming assistance of the United States.

On February 6, the first round of talks between the Kosovar Albanians and Serbs were held in Rambouillet, France under the auspices of the Contact Group. The Rambouillet/Paris negotiations were similar to the Dayton negotiations in many important procedural and substantive respects. The Rambouillet/Paris negotiations, however, diverged from the Dayton model in a number of important respects that indicated an ability by a limited number of key players in the United States and European Union alliance to recognize the failure of their approach of coercive appeasement and begin to rely upon the credible threat of the use of force. Moreover, the Rambouillet/Paris Accords lacked many of the more gaudy trappings of moral equivalence displayed at Dayton, such as the introductory handshake -- in large part because the Serbs refused to shake hands with the KLA representatives of the Kosovar Albanian delegation.

While at Dayton, Milosevic was primarily interested in securing his territorial gains through the peace process, and genuinely concerned about further NATO use of force. At Rambouillet, however, he had not yet accomplished his strategic objectives on the ground and was unconvinced that NATO would in fact use force to prevent him from accomplishing those objectives. In large part, Milosevic's perspective was likely influenced by publications written by former U.S. and European government officials, like Ambassador Holbrooke, who detailed the American and European reluctance to use force in Bosnia, and who declared that NATO could have only sustained the most minimal form of an air campaign.

The forced absence of NATO from the peace talks by the French gov-

ernment also undermined the perceived seriousness of the negotiations in Rambouillet. This state of affairs required that the Contact Group employ significant pressure on the Kosovar delegation, which opened the door for certain Contact Group members to slip back into their more familiar role of coercive appeasers, and also required the American delegation to make overt threats of the use of force against the Serbian delegation in an attempt to compel their constructive participation. As a result, neither the Kosovar nor Serbian delegations to the peace talks believed it to be absolutely necessary to sign a peace agreement at the conclusion of the talks in Rambouillet.

As the negotiations reached a stalemate, with Milosevic refusing to consider NATO peacekeepers in Kosovo and the KLA's continued call for independence, the international community again relied on diplomatic wrangling to reinvigorate the peace talks. To this end, Christopher Hill was sent to Belgrade in an effort to persuade Milosevic to accept the agreement proposed at Rambouillet. Again, it seems, the international community persisted in its belief that Milosevic was the key to a successful settlement, thereby promoting him once again to the position of "partner in peace."¹¹¹ Secretary Albright was also dispatched to pressure the KLA to accept the peace plan, which they had refused to sign, insisting on nothing less than full independence.¹¹² The refusal of the Kosovar delegation to sign the agreement placed the Clinton administration in a quandary, as their strategy to pressure Milosevic into capitulating by threatening air strikes if the Serb delegation failed to reach an agreement hinged upon the Kosovars' acceptance of the peace deal.¹¹³ While the Kosovar delegation eventually accepted the terms of the peace agreement, the Serbian delegation refused to sign – an act which brought about the collapse of the approach of coercive appeasement and opened the way for the Albright and Clark doctrine of diplomacy backed by force as will be discussed in the section below on the use of force.

Myopic Accommodation

Despite knowing that Kosovo was the point where Milosevic had promised to make his stand for the Serb people, and that he had demonstrated a clear pattern of conduct of moving from one conflict to another, the international community, and the United States in particular, demonstrated no

111. See Tom Walker, *U.S. Stance on Kosovo Talks and 'Secret Flight' Infuriate Diplomats*, TIMES (LONDON), Feb. 18, 1999, at 17, available at 1999 WL 7973918.

112. See Marc Weller, *The Rambouillet Conference on Kosovo*, INT'L AFF., Apr. 1999, at 233.

113. See Steven Erlanger, *Albanian 'Nay' Puts Milosevic in Role of Yea-Sayer*, N.Y. TIMES, Feb. 22, 1999, at A6.

significant interest in 1997 in taking the lead in pursuing preventative diplomacy or in holding Milosevic accountable for his actions in Kosovo. Instead, the international community persisted in its policy of viewing Milosevic as a partner in peace, and was content to allow the U.S. Department of State, working through the Contact Group, to work on negotiating a peaceful settlement to the crisis. As noted by General Clark, even after Milosevic had begun a campaign of village busting in the summer of 1998 and even though “[f]or months it had been clear that a fundamental problem in Kosovo was Milosevic himself, . . . there was still an effort to rely on him as a legitimate negotiating partner.”¹¹⁴ In fact, despite the lack of progress in negotiations, the American and European negotiators would periodically announce progress, and according to Clark this “lulled Western governments into postponing the tough decisions before them.”¹¹⁵

This decision was the result of several factors. Most importantly, the international community was reluctant to become enmeshed in the Kosovo crises because it continued to rely on Milosevic in implementing the Dayton Peace Accords and viewed him as a necessary actor in successful negotiations with the Kosovar Albanians. Thus, its ability to pressure Milosevic to end the violence was constrained and was a key factor behind the international community’s reluctance to adopt a more confrontational position.

This reluctance to take a hard line approach with Milosevic resulted in the continuation of the international community’s appeasement of him. The primary indication of international efforts to accommodate Milosevic is evidenced by the continual reaffirmations of Serbia/Montenegro’s sovereignty and territorial integrity. Each Contact Group statement from September 24, 1997 to February 25, 1998 declared support for an enhanced status for Kosovo only within Serbia/Montenegro.¹¹⁶ The Contact Group members also ensured that each U.N. Security Council resolution dealing with the Kosovo crisis contained a reference to the sovereignty and territorial integrity of Serbia/Montenegro, as well as other states in the region.¹¹⁷

114. CLARK, *supra* note 31, at 128.

115. CLARK, *supra* note 31, at 126.

116. See Contact Group Foreign Ministers, Press Statement on Kosovo (Sept. 24, 1997), available at <http://www.ohr.int/other-doc/contact-g/default.asp?content-id=3543>; Contact Group Foreign Ministers, Press Statement on Kosovo (Jan. 8, 1998), available at http://www.ohr.int/other-doc/contact-g/default.asp?content_id=3547 [hereinafter Contact Group Statement on Kosovo].

117. See, e.g., U.N. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998), U.N. S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3830th mtg., U.N. Doc. S/RES/1199 (1998); U.N. S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998), U.N. S.C. Res. 1244, U.N. SCOR, 54rd Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

The support for Serbia/Montenegro's sovereignty and territorial integrity, while designed to accommodate the interests of the Serbian regime, was also based on the realpolitik concerns of Contact Group members like Russia and the United Kingdom, which were mired in their own secessionist movements. Furthermore, the principles of sovereignty and territorial integrity are well founded in the normative structure of public international law -- although they do not justify, nor permit the type of actions undertaken by the Serbian regime against the people of Kosovo.

It was not until after his outright refusal to sign the Rambouillet/Paris Accords and the continued massacre of Kosovo civilians that the international community finally realized that Milosevic was not in fact a partner in peace, and ceased its efforts to myopically accommodate his interests.

Moral Duplicity

As a consequence of the failure of the Rambouillet peace talks, the oppression of the Kosovar Albanians became more severe and their commitment to peaceful resistance waned. With the formation of the KLA and its use of violence against Serbian government officials and Kosovar and Serbian civilians, Milosevic was able to more aggressively utilize his Ministry of Interior forces to terrorize the civilian population. In a number of instances, Serbian Ministry of Interior Forces (MUP) forces would kill large numbers of civilians during their missions against the KLA.

The international community's response to the crisis was first to minimize its severity and importance. When the media began to report the possibility of mass killings and mass graves, these reports were rejected by European political institutions. When credible accounts continued to emerge from Kosovo, the international community sought to promote a dialogue between the Kosovars and Milosevic. These efforts delegitimized the pacifist leader of the Kosovars, and aided in the rehabilitation of Milosevic.

