

## THE ROLE OF JUSTICE IN THE FORMER YUGOSLAVIA: ANTIDOTE OR PLACEBO FOR COERCIVE APPEASEMENT?

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Justice being done, and being seen to be done, is the difference between a lasting peace and an interval between hostilities.

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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.

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<sup>1</sup> Ed Vulliamy, *Bosnia: The Crime of Appeasement*, 74 INT'L AFF. 73, 89 (1998) (quoting Justice Goldstone).

<sup>2</sup> Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 738 (1998).

*Abstract*

Throughout the 1990's, the approach of the European Union and the United States to the conflicts in the former Yugoslavia was one of coercive appeasement. By most professional and historical accounts, this approach was a failed one, with the consequences that over 250,000 civilians were killed, thousands raped and millions displaced. Throughout the conflict, the institutions of justice created by the international community frequently served as a mere placebo rather than an antidote to the dominant approach of coercive appeasement. Frequently key policymakers actively sought to constrain the role of justice during the peace building process. At times during the course of the conflicts, however, the norm of justice did guide European and American policymakers towards more effective approaches such as diplomacy backed by force and the indictment of war criminals. Regrettably, those charged with operating the institutions of justice often failed to comprehend the magnitude of their responsibilities and declined to fully utilize the mechanisms at their disposal to ensure the infusion of justice into the peace building process.

This article conducts a historical analysis of the interaction between the international policy approach of coercive appeasement and the norm and institutions of justice in the conflicts in the former Yugoslavia. Coercive appeasement was the favored approach of the international mediators charged with halting the genocidal campaigns of the Serbian regime. Justice, which may provide an antidote to the approach of coercive appeasement, was at times marginalized and manipulated and frequently served as a placebo to both the mediators and the parties to the peace talks. Importantly, the Yugoslav Tribunal, established to indict and prosecute those responsible for war crimes all too often failed to fulfill its full potential. The reluctance of the international community to invoke the norm of justice as a viable alternative to the approach of coercive appeasement facilitated the ability of the Serbian regime to carry out genocide in Bosnia and attempted genocide in Kosovo.

This article will also demonstrate that despite the obvious lessons learned from the Bosnian conflict, the international community failed to sufficiently invoke the norm of justice and empower the Yugoslav Tribunal to indict and prosecute high level war criminals in the Kosovo conflict three years later.

In the following sections, the article will first define the five key elements of coercive appeasement. Then, using examples from the conflicts in Bosnia and Kosovo, it will illustrate how at various points in the conflicts, a greater reliance on the norm of justice could have provided a viable alternative to coercive appeasement. It will also critically examine the extent to which justice failed to adequately constrain the effects of coercive appeasement due to the inability or unwillingness of the Yugoslav Tribunal to effectively carry out its mandate.

### *Introduction: Coercive Appeasement*

Coercive appeasement begins when politically and militarily powerful third-party states or peace builders, 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 aggression of the rogue regime or when the third-party states use limited force then grant the regime the achievement of many of its primary objectives. Coercive appeasement frequently involves efforts by international peace builders to enable those responsible for the conflict to accomplish their objectives by coercing the victim of the aggression into accepting agreements conducive to the interests of the aggressor. As a result, coercive appeasement encourages further aggression by signaling to the aggressor that it will suffer only minimal political consequences for its actions.

Peace builders seldom intentionally set out to implement a strategic approach of coercive appeasement. It is frequently the case that tactical decisions and actions taken in an *ad hoc* fashion, designed to achieve short-term objectives, come to frame and perpetuate an approach of coercive appeasement. To the extent a strategic tactic existed in the former Yugoslavia, it could be most accurately characterized as accommodation. Because of the categorical commitment to accommodation by many of the key policy makers, they often undertook actions intended to minimize the influence of other approaches such as the meaningful use of force, or justice based initiatives like the Yugoslav Tribunal.

The approach of coercive appeasement is characterized by five core elements. The first element is a **diplomatic deficit**. A Diplomatic deficit entails the failure to create the conditions for effective leadership or to articulate a clear policy objective coupled with the inability to structure a coordinated or capable diplomatic process for peace building. Often, a diplomatic deficit encompasses the unintentional misuse of diplomatic signaling and the readily transparent articulation of the peace builder's intentions. Diplomatic deficit also produces deficient institutional learning whereby peace builders are unable to adequately undergo institutional and personal "learning" during the peace building process.

The second core element is **myopic accommodation**. This element entails the shortsighted pursuit of actions designed to meet the needs and interests of the aggressor. This effort is then coupled with intentional or unintentional obfuscation of the aggressor's objectives.

Consistent with the behavior of myopic accommodation, the third core element, **moral duplicity**, is the application of pressure to the victims designed to compel their acquiescence to the primary demands of the aggressor. Moral duplicity frequently leads to intentional and unintentional actions which create divisions among the political actors representing the victims. Moral duplicity also frequently entails declarations and actions designed to create the perception of moral equivalence among the parties. By creating moral equality between the parties, the peace builders are thus able to blur the distinction between aggressor and victim and thus reduce public resistance to the approach of accommodation. Such positioning also enables the peace builders to erode the moral and strategic imperative to adopt other more aggressive approaches, such as the use of force.

The fourth core element is **constrained force** and entails those activities designed to constrain and minimize the use of legitimate force. Constrained force is the result of the unwillingness on the part of third-party states or peace builders to articulate and implement strong policy initiatives that are not perceived as politically viable, or are inconsistent with previous policy approaches.

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

Ideally justice limits the impact of a diplomatic deficit by providing a principled focus to efforts to resolve conflict – namely justice, fairness, equity and rectitude. Justice works to undue myopic accommodation by serving to prevent or limit efforts to accommodate individuals suspected of or indicted for war crimes. It inhibits moral duplicity by clearly identifying one or more parties as primarily responsible for the commission of atrocities. Justice may also limit the ability of peace builders and culpable parties to constrain the use of legitimate force as it provides a moral justification for the use of force against the aggressor and it narrows the range of options available to peace builders by excluding negotiations with those indicted for war crimes. The institutionalization of justice through mechanisms such as War Crimes Tribunals and truth commissions limits the ability of peace builders to marginalize justice.

### *I. Diplomatic deficit*

The diplomatic deficit at the beginning of the Yugoslav conflict created 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.

Many factors contributed to the diplomatic deficit that plagued the 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.<sup>3</sup> This geopolitical occurrence fostered 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 the atrocities unfolding in Yugoslavia through sheer persuasion.<sup>4</sup> Moreover, the European peace builders also failed to adequately understand Milosevic's intention of creating an ethnically homogeneous greater Serbia and thus began the negotiations with the fundamental miscalculation that the crisis could be resolved with minimal effort in a matter of weeks. This position proved an ill fated mistake as the European Union's preoccupation with its own internal operations left very little time and resources available for the creation of an effective strategy regarding the Yugoslav crisis.<sup>5</sup>

The European Union failed to take a clear and determined stance on the fate of Yugoslavia from the onset of the hostilities. Throughout the crisis, the E.U. repeatedly qualified its statements, adding confusion as to its ultimate position. The E.U. insisted that Yugoslavia remain a unified

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<sup>3</sup> 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.

<sup>4</sup> See Age Eknes, *The United Nations' Predicament in the Former Yugoslavia*, in *THE UNITED NATIONS AND CIVIL WARS* 109 (Thomas G. Weiss ed., Lynne Rienner Publishers 1995) (discussing the European Union's control of the Yugoslav situation during the early stages of the crisis).

<sup>5</sup> See Philip Towle, *The British Debate About Intervention in European Conflicts*, in *MILITARY INTERVENTION IN EUROPEAN CONFLICTS* 94, 99 (Lawrence Freedman ed., Blackwell Publishers 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., Blackwell Publishers 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.*

state, while at the same time some member states sympathized with the plight of those wishing to secede. Within the organization, a conflict ensued regarding Germany and Denmark's early pronounced support for an independent Croatia and Slovenia while other members insisted on unity and refused to recognize the newly seceded states. The consequences of such ambiguity led to both confusion on the part of the Yugoslav actors and an opportunity for Milosevic to exploit the lack of a unified E.U. position to his advantage.

The United States, for its part, made an early tactical decision to defer to the Europeans by simultaneously supporting E.U. initiatives at a peace process and shying away from talks about the necessity of invoking force to end the conflict. Much of this decision rested on the fact that after the collapse of the Soviet Union in December 1991, Yugoslavia had lost its strategic importance to the United States. At the time of the crisis, the U.S. was preoccupied with its military efforts in the Persian Gulf and the future of the disintegrating Soviet Union. The U.S. was satisfied to leave the handling of the Yugoslav conflict to the member states of the European Union.<sup>6</sup> When fighting began in 1991, Secretary of State James Baker succinctly explained the United State's lack of engagement by saying, "We don't have a dog in that fight."<sup>7</sup> Henceforth, the Bush Administration's policy reflected the desire to leave the management and resolution of the hostilities in Yugoslavia in the hands of the Europeans while pursuing a separate agenda based squarely on U.S. interests.

