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Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal

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Justice in The Hague, Peace in the  
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the United Nations War Crimes Tribunal\*

Payam Akhavan\*\*

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## I. INTRODUCTION

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. The ICTY was established by the UN Security Council as a measure for the restoration of peace and security under Chapter VII of the UN Charter. But commentators of a realist persuasion suggested that the ICTY was actually an impediment, and not a contribution, to reconciliation in the former Yugoslavia. It was argued that indicting political and military leaders such as Radovan Karadžić and Ratko Mladić would undermine the prospects of a peace settlement because they were indispensable to ongoing negotiations, and because they would have no incentive to put an end to the fighting without assurances of immunity or amnesty.<sup>1</sup> An anonymous commentator went so far as to suggest that "[t]housands of people are dead who should have been alive—because moralists were in quest of the perfect peace. . . . The quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow."<sup>2</sup>

The prognosis of the skeptics was wrong. The indictment of Karadžić and Mladić and their exclusion from the Dayton talks did not prevent the conclusion of a peace agreement in 1995. Nor was the ICTY sacrificed at the altar of realism as the Dayton Agreement<sup>3</sup> obliged the parties to

1. See, e.g., Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500 (1994); David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401 (1994).
2. Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 250, 258 (1996).
3. The General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes Thereto (Dayton Agreement), U.N. SCOR, 50th Sess., Agenda Item 28, U.N. Doc. A/50/790, S/1995/999 (1995) [hereinafter *The Dayton Peace Agreement*].

recognize its jurisdiction.<sup>4</sup> Some attributed this notable achievement to the skillful diplomacy of Richard Holbrooke, Warren Christopher, and other US mediators.<sup>5</sup> Others suggested that “realities on the ground dictated the terms of the peace,” and that even without a guarantee of immunity or amnesty, the whims of particular leaders could not obstruct an agreement.<sup>6</sup>

In the immediate post-Dayton phase, the peace versus accountability debate focused on the view that “certain leading Yugoslav protagonists do not genuinely believe in legal justice in the form of cooperation with the Yugoslav Court,” that Croat and Serb parties “have stalled with regard to cooperation with international criminal prosecutions,” and that it remains to be seen whether international forces would arrest indicted suspects.<sup>7</sup> Evidently, there was an initial reluctance on the part of international forces to become embroiled in a potential quagmire. But eventually, from July 1997 onwards, elements of the Stabilization Force (SFOR) began arresting indicted persons—both Bosnian Serbs and Bosnian Croats—in Bosnia-Herzegovina. The momentum generated by the fear of further arrests furthermore resulted in several Bosnian Serb indictees voluntarily surrendering themselves to the ICTY starting in February 1998. In addition, an alliance between Bosnian Serb moderates and the international community has significantly diminished the influence of Karadžić and his cohorts, who face ever-increasing isolation and antagonism in Republika Srpska. To the disbelief of many, the possibility that Karadžić may be arrested by the Bosnian Serb police, or that he may even voluntarily surrender himself, let alone be arrested by international forces, is no longer a mere fantasy.<sup>8</sup> Supplementing these positive developments, the Republic of Croatia—succumbing to international diplomatic pressures—also facilitated the “voluntary” surrender of several indictees in October 1997.<sup>9</sup> In short, there is a grudging but emerging widespread acceptance—even among the so-called realists—that regional peace and stability, democratization, and multiethnic coexistence in Bosnia-Herzegovina are at best precarious without the arrest and prosecution of indicted persons. Contrary to the prognosis of the skeptics, the ICTY survived the Dayton Peace Agreement and has been recognized as an essential ingredient of peace building in the former Yugoslavia.

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4. See, e.g., Payam Akhavan, *The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259, 259 (1996).

5. David P. Forsythe, *International Criminal Courts: A Political View*, 15 NETH. Q. HUM. RTS. 5, 9 (1997).

6. Akhavan, *supra* note 4, at 272.

7. Forsythe, *supra* note 5, at 9.

8. See, e.g., *U.S. Official Urges Capture of Top Bosnian War Crimes Suspects*, ASSOCIATED PRESS, 4 Jan. 1998; *A Welcome Arrest*, INT'L HERALD TRIB., 24–25 Jan. 1998.

9. See, e.g., Chris Hedges, *10 Bosnian Croats Surrender to War Crimes Tribunal*, N.Y. TIMES, 7 Oct. 1997.

The brief but eventful history of the ICTY is an outstanding example of the epic battle in decision making between realities and ideals, power and principle. There is no denying that the ICTY must operate in the context of complex political realities or that difficult strategic choices have to be made in the pursuit of ideals. Nor is it befitting to subscribe to the judicial romanticism in some circles that views the ICTY as a panacea for all the ills of the former Yugoslavia. But there comes a point at which realism becomes cynicism, disguising moral ineptitude or a simple unwillingness to take principled action. The human suffering arising from the treachery of the powerful has too often been mystified as the consequence of ineluctable and inexorable historical forces beyond the power of human comprehension and control. Expedient concessions to injustice and oppression, furthermore, are justified as reflections of reality and glorified as brilliant acts of statesmanship. By way of example, a commentator refers admiringly to the Co-Chairman of the International Peace Conference for the former Yugoslavia, David Owen, "who has always been critical of the moralists holding out for a perfect peace while many died or were otherwise victimised by continuing combat and atrocities. Owen and arguably Richard Holbrooke believed that the only durable peace would be one that reflected power realities, not lofty moral values."<sup>10</sup> But what are so-called "power realities"? Are they immutable and constant? Or are they subject to change? To what extent is external legitimization of power the underlying source of its reality? Beyond immediate pragmatic concerns of achieving a cease-fire, is it wise or realistic to invest in dubious power structures that are unlikely to contribute to long-term stability?

The ICTY demonstrates that far from being irreconcilable, peace and accountability, realities and ideals, are inextricably interlinked. But this interlinkage must be understood and evaluated in a broader context—one that looks beyond immediate pragmatic concerns to long-term considerations of how criminal justice contributes to peace and stability, especially in the context of an interethnic conflict. It would be difficult to argue that the deterrence of ethnic cleansing or other such massive and systematic crimes would not significantly contribute to international peace and security. Beyond those immediately victimized, the destabilizing effect of such large-scale violence extends to neighboring States—through a spillover of the conflict either because of a massive exodus of refugees, the existence of victimized ethnic kith and kin across boundaries, or threats to vital geopolitical or other interests—and the effect creates a general sense of insecurity on the part of other vulnerable minorities. Most important of all, however, unchecked atrocities against civilians send the message to

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10. Forsythe, *supra* note 5, at 9 n.11.

potential aggressors elsewhere that they can commit such crimes with impunity, and even benefit therefrom, thus encouraging or even providing an incentive to resort to large-scale violence as an instrument of attaining power.