The Contact Group, led by Russia and the United States, also sought to create a moral equivalence between Milosevic and the Kosovars by declaring that the KLA was a terrorist organization.¹¹⁸ The Russian government also successfully persuaded the U.N. Security Council to include a condemnation of Albanian terrorist action in each Kosovo related resolution adopted by the Council.¹¹⁹ These declarations were initially taken as a

118. See Contact Group Statement on Kosovo, *supra* note 116; Special Representative Robert S. Gelbard, Press Conference in Serbia and Montenegro (Jan. 15, 1998), available at http://www.state.gov/www/policyremarks/1998/980115-gelbard_belgrade.html [hereinafter Gelbard Statement].

119. See, e.g., U.N. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998), U.N. S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3830th mtg.,

green light for Milosevic to continue his aggressive actions against the Kosovar population. While the United States possessed credible evidence that the KLA had committed unlawful acts, the use of the term terrorist was legally inaccurate and had the effect of endorsing Milosevic's characterization, thus lending perceived American support to his use of indiscriminate force to eliminate the KLA threat.

Although the Russian Foreign Ministry led the effort to identify the Kosovar armed resistance as terrorists, the U.S. Department of State also adopted an aggressive policy of identifying the KLA as a terrorist organization. Despite the fact that the Central Intelligence Agency had warned the Clinton administration in both January and February of 1998 that Serb forces were mobilizing along the Kosovo border for a planned crackdown on the Kosovar Albanians, U.S. policy makers focused on moral duplicity as a means of deescalating the crisis.¹²⁰ This entailed sending Robert Gelbard to Belgrade for the purpose of persuading Milosevic to halt the offensive.¹²¹ While the purpose of the visit was ostensibly to connote the United States' sentiments regarding the situation in Kosovo, Gelbard used this opportunity to declare the U.S. Department of State's position that the KLA was a terrorist organization. Thus, on January 15, 1998, Ambassador Gelbard declared in Belgrade, "[w]e strongly believe that violence is not the answer from either side, and we strongly oppose any kind of terrorist activity from Kosovar Albanians or anybody else, as well as violence fomented by government security forces."¹²² Subsequently, on February 22, 1998, he again declared in Prishtina, "[a]s I have said before, I consider these to be terrorists actions, and it is the strong and firm policy of the United States to fully oppose all terrorists actions and all terrorists organizations."¹²³ In subsequent public statements, Gelbard threatened to take action to interrupt the ability of the KLA "to sustain themselves through the full chain of supply."¹²⁴

The invocation of the designation "terrorists" and the threat to impose sanctions on the organization was particularly important as "terrorists" was the term used by Milosevic to describe the KLA and served as the

U.N. Doc. S/RES/1199 (1998); U.N. S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998)

120. See R. Jeffrey Smith, *U.S. Assails Government Crackdown in Kosovo*, WASH. POST, Mar. 5, 1998, at A23.

121. See Jane Perlez, *U.S. Warned Serb Leader Not to Crack Down on Kosovo Albanians*, N.Y. TIMES, Mar. 15, 1998, at 6.

122. Gelbard Statement, *supra* note 118.

123. Special Representative Robert S. Gelbard, Press Conference in Prishtina, Kosovo (Feb. 22, 1998), available at <http://www.fas.org/man/dod-101/ops/docs-/press31.html>.

124. *Fighting in Kosovo Intensifies*, ASSOCIATED PRESS, Jul. 8, 1998, at 1.

bedrock of his justification for the use of force against the civilian Kosovar Albanian population. Moreover, the threat to impose sanctions created a moral equivalence between the Kosovars and the Serbs, something Milosevic had successfully manipulated to his advantage in the Bosnian crisis. Importantly, the U.S. government subsequently found that there was no legal basis for the KLA to be designated a terrorist organization and instructed its diplomats to cease using that term. Over time, and in the face of increasing atrocities, the Contact Group lessened its approach of moral equivalism and began to identify the Serbian regime as primarily responsible for the atrocities.¹²⁵

Constrained Force

In the face of familiar atrocities and the increasing radicalization of the Kosovar community, the peace-builders initially responded with humanitarian assistance. While this approach served as a policy Band-Aid, it did not provide a means for achieving a meaningful end to the conflict.¹²⁶ During this time, the peacebuilders avoided any meaningful threat of the use of force. According to Ambassador Holbrooke, the British, French and Germans believed it necessary to obtain U.N. Security Council authorization prior to using force.¹²⁷ Ambassador Holbrooke also opined that the creation of a common strategy was hampered by the fact that “democracies take a while to get their act together.”¹²⁸

In March 1998, Serb forces cracked down on the KLA, resulting in the death of eighty-five Kosovar Albanians. It was at this time that the United States, along with its European allies, united to denounce the violence and sought options for how to proceed with the conflict. From the beginning of the conflict, Secretary Albright believed that diplomacy alone was insufficient to achieve a resolution to the conflict. Instead, Albright believed that the use of force was the only option in securing Milosevic's acquiescence to the demands of the international community. As stated by Secre-

125. See Contact Group Foreign Ministers, Press Statement on Kosovo (Mar. 9, 1998), available at <http://www.ohr.int/other-doc/contact-g/default.asp?content-id=3550>.

126. As eventually described by the E.U. Humanitarian Aid Commissioner Emma Bonino in 1998, “[t]he international community must face the reality. There is no way we can avert catastrophe without a political solution.” *UN Fears Disaster in Kosovo this Winter*, TORONTO STAR, Aug 20, 1998, at A22. Ms. Bonino later observed that “the situation [in Kosovo] is really very bad. Security has not improved. These people had their homes burned down. Now it’s snowing. The real problem is to get compliance from Milosevic. Humanitarian aid can provide a lot, but it cannot provide security.” REUTERS, Oct. 26, 1998.

127. See Holbrooke & Walker, *supra* note 103.

128. *Id.*

tary Albright, "Slobodan Milosevic has made it clear that he is spurning the incentives that the United States and others have offered him in recent weeks -- unfortunately the only thing he truly understands is decisive and firm action."¹²⁹ Albright's main purpose was to use her rhetoric to "push the European allies, American public opinion, and even her own government toward concerted action designed to avert the kind of human tragedy that had happened in Bosnia."¹³⁰

These strong statements and Albright's position on the use of force, however, were obfuscated by the international community, which consistently balked at the notion of utilizing the threat of the use of force as a foreign policy tool. During this time, General Wesley Clark, the NATO Supreme Allied Commander, had developed a strategic attack plan designed for Milosevic's capitulation. Acting on this plan, and under pressure from the United States, the NATO member states developed a "light" version of Clark's proposal and adopted Activation Warning, which is the first stage in a three stage process procedure for the approval of NATO military action. The ACTWARN applied to a Phased Air Operation and a Limited Air Operation.¹³¹ With this threat in hand, Ambassador Holbrooke was dispatched to Belgrade for the purpose of persuading Milosevic to cease the Serb forces' activities against the Kosovar Albanians. Ambassador Holbrooke was fully briefed on the Activation Warning and was permitted to threaten the use of force, but it is unclear whether he relied upon this option.¹³² According to General Clark, Holbrooke confided that Secretary Cohen had forbidden him to offer NATO ground troops as peacekeepers as part of any agreement reached with Milosevic.¹³³

The result Holbrooke's meeting with Milosevic was the Holbrooke-Milosevic deal of October 1998 (October agreement), which provided for the unarmed deployment of OSCE monitors, and the unarmed NATO over flight of Kosovo. Importantly, to the detriment of the policy objectives devised by the Clinton administration, the deal provided Milosevic with a significant strategic windfall. He was able to position himself yet again as a peacemaker with whom the United States could do business, while at the same time undermining consensus among the NATO member states for the use of force to stop further acts of ethnic cleansing. More importantly, as explained by General Clark, the presence of unarmed observers, "inside

129. Secretary of State Madeleine K. Albright, Press Briefing at the Ministry of Foreign Affairs (Mar. 7, 1998), *available at* <http://secretary.state.gov/www/statements/1998/980307.html>.

130. IVO H. DAALDER AND MICHAEL. O'HANLON, WINNING UGLY 28 (2000).

131. CLARK, *supra* note 31, at 135.

132. *See id.*

133. *See id.* at 137-38.