By the time President Clinton officially assumed office in early 1993, it had become clear that a resolution to the Yugoslav crisis was not going to be accomplished solely by European efforts. Moreover, the United States increasingly became aware that it did have strategic interests in the region and remaining disengaged in the negotiation process was no longer a viable position. Despite Clinton's campaign promises to employ the use of force to protect Bosnian civilians, the U.S. minimized its role in ending the conflict and failed to assume a strong leadership role in negotiations. By labeling Serb atrocities against civilians as attempted genocide, the Administration feared it would close the door on future negotiations with Milosevic and commit itself to the use of force to end the conflict. Despite the subsequent NATO bombing campaign in 1995 and the signing of the Dayton Accords later that year, the Clinton Administration continued to exhibit a diplomatic deficit by excluding the norm of justice from the peace process and identifying Milosevic as a

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<sup>6</sup> For an assessment of the United States interests in the former Yugoslavia, see Laurie A. Cohen, *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, 150 (1997). For a European perspective on the development of U.S. policy, see THOMAS PAULSEN, *DIE JUGOSLAWIENPOLITIK DER USA 1989-1994: BERGRENZTES ENGAGEMENT UND KONFLIKTDYNAMIK* (Baden-Baden: Nomos Verlagsgesellschaft 1995).

<sup>7</sup> LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* 29-30 (TV Books 1996).

legitimate partner in the negotiations. It was not until the appointment of Secretary of State Albright in 1996 that the Clinton Administration's policy began to shift in favor of the indictment of Milosevic as a war criminal, more than five years after he began the campaign of ethnic cleansing in Yugoslavia.

The diplomatic approach favored by both the Europeans and the United States during the crises in Yugoslavia continued to be dominated by a model of realism that placed the overall emphasis on saving lives using "whatever means necessary." The "saving lives" rationale, while encapsulated in only two words, is a powerful tool used by negotiators to diminish the role of justice in dealing with war criminals. In arguing that the accommodation and appeasement of such individuals is sometimes necessary in the interest of "saving lives," it effectively infers that those interested in justice are not interested in saving lives or are willing to allow the sacrifice of human lives in the name of an idealistic objective.<sup>8</sup> This view was clearly stated by an anonymous U.N. official who criticized the then Yugoslav Tribunal Prosecutor and President for their public pressure on the Dayton negotiators. The U.N. official argues, "their 'ill-considered statements could have led to a breakdown of delicate negotiations in Dayton . . . Everyone who was at the Dayton proximity talks knew that if this issue [mandatory cooperation with the Tribunal] were pressed it could have ruined the talks."<sup>9</sup> He declared that they were acting "irresponsibly" and asked, "in the name of what moral principle would one be able to defend those [further] deaths?"<sup>10</sup> The later conflict in Kosovo, however, evidenced the fact that the act of accommodation at Dayton had indeed resulted in further deaths and that only the use of force, coupled with the indictment of Milosevic, brought an end to ethnic cleansing perpetrated by Serbian forces in the former Yugoslavia.

### **Justice as an Antidote for Diplomatic Deficit**

Justice can serve as an antidote to a diplomatic deficit by providing a rationale for taking sides in a conflict and using force if necessary. In the case of the Yugoslav conflicts, the norm of justice provided that those individuals and institutions responsible for the wide scale commission of crimes against humanity be held responsible for their actions according to the principles of international human rights law. As the Yugoslav Tribunal was established to prosecute such individuals, regardless of rank or affiliation, its existence provided a practical alternative to attempts to accommodate war criminals and continue to view their participation in the peace process as fundamental.

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<sup>8</sup> See Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 2, 250, 258 (1996).

<sup>9</sup> See *Id.* at 255.

<sup>10</sup> *Id.* at 257.

The norm of justice also injects a principled focus to diplomatic initiatives. As the rule of law and the prosecution of those responsible for violating internationally accepted codes of human rights fall within the jurisdiction of the Tribunal, the argument that "saving lives" falls outside of the sphere of imposing justice is negated. The model of realism favored by the international negotiators allowed for the continued participation and later rehabilitation of Milosevic in both the Bosnia and Kosovo conflicts when his indictment could have easily been secured well before the campaign of terror began in Kosovo. Acting under the principle of enforcing international standards of justice, the Yugoslav Tribunal could have provided a clear and accepted alternative to accommodation. By exercising its authority in issuing indictments and pressing for the apprehension of war criminals, the Tribunal might have played an important role in limiting diplomatic maneuvers which only served to legitimize and ratify the gains of war criminals and forestall the use of force to end the conflict.

### **Justice as Placebo for Diplomatic Deficit**

The Yugoslav Tribunal was designed, as all institutions of justice, to operate freely from the political agendas and concerns of outside parties. Yet, unlike other institutions of justice, it was established to play a role in the peace building process and, as such, needed to be functionally aware of its mandate while attempting to maintain the standards of impartiality and fair proceedings. Unfortunately, many political figures manipulated the unique nature of the Tribunal to serve their own political agendas. These agendas were largely centered on promoting the approach of accommodation as a means to forestall the use of force. Additionally, the Tribunal itself failed to acknowledge or sufficiently understand its role in the peace building process and often failed to act in a timely or forceful manner when faced with indicting war criminals. The combination of these problems, and the continued vacillation by the peace builders regarding the employment of the norm of justice in ending the hostilities in both Bosnia and Kosovo led to false expectations and disappointing results in the operation of the Tribunal. Specifically, in the minds of many actors involved in bringing peace to the former Yugoslavia, the Tribunal came to represent a mere placebo.

An initial shortcoming of the Tribunal centered on its failure to indict senior level officials responsible for ordering mass atrocities. This hesitance was fueled by the belief on the part of many peace-builders that indicting top officials would hamper efforts to reach a negotiated agreement to end the conflict without military action. In direct contrast to the Nuremberg and Tokyo Tribunals where top surviving military officials were first prosecuted while lower level culprits were left to military commissions and



domestic court trials, the chief investigators for the Yugoslav Tribunal initially focused their efforts on low-level perpetrators.<sup>11</sup>

In fact, Momcilo Krajisnik, a man known as one of the “individuals who ran illegal operations that resulted in the deaths of thousands of Bosnians,”<sup>12</sup> campaigned and was elected as the Serbian member of the Bosnian Presidency in the wake of the Dayton Accords. For the most part, Krajisnik, who often operated in tandem with indicted war criminal, Radovan Karadzic, used his time in office to stifle the implementation of the Dayton Accords and advocate the ethnic separation of Bosnia. Furthermore, Biljina Plavsic, another individual known to act in tandem with Karadzic and promote ethnic partition and violence, was elected to the Presidency of the Republika Srpska during a crucial phase in the implementation process. Both Krajisnik and Plavsic were indicted for war crimes after they had finished serving their full terms in office.

The visibility of known war criminals holding elected office, coupled with the failure of the Tribunal to issue indictments despite compelling evidence of their guilt, greatly undermined the legitimacy of the international community in its attempts to bring a just and lasting peace to Bosnia. Additionally, in November 2000, the International Crisis Group estimated that there were over seventy-five known major war criminals holding positions of power in the Republika Srpska. A failure to indict these individuals, and allow them to attain positions of power, enabled them to continue the process of unraveling the Dayton Accords and impose an agenda of ethnic partition.<sup>13</sup>

Beyond the troubling aspect of the Prosecutor's early failure to indict senior level defendants, there were indications that the ability of the Prosecutor to obtain evidence necessary to incriminate top officials was hampered by the United States and its European allies. Richard Holbrooke, for instance, stated that it is “not my role here to make a judgment” and refused to address Milosevic's culpability for the atrocities in Bosnia during the Dayton negotiations.<sup>14</sup> Although the Tribunal indicted Milosevic in 1999 for the role he played in the Kosovo atrocities,<sup>15</sup> it was not until

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<sup>11</sup> Interview with Judge Richard Goldstone, Chief Prosecutor for the ICTY and the ICTR (Dec. 3, 1995), in 5 TRANSNAT'L L. & CONTEMP. PROBS. 373, 380 (1995).

<sup>12</sup> Mark Tran, *Nato Seizes Bosnian Serb Leader over War Crimes*, THE GUARDIAN, Apr. 3, 2000, available at <http://www.guardian.co.uk/international/story/0,3604,178495,00.html> (quoting Tribunal Spokesperson, Paul Risely).

<sup>13</sup> See INTERNATIONAL CRISIS GROUP, BALKANS REPORT NO.103, WAR CRIMINALS IN BOSNIA'S REPUBLIKA SRPSKA: WHO ARE THE PEOPLE IN YOUR NEIGHBOURHOOD? (Nov. 2, 2000), available at <http://intl-crisis-group.org/home/index.cfm?id=1518&l=1>.

<sup>14</sup> Jurek Martin, *Holbrooke Sees "Tough Slog" to Peace in Bosnia*, FIN. TIMES, Nov. 2, 1995, at 3.

<sup>15</sup> Prosecutor v. Milosevic, Indictment, I.C.T.Y., No. IT-99-37 (1999), available at <http://www.un.org/icty/cases/indictindex-e.htm>.

November 22, 2001 that he was charged for his crimes in Bosnia, while he was already in custody in The Hague.

In addition to the lack of cooperation by the U.S. and other governments in providing the needed evidence to indict Milosevic for war crimes in Bosnia, the Office of the Prosecutor failed to review all of the legal avenues open to the Tribunal for prosecution. Specifically, as the civilian commander of the Serbian military and police forces, Milosevic could have been held accountable under the theory of command responsibility for allowing his forces to commit crimes against humanity in Bosnia. Despite the existence of other grounds on which to prosecute Milosevic, Prosecutor Louise Arbour refused to issue an indictment, rather she argued she needed an airtight case against the leader.<sup>16</sup>

If the full application of the norm of justice had been applied from the onset, Milosevic would have been indicted for his role in the atrocities in Bosnia in 1995, if not earlier. Yet the institutionalized inadequacies of the Tribunal, coupled with the overriding belief that Milosevic was essential as a partner for peace at Dayton and thereafter, left the door open for his genocidal campaign in Kosovo four years later. By indicting Mladic and Karadzic on the eve of the Dayton Accords in 1995, Prosecutor Goldstone had effectively kept them from the negotiating table and from being revived at a later date for further negotiations.