Deterrence broadly defined is the ability of a legal system to discourage or prevent certain conduct through threats of punishment or other expressions of disapproval. Obviously, sanctions are essential for the credibility of the law, especially against those with criminal predispositions. But sanctions are most important because they help instill voluntary or "good faith" respect for just conduct by discrediting inhumane or unjust conduct, the cumulative effect of which encourages habitual or subliminal conformity with the law. Thus, the prevention of future crimes is necessarily a long-term process of social and political transformation, entailing internalization of ideals in a particular context or "reality," or the gradual penetration of principles into given power realities.

However, deterrence presupposes the existence of identifiable or determinate causes of criminal behavior that are the targets of punishment. It also assumes that the proscribed conduct is an aberration or deviation from normal conduct because it would be unrealistic to expect a legal system to penalize behavior that is either widespread or inherent to human nature. This is especially problematic in the context of large-scale crimes (such as ethnic cleansing), which often implicate a significant proportion of the population as perpetrators. Nevertheless, deterrence is possible in the context of the former Yugoslavia because such systematic and massive violence is anything but the expression of spontaneous bloodlust or irreversible primordial hatreds. Rather, it is the consequence of a deliberate resort to incitement of ethnic hatred and violence as an expedient instrument by which élites arrogate power to themselves.

It is in this broader context that the role of the ICTY in contributing to peace must be analyzed and evaluated. The ICTY will contribute to interethnic reconciliation by telling the truth about the underlying causes and consequences of the Yugoslav tragedy. The ascertainment and public recognition of indisputable facts before an impartial tribunal will help counter the distortions of demonization and ethnic hatred fomented by certain political élites in the former Yugoslavia. The truth will demonstrate that there was nothing inevitable or irreversible about the eruption of ethnic violence and that interethnic harmony is both possible and desirable. Beyond a mere recital of objective facts, however, reconciliation requires a shared truth—a moral or interpretive account—that appeals to a common bond of humanity transcending ethnic affinity. To achieve this, it is not necessary or desirable to provide an exhaustive or definitive official historical record. Through the exercise of prosecutorial discretion, the limited resources at the disposal of the ICTY can be used to construct an

optimal shared truth that demonstrates that individuals—primarily leaders—bear liability for crimes, and that there is no justification for the collective attribution of guilt to entire ethnic groups. But such truth-telling is necessarily restrained by the limits of the judicial process, the focus of which is the deeds of the accused and not the suffering of the victims. Furthermore, to achieve this transformation of perspective, the peoples of the region must have unadulterated media access to the proceedings of the ICTY. Even so, the relative remoteness of the ICTY from the region means that it cannot be a substitute for local initiatives (including a commission of truth based on popular participation or public gestures of atonement by leaders), which must ultimately create the basis for reconciliation.

Notwithstanding these limitations to truth telling, the essential mission of the ICTY is to target and bring to justice leaders such as Karadžić and Mladić who bear primary responsibility for the campaign of ethnic cleansing that afflicted millions in the former Yugoslavia. Even if the public in the former Yugoslavia has limited access to the proceedings of the ICTY, the arrest and prosecution of these leaders will send a powerful signal to other aspiring tyrants in elite circles that crime does not pay. In order to bring such accused to justice, there must be sustained international pressure, combined with a skillful exploitation of transitional political circumstances in the former Yugoslavia, in order to facilitate or create new power realities and expedite the prospects of their arrest and transfer to the ICTY. Only in this way can the international community send a firm and credible message to would-be warlords that gains made through genocide will not be ratified by the international community.

It should be underscored that beyond its impact on the former Yugoslavia, the ICTY is also an essential contribution to eradicating the culture of impunity that has characterized international relations for so long. If effective, the ICTY will contribute to general deterrence in the world community through the moral propaganda of international criminal justice. In the long term, such expressions of disapproval against genocidal crimes will help produce unconscious inhibitions against massive human rights violations in the elite culture of international diplomacy as well as world public opinion in general. Concerns for justice, customarily at the periphery of decision making, will converge increasingly with mainstream pragmatism such that accountability for war crimes will become a matter of course. It is this condition of habitual lawfulness that is the ultimate foundation of a peaceful and viable international order.

In considering the peace versus accountability debate—even if it were accepted that the creation of the ICTY may have prolonged the war, that the continued pursuit of indicted leaders such as Karadžić is a source of instability, or even that it may possibly provoke a partial resumption of violence—the fact remains that effective deterrence and peace building is a



long-term proposition. Short-term concessions can undermine the long-term credibility of international law and send the message that fomenting ethnic war and genocide will go unpunished. In view of this reality, punishing the perpetrators of ethnic cleansing is the only realistic option for achieving peace. By contrast, cynicism is an illusion that, under the guise of realism, encourages capitulation to the sinister forces that are the root cause of deceit, hatred, and war. Neither justice nor peace are achieved overnight in the wake of a calamity. But in the long term, it is lofty moral values and fundamental principles of justice that are the surest foundation for lasting peace and security.

## II. JUSTICE IN THE CYNICAL THEATER: DETERRENCE AGAINST A CULTURE OF IMPUNITY

In 1948, the British prosecutor at Nuremberg, Sir Hartley Shawcross, dismissed UN deliberations on the adoption of the Genocide Convention<sup>11</sup> as a "complete delusion," stressing that "nobody believed that the existence of a convention . . . would have deterred the nazis or fascists from committing the atrocious crimes of which they had been guilty."<sup>12</sup> He was of the view that "genocide committed by States was punishable only by war."<sup>13</sup> This provocative statement is an appropriate point of departure for assessing the ICTY's original mandate: namely, the attainment of peace and security in the former Yugoslavia through the deterrence of war crimes during an ongoing armed conflict. In establishing the ICTY in the midst of a raging war, Security Council member states expressed their conviction that ad hoc justice "will contribute to ensuring that such violations [of humanitarian law] are halted and effectively redressed."<sup>14</sup> It was this function of deterring further atrocities during an ongoing war that distinguished the ICTY from its predecessor at Nuremberg, which was established after a decisive victory on the battlefield.