Kosovo also vitiated the implicit NATO threat against Milosevic or his forces.”¹³⁴

As soon as the October agreement was finalized, it became apparent to the international community that Milosevic was reneging on the agreement. Intelligence reports indicated that Milosevic, in violation of the agreement, was amassing forces between Prishtina and Belgrade.¹³⁵ In response, President Clinton dispatched General Clark to pressure Milosevic into abiding by the terms of the agreement.¹³⁶ Clinton did not, however, give General Clark sufficient latitude to threaten the use of meaningful force if Milosevic failed to adhere to the agreement. Predictably, the meeting failed to convince Milosevic to implement the provisions of the October agreement. Given the perceived failure of the agreement, Clinton’s foreign policy team struggled to ascertain Milosevic’s intentions and how best to respond.

In December 1998 and January 1999, the fighting continued between the KLA and Serb forces, resulting in the death of more than 70 KLA rebels and 6 Serb civilians. During this time, public criticism and demand for action spurred Secretary Albright to increase pressure on the White House to push for the use of force. Despite Albright’s efforts, the Clinton administration remained unwilling to advocate or plan for the use of force.¹³⁷ Secretary of Defense William Cohen and National Security Advisor Samuel Berger raised the most strident objections. Cohen’s reluctance stemmed from his concern that U.S. troops would become involved in a militarily conflict without a strategic exit plan. Berger, on the other hand, never seemed to quite comprehend the seriousness of the threat posed by Milosevic and the capacity of the United States and its allies to prevent further atrocities in the Balkans.¹³⁸

Ironically, while the international community was debating its next course of action in light of the failure of the October agreement, Serbian military and paramilitary forces massacred over forty civilians in the Kosovo town of Racak. Subsequent intelligence intercepts reported in the *Washington Post* established a clear link between the front line forces responsible for the massacre, the subsequent attempt to cover it up, and high-level officials in the Serbian government.¹³⁹ The massacre was met

134. *Id.* at 126.

135. See *PBS Frontline: War in Europe*, Interview with General Wesley Clark, NATO Supreme Allied Commander, at <http://www.pbs.org/wgbh/pages/frontline-/shows/kosovo/interviews.clark.html> (last visited February 23, 2002).

136. See *id.*

137. See Albright Interview, *supra* note 110.

138. DAALDER & O’HANLON, *supra* note 130, at 70.

139. See R. Jeffrey Smith, *Serbs Tried to Cover Up Massacre; Kosovo Reprisal Plot Bared by Phone Taps*, WASH. POST, Jan. 28, 1999, at A1.

by a rapid series of public denunciations by President Clinton and Secretary Albright.¹⁴⁰

The Racak massacre, the collapse of the October agreement, and the apparent failure of earlier mediation efforts resulted in increased political pressure, especially from the United States Congress. Before, and immediately after the massacre, a number of prominent U.S. Senators began to call for the use of force to promote a cessation of the hostilities. For instance, Senator Mitch McConnell declared, “[i]t is time for the United States to accept reality, recognize Kosovo’s independence and provide Prishtina’s leadership with the political and security assistance necessary to halt [Serbia’s] genocidal war . . . [and] [d]emand a NATO vote to implement the Activation Order for air strikes.”¹⁴¹ Similarly, Senator Frank Lautenberg declared, “clearly Milosevic thinks he can get away with murder, literally, and NATO needs to send him a strong message. He is the Saddam Hussein of Europe, and force is the only language he seems to understand. NATO must follow through on its threats with air strikes to force the Serbs to respect their commitments.”¹⁴² The public also exerted public pressure as they increasingly called for a more aggressive incorporation of the use of force into the peace-building process. One of the most insightful and potentially influential calls for force came from the *Washington Post’s* Editorial Board, writing,

This humanitarian disaster [in Kosovo] cannot be ended without a political solution, and a political solution is impossible without a U.S. resolve to use force, if necessary, against Mr. Milosevic’s marauding soldiers. President Clinton and his team have promised again and again to show such resolve, but their threats have proved empty. Instead Mr. Clinton sends his emissaries, again and again, to plead with the war criminal to stop his crimes. Mr. Milosevic has learned he can defy them at no cost. . . . The longer Mr. Clin-

140. See President Bill Clinton, Statement by the President on the Massacre of Civilians in Racak (Jan. 16, 1999); Secretary of State Madeleine K. Albright, Press Availability on Kosovo Following Volunteer Event at Children’s Hospital (Jan. 18, 1999), available at <http://secretary.state.gov/www/statements/1999/990118.html>.

141. Senator Mitch McConnell, *Independence for Kosovo*, WASH. POST, Jan. 22, 1999, at A35.

142. Senator Frank Lautenberg, *Crisis in Kosovo*, N.Y. TIMES, Jan. 20, 1999, at A30. Perhaps recognizing the consequences of equivocating on the use of force, Senator Lautenberg also stated:

NATO should give Mr. Milosevic a short deadline to comply with his promises, including a pullout of his forces and full cooperation with international monitors, humanitarian agencies and the war crimes tribunal. If he refuses, it should pull out the monitoring force and bomb selected Serbian military targets. If, as has been his habit, he promises compliance but then reneges, NATO must immediately resume the threat.

Id.

ton dithers the greater the cost will be.¹⁴³

Given these strong sentiments and a lack of other viable options, Secretary Albright and Prime Minister Blair pushed the approach to one of “diplomacy backed by force.” This approach included increased reliance on the threat of the use of force,¹⁴⁴ and the introduction of direct mediation in the form of proximity peace talks similar to those held at Dayton.¹⁴⁵ This later provision was incorporated to tie the threat of force to political objectives as means of garnering NATO support, whose members wanted another attempt at reaching a peace agreement.¹⁴⁶ With the U.S. strategy clearly in place, on January 28, 1999, NATO issued a declaration (1) indicating its full support for the “conclusion of a political settlement under the mediation of the Contact Group,” (2) demanding that the Serbian regime comply with their commitments to withdraw military forces under the October 25, 1998 agreement with NATO and with the obligations set forth in the agreement with OSCE, and (3) further demanding that the Serbian regime cooperate fully with the Yugoslav Tribunal by granting immediate and unrestricted access to its representatives so they could carry out their investigation of the Racak massacre and by ensuring the safety of the investigators.¹⁴⁷

Subsequently, the Contact Group gave Milosevic and the Kosovar Albanians an ultimatum on January 29, 1999 to attend peace talks in France in February or face NATO air strikes. On January 30, 1999, the North Atlantic Council (NAC) reactivated the October 13, 1998 NATO Activation Order and declared that “[t]he crisis in Kosovo remains a threat to peace and security in the region. NATO's strategy is to halt the violence and support the completion of negotiations on an interim political settlement for Kosovo, thus averting a humanitarian catastrophe.”¹⁴⁸ If the parties failed to reach agreement at Rambouillet, the NATO Secretary-General was authorized to order air strikes against Serbia/Montenegro. The NAC also announced that it was prepared to take unspecified “appro-

143. *A Massacre Without Knives*, WASH. POST, Sept. 16, 1998, at A16.

144. See Press Release, North Atlantic Council (99)12 (Jan. 30, 1999), at <http://www.nato.int/docu/pr/1999/P99-012e.htm>.

145. Secretary of State Madeleine K. Albright, U.S. Dept. of State on NATO Final Warning on Kosovo (Jan. 30, 1999), at <http://secretary.state.gov/www/-/statements/1999/990130.html>.

146. See *PBS Frontline: War in Europe*, Interview with Samuel Berger, National Security Advisor, at <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/berger.html> (last visited Feb. 23, 2002).

147. See NATO Secretary General Dr. Javier Solana, Press Statement on Kosovo (99)11 (Jan. 28, 1999), at <http://secretary.state.gov/www/-/statements/1999/990130.html> (last visited Feb. 23, 2002) [hereinafter Solana Press Statement].