Unfortunately, instead of following suit with Milosevic and facilitating his indictment for genocide and crimes against humanity, the international community sought to achieve a negotiated settlement through the approach of coercive appeasement.<sup>17</sup> The Office of the Prosecutor was also slow to assert jurisdiction in the Kosovo case and failed to demand early on that relevant evidence identifying the nature of the atrocities be turned over to the Tribunal. In the end, an overriding distaste for the use of force, coupled with a myopic and faulty approach to peace building, allowed Milosevic to remain a "partner for peace" through 1999. The price for these actions was undoubtedly paid in the suffering and death of the thousands of victims of his genocidal campaigns.

As the dominant belief held by the United States and the E.U. was that Milosevic was essential to the success of the Dayton Accords, it is not altogether surprising that information facilitating his indictment was withheld from the Prosecutor. The failure to provide the information was blamed on complications arising from domestic laws and delays in

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<sup>16</sup> See Ed Vulliamy & Patrick Wintour, *Hawks Smell a Tyrants Blood*, THE OBSERVER, May 30, 1999, at 15, available at <http://www.guardian.co.uk/Kosovo/Story/0,2763,207382,00.html>. (last visited Oct. 7, 2003).

<sup>17</sup> See Paul Williams & Norman Cigar, *War Crimes and Individual Responsibility: A Prima Facie Case for the Indictment of Slobodan Milosevic*, at <http://www.nesl.edu/center/balkan1.htm> (reportedly used as a research template for the indictment).

declassification.<sup>18</sup> As the Serbian offensive raged on in Kosovo in the spring of 1999, both the U.S. and British governments came to realize that after years of appeasing Milosevic, he was in fact not a partner in peace, but rather the primary culprit. Shortly thereafter, Madeleine Albright made several speeches signaling that the indictment of Mr. Milosevic would not be opposed by the United States as British and U.S. officials began handing over long-overdue evidence to the Office of the Prosecutor.<sup>19</sup>

## *II. Myopic accommodation*

The graveyard of Balkan diplomacy is filled with tombstones bearing the names of the various peace efforts such as the Brioni Agreement, Carrington Plan, Vance/Owen Plan, London Agreement, Geneva Principles, New York Principles, Dayton Accords, Rambouillet/Paris Agreement, and U.N. Security Council Resolution 1244. While some of these agreements contributed to the end of ethnic cleansing in the former Yugoslavia, many of them were failures and some actually had the effect of encouraging ethnic cleansing while others ratified its gains.

For example, throughout the period of 1991 to 1995, the E.U. and the U.N. held intermittent negotiations in Geneva that sought a negotiated resolution of the conflict.<sup>20</sup> However, these 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 despite continued engagement.<sup>21</sup> The U.N./E.U. peace conference proposed a series of peace plans for the de facto and de jure partition of Bosnia. Despite the occasional maneuver by a party to tentatively accept a plan in an attempt to curry favor with the international community or to forestall international sanctions, no proposed peace plan was ever agreed to by the actors. The U.N./E.U. Co-Chairmen of the Peace Conference had initially sought to make gains by adopting a policy of accommodation that quickly turned to one of appeasement. In such a milieu, the conflicting parties felt no dire compulsion to undertake a concerted effort to bring about a negotiated cease-fire to end the war.

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<sup>18</sup> See *Id.*

<sup>19</sup> See Secretary of State Madeleine Albright, *The Situation in and around Kosovo*, Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council Held at NATO Headquarters Brussels (Apr. 12, 1999), available at <http://www.nato.int/docu/pr/1999/p99-051e.htm> (last visited Dec. 22, 2003).

<sup>20</sup> See T. Modibo Ocran, *How Blessed were the UN Peacekeepers in Former Yugoslavia? The Involvement of UNPROFOR and other UN Bodies in Humanitarian Activities and Human Rights Issues in Croatia, 1992-1996*, 18 WIS. INT'L L.J. 193 (2000).

<sup>21</sup> 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. 38 KESING'S RECORD OF WORLD EVENTS 38943 (1992).

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 that ratified the gains of ethnic cleansing. The United States endorsed the same view.<sup>22</sup> Yet despite such pronouncements, the most notable example of myopic accommodation occurred when the U.N./E.U. proposed the Vance-Owen Peace Plan, which divided Bosnia into ethnic cantons. In response to the international backing of the Vance-Owen Plan, the Serb and Croat parties sped up efforts to ethnically cleanse those cantons to which they had been assigned authority.<sup>23</sup> In fact, the U.N./E.U. accommodation approach at the London Conference 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 the atrocities in Bosnia made it impossible for him to continue.<sup>24</sup>

The reliance on myopic accommodation is further evidenced by the fact that two of the four signatories to the Dayton Accords are now indicted for war crimes. Krajisnik and Milosevic were later indicted by the Tribunal; while Franjo Tudjman would have been had his death not preceded the indictment. In fact, Prosecutor Carla Del Ponte declared that she was close to issuing an indictment for the Croatian President at the time of his death. But her failure to act earlier allowed for the missed opportunity to fully establish the culpability of Tudjman or his plan to ethnically cleanse Croatia of non-Croats.

The myopic accommodation of Milosevic and the legitimization of his role as a partner in peace during the Dayton negotiations undermined any real chance for the long-term survival of a multi-ethnic Bosnia. Moreover, the reliance on the approach of accommodation set a precedent for what Milosevic could expect from the international community even after the use of force. Rather than dismantling the achievements of ethnic cleansing, the Dayton Accords formally ratified these gains by formalizing the ethnically motivated territorial ambitions of Milosevic.

Despite clear evidence that Kosovo was the place where Milosevic had promised to make his stand for the Serbian people, and that he had demonstrated a clear pattern of moving from one conflict to another, the international community demonstrated no significant interest in 1997 in

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<sup>22</sup> 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), at <http://foia.state.gov/Documents/foiadocs/2af8.PDF> (last visited Oct. 6 2003).

<sup>23</sup> For a pointed critique of the Vance-Owen Peace Plan, see generally RENE LUKIC, *THE WARS OF SOUTH SLAVIC SUCCESSION YUGOSLAVIA 1991-1993* 36-39 (1993).

<sup>24</sup> 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>

taking the lead in pursuing aggressive measures of prevention or in holding Milosevic accountable for his actions in Kosovo. Instead, the international community again attempted to negotiate a peaceful settlement to the crisis. In fact, the international community was reluctant to become enmeshed in the Kosovo crises because it continued to rely on Milosevic to implement the Dayton Peace Accords. The international community's ability to pressure Milosevic to end the violence was thus constrained and was a key factor behind its reluctance to adopt a more confrontational position.

### **Justice as an Antidote to Myopic Accommodation**

On the eve of the Dayton Accords, the international actors involved in the negotiations began to make a number of public and private statements about the need to include the norm of justice in the process. Although these statements appeared to make a case for justice, they were intended only to curtail public demands for its inclusion while creating a wider space for the continued reliance on an approach of accommodation. Judge Goldstone, sensing the erosion of the role of justice in the peace process, acted quickly to indict Radovan Karadzic and Ratko Mladic for genocide on July 24, 1995 and again on November 16, 1995 for their role in the Srebrenica massacre. This act proved to be a crucial point in the process as it made it difficult for the United States and the Europeans to negotiate with them.

Yet despite this positive action by Judge Goldstone and the public proclamations of praise by the international community for the indictments, Richard Holbrooke still sought the inclusion of Karadzic and Mladic in the negotiations as late as September of 1995. Ambassador Holbrooke rationalized this contact as necessary in order to establish a ceasefire in Sarajevo and as not truly a legitimate negotiation as he did not shake their hands or view them as a separate negotiating team. He went on to attest that Raoul Wallenberg and Folke Bernadotte had negotiated with Adolf Eichmann and Heinrich Himmler to "save lives" during the Second World War.<sup>25</sup> Moreover, the indictment of Karadzic and Mladic was coupled with the non-indictment of Milosevic so although it served to exclude two individuals that might have the most destabilizing effect on the negotiations, it allowed the internationals to continue to negotiate with a seemingly exonerated President Milosevic.

In Kosovo, the failure of weak policy responses and the apparent replay of the approach of accommodation with Milosevic drew criticism from many international leaders and resulted in increased pressure from international figures. As a result, 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. Although at the meeting the Prosecutor rebuffed the State

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<sup>25</sup> RICHARD HOBROOKE, *TO END A WAR* 147-9 (1998).

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.<sup>26</sup> The indictment of Milosevic put a quick stop to any efforts at further accommodation. As noted by former Senator Bob Dole, "The administration cannot reasonably expect the Kosovar Albanian deportees to return to Kosovo with an indicted war criminal – and the very man who attempted to destroy them and their society – as the guarantor of their security."<sup>27</sup>

### **Justice as a Mere Placebo to Myopic Accommodation**

While the Yugoslav Tribunal was created to serve many functions, such as establishing individual responsibility, denying collective guilt, deterring future crimes, dismantling institutions responsible for enabling atrocities, and providing a process for victim catharsis, a persistent shortcoming of the Tribunal was its tendency to focus solely on establishing individual culpability for the perpetration of atrocities, and its failure to recognize its proper role in influencing the peace process by precluding negotiations with those responsible for international crimes.