This distinction between the two tribunals raises questions about the impulse behind the establishment of the ICTY and the consequences thereof. Inis Claude observed that international institutions "are products

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11. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, 78 U.N.T.S. 277 (*entered into force* 12 Jan. 1951) (*entered into force for U.S.* 23 Feb. 1989).
  12. Official Records of the Third Session of the General Assembly Part I Legal Questions. Summary Records of Meetings 21 September–10 December 1948, U.N. GAOR, 6th Comm., 3d Sess., 64th mtg., at 17 (1948).
  13. *Id.* at 18.
  14. U.N. SCOR, 3217th mtg., pmb., U.N. Doc. S/RES/827 (1993).



not of the aspirations of idealists . . . but of the necessities felt by statesmen operating within the arena of international politics."<sup>15</sup> Such institution building "is a functional response to the complexities of the modern state system, an organic development rooted in the realities of the system rather than an optional experiment fastened upon it."<sup>16</sup> This observation provokes the questions: what necessity prompted the international community to establish the ICTY, and on what basis should the success or failure of this institution be evaluated? An examination of this particular institutional response reveals that the tribunal was established with questionable motives. Claims that it would deter further atrocities seemed to mask the reluctance of the Western powers to take resolute action to repress the policy of ethnic cleansing in Bosnia-Herzegovina. Despite public displays of empathy with the victims, it seemed that the tribunal was more an instrument for appeasing a troubled conscience that yearned for absolution from responsibility. Against the unrealistic expectation that it could somehow put an immediate end to the horrors unfolding in Bosnia-Herzegovina, the ICTY was sure to be a disappointment. This dubious genesis, however, was quickly overtaken by events in the post-conflict phase (after the conclusion of the Dayton Peace Agreement), during which the important long-term role of the ICTY in peace building became increasingly apparent.<sup>17</sup> Although the evidence of the tribunal's contribution to the deterrence of ongoing humanitarian law violations remains equivocal, its primary function lies elsewhere. It is at the level of general deterrence that the ICTY can make a meaningful contribution to the prevention of future atrocities. The penalization of ethnic cleansing and the exposition of the truth behind this campaign of deception will help educate and transform popular values in the former Yugoslavia and act as a bulwark against the culture of impunity that has prevailed in the international community for so long.

At the time of its establishment, rather than being universally hailed as a moral triumph, the ICTY was derided by some observers as an act of hypocrisy. In the words of Kenneth Anderson, reducing the world to a courtroom is possible "only once an army sits atop its vanquished enemy. . . . A trial, Nuremberg taught, puts the symbolic seal of justice on what armies have rectified with force."<sup>18</sup> Far from being a historical parallel,

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15. INIS L. CLAUDE JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 6 (4th ed. 1984).

16. *Id.*

17. See, e.g., *At Last, a Court That War Criminals Take Seriously*, *ECONOMIST*, 31 Jan. 1998.

18. Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 *HARV. HUM. RTS. J.* 281, 292 (1994) (reviewing Telford Taylor, *The Anatomy of the Nuremberg Trials*).

Anderson noted, the establishment of the ICTY was like "holding Nuremberg after acquiescing in the German annexation of Poland, the Ukraine, and the rest of the eastern lands."<sup>19</sup> Former US Ambassador to Belgrade, Warren Zimmermann, described the larger political context within which the ICTY was established. The reluctance to make credible threats of force against the Serbs, he maintained, reduced Western diplomacy "to a kind of cynical theater, a pretence of useful activity, a way of disguising a lack of will. Diplomacy without force became an unloaded weapon, impotent and ridiculous."<sup>20</sup> Muhamed Sacirbey, the Ambassador of Bosnia-Herzegovina to the United Nations, candidly concluded that "justice was held out, in reality, as an alternative to real immediate measures to confront the crime or the criminals."<sup>21</sup> In other words, absent the will to resort to armed force or serious political pressures to confront those responsible for ethnic cleansing, the world community was told: "*Don't worry about it. What we are going to do is make sure that all the criminals are brought to justice. And this will teach everyone a lesson, that this should not happen again.*"<sup>22</sup>

In a similar vein, David Forsythe maintained that countries such as the United States, Canada, and the Netherlands, "championed a court, in part because of moral and legal considerations and in part for less exalted political reasons."<sup>23</sup> The creation of the ICTY was an instrument for pacifying critics and would at least generate "the appearance of action against gross violations of human rights, but without great sacrifice of outsiders' blood or treasure."<sup>24</sup> Other more skeptical Western countries, such as the United Kingdom, considered the ICTY an impediment to a negotiated peace, but "knew that opposing criminal prosecution could be politically awkward" and therefore played a "double diplomatic game of public endorsement but private opposition."<sup>25</sup> Third World states such as China and Brazil, Forsythe suggested, were opposed to the creation of the ICTY, but "for reasons of deference to a hegemonic US, or to deflect criticism from their own human rights record . . . chose not to vigorously contest an *ad hoc* court" of limited jurisdiction.<sup>26</sup>

Against the backdrop of this cynical theater, it is necessary to evaluate to what extent the ICTY can contribute to deterrence, broadly defined. But

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19. *Id.* at 293.

20. WARREN ZIMMERMANN, ORIGINS OF A CATASTROPHE 230–31 (1996).

21. Muhamed Sacirbey, untitled, *in* NO PEACE WITHOUT JUSTICE, INTERNATIONAL CAMPAIGN FOR THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT IN 1998, at 53, 54 (1997).

22. *Id.*

23. Forsythe, *supra* note 5, at 8.

24. *Id.*

25. *Id.*

26. *Id.*

what exactly is meant by deterrence and how can its effectiveness be measured? Is deterrence directed at particular criminals or society at large? What are the peculiar characteristics of deterrence in the international system, in which there is no central sovereign? The foregoing criticism of the ICTY's establishment—focusing solely on the specific deterrence of individual perpetrators such as Karadžić and Mladić or ongoing violations in general—overlooks the tribunal's long-term impact on the transformation of the political culture of both the former Yugoslavia and international society as a whole. The potential of the tribunal should be analyzed from the perspective of the general deterrence of future breaches of international humanitarian law.