148. Press Release, North Atlantic Council, *supra* note 144.

priate measures” in the event of a failure by the Kosovar Albanians to fully cooperate with the peacebuilders.¹⁴⁹

The motivations for a strategy of “diplomacy backed by the threat of force” included a mix of realpolitik assessment of American and European security interests and the political need to save diplomatic face.¹⁵⁰ As explained by President Clinton, “[i]n this volatile region, violence we fail to oppose leads to even greater violence we will have to oppose later at greater cost There is a serious risk the hostilities [in Kosovo] would spread to the neighboring new democracies of Albania and Macedonia, and re-ignite the conflict in Bosnia we worked so hard to stop. It could even involve our NATO allies, Greece and Turkey. . . . The time to stop the war is right now.”¹⁵¹ This approach would set the tone for the Rambouillet peace negotiations.¹⁵²

Throughout the unsuccessful Rambouillet talks, the atrocities continued on the ground in Kosovo. In March, seven ethnic Albanians were killed and dozens injured in Kosovska, Mitrovica and Podujevo. Later that month, the peace talks resumed in Paris. Under the threat of abandonment by the international community, the Kosovar Albanian delegation agreed to the peace plan, which included broad autonomy and NATO enforcement troops. The Serb delegation, however, refused to sign the peace agreement.¹⁵³

In a final attempt to settle the conflict, the Clinton administration sent Holbrooke to negotiate with Milosevic. The perceived consequences of such an approach was best articulated by the *Washington Post* editorial board, which declared,

149. *See id.*

150. The political backlash against the administration’s equivocation began reaching a fevered pitch in the media. *See, e.g.,* Jim Hoagland, Editorial, . . . *Or a NATO Opportunity?* WASH. POST, Feb. 14, 1999, at B07. Mr. Hoagland stated:

President Clinton and the other leaders can expect to be laughed off the . . . stage if Rambouillet fails and ethnic war is raging on Europe’s ragged southern fringe while they solemnly party at the [April 23-25 NATO 50th] anniversary celebration. The road to a Washington summit that reflects glory on the good and great of the Atlantic community now passes through the police stations and city hall of the pitiable Kosovar capital of Prishtina. Stopping the bloodshed there and policing the peace is a mission Americans and Europeans should share equitably.

Id.

151. President William J. Clinton, The President’s Radio Address, 1 PUB. PAPERS, 190, 190 (Feb. 13, 1999).

152. *See* Jane Perlez, *Albright Foresees No Raids on Serbia if 2 Sides Bar Pact*, N.Y. TIMES, Feb. 22, 1999, at A1; Thomas W. Lippman, *U.S. Could Join Force to Manage Postwar Kosovo*, WASH. POST, Jan. 27, 1999, at A15.

153. *See* Carlotta Gall, *U.S. Official Sees ‘Collision Course’ in Kosovo Dispute*, N.Y. TIMES, Mar. 10, 1999, at A1.

Now Holbrooke has returned to Belgrade for more talks with Milosevic. Since U.S. and European officials have all but assured the dictator that he no longer need fear a bombing campaign, there's reason to worry that Holbrooke will be offering rewards instead - assurances of immunity from war crimes prosecution for what's taken place in Kosovo so far, a lifting of economic sanctions, perhaps an increase in the already-too-high number of troops Milosevic would be permitted to station in Kosovo.¹⁵⁴

Believing that the NATO threats were hollow, Milosevic opted to reject the agreement and the peace talks were suspended. With the refusal of Milosevic to accept a NATO peacekeeping force on Serbian soil, NAC authorized the NATO Secretary General to establish an air strike plan.

During this time, the Serb government, in preparation for a massive spring offensive, amassed one-third of all its forces in and around Kosovo, a fact that was well known to the international community.¹⁵⁵ The Serbian army then launched its campaign of terror forcing tens of thousands of ethnic Albanians to flee their homes. This escalation in ethnic aggression gave rise to calls for the Contact Group and for NATO to make good on their threat of force and seek to compel the Serbian regime's compliance with their demands. As described by the editorial board of the *Washington Post*,

[T]owns are being burned, fathers executed in front of their children, thousands of people force-marched to unknown destinations, men separated en masse from women and children these are all to familiar indicators . . . Mr. Milosevic has embarked on something close to genocide. NATO and President Clinton must not allow this to continue.¹⁵⁶

Even more pointed were calls for a military response by several U.S. Senators, with Senator Joseph Lieberman for instance declaring, "we have been threatening [Milosevic] since Christmas of 1992 . . . warning him that if he attacked Kosovo, we would respond with force. Great alliances and great countries don't remain great if they issue threats and don't keep them."¹⁵⁷

President Clinton responded to the increasing atrocities and the intense pressure with a perceived call to arms among the allies by declaring, "make no mistake, if we and our allies do not have the will to act, there will be more massacres. In dealing with aggressors in the Balkans, hesitation is a license to kill. But action and resolve can stop armies, and save

154. Editorial, *Modest Assaults Only, Please*, WASH. POST, Mar. 10, 1999, at A22.

155. See Sciolino & Bronner, *supra* note 101, at 12.

156. Editorial, *The Ground War*, WASH. POST, Mar. 28, 1999, at B06.

157. Jane Perlez, *Conflict in the Balkans: The Overview, Milosevic to Get One 'Last Chance' to Avoid Bombing*, N.Y. TIMES, Mar. 22, 1999, at A1.

lives.”¹⁵⁸ Again, the strong rhetoric of President Clinton belied the actual policy commitment the United States and its European allies were willing to take in resolving the conflict. At this stage, the Americans and Europeans adopted a policy of air strikes without the possibility of ground troops.¹⁵⁹ In arriving at this strategy, the international community eschewed the use of ground troops as it was deemed a deal breaker with respect to the NATO members as it would likely shatter the allied consensus over the imposition of force.¹⁶⁰ Thus, with the issue of ground troops effectively stifled, the United States, along with its NATO allies, prepared to go to war.

More than any other factor, the public refusal to even consider or plan for the deployment of ground troops undermined the effectiveness of the air campaign and thereby increased the likelihood that ground troops would in fact have to be deployed in order to bring an end to Serbian aggression.

On March 24, 1999, NATO began its strategic air campaign against Serbian forces wherein it launched a series of increasingly intense air strikes against Yugoslav forces in Serbia and Kosovo, as well as Serbia's civil and military infrastructure. The purpose of the air campaign, in Clinton's words was to “demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course, [to] deter an even bloodier offensive against innocent civilians in Kosovo, and, if necessary, to seriously damage the Serb military's capacity to harm the people of Kosovo.”¹⁶¹

Unfortunately the diplomatic deficit that had become such a common factor in the approach to the Yugoslav conflict substantially constrained the initial effectiveness of the air campaign. From the outset of the bombing campaign, the NATO member states had devised a strategic campaign based on their assessment that the war would only take a few days.¹⁶² This assumption was largely based on the severe miscalculation on the part of the NATO member states that Milosevic would succumb to allied demands immediately following an allied air attack and would compromise just enough to avoid further NATO bombing. Based on this erroneous, the

158. See President William J. Clinton, News Conference on the Situation in Kosovo (Mar. 19, 1999), at http://abcnews.go.com/sections/us/Daily_News/Clinton_Transcripts.990319.html (last visited Feb. 23, 2002).

159. See President William J. Clinton, Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 1 PUB. PAPERS 451, 452 (Mar. 24, 1999).