In establishing individual responsibility for the commission of atrocities prior to the Dayton Accords, the Tribunal initially spent a considerable amount of time and resources focusing on low-level perpetrators. The first indictment of Dusko Tadic,<sup>28</sup> a Bosnian-Serb traffic cop, was followed by a string of other low-level indictments of prison camp guards, foot soldiers, and members of paramilitary units. Although Prosecutor Goldstone's indictments of Karadzic and Mladic in July 1995 and the public airing of evidence supporting their charges came as a positive step, the failure to simultaneously indict Slobodan Milosevic and Franjo Tudjman left the most culpable parties at the helm. The overall implication gathered from the early years of the operation of the Tribunal was that by failing to indict those in top positions of leadership in favor of low-level perpetrators, the Office of the Prosecutor missed an important opportunity to establish the individual guilt of top officials and to set an important precedent for other conflicts.

By attempting to build a safe record of prosecutions and focusing on gathering evidence on low and mid-level perpetrators of war crimes, the Tribunal failed in one of the most important tasks – the deterrence of future crimes. By refusing to exert its authority over the conflict, the Office of the

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<sup>26</sup> See *Prosecutor v. Slobodan Milosevic*, Indictment, I.C.T.Y., No. IT-99-37 (2001), available at <http://www.un.org/icty/indictment/english/mil-ii99524e.htm>.

<sup>27</sup> Senator Robert Dole, *No Deals with Milosevic*, WASH. POST, June 1, 1999 at A15.

<sup>28</sup> See *The Prosecutor v. Dusko Tadic*, Indictment, I.C.T.Y., No. IT-94-1 (1999), available at <http://www.un.org/icty/indictment/english/tad-ii950213e.htm>. (last visited Oct. 6, 2003).

Prosecutor undermined the role of justice and provided support to those who sought to end the conflict by making peace with its architects. Overall, the failure of the Office of the Prosecutor to indict Milosevic and other top level officials for their role in Bosnia allowed them to secure their objectives at Dayton and repeat their war crimes again in Kosovo in 1998.

Even after the indictments of both Milosevic and Milutinovic were issued in May 1999, the Tribunal was relatively silent as to the need for Milosevic's removal from power. Importantly, for at least three years after his indictment for crimes against humanity Mr. Milutinovic continued to serve as the President of Serbia. During that time the Tribunal voiced almost no demand for his apprehension and delivery to The Hague. His visibility, along with the failure of the international community to apprehend Karadzic and Mladic, continued to perpetuate feelings of hatred and injustice on the part of many of the survivors of the Bosnian genocide and hamper most hopes at a future reconciliation.

It may well be the case that the only reason Milosevic was handed over to the Tribunal was because Senators McConnell and Leahy sponsored a rider to the Foreign Appropriations Bill which precluded the United States from providing aid to Serbia after March 31, 2000 if Yugoslavia failed to cooperate with the Tribunal. Notably, this legislation was passed despite the express objection of the Department of State and in contravention of the recommendation of America's European allies, in particular the French government. On April 2001, Milosevic was arrested by Serbian security forces and charged with domestic crimes. As required by the McConnell/Leahy legislation, Secretary of State Powell declared that the United States would block up to \$1 billion in additional international assistance scheduled to be pledged at an international donor's conference on June 29, 2001. On June 28, Milosevic was transferred to the custody of international officials and brought to The Hague to stand trial for war crimes.

### *III. Moral duplicity*

While the Europeans relied upon moral duplicity as a means for justifying their accommodation of Serbian interests, the United States relied upon moral duplicity as a justification for remaining disengaged from the conflict. Such justifications resulted in the adoption of a number of platitudes issued by the Americans and Europeans to defend their positions. A frequently echoed justification for the conflict was that the war was caused by the bubbling over of "ancient ethnic hatreds," and that all the parties were in effect "warring factions" equally responsible for the commission of atrocities. Some officials argued 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 equal

responsibility for the commission of atrocities by the warring factions as it promoted his objective of a negotiated settlement of the crisis without the complicated involvement of invoking the norm of justice. Similarly, Secretary of State Warren Christopher adopted Milosevic's propaganda about ancient ethnic hatreds and warring factions<sup>29</sup> to create the impression that the conflict was historically inevitable and that the American government could therefore not be faulted for failing to prevent the conflict or the resulting atrocities.<sup>30</sup>

Another illustration of U.S. reliance on the approach of moral duplicity 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 atrocities – thus removing the imperative for action.<sup>31</sup> In fact, according to the former Yugoslav desk officer, Richard Johnson, the evening before his testimony, Secretary Christopher's office "sought urgent information from the [State

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<sup>29</sup> See, e.g., Secretary of State Warren Christopher, *New Steps Toward Conflict Resolution in the Former Yugoslavia*, Opening Statement at News Conference on Former Yugoslavia (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 Secretary of State Warren Christopher, Remarks at the Plenary Session of the Conference on Security and Cooperation in Europe (Nov. 20, 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 President William Clinton, Remarks During a Presidential Exchange with Reporters (Jan. 24, 1994), in 1 PUB PAPERS 122 (Jan. 24, 1994). President Clinton declared that "the killing is a function of a political fight between three factions. Until they 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.*

<sup>30</sup> See Georgie Anne Geyer, *How the Conscience of the West Was Lost*, in THE CONCEIT OF INNOCENCE 91 (Stjepan G. Mestrovic ed., 1997).

<sup>31</sup> See *Foreign Policy Focus*, CHRISTIAN SCIENCE MONITOR, May 26, 1993, available at [http://www.csmonitor.com/cgi-bin/wit\\_article.pl?tape/93/may/day26/2618](http://www.csmonitor.com/cgi-bin/wit_article.pl?tape/93/may/day26/2618); see also Saul Friedman, *Christopher Assailed Official: U.S. Downplayed Bosnia Genocide*, NEWSDAY, Feb. 4, 1994, at 4 (describing the continued obfuscation of the genocide issue by the Department of 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."<sup>32</sup> Christopher's actions affirmed the belief that 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.<sup>33</sup>

The element of moral duplicity was also embraced as 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 valid partner in peace during the Geneva negotiations, and lauding him as a "gracious host," with "excellent English," while overlooking his culpability for genocide. It was only when Judge Richard Goldstone, the Yugoslav Prosecutor for the International Tribunal, indicted Karadzic for genocide that he was effectively de-legitimized as a viable partner in negotiations. Similarly, Ambassador Richard Holbrooke's now famous quote just before the negotiation of the Dayton Accords, stating, "You can't make peace without President Milosevic,"<sup>34</sup> re-established Milosevic as a legitimate peace negotiator despite his clear orchestration of genocide against non-Serbs. Additionally, Secretary Christopher characterized Slobodan Milosevic 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."<sup>35</sup>

The perceived necessity of Milosevic's participation at Dayton negated the peace builders' willingness to follow a basic moral compass which would have led to calls for his indictment for war crimes. Rather, the peace builders, led by Secretary Christopher, legitimized Milosevic and obfuscated his culpability for war crimes by arranging for the now famous "handshake" among the three presidents of Serbia, Croatia and Bosnia.<sup>36</sup> By reinforcing the perception of moral equivalence among the parties and equal responsibility for the conflict, Milosevic was both exonerated and rehabilitated. If President Izetbegovic was willing to shake his hand, then

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<sup>32</sup> 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).

<sup>33</sup> Geyer, *supra* note 30, 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").

<sup>34</sup> Martin, *supra* note 14.

<sup>35</sup> WARREN CHRISTOPHER, *IN THE STREAM OF HISTORY: SHAPING FOREIGN POLICY FOR A NEW ERA* 352 (1998).

<sup>36</sup> See generally 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. Mešovic ed., 1997).

the direct engagement of Milosevic by European and U.S. negotiators could not be seen as duplicitous.

To maintain pressure on the Bosnian delegation, Milosevic's role as the aggressor and Bosnia's role as the victim was greatly minimized. The direct result of the process was the institutionalization of ethnic nationalism and the political marginalization of individuals not falling into the three dominant ethnic categories. The government system that resulted in the wake of Dayton remained full of mechanisms able to be utilized by nationalists to create political gridlock. For Milosevic, it signaled the willingness of the international community to sanction his framework for resolving the Yugoslav crisis.

The international community's initial response to the Kosovo crisis was to downplay its severity and significance. Early media reports of systematic killings, expulsions, and the discovery of mass graves were largely rejected. When credible accounts emerging from Kosovo continued unabated, the international community attempted to promote a dialogue between the Kosovar political leaders and Milosevic. In seeking to establish talks between the two parties, Milosevic was once again rehabilitated and granted credibility in his campaign of violence while the pacifist leader of the Kosovar Albanians was effectively de-legitimized.

The Contact Group, led by Russia and the United States, sought to create a moral equivalence between Milosevic and the Kosovars by declaring that the KLA was a terrorist organization.<sup>37</sup> At the insistence of the Russians, each resolution adopted by the U.N. Security Council regarding the crisis included a condemnation of Albanian terrorist actions in Kosovo.<sup>38</sup> These declarations were perceived by Milosevic as a green light to continue his aggression 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 led to the false perception that the Americans concurred with Milosevic's characterization of the KLA and the indiscriminate use of force aimed at eliminating them. The subsequent threat of sanctions against the KLA and the continued use of the designation "terrorist" created a moral equivalence between the Serbs and the Kosovars and allowed Milosevic to pursue his genocidal campaign against the civilian Albanian population. Eventually, in

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<sup>37</sup> See Contact Group Statement on Kosovo (Mar. 9, 1998), at <http://www.ohr.int/other-doc/contact-g/defai;t.asp?content-id=3550> [hereinafter Contact Group on Kosovo] (last visited Oct. 6, 2003); Special Representative Robert S. Gelbard, Remarks at a Press Conference in Belgrade, Serbia, and Montenegro (Jan. 15, 1998), at [http://www.state.gov/www/policy\\_remarks/1998/980115\\_gelbard\\_belgrade.html](http://www.state.gov/www/policy_remarks/1998/980115_gelbard_belgrade.html) (last visited Oct. 6, 2003) [hereinafter Gelbard Jan. 15 Statement].