According to classical theory, one of the primary functions of criminal law is the deterrence of future criminal behavior. Deterrence operates at two levels: it is directed at those who have already engaged in criminal behavior as well as those who may commit crime in the future. The former function is referred to as specific deterrence because it is directed at the specific perpetrator and his propensity to repeat a crime that he has already committed. The latter function is referred to as general deterrence because it is aimed at the discouragement of potential criminal behavior in society at large as distinct from the individual offender.

This distinction between specific and general deterrence is crucial to understanding the role of international criminal justice in the wake of mass violence and to evaluating the success of the ICTY. The eminent Norwegian jurist Johannes Andenæs explained that court decisions and police actions in the criminal justice system "transmit knowledge about the law, underlining the fact that criminal laws are not mere empty threats."<sup>27</sup> However, beyond "factual information about what would be risked by disobedience," criminal justice contains "proclamations specifying that it is *wrong* to disobey."<sup>28</sup> It is this "*moral or socio-pedagogical* influence of punishment" that underlies the concept of general deterrence.<sup>29</sup> In other words, from the criminal justice system emanates a flow of moral propaganda such that punishment of the individual offender is transformed into a means of expressing social disapproval. In addition to the fear and conscious moral influence of punishment, it is also possible to create "unconscious inhibitions against crime, and perhaps to establish a condition of habitual lawfulness" such that "illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught."<sup>30</sup> The

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27. JOHANNES ANDENÆS, PUNISHMENT AND DETERRENCE 34–35 (1974).

28. *Id.*

29. *Id.* at 36.

30. *Id.*

essential point here is that it is not necessary—even if it were possible—to punish a large number of perpetrators in order to achieve deterrence. Rather, the ultimate foundation for prevention of future criminal behavior is the transformation of popular conceptions of correct behavior and the gradual internalization of values that encourage habitual conformity with the law.

A closely related point is that even in the best circumstances, a legal order that does not remotely reflect existing behavior cannot simply be imposed. To imagine that a legal system can instantaneously transform the social foundation upon which it rests without the gradual internalization of new norms is to misconceive the limits of what law and legal institutions reasonably can achieve. In this respect, it is instructive to examine the observations of the Czech legal anthropologist Leopold Pospíšil, who notes that in the context of tribal societies, the great majority of disputes are resolved by internalized customary norms as distinct from authoritarian norms imposed externally. A law is internalized when the preponderant majority of a group “considers it to be binding, as when it stands for the only proper behavior in a given situation. If such a law is broken, the culprit has a bad conscience or at least feels that he has done wrong—that he has behaved improperly.”<sup>31</sup> In such a system, law is usually enforced not by external pressure but rather “by an internal mechanism which we may call conscience in some cultures and fear or shame in others.”<sup>32</sup> As discussed below, this tribal conception of law is not far from the state-centered conception of international law in which internalized norms or the actual behavior of states—whether expressed in customary or conventional law—is at the foundation of the contemporary legal order. The parallels are especially important because of the absence of a sovereign authority that can impose norms externally against the subjects of the legal system.

Similar to the approach of Andenæs and Pospíšil, Louis Henkin, in discussing the viability and nature of international law, observed that “law is generally not designed to keep individuals from doing what they are eager to do. Much of law, and the most successful part, is a codification of existing mores, of how people behave and feel they ought to behave. To that extent law reflects, rather than imposes, existing order.”<sup>33</sup> The fact that nations act in conformity with the law as they would act anyhow “may indicate not that the law is irrelevant, but rather that it is sound and viable, reflecting the true interests and attitudes of nations, and that it is likely to be maintained.”<sup>34</sup> As

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31. LEOPOLD POSPÍŠIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 196 (1971).

32. *Id.*

33. LOUIS HENKIN, *HOW NATIONS BEHAVE* 97–98 (1979).

34. *Id.*

he pointed out, "the effective legal system . . . is not the one which punishes the most violators, but rather that which has few violations to punish because the law deters potential violators."<sup>35</sup> The same observation applies to international society in which "law is not effective against the Hitlers, and is not needed for that nation which is content with its lot and has few temptations. International law aims at nations which are in principle law-abiding but which might be tempted to commit a violation if there were no threat of undesirable consequences."<sup>36</sup>

It is exactly because international law may not be effective against the Hitlers that the ICTY is so important. Against a culture of impunity that has allowed the likes of Pol Pot, Idi Amin, Mengistu, and Sadaam Hussein to go unpunished for their crimes, the process of international criminal justice before the ICTY will provide a means of pushing the frontiers of existing mores of how nations behave and feel they ought to behave. The ICTY will help internalize the expectation that individuals, irrespective of their official position, may be held liable for violations of international humanitarian law. The gradual internalization of this expectation will help bring about subliminal inhibitions against ethnic cleansing and other massive human rights abuses. Over time, this will contribute significantly to deterrence through the transformation of the political culture of the former Yugoslavia and the international community as a whole.

In this respect, Harold Koh provided an illuminating elaboration of the process by which an external norm becomes internalized in international society:

In tracing the move from the external to the internal, from one-time grudging compliance with an external norm to habitual internalized obedience, the key factor is repeated participation in the transnational legal process. That participation helps to reconstitute national interests, to establish the identity of actors as ones who obey the law, and to develop the norms that become part of the fabric of emerging international society.<sup>37</sup>

Accordingly, through voluntary state involvement in the investigation of crimes as well as the arrest of indicted persons, through international diplomatic pressures brought to bear against recalcitrant states, through the involvement of nongovernmental organizations supporting the aims of the tribunal, through the broad exposure of prosecutions through the international media, and through the study of the ICTY in academic circles and other such initiatives, the ICTY has generated this "repeated participation in

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35. *Id.*

36. *Id.*

37. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2655 (1997).

the [transnational] legal process."<sup>38</sup> Theodor Meron pointed out, for example, that the ICTY "has had significant success in strengthening international law. . . . Without the establishment of the tribunal and the example of the Tadić trial, the perception that even the most egregious violations of international humanitarian law can be committed with impunity would have been confirmed."<sup>39</sup> He observed that the ICTY "has generated an unprecedented interest in humanitarian law and in punishing those who violate it. War crimes have entered the mainstream of political debate and U.N. decision-making."<sup>40</sup> This transnational participation has helped to reconstitute national interests in the sense that punishing war crimes is now linked with post-conflict peace building in the former Yugoslavia and the maintenance of international peace and security in general. Therefore, individual accountability for massive human rights violations, hitherto external to international relations, is increasingly internalized as part of the "fabric of emerging international society."<sup>41</sup>

In brief, the primary test of effective deterrence is not whether Karadžić or Mladić desist from further atrocities because of ICTY indictments. Rather, the apparently simple test is whether the ICTY, through exposing and stigmatizing particular forms of conduct, can convey the message more broadly that ethnic cleansing is wrong. It is this expression of disapproval by the world community that is at the core of the ICTY's mandate. The punishment of particular individuals—whether star villains such as Karadžić and Mladić or ordinary perpetrators such as Tadić and Erdemović—becomes an instrument through which respect for the rule of law is instilled into the popular consciousness. Ultimately, the ICTY will be a success if it contributes to bringing about a culture of habitual lawfulness such that persecutions and atrocities do not present themselves as a real alternative to peaceful multiethnic coexistence. As such, in a society in which thousands may have become embroiled in war crimes, the punishment of each and every offender is unnecessary to achieve deterrence.