160. CLARK, *supra* note 31, at 166.

161. *Id.*

162. See Thomas W. Lippman, *Albright Misjudged Milosevic on Kosovo*, WASH. POST, Apr. 7, 1999, at A1.

international community was woefully unprepared for an extensive campaign against Serbia, with NATO committing only 366 planes, and approving only fifty-one targets.¹⁶³

Throughout the air campaign, the effective use of force was hampered by a number of other constraining factors – most of which originated from America's European allies. Within a few days of the initiation of the campaign, the European allies, and some American officials sought a bombing pause so that negotiations could resume with Milosevic.¹⁶⁴ Of course, once the NATO bombing had been halted it might have been near impossible to resume the air campaign.¹⁶⁵ According to General Clark, strategic plans were also influenced by an "exaggerated fear of the Serbs' military capabilities, and the American military's reluctance to risk the Apache helicopters."¹⁶⁶ As a consequence, according to Clark, "The air campaign began with enough forces to punish the Serbs, but it lacked the mass and capabilities needed to halt the ethnic cleansing."¹⁶⁷ Moreover, the crucial element of surprise was often lost as a result of diplomatic maneuvering which informed Milosevic of impending targets. For instance the nature of the air campaign and a number of targets were provided to Milosevic during the October 1998 negotiations to establish the OSCE verification mission, as well as subsequent public discussion among NATO governments during the target approval process.¹⁶⁸ As with the case of Bosnia, espionage was also considered a possible key factor in the ability of the Serbs to anticipate NATO targets.¹⁶⁹

With the failure of the initial campaign to bring a halt to Serbian aggression, the Americans sought to increase the number and range of targets. The objective being to deliver a series of knock-out blows to Milosevic and force him to the table. This approach was met by stiff resistance from Americas' allies, in particular the French, who believed that it was best to strike only secondary targets and "signal" to Milosevic that he had a lot to lose if the campaign continued.¹⁷⁰ This approach coincided with France's belief that Milosevic should remain in power after the end of the campaign, and that he was an individual with whom Europe could do business – both political and economic.

America's European allies also sought to dissuade NATO from exten-

163. CLARK, *supra* note 31, at 425.

164. *See id.* at 204, 424.

165. *See id.* at 205.

166. *Id.* at 424.

167. *Id.* at 424.

168. *See id.* at 424.

169. *See* CLARK, *supra* note 31, at 424-25.

170. *See id.* at 236-37.

sive strikes in Serbia, rather suggesting that NATO should limit its strikes to Kosovo and attempt to strike those units which were carrying out ethnic cleansing, and should avoid targets that might, “antagonize or damage Serbia further.”¹⁷¹ The French, in fact, argued that, “they wanted only ‘reactive’ strikes, not ‘preventative’ ones.”¹⁷² Having learned the lessons of Vietnam, America sought a more strategic approach, designed to go “after the heart of Milosevic’s power.”¹⁷³ Moreover, the American and European governments began to subject NATO targeting to political approval, with prime ministers and presidents deeply involved in selecting which targets could be bombed by NATO. The disagreements over strategy coupled with the process of political approval for targets led to an approach of incrementalism and according to Clark, “a growing perception that NATO wasn’t committed to winning, a perception that was already undermining [NATO’s] efforts.”¹⁷⁴

In an effort to enhance the effectiveness of the air campaign, and possibly avoid the need for a ground invasion, General Clark secured the deployment of US Army Apache helicopters to Albania. Unfortunately, as a result of internal political feuding within the Department of Defense, a miscalculation of casualty estimates, the reluctance of the US Army to become involved in the Kosovo conflict, a lack of understanding of the manner in which the Apaches could be used in support of the air campaign, and a “plain lack of knowledge” about the capabilities of the Apaches,¹⁷⁵ coupled with the absence of political leadership from the White House, the Apaches were never used.

With the perceived failure of the air campaign, and the reluctance to discuss the deployment of ground troops, concern increased that it may be necessary to return to a process of negotiation, thereby undermining NATO’s deterrent capability. As recognized by the *Financial Times* editorial board,

It is becoming painfully clear that bombing alone is not working . . . NATO and above all President Bill Clinton's administration is guilty of a failure to use all necessary force. Mr. Clinton's prevarication about offering the U.S. troops that are vital to a successful outcome has left time on Mr. Milosevic's side. The window of opportunity is closing fast. . . . The alternative [is] a political settlement. There can be no pretense here that such a deal would be anything other than a terrible blow for the alliance.¹⁷⁶

171. *Id.* at 237.

172. *Id.* at 256.

173. *Id.* at 237.

174. *Id.* at 253.

175. CLARK, *supra* note 31, at 289.

176. Editorial, *Time for Choice in Kosovo*, FIN. TIMES (LONDON), May 17, 1999, at 21.

Even other world leaders began to publicly worry. Jordan's King Abdullah was quoted as saying,

As a friend of the United States, I think you have to be aware that the whole world is looking to see your commitment on this. If you step out of line and do this wrong, you will have a reaction There is a standard of values being addressed here, and your success or lack thereof will either encourage radicals or give them the sense that they have to tow the line. There is a lot riding on this. I don't think people fully understand the implications, whatever the final solution is in Kosovo.¹⁷⁷

Given the failure of the limited air campaign to prevent Serbian atrocities against the Kosovar Albanian population, the United States came under increasing domestic and international pressure to consider the use of ground troops. On April 23, the NATO Summit took place in Washington, D.C. Although Secretary Cohen expressly forbade General Clark from raising the issue of ground troops at the Summit,¹⁷⁸ Prime Minister Tony Blair was more astute and recognized that by ruling out the credible threat of the use of ground troops the air campaign was unlikely to succeed. Prime Minister Blair thus privately pressured President Clinton to accept the inevitability of the need to prepare for the deployment of ground troops.

The immediate result of the Summit was the agreement to impose enhanced sanctions, including the blocking of all property and interests in property of Serbia/Montenegro, and a general ban on all exports to and imports from Serbia/Montenegro, including the export of petroleum and strategic goods.¹⁷⁹ Notably, until this ban France and other NATO member states had continued to sell oil to Serbia – even while their armed forces were bombing Serbia.¹⁸⁰

As a result of the strong urging by Prime Minister Blair during the NATO meeting, the Clinton administration shifted its policy focus and created a “strategic campaign plan that combined military, economic, diplomatic, and other means to achieve core U.S. objectives.”¹⁸¹ This entailed an intensification of the air campaign and planning for the potential use of ground troops. It was finally becoming obvious to the United States and its NATO allies that the war in Kosovo was not a war that the United States and NATO could afford to lose.

177. Nora Boustany, *Jordan's King Says Stakes High for U.S. in Kosovo*, WASH. POST, May 18, 1999, at A19.

178. CLARK, *supra* note 31, at 269.

179. See FACT SHEET, NEW SANCTIONS AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (White House, Office of the Press Secretary, May 1, 1999); at <http://clinton6.nara.gov/1999/05/1999-05-01-fact-sheet-on-yugoslavia-sanction.html>.

180. CLARK, *supra* note 31, at 259, 267.

181. DAALDER & O'HANLON, *supra* note 130, at 141.

Unfortunately, even though the White House had become increasingly committed to the possible use of ground troops, the Pentagon continued its efforts to undermine NATO consensus for the deployment of ground troops. Although it was becoming widely known that Secretary Cohen was the only remaining principle within the NATO mechanism ardently opposed to the use of ground troops, the Pentagon continued to report to President Clinton and others that there was no consensus in NATO for preparing for the deployment of ground troops. While this was technically correct, it was the United States that was blocking consensus. Similarly, the Pentagon relied on the lack of political guidance for the planning process and upon the natural inertia within the Pentagon for the eventual development of plans which indicated that the ground troops could not be effectively deployed until after the first snowfalls in Kosovo, thus delaying the deployment for a year.¹⁸²

Finally, Prime Minister Blair, Secretary Albright, and General Clark were able to persuade President Clinton to embrace the need to become serious about planning for a ground deployment. After over seventy days of air strikes and an increasing willingness of NATO and the United States to commit ground troops to the conflict, the Russian government became involved in trying to negotiate a peace deal with Milosevic. The United States sent Strobe Talbott to negotiate agreeable terms for the cessation of the bombing campaign. The resulting agreement consisted of ten principles which Milosevic had to accept in their entirety. On June 4, 1999 the government of Serbia agreed to peace.¹⁸³

Sadly, the coercive appeasement approach had become so ingrained within the international community that elements of the approach persisted long after the bombing campaign ended – this time with devastating consequences for the civilian Serb population residing in Kosovo. With a shift toward accommodating the interests of the Kosovars, and adopting the perspective that they were the victims in the conflict, the international community failed to foresee the likelihood that atrocities would be committed against the remaining Serb civilians. Given the atrocities which were committed throughout the conflict, it was clear that once the Serb army was forced to retreat under the NATO mandate, the Serb civilians would be subject to reprisals by certain elements of the Kosovar Albanian population. When this in fact happened, there was no immediate and serious NATO effort to protect the Serbs. Perhaps unconsciously, the international community failed to differentiate between the Serb army, which had perpetrated ethnic crimes and the Kosovar Serb population at large. Hav-

182. See CLARK, *supra* note 31, at 330-44.

183. See Daniel Williams, *Yugoslavs Yield to NATO Terms; Air Assault to Continue Pending Full Compliance* WASH. POST, June 4, 1999, at A1.

ing just defeated “the Serbs,” NATO forces on the ground did not immediately possess the inclination to now “protect the Serbs.” The approach of coercive appeasement also resulted in the marginalization of justice, whereby the Tribunal failed to indict any Kosovar Albanians for crimes committed against the Serbs residing in Kosovo, and again openly mulled over the uncertainty of its jurisdiction.