<sup>38</sup> 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).

the face of increasing atrocities, the Contact Group lessened its approach of moral equivalence and began to identify the Serbian regime as primarily responsible for the atrocities. Nevertheless, the initial international response reflected that Milosevic had once again manipulated the international community to his advantage, as he had in Bosnia three years earlier.<sup>39</sup>

### **Justice as an Antidote to Moral Duplicity**

The indictments of Karadzic and Mladic during the Bosnian campaign were an initial step in identifying the Serbian regime as the primary culprit in the violent genocidal campaign waged in Bosnia. In identifying one or more parties as the primary aggressors in the conflict through indictments and the release of information clearly tracing their culpability in the aggression, the norm of justice can help to build the political will necessary to take action. Justice can serve as an antidote to moral duplicity by naming those responsible for acts of aggression and terror.

In Bosnia and Kosovo, an early failure by the international community to define Milosevic and the Serbian regime as the perpetrators of the genocidal campaigns fundamentally hampered the role of justice in one of its most simple forms; the designation of aggressor and victim. The reluctance to assign such labels allows for the approach of accommodation to continue operating without obstruction and public condemnation. Secretary Christopher's public declarations of the equality of all warring factions in the perpetuation of atrocities, the acceptance of the myth of inevitability of ancient ethnic hatreds coming to their natural conclusion all served to obfuscate the clear and obvious intention of Milosevic to ethnically cleanse Yugoslavia of non-Serbs.

When faced with the results of their duplicitous actions in Bosnia in 1995 and again in Kosovo in 1999, the international community moved to define the Serbian regime as the primary aggressor in the actions in Bosnia and Kosovo and invoked the norm of justice as a basis for the NATO humanitarian intervention. The eventual use of force against Serbia left little doubt as to the culpability of Milosevic in perpetuating hostilities in Bosnia, but as his removal from power was seen as a detriment to the implementation of the Dayton Accords, accommodation once again dominated a platform where justice should have taken the lead. Although Kosovo finally proved to be Milosevic's last stand, the norm of justice could have prevented his rehabilitation after Bosnia and prevented the bloodshed witnessed in Kosovo.

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<sup>39</sup> See Contact Group on Kosovo, *supra* note 37.

### **Justice as a Mere Placebo for Moral Duplicity**

One of the most important functions assigned to the Yugoslav Tribunal was the establishment of individual responsibility for the commission of atrocities as well as laying bare to the Yugoslav people how they were manipulated through propaganda and coercion to commit savage acts on a massive scale. While this by no means would serve as complete absolution for those involved in the horrific crimes perpetrated during both conflicts, it could potentially open a channel for reconciliation and acknowledgement among the parties and limit the psychological legacy of institutionalized violence. Although the public indictments of Karadzic and Mladic were steps in that direction, the failure to indict Tudjman and Milosevic as well as at that time limited the actual impact of the Tribunal.

Although Milosevic was eventually indicted and tried for his role in the wars in Bosnia and Kosovo, the failure of the Office of the Prosecutor to act in a timely fashion in the indictment of Tudjman led to the loss of a significant historical record both for the international community, and the Croatian community. Undoubtedly the continued idolization of Tudjman by many Croatian people, and the remnants of hostility among Croats regarding their role in the early Yugoslav conflict, arose not only from a strong sense of nationalism but also from a dearth of information regarding the specific aspirations and actions of Franjo Tudjman.

Another limitation of the Tribunal in establishing a role for justice in the post-conflict phase was its reliance on secret indictments in the interest of facilitating the apprehension of the indictees. Although tactically viable, the use of secret indictments failed to establish a much-needed deterrent force and a transparent mechanism of truth for members of the international community and the Serbian populace. A similar problem was encountered when the Tribunal dismissed cases where the defendant died prior to the rendering of a judgment, and then effectively sealed the record. In both cases, the failure of the Tribunal to make information accessible to the public greatly hampered its ability to serve one of the primary functions of justice – the establishment of an accurate historical record and the release of relevant information to the public.

Similarly, the failure of the international community to establish an alternative form of justice for the purpose of victim catharsis is evidenced in its opposition to the establishment of a truth commission and its failure to apprehend indicted war criminals evading justice in the Republika Srpska and Serbia. The opposition to a truth commission fundamentally undermined the ability of victims to air their grievances outside of the much wider scale than the official proceedings of the Tribunal. Moreover, in failing to allow a truth commission to be implemented, important testimony leading to the establishment of an accurate historical record has been forever stifled.

*IV. Constrained Force*

In 1991, after fighting broke out in Slovenia and Croatia, Belgrade requested that the Security Council impose an arms embargo on Yugoslavia to prevent an escalation and potential spillover of the conflict.<sup>40</sup> This measure was initially consistent with the dictates of international law as Milosevic's true brutality and the nature of the conflict had yet to be realized. However, as the methods employed by Milosevic's forces were being used against the Bosnian Muslim populace became clear, the Security Council refused to reassess its earlier position. Furthermore, the Security Council reaffirmed that the arms embargo would continue to remain in place in all parts of Yugoslavia, any decisions on the question of the recognition of the independence of certain republics notwithstanding.<sup>41</sup> Thus, the state most acutely affected by the arms embargo, Bosnia, was left with no means to defend itself, while Serbia had all it needed in terms of military equipment and supplies. Although President Clinton had campaigned on a pledge to lift the arms embargo on Bosnia, he later backed down under pressure from the United Kingdom and Russia.

The most controversial act of constrained force undertaken by the Security Council occurred in early 1993 with the creation of so-called "safe-havens" and the subsequent failure of U.N. forces to properly guard and protect Bosnian civilians. The attacks in the eastern Bosnian town of Srebrenica led to massive civilian casualties and worldwide condemnation of the massacre. By April of 1993, as the town was on the brink of collapse, the Security Council issued Resolution 819, demanding that all parties treat the town as a safe area free from armed attack. Although UNPROFOR was tasked with overseeing the withdrawal and demilitarization of Serb forces in the safe areas, the Council provided no viable means of enforcement or protection for the mission. When the UNPROFOR commander indicated it would take 35,000 troops to accomplish the job, the Security Council responded by authorizing the deployment of only 7,500 troops to fulfill the mandate. UNPROFOR forces, inadequately equipped to protect themselves or the safe areas retreated when attacked by Serb forces. As a result, thousands of defenseless civilians were massacred and carted off to mass graves in the nearby countryside.<sup>42</sup> "Historians will show," wrote the editors of *The New*

<sup>40</sup> See S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., at 42-43, U.N. Doc. S/RES/TB (1991).

<sup>41</sup> S.C. Res. 727, U.N. SCOR, 47th Sess., 3023 mtg., at 7, U.N. Doc. S/RES/727 (1992).

<sup>42</sup> See generally Laurence de Barros-Duchêne, *Srebrenica: Histoire d'un Crime International* (1996); Jan Willem Honig & Norbert Both, *Srebrenica: Record of a War Crime* (1996); Bob Van Laergoven, *Srebrenica: Getuigen van een Massamoord* (1996); Eric Stover & Gilles Peress, *The Graves: Srebrenica and Vukovar* (1998); *Report to the Secretary General pursuant to General Assembly resolution 53/35, the Fall of Srebrenica*, U.N. Doc A/54/549 (1999), available at <http://www.un.org/peace/srebrenica.pdf> (last visited Dec. 8, 2003).

*Republic* shortly after the Srebrenica massacre, "that the most important allies of the Bosnian Serbs have been the peacekeeping forces of the United Nations."<sup>43</sup>

Accommodation remained the preference over the use of force in the Yugoslav conflict from 1991-1995. The dominant rationale 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 regard to 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."<sup>44</sup> 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.<sup>45</sup>

Throughout the Dayton negotiations, the international aversion to the use of force manifested itself on numerous occasions. The refusal of the mediators to create an international police force or provide IFOR with the authority to create an environment suitable for the safe return of refugees and the provision of basic human rights proved to be most notable. A generalized fear of "mission creep" on the part of the military was largely based on recent experiences in Somalia and led to the limitation of authority relegated to police and military forces in Bosnia. Essentially, the internationals, and the U.S. in particular, hoped to assume the reigns only for a limited tenure and wanted to avoid commitment to any follow-on missions. For Milosevic, this approach signaled the chance for his forces to cement territorial and political advantages gained through ethnic cleansing. Moreover, he realized that even if force was used against his troops by heavily armed peace enforcers, the gains he had made through ethnic cleansing and systematic human rights abuses would not be rolled back.

As in Bosnia, in the face of familiar atrocities and the increasing radicalization of Kosovar Albanians, the peace builders initially sought to provide humanitarian aid in hopes of averting a wider-scale conflict and avoiding any threat of the use of force.<sup>46</sup> According to Ambassador

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<sup>43</sup> The Editors, *A Civil War, in THE BLACK BOOK OF BOSNIA THE CONSEQUENCES OF APPEASEMENT* 175 (Nader Mousavizadeh ed., 1995).