Even in the pre-Dayton phase, the role of the tribunal in promoting general deterrence was not entirely overlooked. Then US Secretary of State Warren Christopher recognized that the ICTY's significance extends far beyond the Balkan region. "The world's response to the violence in the former Yugoslavia," he asserted, "is an early and concrete test of how we will address the concerns of the ethnic and religious minorities in the

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38. *Id.* at 2646.

39. Theodor Meron, *Answering for War Crimes: Lessons from the Balkans*, 76 FOREIGN AFF. 2, 7 (1997).

40. *Id.*

41. Koh, *supra* note 37, at 2655.

post-cold-war period.”<sup>42</sup> The atrocities committed in the former Yugoslavia raise the question of “whether a State may address the rights of its minorities by eradicating those minorities to achieve ethnic purity.”<sup>43</sup> Referring to the importance of general deterrence, he pointed out that both “[b]old tyrants and fearful minorities are watching to see whether ethnic cleansing is a policy the world will tolerate. If we hope to promote the spread of freedom, or if we hope to encourage the emergence of peaceful, multi-ethnic democracies, our answers must be a resounding ‘no.’”<sup>44</sup> Similarly, the representative of the Russian Federation to the Security Council recognized that the establishment of the ICTY will serve as “a serious warning to those guilty of mass crimes and flagrant violations of human rights in other parts of the world.”<sup>45</sup> These actors accept that the punishment of war crimes committed in the former Yugoslavia will send the message, both to potential aggressors and vulnerable minorities, that the international community will not allow atrocities to be committed with impunity.

Although great importance is attached in the preceding analysis to the broader social effects of punishing individual offenders in terms of general deterrence, it should not be concluded that specific deterrence is altogether irrelevant. By some accounts, expecting the ICTY to deter atrocities during an ongoing armed conflict would stretch the limits of credulity. As Meron observed, “[T]he gravest atrocity, the Serb massacre of thousands of Muslims living in and around Srebrenica, happened in July 1995, when the tribunal was fully operational and Karadžić and Mladić had both been indicted.”<sup>46</sup> Thus, it would appear that indictments issued at The Hague failed to significantly deter further atrocities in the former Yugoslavia. It even has been suggested that the Srebrenica genocide was a deliberate flouting of the ICTY’s authority. But to suggest categorically that the ICTY has had no impact whatsoever on specific deterrence may be going too far.

To be sure, it is difficult at times to believe that vague threats of criminal prosecution in the midst of a savage war would instantly somehow halt further atrocities. However, there is evidence that suggests that targeting political and military leaders and subjecting them to a threat of punishment, or even mere international opprobrium, can generate a form of immediate deterrence. As David Scheffer observed, “we know from experience in Bosnia that local authorities—camp commanders and temporary local ‘officials’—sometimes do what they can to improve the circumstances of

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42. *Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting*, U.N. SCOR, 3175th mtg., at 12–13, U.N. Doc. S/PV.3175 (22 Feb. 1993) [hereinafter U.N. Doc. S/PV.3175].

43. *Id.*

44. *Id.*

45. *Id.* at 16.

46. Meron, *supra* note 39, at 6.



those under their care once they know that the international community will investigate and punish those who fail to respect human rights standards."<sup>47</sup>

In this respect, it is intriguing to consider the example of Simo Drljača, former Deputy Minister of Interior of the Serb Republic of Bosnia, indicted for genocide by the ICTY and killed by SFOR troops in 1997 when he resisted arrest. In a 1993 interview, he stated that 6,000 "informative talks" had been held with Muslims and Croats in the Omarska, Keraterm, and Trnopolje "collection centers."<sup>48</sup> Of this number, some 1,500 individuals were sent to the Manjača camp "on the basis of solid documentation of active participation in the fighting against the Army of Republica Srpska, and also participation in genocide against the Serbian people."<sup>49</sup> Drljača remarked scornfully that "instead of letting them get their deserved punishment, the powerful men of the world expressing disdain forced us to release them all," referring apparently to international condemnation of these notorious concentration camps.<sup>50</sup> It is telling that even someone as cruel as Drljača would respond to mere world opinion, and that some 1,500 lives may have been saved as a result. Ironically, such concessions—coming from those so steeped in evil—say something positive about the human condition. Seemingly, the voice of conscience, or at least the fear of shame and the loss of legitimacy, operate even under the worst of circumstances. Obviously, though, in view of massive victimization, such limited concessions are not enough.

It is apparent that to some degree, the ICTY was established within a cynical theater, in which—for certain players—political expedience overrode genuine concerns for justice. Its original mandate of halting ongoing violations was perhaps unrealistic. Although the tangible effects of general deterrence are not easily discerned, it is in this direction that the ICTY's mandate has evolved. The ICTY's most significant and realistic contribution to deterrence is in the gradual internalization of expectations of individual accountability and the emergence of habitual conformity with elementary humanitarian principles, both in the former Yugoslavia and the international community. But in order to fully appreciate the far-reaching implications of the ICTY for deterrence, it is necessary to examine the causes of ethnic conflict in the former Yugoslavia. An examination of this specific context reinforces the proposition that peace and accountability, far from being irreconcilable, are inextricably interlinked.

47. David J. Scheffer, *International Judicial Intervention*, 102 *FOR. POL'Y* 34, 39 (1996).

48. *Kozarski Vjesnik*, 9 Apr. 1993, cited in *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, at 40–41, U.N. Doc. S/1994/674 (1994).