Marginalized Justice

Given its aversion to the use of force, and its recognition that a pure reliance on accommodation would likely be insufficient, the Contact Group, in March 1998 for the first time in the conflict, invoked the norm of justice. It first called upon the Serbian regime to “invite independent forensic experts to investigate the very serious allegations of extra judicial killings,” and indicated that if the accusations were true, it expected Serbian authorities to prosecute and punish those responsible.¹⁸⁴ The Contact Group also asserted that its growing involvement in the issue was based on the members’ “commitment to human rights values.”¹⁸⁵ British Foreign Secretary Robin Cook, speaking on behalf of the United Kingdom and the E.U., explained that “serious violations of human rights, of civil liberties, of the freedom of political expression, are matters of concern to every member of the international community and cannot be regarded simply as an internal matter” for Serbia.¹⁸⁶

The Contact Group further sought to motivate the Yugoslav Tribunal’s Prosecutor, Judge Louise Arbour, by urging her to begin gathering information related to the violence in Kosovo, and reaffirmed that the Federal Republic of Yugoslavia (FRY) authorities have an obligation to cooperate with the Tribunal. Robin Cook further elaborated that the Contact Group had agreed the Prosecutor

[S]hould consider the prosecution of anyone who may have committed a violation of humanitarian law in Kosovo. We are clear and she is clear that she has the legal authority to do that. We invite her to consider whether indictments might be appropriate in the light of the evidence of the past week.¹⁸⁷

Cook further declared “there must be no impunity for those who break international law.”¹⁸⁸ The Contact Group members also pledged to make

184. Contact Group Foreign Ministers, Press Statement on Kosovo (Mar. 9, 1998), *available at* [http:// usembassy-australia.state.gov/hyper/wfa80309/cpf103.htm](http://usembassy-australia.state.gov/hyper/wfa80309/cpf103.htm) (last visited Feb. 23, 2002).

185. *Id.*

186. *See* Secretary of State Madeleine K. Albright and Contact Group Foreign Ministers, Press Conference (Mar. 9, 1998), *available at* <http://secretary.state.gov/www/statements/1998/980309a.html>.

187. *Id.*

188. *Id.* In the question and answer session, British Foreign Minister Robin

available to the Tribunal “substantiated relevant information in their possession.”¹⁸⁹

In addition to the actions of the Contact Group, both the U.N. Security Council and the United States took a number of steps to more fully integrate the norm of justice. The Security Council urged the Prosecutor to “begin gathering information related to the violence in Kosovo that may fall within its jurisdiction,”¹⁹⁰ and created a committee to monitor the work of the Contact Group and to provide regular updates to the Council. In order to provide a constant flow of information to the Council concerning violations of international humanitarian law by the Serbian regime in Kosovo.¹⁹¹ The U.S. also began distancing itself from the policy of moral equivalence¹⁹² with Secretary Albright aggressively urging the Office of the Prosecutor to immediately begin investigations and for Serbia to allow the International Red Cross and UNHCHR to undertake their own investigations.¹⁹³ In order to prod the Prosecutor, the U.S. announced a contribution of \$1 million to support the Tribunal’s investigations in Kosovo.¹⁹⁴

The emergence of the norm of justice was in large part a result of the belief that the approach of accommodation was failing, an implicit recognition that the approaches of economic inducement and the policy of diplomatic engagement were not serious, and a reluctance to commit to the use of force. More specifically, its invocation was based on the realization that there was no identified role for the use of force, and that greater involvement of justice based institutions (or their intentional exclusion by Milosevic) might provide a moral basis for the invocation of the use of force approach. However, despite the renewed employment of the norm of

Cook even declared, “we are insisting on the right of the international community to police international law and that means that we have a perfect right to express concern as we have done today at extra judicial killings and the death of eighty people without any trial or any judicial process.” *Id.*

189. *Id.*

190. U.N. S.C. Res. 1160, U.N. SCOR, 54th Sess., 3868th mtg., para. 17, U.N. Doc. S/RES/1160 (1998).

191. *See id.*

192. *See* Secretary of State Madeleine K. Albright, Statement at the Contact Group Ministerial on Kosovo (Mar. 9, 1998), *available at* <http://secretary.state.gov/www/statements/1998/980309.html>. (last visited Feb. 23, 2002) (declaring “we must avoid being paralyzed by the kind of artificial even-handedness that equates aggressors with their victims. We need to say clearly what is so clearly true: that responsibility for the violence lies squarely with Belgrade.”)

193. *See id.*

194. *See* State Department Spokesman James Rubin, *Secretary Albright Announces \$1.075 Million to Support Yugoslav War Crimes Tribunal Investigations in Kosovo* (Mar. 13, 1998), *at* <http://secretary.state.gov/www/briefings/Statements-1998/ps980313.html>. (last visited Feb. 23, 2002).

justice, the international community once again failed to fully support this approach.

With respect to the implementation of the norm of justice, there were several qualifications which limited its utility as a means for bringing the perpetrators of ethnic violence to justice. First, Secretary Albright expressly acknowledged that the Office of the Prosecutor's investigators were required to obtain visas from Serbia in order to investigate the alleged crimes, and thus provided Slobodan Milosevic with an effective veto over the ability of the Tribunal to have any meaningful role in stemming the atrocities. Second, the U.S. further limited the reach of the Tribunal by allowing the FRY to undertake responsibility for domestic prosecutions. Third, prominent U.S. Ambassadors were vocally reluctant to pursue the justice approach. This was evidenced in December 1998 when Ambassador Holbrooke and Ambassador Hill were asked whether they would comment on the fact that Milosevic and other Serbian officials had declared "that they don't have an intention to deliver any suspected war criminals to The Hague," Ambassador Holbrooke declined to take the question, while Ambassador Hill merely stated that "[t]he Hague Tribunal is the appropriate place for people who are accused of war crimes -- that it is the appropriate place, that it should be judged in The Hague."¹⁹⁵

Thus, the limitations placed on the Tribunal by the international community and the public qualifications of the pursuit of justice seriously undermined its mandate. The Tribunal was given no authority to issue indictments or hold trials, nor was it viewed as having the full support of the international community. At the same time, the international community granted Milosevic the power to deny access to Tribunal investigators and to internally prosecute acts of war crimes in Kosovo, thereby severely hampering the overall effectiveness of the Tribunal itself and calling into question the resolve of the international community with respect to the application of the norm of justice.

The Contact Group's approach of minimal economic inducements, tepid diplomatic engagement, and calls for the greater application of justice during the winter of 1998 did little to dampen the conflict in Kosovo.¹⁹⁶ As acknowledged in June 1998 by Paddy Ashdown, leader of Britain's

195. Ambassadors Richard Holbrooke and Christopher Hill, Round-Table Discussion with Representatives of the Serbian Independent Media (Dec. 15, 1998), at http://www.state.gov/www/policy_remarks/1998/981215_holo_hill_rnd.html.