<sup>44</sup> Information Memorandum, *Belgrade Press Focused on UN Investigation of Sarajevo Massacre, Mladic* (Feb. 17, 1994), Dep't St. Declassified Doc., at <http://www.foia.state.gov/documents/foiadocs/5557.pdf> (last visited Dec. 8, 2003).

<sup>45</sup> See *id.*

<sup>46</sup> 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*

Holbrooke, the British, French and Germans believed it necessary to obtain U.N. Security Council authorization prior to using force.<sup>47</sup> 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.”<sup>48</sup>

After a March 1998 Serb crack down on the KLA that resulted in the death of eighty-five Kosovar Albanians, the United States, along with its European allies, united to denounce the violence and seek options on how to best proceed with the conflict. Secretary Albright, from the beginning, believed that diplomacy alone was insufficient to achieve a resolution to the Kosovo crisis. Instead, Albright believed that Milosevic’s acquiescence to the demands of the international community could only be secured through the use of force. Secretary Albright stated, “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.”<sup>49</sup> The main purpose of Albright’s rhetoric was 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.”<sup>50</sup>

Despite Albright’s strong words, an October meeting between Holbrooke and Milosevic resulted in the “October Agreement” providing for the deployment of unarmed OSCE monitors and NATO flights over Kosovo. Once again, to the detriment of the policy objectives devised by the Clinton administration, Milosevic was provided with an important strategic windfall. By gaining the position of a legitimate peacemaker with whom the United States could negotiate, Milosevic simultaneously was able to undermine any consensus among the NATO powers regarding the use of force to end the conflict and continue his campaign of ethnic cleansing. As General Clark explained, the presence of unarmed observers, “inside Kosovo also vitiated the implicit NATO threat against Milosevic or his forces.”<sup>51</sup>

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*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.” *Kosovo refugee plight still very bad*, REUTERS (Oct. 26, 1998).

<sup>47</sup> Amb. Richard Holbrooke & Amb. William Walker, Special Kosovo Briefing (Oct. 28, 1998), available at <http://www.usembassy.it/file9801/alia/98102905.htm>.

<sup>48</sup> *Id.*

<sup>49</sup> Press Release, 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>.

<sup>50</sup> IVO H. DAALDER & MICHAEL. O’HANLON, WINNING UGLY 28 (2000).

<sup>51</sup> See *id.* at 126.

Soon after the finalization of the October agreement, Milosevic began reneging on his promises. Specifically, intelligence reports indicated that Milosevic was amassing forces between Prishtina and Belgrade, in flagrant violation to the agreement.<sup>52</sup> Shortly thereafter, General Clark was dispatched by the Clinton administration to pressure Milosevic into holding up his end of the agreement.<sup>53</sup> Despite the move, President Clinton did not authorize General Clark to threaten the use of meaningful force if Milosevic continued to violate the agreement. As such, the agreement was perceived as a failure and Clinton's foreign policy team once again struggled to realize Milosevic's intentions and the best course of action to take in light of the disparaging outcome.

While the international community was debating its next course of action, Serbian military and paramilitary units massacred over forty civilians in the Kosovo town of Racak. Later intelligence intercepts reported in the *Washington Post* showed an obvious link between the front line forces responsible for the atrocities, the subsequent cover-up attempt, and the involvement of high-level Serbian government officials.<sup>54</sup> In a rapid series of public statements following the attacks, both President Clinton and Secretary Albright denounced the massacre.<sup>55</sup>

The Racak massacre, the failure of the October agreement, and earlier attempts at mediation resulted in increased political pressure on the administration from the United States Congress. Both before and immediately after the massacre, a number of prominent U.S. Senators began to advocate the use of force to end the atrocities. For instance, Senator Mitch McConnell declared, "It 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."<sup>56</sup> Similarly, Senator Frank Lautenberg declared, "[C]learly 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.

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<sup>52</sup> See *PBS Frontline: War in Europe*, Interview with General Wesley Clark, NATO Supreme Allied Commander (Feb. 22, 2000), at <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/clark.html>.

<sup>53</sup> See *id.*

<sup>54</sup> See R. Jeffrey Smith, *Serbs Tried to Cover Up Massacre; Kosovo Reprisal Plot Bared by Phone Taps*, WASH. POST, Jan. 28, 1999, at A1.

<sup>55</sup> See President Bill Clinton, Statement by the President on the Massacre of Civilians in Racak (Jan. 16, 1999); Press Release, 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>.

<sup>56</sup> Senator Mitch McConnell, *Independence for Kosovo*, WASH. POST, Jan. 22, 1999, at A35.



NATO must follow through on its threats with air strikes to force the Serbs to respect their commitments.”<sup>57</sup> Public pressure also intensified with the demands for a more aggressive incorporation of the use of force in the efforts to bring peace to Kosovo. A particularly insightful and potentially influential call 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. Clinton dithers the greater the cost will be.<sup>58</sup>

Given these strong sentiments and a lack of other viable options, Secretary Albright and Prime Minister Blair pushed the approach of “diplomacy backed by force.” This approach included increased reliance on the threat of the use of force,<sup>59</sup> and the introduction of direct mediation in the form of proximity peace talks similar to those held at Dayton.<sup>60</sup> This later provision was incorporated to tie the threat of force to political objectives as means of garnering NATO support, whose members sought another attempt at reaching a peace agreement.<sup>61</sup> 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

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<sup>57</sup> See 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.*

<sup>58</sup> *A Massacre Without Knives*, WASH. POST, Sept. 16, 1998, at A16.

<sup>59</sup> See Press Release (99)12, North Atlantic Council, Statement by North Atlantic Council on Kosovo (Jan. 30, 1999), available at <http://www.nato.int/docu/pr/1999/p99-012e.htm>.

<sup>60</sup> See generally Secretary of State Madeleine K. Albright, Statement on NATO Final Warning on Kosovo (Jan. 30, 1999), at <http://secretary.state.gov/www/statements/1999/990130.html>.

<sup>61</sup> See *PBS Frontline: War in Europe*, Interview with Samuel Berger, at <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/berger.html> (last visited Feb. 23, 2004).

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.<sup>62</sup>

Believing that the NATO threats were hollow, Milosevic continued to reject the agreement and the presence of NATO peacekeepers on Serbian soil. During this time, the Serb government, in preparation for a major spring offensive, amassed one-third of all its forces in and around Kosovo, a fact that was well known to the international community.<sup>63</sup> The Serbian army then launched its campaign of terror and expulsion that forced tens of thousands of ethnic Albanians to flee their homes. The escalation of aggression and brutality against Kosovar Albanians gave rise to calls for the Contact Group and NATO to use force to compel the Serbian regimes' compliance with their demands. As described by the editorial board of the *Washington Post*:

Towns 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.<sup>64</sup>

Even more direct were calls for a military response by several U.S. Senators, with Senator Joseph Lieberman declaring, "[W]e 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."<sup>65</sup>

The Europeans also sought to dissuade NATO from extensive strikes in Serbia, suggesting that attacks should be limited to Kosovo and only against units carrying out ethnic cleansing in the region. Overall, the European allies proposed that NATO should avoid targets that might

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<sup>62</sup> See Dr. Javier Solana, NATO Secretary General, Statement to the Press on Kosovo (Jan. 28, 1999), at <http://www.nato.int/docu/pr/1999/p99-011e.htm> (last visited Dec. 14, 2003) [hereinafter Solana Press Statement].

<sup>63</sup> See Elaine Sciolino & Ethan Bronner, *How a President, Distracted by Scandal, Entered Balkan War*, N.Y. TIMES, Apr. 18, 1999, at A1.

<sup>64</sup> Editorial, *The Ground War*, WASH. POST, Mar. 28, 1999, at B06.

<sup>65</sup> 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.

“antagonize or damage Serbia further.”<sup>66</sup> To this end, the French argued that “they wanted only ‘reactive’ strikes, not ‘preventative’ ones.”<sup>67</sup> Based on lessons learned from Vietnam, America sought a more strategic approach, designed to go “after the heart of Milosevic’s power.”<sup>68</sup> Moreover, NATO targeting became subject to American and European political approval, with prime ministers and presidents deeply involved in selecting which targets could be bombed. Disagreements over strategy combined with a process of political approval led to an increasingly incremental approach to action on the part of the allies. According to Clark, there was “a growing perception that NATO wasn’t committed to winning, a perception that was already undermining [NATO’s] efforts.”<sup>69</sup>

### **Justice as an Antidote to the Constrained Use of Force**

Justice provided the moral backing for the use of force, particularly in the Kosovo campaign. Once the International Tribunal formally indicted Slobodan Milosevic, the Europeans backed away from calls for negotiations and the Americans moved away from their repeated refusals to use ground troops to halt the violence. The formal indictment of Milosevic also provided the internationals with a legitimate basis for calls for a regime change and the public acknowledgement that Milosevic was no longer a legitimate negotiating partner. Despite fears in the Administration that the indictment would require NATO to defeat Milosevic’s regime and facilitate his arrest and surrender to The Hague, the process actually served to embolden the allies as it negated any further attempts to rely on Milosevic to implement a peace settlement.