49. *Id.*

50. *Id.*

### III. UNDERSTANDING THE NON-ETHNICITY OF ETHNIC CONFLICT

Understanding the ICTY's potential contribution to deterrence and peace building depends on understanding the causes of conflict in the former Yugoslavia. Any system of criminal justice must take account of the roots of the criminal behavior it seeks to proscribe. As Andenæs explained, for example, "[s]ome crimes are committed in such a state of excitement that the criminal acts without regard to the consequences."<sup>51</sup> Threats of punishment may have very limited impact on such crimes of passion. In the case of the ICTY, the impact of threats of punishment on deterrence is likewise premised on the root cause of the criminal behavior in the former Yugoslavia. In this regard, it must be considered whether the outbreak of war and the pursuit of ethnic cleansing was an expression of pervasive primordial tribal hatreds or whether it was the consequence of a deliberate and calculated strategy of political leaders. If the Yugoslav and other such conflicts are historically determined clashes of civilizations or the result of spontaneous outbursts of bloodlust among the masses, doing justice can have only a marginal impact on deterrence, interethnic reconciliation, and peace building. By contrast, if ethnic cleansing is viewed as the end product of a deliberate campaign of incitement to hatred and violence by leaders and other élites, mass violence becomes a calculated conspiracy that is capable of definition, containment, and prevention. It is feasible, therefore, to punish the architects of ethnic cleansing, and not necessary to punish each and every one of the thousands of low-ranking perpetrators who seized the opportunity to commit crimes, or who simply were swept into an artificially induced whirlwind of violence. Likewise, if pathological hatred and violence are not inherent characteristics of peoples, it is more realistic to undo the political culture of deception and falsehood imposed by incitement to hatred and violence through telling the truth and transforming values.

Ethnic conflicts, or "conflicts of identity," as they have come to be known, are extremely complex, and the conflict in the Balkan region is certainly no exception. Obviously, an important ingredient of any such conflict is historical rivalry or intercommunal tensions of one form or another—phenomena that often seem to defy coherent analysis or theory. But why such tensions erupt into systematic mass violence is a somewhat different question. While the communal dimension of ethnic and religious identity is a profound and seemingly inexplicable aspect of human existence, its manipulation by political élites as a means of maintaining or usurping power is less mystical. It is this nonethnic dimension of ethnic conflict that is fundamental to understanding the way in which the ICTY can contribute both to deterrence and reconciliation.

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51. ANDENÆS, *supra* note 27, at 49.

### A. The Politicization of Ethnicity

The study of ethnic conflict is a vast and complex field. Any attempt at generalization is bound to overlook the theoretical complexity of various approaches. For present purposes, however, it is possible to speak of two predominant and divergent schools of thought. These can best be described as "primordialism" and "instrumentalism," although these approaches are not necessarily mutually exclusive. The general premise of primordialists is that ethnicity is defined by inherent factors such as race, language, or religion, that distinguish groups in fundamental or irreconcilable ways, and that frequently or inevitably lead to conflict. In contrast, the instrumentalists maintain that ethnicity is essentially a political contrivance of élites who seek to manipulate the social construction of identity among the masses as a means of preserving or acquiring power. Both sets of theorists approach the notion of ethnicity itself with ambivalence. Some view ethnicity in disparaging terms as an inevitable cause of division, instability, and violence, whereas others consider ethnic consciousness a valuable political force for emancipating subjugated peoples and marginalized cultures from foreign domination, or an instrument for humanizing the alienating impersonality of the modern state. A comprehensive discussion of these theoretical perspectives and their underlying assumptions is far too ambitious for present purposes. It is instructive, however, to consider the relevance of these two theories to the causes of the conflict in the former Yugoslavia as it relates to the potential contribution of the ICTY to the deterrence of future interethnic conflicts. An examination of the events surrounding the conflict in the former Yugoslavia illustrates that, although observers have adopted primordialist theories to explain the causes of the conflict, an instrumentalist approach more accurately captures the role played by élites in transforming ethnic consciousness from a legitimate communal identity into a legitimization of mass violence against rival groups.

Primordialists emphasize that ethnicity is an innate factor of human identity with important implications for political organization. Clifford Geertz spoke of "primordial attachments" as a significant threat to modern states in which "national unity" is maintained "not by calls to blood and land but by a vague, intermittent, and routine allegiance to a civil state, supplemented to a greater or lesser extent by governmental use of police powers and ideological exhortation."<sup>52</sup> A "primordial attachment" is one that stems from the "givens" of social existence.<sup>53</sup> These he defined as

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52. Clifford Geertz, *The Integrative Revolution, in OLD SOCIETIES AND NEW STATES: THE QUEST FOR MODERNITY IN ASIA AND AFRICA* 105, 110 (Clifford Geertz ed., 1963).

53. *Id.*

immediate contiguity and kin connection mainly, but beyond them the givenness that stems from being born into a particular religious community, speaking a particular language, or even a dialect of a language, and following particular social practices. These congruities of blood, speech, custom, and so on, are seen to have an ineffable, and at times overpowering, coerciveness in and of themselves.<sup>54</sup>

Such ties, Geertz suggested, are qualitatively different and more profound than mere social bonds: "One is bound to one's kinsman, one's neighbor, one's fellow believer, *ipso facto*; as the result not merely of personal affection, practical necessity, common interest, or incurred obligation, but at least in great part by virtue of some unaccountable absolute import attributed to the very tie itself."<sup>55</sup> Although he conceded that such "primordial bonds" exist in differing degrees according to each society or historical period, he concluded that "for virtually every person, in every society, at almost all times, some attachments seem to flow more from a sense of natural—some would say spiritual—affinity than from social interaction."<sup>56</sup>

When such "primordial attachments"—or what Geertz described as a "longing not to belong to any other group"<sup>57</sup>—prevail over civil sentiments, then a multiethnic state is in jeopardy. Strong expressions of "tribalism," "parochialism," or "communalism" have a "more ominous and deeply threatening quality than most of the other, also very serious and intractable problems" that modern states face.<sup>58</sup> In other words, "[e]conomic or class or intellectual disaffection threatens revolution, but disaffection based on race, language, or culture threatens partition, irredentism, or merger, a redrawing of the very limits of the state, a new definition of its domain."<sup>59</sup> Given the presumed innate quality of ethnic identity, the primordialist school suggests that mass interethnic crimes are somehow inevitable. The consequence of this theory is that specific or general deterrence through punishment is either impossible or of very limited effect. Because the law cannot externally impose norms and values without at least some degree of internalization, and because ethnic hatred and propensity to violence is inherent, the penalization of ethnic cleansing would become at best a ritualistic purging that is at variance with human nature.