196. Commenting on the softening of U.S. policy toward Belgrade and the squandered opportunity to prevent the Kosovo conflict, a western diplomat stated in May 1998, "Milosevic has agreed only to talk not to strike an agreement on the future of Kosovo. The Americans have used our leverage to get the dialogue going, rather than to get somewhere." Steven Erlanger, *Allies Upset as U.S. Eases Stance on Kosovo*, N.Y. TIMES, May 28, 1998, at A12.

Liberal Democrats,

[A]ll the blandishments of the international community, . . . all the sanctions, all the veiled threats have achieved absolutely nothing. There is no visible sign that any...actions we have so far taken have encouraged Milosevic to be in the slightest more restrained. He is now using tanks, heavy artillery the maximum weapons of war.¹⁹⁷

As a result of the failure of the weak policy response and the apparent replay of the accommodation approach, which led to the prolonged Bosnia conflict, a number of prominent public officials called for a change in tactics. Czech President Vaclav Havel declared, "the earlier evil is confronted, the less we have to pay in human lives and suffering. Why for eleven years can one man expose the international community to ridicule? Why, when it was clear to any sensible person that Kosovo was bound to explode, do we have to wait for that explosion to happen?"¹⁹⁸ Similarly, former U.S. Ambassador Morton Abramowitz, declared "the United States and its allies have waited four months while Milosevic cleaned the clock of the Kosovo Liberation Army and [have] taken three weeks to discuss military action, with the result that 500 Albanian villages were destroyed."¹⁹⁹

As a result of this increasing pressure and a growing understanding of the failure of the approach of coercive appeasement, a key senior State Department official met with Judge Arbour while she was visiting the United Nations for consultations and in very strong terms encouraged her to rapidly indict Milosevic. The Prosecutor was stunned as the United States had apparently changed its stance from one of urging caution in pursuing Milosevic and withholding sensitive material that might further the case against him, to an aggressive position favoring an immediate indictment.

At the meeting, the Prosecutor rebuffed the State Department plea as an infringement upon her impartiality. Shortly thereafter, on May 27, 1999, she indicted Mr. Milosevic, and five other top Yugoslav officials for war crimes and crimes against humanity committed in Kosovo from January 1999.²⁰⁰ The indictment of Milosevic put a quick end to any remaining efforts at accommodation. As noted by former Senator Bob Dole, "the administration cannot reasonably expect the Kosovo Albanian deportees to return to Kosovo with an indicted war criminal and the very man who

197. *Voice of America*, June 5, 1998.

198. Robert Anderson, *Havel Urges Slovak EU Entry*, FIN. TIMES (LONDON), Oct. 19, 1998, at 2.

199. Jane Perlez, *Serb Pullback May Forestall NATO Attack*, N.Y. TIMES, Oct. 5, 1998, at A1.

200. See *Milosevic et al., Indictment*, IT-99-37 (June 29, 2001).

attempted to destroy them and their society as the guarantor of their security.”²⁰¹

According to General Clark, while the State Department was encouraged by this development, some Pentagon and White House officials were displeased with the indictment, on the grounds that it would limit or preclude their ability to negotiate with Milosevic, and that it would strengthen his resolve to proceed with the ethnic cleansing of Kosovo.²⁰² These concerns were reminiscent of those of Secretary Christopher when he reasoned that labeling the Serbian atrocities in Bosnia as genocide would create a moral imperative to use force and would limit the ability of the United States to negotiate with Milosevic. Although in the case of Kosovo, the threshold for the use of airpower had been crossed, some in the Clinton Administration were concerned that the indictment of Milosevic would require NATO to actually defeat Milosevic, rather than wound his regime and then rely upon him to guarantee a negotiated settlement as was the case in the autumn of 1995 and the subsequent Dayton negotiations.

Despite these fears, the indictment had the positive effect of strengthening the resolve of America's European partners in the NATO air campaign.²⁰³ The indictment also provided a legitimate basis for the peace builders to call for a regime change, something they had previously been reluctant to do because it would be perceived as a violation of the FRY's sovereignty and political independence. As detailed by British Prime Minister Tony Blair, “the world cannot help you [Serbs] rebuild your country while Mr. Milosevic is at its head. And nor will the world understand, as the full extent of these atrocities is revealed, if you just turn a blind eye to the truth and pretend it is nothing to do with you. . . . This evil was carried out by your soldiers and by your leaders.”²⁰⁴ Moreover, the indictment provided a basis for calls from within the FRY for a regime change. Serbian Orthodox Bishop Artemije, for example, ventured that “there can be no solution under this regime, at least not a just and peaceful one. In Serbia as it is now, neither Serbs nor Albanians wish to live under this regime.”²⁰⁵

201. Senator Robert Dole, *No Deals with Milosevic*, WASH. POST, June 1, 1999 at A15.

202. CLARK, *supra* note 31, at 325-26.

203. *See id.*

204. Gerald Baker et al., *NATO Leaders Urge Serbs to Oust Milosevic*, FIN. TIMES (LONDON), June 22, 1999, at 3.

205. Serbian Orthodox Bishop Artemije, ASSOCIATED PRESS, June 14, 1998.

B. The End of the Milosevic Reign of Terror: The Triumph of
Diplomacy Backed by Force over Coercive Appeasement

In the aftermath of the 1999 NATO bombing campaign, Milosevic's local popularity dropped to just 20 percent, the lowest approval ratings in his thirteen-year rule.²⁰⁶ Serbia's economic woes, brought on by years of international sanctions and exacerbated by the damage wrought by the NATO bombs, ultimately led to Milosevic's defeat in the Yugoslav presidential election on September 24, 2000.²⁰⁷ Although he relinquished his official position, Milosevic continued to reside in the Presidential residence that had been his home for over a decade, and continued to serve as leader of the Yugoslav Socialist party, perhaps contemplating a way to return to power. For his part, the new Yugoslav President, Vojislav Kostunica, made clear that he had no intention of turning Milosevic or any other indicted Serbs over to the Yugoslav Tribunal. Despite this announcement, the United States and European Union lifted their economic sanctions on the FRY to signal their support for the new Yugoslav regime.²⁰⁸

As a result of Kostunica's defiance of the Tribunal, Senator Mitch McConnell instructed his staff member on the Senate Appropriations Subcommittee on Foreign Operations, Robin Cleveland, to craft a provision

206. See Independent Center for Political Studies and Public Opinion Research at the Institute of Social Sciences, Belgrade (1999), at <http://www.cpijm.org-yurprevious/sep2000.htm> (last visited Feb. 23, 2002) (opinion poll).

207. See NATIONAL DEMOCRATIC INSTITUTE, SERBIA POST-ELECTION POLL (Oct. 6 2000), at <http://www.accessdemocracy.org/NDI/library/1067.yu.poll/062000.pdf>. When the Federal Election Commission nevertheless declared there would be a run-off between Mr. Kostunica and Milosevic, Mr. Kostunica vowed to boycott a second round, and thousands of Serb civilians took to the streets in Belgrade, Novi Sad, Nis, Kragujevac and Kraljevo in protest of Milosevic's perceived attempt to steal the election. As the throngs of protestors steadily grew outside the government offices in Belgrade, there was concern among the international community that Milosevic would quell the popular uprising by employing force, as he had done earlier. But rather than attack the protestors, the members of the local Serb army garrison joined them as they stormed various government buildings. Realizing that Milosevic's fate was now sealed, his confederates quickly scrambled for political cover. Subsequently, the Yugoslavia Constitutional Court ruled that Milosevic's opponent, Vojislav Kostunica, had in fact captured over fifty percent of the vote. This was followed from action by the Serbian parliament recognizing Kostunica's election as President. On October 7, 2000, Milosevic conceded defeat and turned the government over to Kostunica. See Steve Erlanger, *After Yugoslavs Celebrate, Belgrade Orders a Runoff*, N.Y. TIMES, Sept. 28, 2000 at A1.