The indictment of Slobodan Milosevic greatly narrowed the range of options aside from the use of force to end the hostilities. The indictment served the two-fold purpose of legitimizing the use of force to end the genocidal campaign against the ethnic Albanian communities in Kosovo while effectively precluding future attempts to induce Milosevic into a negotiated settlement that allowed him to remain in power. When the Office of the Prosecutor issued the indictment for war crimes, a fundamental, if obvious, stumbling block that had plagued the actions of the Contact Group was summarily removed. The process of coercive appeasement and the reliance on accommodation was suddenly cast in the new light of trying to make peace with a war criminal. A basic change in semantics affected a

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<sup>66</sup> WESLEY K. CLARK, *WAGING MODERN WAR BOSNIA, KOSOVO AND THE FUTURE OF COMBAT* 237 (2001).

<sup>67</sup> *Id.* at 256.

<sup>68</sup> *Id.* at 237.

<sup>69</sup> *Id.* at 253.

change in approach. Essentially, the formal removal of the international "crutch" left the internationals with a zero-sum game plan: do nothing and allow atrocities to escalate, bringing shame and condemnation on the international body as a whole or take decisive action through the use of force to end the reign of terror in Kosovo. With official documentation in hand, NATO chose the latter alternative.

It is important to acknowledge that the indecisiveness and reluctance to commit air power and ground forces to Kosovo was generated from within the NATO alliance itself and also from within the Clinton Administration. While Secretary of State Albright and General Clark supported the use of force against the Milosevic regime, many in the Pentagon and the Defense Department discouraged the involvement of U.S. troops in any Kosovo mission. Many of these fears rested on a reluctance to commit U.S. forces to operations that were viewed as interminable, as was the case with the Somalia operation. Yet the important step of indicting Slobodan Milosevic as a war criminal and formally acknowledging his role in the commission of war crimes in the former Yugoslavia facilitated the continuation of the NATO humanitarian intervention.

### **Justice as a Mere Placebo to the Constrained Use of Force**

In the wake of the NATO bombing campaign, the Office of the Prosecutor launched one of the most potentially damaging investigations into alleged war crimes. The Russian Parliament and a group of law professors from Toronto submitted reports accusing NATO of committing war crimes by killing civilians in the air strikes against Serbia. According to the allegations, over half of the casualties in the NATO interventions were non-combatants and the targeting of television stations; sewage processing plants, and power plants all fell outside the realm of legitimate military targets.

Prosecutor Arbour, in her last month in office, attempted to display even-handedness and independence by ordering a preliminary review of the evidence by an internal committee composed of Russian, British, and American lawyers and investigators. While the investigation was professionally handled, the White House and other NATO offices met it with harsh criticism and condemnation. The main objection to the pseudo-investigation was that it created the perception of moral equivalence between NATO and Slobodan Milosevic as perpetrators of war crimes.

Although Prosecutor Arbour's successor, Carla Del Ponte, tried to downplay the incident by assuring NATO officials that she would not carry this exercise far and she was embarrassed by having to deal with a tendentious process left by her predecessor, she did circulate a list of questions related to conduct during the bombing campaign to Washington and other NATO capitals. In June of 2000, a 100-page report was released to the public that exonerated NATO for war crimes although it did criticize

the use of excessive force in the air strikes. When submitting the report to the Security Council, Del Ponte stated that although "some mistakes were made by NATO," she was "very satisfied that there was no deliberate targeting of civilians or unlawful military targets."<sup>70</sup>

The result of the NATO investigation was an overall cooling of the desire on the part of the organization to risk the lives of military personnel in the capture of indicted war criminals Karadzic and Mladic. Moreover, the negative attention following the humanitarian intervention also significantly lessened the desire on the part of many NATO members to become involved in future humanitarian military campaigns. Members of the establishment were also acutely aware that although a report detailing how to make a credible case against Milosevic for his war crimes in Bosnia had been filed in 1996, it had been largely ignored for three years. In contrast, the investigation of NATO actions had been handled with alacrity and in full public view.

#### *V. Marginalization of Justice*

Throughout the Yugoslav conflict, the peace builders actively sought to marginalize any role for justice, arguing that it would substantially diminish the effectiveness of their efforts to attain peace.<sup>71</sup> As detailed in an article by an anonymous U.N. official, reliance on the approach of justice is generally understood to inhibit efforts to bring about peaceful resolutions of conflict. Rather, an effort to pursue justice is seen as often prolonging the conflict and its associated atrocities and human suffering. The anonymous U.N. official further argued that the deployment of even fact-finding missions seeking to investigate war crimes often complicates the task of peace negotiations to the point where they become prolonged or impossible.<sup>72</sup>

According to Payam Akhavan of the Office of the Prosecutor of the Tribunal:

From its very inception in 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) was surrounded by the so-called 'peace versus accountability' controversy . . . . It was argued that indicting political and military leaders such as

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<sup>70</sup> Steven Erlanger, *Rights Group Says NATO Bombing in Yugoslavia Violated Law*, N. Y. TIMES, June 8, 2000, at 7A.

<sup>71</sup> 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).

<sup>72</sup> See Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q., 249, 255-56 (1996).

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.<sup>73</sup>

In fact, during his tenure as Co-Chairman of the Yugoslav Peace Conference, David Owen expressly stated his opposition to the prosecution of Serbian officials engaged in the peace negotiations, believing that it would undermine his efforts to craft a settlement.<sup>74</sup>

Even after the massacre at Srebrenica and the clear pattern of genocide being undertaken by the Serbian regime, 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."<sup>75</sup> It was even noted by some commentators that any NATO efforts to capture Radovan Karadzic, whose purported approval rating was seventy-nine percent, would undermine the Dayton Peace Accord by fostering a belief of perpetual persecution and injustice on the part of the Serbian people.<sup>76</sup> Goldstone correctly expressed surprise at this view, especially in light of the atrocities that had been committed over four years, and the clear intent of the Security Council when it established the Tribunal in May 1993.<sup>77</sup>

The establishment of the Yugoslav War Crimes Commission, and the subsequent Tribunal seven months later, suggests that the Security Council embraced the norm of justice mainly as a public relations tool while leaving space for other approaches towards peace building.<sup>78</sup> Overall expectations were slim that the approach of accountability would succeed where other

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<sup>73</sup> Akhavan, *supra* note 2 at 738.

<sup>74</sup> 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 (1997) (citing Mirko Klarin, *The Moral Case for a War Crimes Tribunal*, WALL ST. J. EUROPE, Mar. 17, 1994, at 8).

<sup>75</sup> 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).

<sup>76</sup> Charles G. Boyd, *Making Bosnia Work*, 77 FOREIGN AFF. 42, 50-51 (Jan./Feb. 1998).

<sup>77</sup> See Goldstone, *supra* note 75, 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.

<sup>78</sup> 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).

initiatives had failed. Many members of the Security Council viewed the Tribunal as fundamentally incompatible with other approaches and worked to undermine its operation. Some members believed the Tribunal could be useful for isolating leaders accused of offenses and for garnering support for more aggressive approaches.

Throughout the Dayton negotiations, tensions arose surrounding the need to create vetting mechanisms to cull war criminals from society and the need to accommodate the aggressors.<sup>79</sup> The Bosnian delegation proposed a number of specific provisions for ensuring that war criminals remain outside of the police, military, and civil structures, and that a failure to comply with the Tribunal would result in renewed economic sanctions against the Republika Srpska and Serbia.<sup>80</sup> The Contact Group, led by the French and British delegations, rejected these proposals citing the personal assurances from Milosevic that Karadzic and Mladic would be turned over to the Tribunal. Moreover, the Contact Group was compelled by the need to secure a peace deal and sought to limit Bosnian calls for the implementation of the norm of justice in the interest of securing a final agreement. 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."<sup>81</sup>

The failure to create a mechanism by which to impose sanctions in response to non-compliance from Milosevic proved to be a fatal error on the part of the Contact Group. In the aftermath of Dayton, Milosevic expressly refused to honor a personal request from Ambassador Holbrooke to have Karadzic and Mladic extradited to The Hague.<sup>82</sup> With the abandonment of the option to impose sanctions on Serbia at Dayton, there was simply no incentive for Milosevic to cooperate with the Tribunal. As such, the International Crisis Group 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.<sup>83</sup> 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.<sup>84</sup> Unfortunately, this provision by itself was an ineffective tool for preventing publicly indicted war criminals from

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<sup>79</sup> See Paul C. Szasz, *The Dayton Accord: The Balkan Peace Agreement*, 30 CORNELL INT'L L.J. 759, 762 (1997).

<sup>80</sup> See CLARK, *supra* note 66, at 65.

<sup>81</sup> Doubt, *supra* note 36, at 125.

<sup>82</sup> See RICHARD HOLBROOKE, TO END A WAR 320 (1998).

<sup>83</sup> See INTERNATIONAL CRISIS GROUP, *supra* note 13, at 77, 81.

<sup>84</sup> Dayton Peace Agreement, Nov. 21, 1995, Annex 4, art. IX, available at <http://dosfan.lib.uic.edu/ERC/bureaus/eur/dayton/07Annex4.html> (last visited Sep. 25, 2003).

significantly influencing the electoral process, or from undertaking efforts to block the meaningful implementation of the Dayton Accords.

In March of 1998, in the midst of the Kosovo crisis, the Contact Group, recognizing its past failures at accommodation and its aversion to the use of force, 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 found to be true, the Serbian authorities would be expected to prosecute and punish those responsible.<sup>85</sup> The Contact Group also asserted that its growing involvement in the conflict was based on the members' "commitment to human rights values."<sup>86</sup> 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.<sup>87</sup>

The Contact Group also sought to encourage the Yugoslav Tribunal's Prosecutor, Judge Louise Arbour, to begin gathering information related to the violence in Kosovo while reaffirming that FRY authorities were obligated to cooperate with the Tribunal. Robin Cook further elaborated that the Contact Group had agreed the Prosecutor:

Should 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.<sup>88</sup>

Cook further declared "there must be no impunity for those who break international law."<sup>89</sup> The Contact Group members also pledged to make

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<sup>85</sup> Contact Group Foreign Ministers, Statement on Kosovo (Mar. 9, 1998) *available at* <http://usembassy-australia.state.gov/hyper/wfa80309/cpf103.htm> (last visited Sept. 28, 2003).