In contrast, instrumentalists emphasize the pliability and artificiality of ethnicity and its potential as a political tool for the acquisition of power. Paul Brass provided a useful illustration of the process by which ethnicity is

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54. *Id.* at 109.

55. *Id.*

56. *Id.* at 110.

57. *Id.* at 111.

58. *Id.*

59. *Id.*

politicized by élites, suggesting that it is simply one among other forms of identity that can be utilized for asserting collective political demands: "ethnicity is to ethnic category what class consciousness is to class. . . . Ethnicity is an alternative form of social organization and identification to class, but it is a contingent and changeable status that, like class, may or may not be articulated in particular contexts or at particular times."<sup>60</sup> In other words, "ethnic groups that use ethnicity to make demands in the political arena for alteration in their status, in their economic well-being, in their civil rights, or in their educational opportunities" are simply engaged "in a form of interest group politics."<sup>61</sup> In this scheme, a nation is a politicized ethnic community that can come into being variously "by the transformation of an ethnic group in a multiethnic state into a self-conscious political entity or by the amalgamation of diverse groups and the formation of an inter-ethnic, composite or homogeneous national culture through the agency of the modern state."<sup>62</sup> Both processes attempt "to give subjective and symbolic meanings to merely objective distinctions between peoples and to increase the number of attributes and symbolic referents that they have in common with each other and that distinguish them from other groups."<sup>63</sup>

Instrumentalists emphasize the way in which ethnic identity can be manipulated to threaten the very survival of the state. The politicization of ethnicity initially may revolve around a single central symbol such as language, religion, territory, or other common attributes. However, in order to increase internal cohesion and to more effectively assert demands against other groups, "ethnic and nationalist elites increasingly stress the variety of ways in which the members of the group are similar to each other and collectively different from others."<sup>64</sup> In identifying the contrived identity that results from such a striving for "multisymbol congruence," Brass suggested that if the process is relatively successful, "the nationality created out of an ethnic group is sure to be quite a different social formation from the initial group."<sup>65</sup> This scheme becomes problematic when either the process of nation building, or alternatively the politicization of ethnicity by a community within the state, is "pushed beyond pluralist accommodations to extreme, even pathological limits, to expulsions, counter-expulsions, the exchange of population groups and even to genocide."<sup>66</sup> Thus, instrumentalists

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60. PAUL BRASS, *ETHNICITY AND NATIONALISM* 19 (1991).

61. *Id.*

62. *Id.* at 20.

63. *Id.*

64. *Id.* at 21.

65. *Id.*

66. *Id.*

view ethnicity as a political instrument and ethnic identity as a political construction. As such, these essentially exclusionary attributes can be shaped and manipulated by political élites in such a way that, in extreme situations, they can result in mass violence against rival groups.

Members of the instrumentalist school recognize that the transition from low-level ethnic conflict to genocidal violence is far from inevitable. In fact, they suggest that the addition of other ingredients such as systematic incitement is necessary. For example, a leading historical study by Frank Chalk and Kurt Jonassohn pointed out that in order to commit genocide,

the perpetrator has always had to first organize a campaign that redefined the victim group as worthless, outside the web of mutual obligations, a threat to the people, immoral sinners, and/or subhuman. Even after such a campaign of vilification and dehumanization the actual performance of the mass killing seems to have required a good deal of coercion and centralized control.<sup>67</sup>

Chalk and Jonassohn suggested that "mass killing is extremely difficult for ordinary people to carry out" and that "it requires the recruitment of pathological individuals and criminals."<sup>68</sup> They pointed out that the leadership of the Turks in 1915 and the Nazis during 1939 to 1945 "had to deal with symptoms of psychological break-down when attempting to use regular troops for mass killing."<sup>69</sup> They concluded that given "such reluctance on the part of most ordinary people in all societies to carry out a mass slaughter of defenseless victims, it becomes more clear why the performance of a genocide has always required a high degree of centralized authority and quasi-bureaucratic organization."<sup>70</sup>

It is apt to recall here the observations of Hannah Arendt in *Eichmann in Jerusalem* that even the murderers of the notoriously brutal *Einsatzgruppen* "were not sadists or killers by nature. . . . Hence the problem was how to overcome not so much their conscience as the animal pity by which all normal men are affected in the presence of physical suffering."<sup>71</sup> She observed that "just as the law in civilized countries assumes that the voice of conscience tells everybody 'Thou shalt not kill,' even though man's natural desires and inclinations may at times be murderous, so the law of Hitler's land demanded that the voice of conscience tell everybody: 'Thou shalt kill,' although the organizers of the massacres knew full well that murder is against the normal desires and inclinations of most people."<sup>72</sup>

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67. FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 28 (1990).

68. *Id.*

69. *Id.*

70. *Id.*

71. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 105–06 (1992).

72. *Id.* at 150.

Even controversial theorists such as Daniel Goldhagen who posit deeply rooted German anti-Semitism as the cause of the Holocaust did not deny the essential role of political élites in transforming that hatred into systematic genocide:

The road to Auschwitz was not twisted. Conceived by Hitler's apocalyptically bent mind as an urgent, though future, project, its completion had to wait until conditions were right. The instant that they were, Hitler commissioned his architects, Himmler and Heydrich, to work from his vague blueprint in designing and engineering the road. They, in turn, easily enlisted ordinary Germans by the tens of thousands, who built and paved it with an immense dedication born of great hatred for the Jews whom they drove down that road.<sup>73</sup>

But despite the dubious assertion that the hatred for Jews was somehow an inherent part of German culture—epitomized by the pervasive myth of the Jewish world conspiracy—anti-Semitic killings in Europe were as a rule organized. Norman Cohn observed that “pogroms as spontaneous outbreaks of popular fury seem to be a myth, and there is in fact no established case where the inhabitants of a town or village have simply fallen upon their Jewish neighbours and slaughtered them.”<sup>74</sup> In order to explain the Holocaust, therefore, it is apt to make a distinction between an anti-Semitic culture on the one hand and its pathological distortion and instrumentalization by the Nazi leadership on the other. In this respect, the testimony of Hitler himself is perhaps the most revealing explanation of how political élites could transform a supposedly lingering hatred into the monstrous proportions of an all-embracing plan to exterminate an entire race of people. According to Hitler,

anti-Semitism is a useful revolutionary expedient. Anti-Semitic propaganda in all countries is an almost indispensable medium in the extension of our political campaign. You will see how little time we shall need in order to upset the ideas and criteria of the whole world simply and solely by attacking Judaism. It is beyond question the most important weapon in our propaganda arsenal.<sup>75</sup>

Irving Horowitz also supports the proposition that genocide is first and foremost a design of political élites. He noted that when such groups “decide that their continuation in power transcends all other economic and social values, at that point does the possibility, if not the necessity, for genocide increase qualitatively. For this reason, genocide is a unique

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73. DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 425 (1996).