208. See Michael Ignatieff, *The Right Trial for Milosevic*, N.Y. TIMES, Oct. 10, 2000, at A1.

conditioning further U.S. assistance to Serbia on compliance with its obligations under international law to the Tribunal. Together with a small group of NGO representatives including James Hooper of the Public International Law and Policy Group, Nina Bang-Jensen of the Coalition for International Justice, Susan Blaustein of the International Crisis Group, and John Fox, Cleveland crafted section 594(a) of the 2001 Appropriations Act. This paragraph provided that the United States should cease all assistance to Serbia and seek to block International Financial Institution lending if by March 31, 2001, the FRY had not provided sufficient cooperation with the Tribunal, including access for investigators, the provision of documents, and the surrender and transfer of indictees or assistance in their apprehension. The provision also required the FRY to take steps consistent with the Dayton Accords to end Serbian financial, political, security and other support which has served to maintain separate Republika Srpska institutions, and to take steps to implement policies which reflected a respect for minority rights and the rule of law. The Clinton Administration, and in particular the Department of State, aggressively lobbied for the removal of this conditionality provision from the Appropriations bill. But the provision was nevertheless enacted into law.

As March 31, 2001 approached, the new administration, led by President George W. Bush, began to signal to the Kostunica government that it was required to take at least some action to comply with the conditionality requirement. In response to continued attention to this issue by Senators McConnell and Leahy, the Department of State in mid-March prepared a demarche for Ambassador Bill Montgomery to deliver to President Kostunica, which expressly made the "arrest" of Milosevic a condition of continuing assistance. The U.S. did not specify on what grounds Milosevic was to be arrested or whether it was necessary that he be transferred to The Hague. The demarche also included a number of other actions the FRY was to take in order to comply with the legislation. Reportedly, the Ambassador ended up under-emphasizing the requirement of arrest and emphasized other more easily attainable conditions. As a result, President Kostunica sought to comply with the conditions by turning over to the Tribunal a Bosnian Serb, Milomir Stakic, the former mayor of Prijedor, who was wanted under a sealed indictment issued to the FRY in March 1997 for atrocities allegedly committed in 1992 and 1993 at the Omarska, Keraterm and Trnopolje camps in Bosnia.²⁰⁹

When on the advice of Ambassador Montgomery, the Department of State began to indicate that it would likely recommend that President Bush certify compliance and release the millions of dollars in aid funds despite

209. See Jane Perlez, *U.S. Set to Finesse Tribunal Issue and Allow Belgrade Aid*, N.Y. TIMES Mar. 29, 2001, at A3.

the FRY's failure to arrest Milosevic or take any other meaningful steps to abide by the conditions, Senator McConnell, backed by Senator Leahy publicly declared there had not been sufficient observance to warrant certification of compliance with the conditions and further assistance.²¹⁰ The Tribunals' Prosecutor, Carla del Ponte, also added her voice to the chorus calling for the withholding of aid unless Milosevic was arrested and transferred to The Hague.

On April 1, 2001 Milosevic was arrested by Serbian security forces and charged with corruption, political assassination, and election fraud. On April 3, Secretary of State Colin L. Powell certified the FRY's compliance with the conditions, but qualified the certification by noting that the United States support for up to \$1 billion in additional international assistance to be pledged at a future international donors conference would be conditional on the FRY's full cooperation with the Tribunal. While much of the international community welcomed this development, the French objected to the use of economic conditionality to promote the arrest and the transfer to The Hague of Mr. Milosevic.

Many Serbian government officials and NGOs made the claim that it was necessary first to try Milosevic in Serbia for economic crimes committed against the people of Serbia as they were the most serious victims of his actions, and only then transfer him to The Hague to face charges of crimes against humanity and possibly genocide. The United States led a campaign to condition international assistance on his transfer to The Hague. But when Prosecutor del Ponte met with President Kostunica to work out arrangements for cooperating with the Tribunal, she found "he was absolutely [in denial], denying even the existence of the Tribunal — just accusing the Tribunal, because the Serbs are only victims."²¹¹ During this time, half-hearted efforts of the FRY parliament to pass a law on extradition and cooperation with the Tribunal faltered, due in large part to the efforts of the pro-Milosevic Socialist People's Party from Montenegro -- which although delegitimized by the government of Montenegro, was frequently embraced and legitimized by Ambassador Montgomery and the Department of State.

As the June 29, 2001 deadline neared for the international donors conference in Brussels, all of the major European states agreed to attend despite the failure of the FRY government to act on the transfer of Milosevic to The Hague. In an interview with Newsweek Magazine, Prosecutor del Ponte responded to the question "[w]hat kind of pressure are the U.S. and other governments putting on Belgrade to hand him over?," by stating,

210. *See id.*

211. Roy Gutman & Daniel Klaidman, *Tracking War Criminals: Del Ponte Says NATO Troops are 'Doing Nothing'*, NEWSWEEK INT'L, May 21, 2001, at 22.

“the United States is giving very, very good support. I am very happy about that because the European Union support is low-level. The E.U. doesn’t want to put conditions [on aid]. I am counting on the Americans. So aid must be conditioned? That is the only, only voice they hear . . . I am sure it is the only way to obtain what we need to make justice.”²¹² In the face of this failure of European resolve, and against the advice of career officers at the State Department, but under renewed pressure from McConnell and Leahy and other important senators, Secretary Powell declared the United States would not be attending the conference unless Milosevic was extradited to The Hague.

On June 28, 2001, in the face of Kostunica’s failure to comply with the conditions, Serbian Prime Minister Zoran Djindjic ordered the transfer of Milosevic to The Hague. While this act was welcomed by the international community, President Kostunica protested that the transfer of Milosevic was “illegal and unconstitutional,” as well as “lawless and hasty.”²¹³ Other members of Kostunica’s cabinet resigned in dissent, throwing the fragile Belgrade government into turmoil. But the political crisis quickly faded when, two days later, Yugoslavia was awarded 1.28 billion dollars in aid by the United States and its European allies.

Milosevic, once America’s and Europe’s partner in peace, is now standing trial before the Yugoslav Tribunal for crimes against humanity and genocide. He has indicated that he intends to call numerous international officials, such as former British Foreign Minister Douglas Hurd, General Michael Rose, David Owen, Carl Bildt and Ambassador Richard Holbrooke to establish that they considered him essential to their efforts to bring peace to the former Yugoslavia and that they embraced him as a peace maker and not as a war criminal. While the testimony of these individuals and their explanations under cross examination would likely do little to actually support Milosevic’s legal case, a probing of their diplomatic relationship with Milosevic will undoubtedly highlight the predominance of the approach of coercive appeasement and its devastating consequences for the people of Croatia, Bosnia, Kosovo and Serbia as well as the extent to which its use undermined the credibility of European and American foreign policy.

CONCLUSION

The war in Yugoslavia represented a unique opportunity for the interna-

212. *Id.*

213. Marlise Simons with Carlotta Gall, *The Handover of Milosevic: The Overview; Milosevic is Given to UN For Trial in War-Crime Case*, N.Y. TIMES, June 29, 2001, at A1.

tional community to act on its post cold war rhetoric of a new world order and the universal protection of human rights and human dignity. Instead, the story of the international response to the Serbian rogue regime represents a case study in failure and provides a very clear picture of the devastating consequences of failed efforts at peace building. The story is replete with missed opportunities, conflicted governments and institutional egoism, which prevented the international community from learning from its mistakes and taking the necessary action to defeat an evil regime bent on committing genocide against its former citizens. The result was a decade long war filled with countless atrocities, the collapse of institutional, economic and political structures, and a region whose future remains in doubt. Although both the Bosnian and Kosovo conflicts were eventually resolved through the use of force, the policy choices made by the international community that led to the approach of coercive appeasement have many reverberations. The status of Kosovo remains unresolved and continues to serve as a destabilizing factor in the region, the credibility of NATO and the U.N. is tarnished, and the ability of the international community to resolve such conflicts remains in doubt. What remains to be seen is whether the approach of coercive appeasement has become so ingrained as to preclude the adoption of other foreign policy approaches more suitable for solving conflicts. With the current war against terrorism and the ongoing crisis in the Middle East, the international community can ill afford to ignore the lessons of its failed approach to the Yugoslav conflict, and it must ever be on its guard not undertake flawed tactical decisions for short term gain which then commit it to a strategic approach of coercive appeasement.