<sup>86</sup> *Id.*

<sup>87</sup> See Secretary of State Madeleine K. Albright and the Ministers to the Contact Group on Kosovo, Press Conference at Lancaster House, London (Mar. 9, 1998) *available at* <http://secretary.state.gov/www/statements/1998/980309a.html> (last visited Sep. 26, 2003).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* In the question and answer session, British Foreign Minister Robin Cook even declared, "[W]e 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



available to the Tribunal" substantiated relevant information in their possession.<sup>90</sup>

Beyond the actions of the Contact Group, both the U.N. Security Council and the United States took a number of steps to more fully incorporate 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,"<sup>91</sup> and created a committee to monitor the work of the Contact Group and to provide regular updates to the Council to maintain a regular flow of information about human rights violations in Kosovo.<sup>92</sup> The U.S. also began to abandon the tactic of moral equivalence<sup>93</sup> by aggressively urging the Office of the Prosecutor to immediately begin investigations into human rights violations. It also called for Serbia to allow the International Red Cross and UNHCHR to undertake its own investigations.<sup>94</sup>

The emergence of the norm of justice was largely the result of the recognition that other approaches were failing and there remained a strong reluctance to commit to the use of force to end the hostilities. The realization that there was no identified role for the use of force, and that the involvement of justice-based institutions (or their exclusion by Milosevic) might provide a moral basis for introducing the norm of justice, specifically contributed to its invocation. Despite the international community's renewed commitment to rely on justice as a means for bringing peace to Kosovo, it once again failed to adequately support its application.

In the implementation of the norm of justice, there were several contributing factors that limited its utility to bring to justice those responsible for war crimes. First, the acknowledgement by Secretary Albright that investigators working for the Tribunal must obtain visas in order to enter the country provided Milosevic with an effective tool to thwart the ability of the Tribunal to play any meaningful role in halting the atrocities. Second, the U.S. further limited the reach of the Tribunal in allowing the FRY to assume responsibility for domestic persecutions.

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done today at extra judicial killings and the death of eighty people without any trial or any judicial process." *Id.*

<sup>90</sup> U.N. S.C. Res. 1160, U.N. SCOR, 54th Sess., 3868th mtg., para. 17, U.N. Doc. S/RES/1160 (1998).

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* ¶ 9.

<sup>93</sup> *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 Sep. 26, 2003) (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.")

<sup>94</sup> *Id.*

Third, prominent U.S. Ambassadors voiced reluctance to pursue justice through the Tribunal. For instance, in December of 1998, when Ambassadors Hill and Holbrooke were asked to comment on Serbian officials' declarations "that they don't have an intention to deliver any suspected war criminals to The Hague," Ambassador Holbrooke declined to answer 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."<sup>95</sup>

Thus, the limitations placed on the Yugoslav Tribunal by the international community and the public qualifications of the pursuit of justice seriously undermined its mandate. 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.

Despite the fears of some Pentagon and White House officials that the indictment would limit their ability to negotiate with Milosevic, it had the positive effect of strengthening the resolve of America's European partners in the NATO air campaign.<sup>96</sup> The indictment further provided legitimate grounds for calls for a regime change, something that had previously been regarded as an infringement on Serbian sovereignty and political independence. British Prime Minister Tony Blair stated, "[T]he 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."<sup>97</sup> Furthermore, the indictment provided a basis for demands for a regime change from within the FRY. Serbian Orthodox Bishop Artemije, for example, declared, "[T]here 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."<sup>98</sup>

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<sup>95</sup> Round-table discussion by Ambassadors Richard Holbrooke and Christopher Hill with Representatives of Serbian Independent Media (Dec. 15, 1998).

<sup>96</sup> See Albright, *supra* note 93.

<sup>97</sup> Gerard Baker, *NATO Leaders Urge Serbs to Oust Milosevic*, FIN. TIMES (LONDON), June 22, 1999, at 24.

<sup>98</sup> *Can NATO Intervention Bring Talks?*, ASSOC. PRESS, June 14, 1998, available at 1998 WL6681066.

### **The Tribunal as an Antidote for the Marginalization of Justice**

The mere existence of the Tribunal secures a role for justice in all stages of attempting to end the hostilities and craft a viable peace in the wake of a conflict. Moreover, the Tribunal's creation and existence makes it more difficult for negotiators to marginalize its place in peace building. Specifically the Tribunal serves as an antidote by possessing the legal authority to indict individuals responsible for war crimes and by providing a consistent and stable forum for individuals who are charged with the task of ensuring that justice plays an effective role in the peace process. The tools of the Tribunal include press briefings, public diplomacy, indictments, Rule 61 hearings, trials, and reports or requests to the Security Council.

### **Justice as a Mere Placebo for the Marginalization of Justice**

Although the Yugoslav Tribunal was not intended to be the only forum for the prosecution of war criminals, over time it seized on its Security Council mandate and sought to exclude the creation or further development of other mechanisms of justice. In some instances, the Tribunal was manipulated into narrowing the opportunity for the development of additional mechanisms of justice, such as domestic prosecutions and truth commissions. As noted above, on a number of occasions the Tribunal also failed to fully exercise its jurisdiction or its obligation to indict those responsible for war crimes. The timid and tardy approach of the Tribunal thus substantially blunted the opportunity to weave justice throughout each of the phases of the peace building process. The overly cautious approach of the Tribunal thereby reduced the resistance to those who sought to marginalize the extent to which justice impinged upon efforts to resolve the conflict through accommodation.

After the Dayton Accords, one of the first mistakes of the Tribunal was to fall prey to efforts by Milosevic and Holbrooke to minimize domestic prosecutions in Bosnia by agreeing to the "Rules of the Road" agreement. Signed in the aftermath of Dayton, the Rules of the Road Agreement provided that parties could arrest persons in their territories for the domestic prosecution for war crimes only after the Office of the Prosecutor of the Yugoslav Tribunal had either issued an indictment consistent with international legal standards or made a determination that there was an indictable offense which could be pursued by domestic prosecutors. This agreement severely limited the role of justice as the Tribunal had only limited resources and personnel and it took a number of years for the Tribunal, with outside resources, to review the thousands of cases forwarded to the Tribunal by Bosnian authorities. For nearly five years, "The Rules of the Road" agreement shut down all efforts by Bosnian

government authorities to utilize justice to remove war criminals from powerful post-war positions.

Furthermore, the Tribunal not only failed to create an environment conducive to the growth of other mechanisms of justice, but affirmatively sought to prevent the creation of a Bosnian Truth Commission. Despite the fact that all three parties to the Bosnian conflict agreed on the need to create a truth commission, the Tribunal publicly objected on the grounds that it might limit the ability of the Tribunal to effectively prosecute suspected war criminals by providing the defense with an opportunity to impeach witnesses who gave conflicting testimonies in each forum. While a technically correct view, this opinion evidenced the interest of the Tribunal in preserving its own prerogatives and its neglect of the need for the wide use of justice and a cathartic process for the victims – one the Tribunal had become incapable of providing.

Finally, during the Kosovo crisis, the Office of the Prosecutor minimized the role of justice by failing to assert proper jurisdiction over the matter. Emerging at a time when the Tribunal had begun to make meaningful progress in the apprehension and prosecution of indictees, the Prosecutor feared that involvement in the Kosovo crisis would drain its limited resources. The Office of the Prosecutor also claimed it was unsure whether the conflict was an international armed conflict and therefore might not have the proper jurisdiction to pursue prosecution. The vacillation of the Tribunal in the early stages of the war in Kosovo further undermined its legitimacy.

## *VI. Conclusion*

The default approach of the Europeans, and often the Americans, to the crisis in the former Yugoslavia was one of coercive appeasement. The consequences of this approach were nearly a quarter of a million people killed, over two million displaced, and the continued separation and bitter resentment of ethnic communities in Bosnia and Kosovo. The primary antidote to this approach was justice, in the form of tribunals, truth commissions, domestic prosecutions, and lustration. Unfortunately, rather than utilizing the institution of justice to prosecute those individuals responsible for the commission of war crimes, the operation of the Tribunal was repeatedly stifled when it should have been widely promoted. If the norm of justice had been more fully incorporated and allowed to operate freely, the Yugoslav Tribunal could have served as a legitimate alternative to reliance on a strategy of coercive appeasement which plagued the Bosnia and Kosovo conflicts and led to the death of thousands of innocent civilians.

Although the Yugoslav Tribunal was perceived to be a valuable tool for weaving the norm of justice into the peace building process, its impact

was limited. The limitations of the Tribunal stemmed from the lack of commitment on the part of the peace builders to fully incorporating the norm of justice into the peace building process and the reluctance to move far from the approach of accommodation. When the Office of the Prosecutor eventually realized its broader mandate and role in halting the atrocities through the issuance of indictments and public condemnation of the acts of Milosevic and his supporters, it did so in a tardy and timid manner. The slowness to act and the reluctance to assert a robust role for justice through strong statements demanding accountability limited the Yugoslav Tribunal's effectiveness and established a questionable precedent for the operation of future Tribunals.