74. NORMAN COHN, *WARRANT FOR GENOCIDE: THE MYTH OF THE JEWISH WORLD-CONSPIRACY AND THE PROTOCOLS OF THE ELDERS OF ZION* 266 (1967).

75. *Quoted in XIX LAW REPORTS OF TRIALS OF WAR CRIMINALS* 437–38 (1948).



strategy for totalitarian regimes.”<sup>76</sup> Similarly, Leo Kuper recognized that although élites are “working with social forces present within the society, and not creating a genocidal situation out of a vacuum or transforming a harmonious equilibrium into a genocidal conflict,” genocide is “invariably a crime of governments, or of organized groups.”<sup>77</sup> In this way, these perspectives support the proposition that far from being inherent or inevitable, the centralized control of the state under the direction of political élites is an essential element of genocidal mass violence. Similarly, the instrumentalist perspective suggests that it is possible to identify and punish a distinct category of perpetrators responsible for fomenting ethnic violence and, consequently, that deterrence is a feasible and realistic prospect. If ethnic hatred and violence is the product of a campaign of indoctrination and misinformation, it is equally possible to engage in a campaign of truth and justice by which the role of individual leaders in fomenting war is exposed. In this manner, the collective attribution of guilt to other groups and desires for vengeance can be externalized, and respect for humanitarian principles and peaceful multiethnic coexistence can be internalized.

## **B. A Clash of Civilizations or a Clash of Political Elites in the Former Yugoslavia?**

Some leading theorists and commentators have described the disintegration of the former Yugoslavia in essentially primordialist terms as an inevitable post-communist resurgence of hitherto suppressed historical ethnic rivalries. An illustration of this approach is Samuel Huntington’s thesis that in the post-Cold War era, “the fault lines between civilizations will be the battle lines of the future.”<sup>78</sup> With the end of “ideologically defined states” in Eastern Europe and the former Soviet Union, he suggested, “traditional ethnic identities and animosities” come to the fore, resulting in self-definition in ethnic and religious terms. This in turn makes it more likely that people “see an ‘us’ versus ‘them’ relation existing between themselves and people of different ethnicity or religion.”<sup>79</sup> Thus, these civilizational “fault-lines” are “replacing the political and ideological boundaries of the Cold War as the flash points for crisis and bloodshed.”<sup>80</sup> In particular, the end of ideological division in Europe has resulted in the reemergence of “the cultural division of Europe between Western Christianity, on the one hand, and Orthodox

76. IRVING LOUIS HOROWITZ, *GENOCIDE: STATE POWER AND MASS MURDER* 38–39 (1976).

77. LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 49–50 (1981).

78. Samuel P. Huntington, *Clash of Civilizations?*, 72 *FOREIGN AFF.* 22, 22 (1993).

79. *Id.* at 29.

80. *Id.*

Christianity and Islam, on the other," making "the most significant dividing line in Europe" the Eastern boundary of Western Christianity in the year 1500.<sup>81</sup>

This putative fault-line bisects the former Yugoslavia almost exactly along the line that now separates Croatia and Slovenia from the rest of Yugoslavia, including Bosnia-Herzegovina; the line also coincides with "the historic boundary between the Habsburg and Ottoman empires."<sup>82</sup> To the North and West of this line are Protestant and Catholic peoples who "shared the common experiences of European history" such as "feudalism, the Renaissance, the Reformation, the Enlightenment, the French Revolution, [and] the Industrial Revolution."<sup>83</sup> In general, these peoples are in a better economic situation than their neighbors to the East; as a result, "they may now look forward to increasing involvement in a common European economy and to the consolidation of democratic political systems."<sup>84</sup> In contrast, peoples to the East and South of this line are Orthodox or Muslim and "historically belonged to the Ottoman or Tsarist empires and were only lightly touched by the shaping events in the rest of Europe."<sup>85</sup> In general, their economic situation is less advanced, and "they seem much less likely to develop stable democratic political systems."<sup>86</sup> Thus, in Europe the "Velvet Curtain of culture" has supplanted the "Iron Curtain of ideology" as the "most significant dividing line," and the events in the former Yugoslavia demonstrate that "it is not only a line of difference" but also, at times, "a line of bloody conflict."<sup>87</sup>

In a similar vein, the former co-chairman of the International Peace Conference for the former Yugoslavia, David Owen, looks backwards to a history of violence and "clashes of civilizations" for an explanation of the Yugoslav conflict. History, he asserted, "points to a tradition in the Balkans of a readiness to solve disputes by the taking up of arms and acceptance of the forceful or even negotiated movement of people as the consequence of war." History also reveals a "culture of violence" within a "crossroad civilization" in which three predominant religions—Orthodox Christianity, Islam, and Roman Catholicism—"have divided communities and on occasions become the marks of identification in a dark and virulent nationalism."<sup>88</sup> "Long before Tito died," Owen continued, the forthcoming "division

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81. *Id.* at 29–30.

82. *Id.* at 30.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 30–31.

87. *Id.* at 31.

88. DAVID OWEN, *BALKAN ODYSSEY* 3 (1995).

and disarray" of Yugoslavia was predictable, although the suppression of Croatian, Serbian, and Slovenian nationalism "lulled people into believing that the old nationalisms had been forgotten."<sup>89</sup> But when elections were held in the six constituent republics of the Yugoslav Federation in 1990, "it was the nationalist parties that everywhere received the strongest support through the ballot box."<sup>90</sup>

These perspectives suggest that the bloody conflict in the former Yugoslavia was an inescapable consequence of resurgent nationalism in the Balkans in the wake of communism's sudden collapse. These portraits, however, overlook and underestimate the instrumentalization of ethnicity by political élites that occurred in the region. To be sure, it is evident that post-communist Yugoslavia could not avoid a constitutional redefinition; that democratization would permit hitherto repressed national sentiments to resurface; and that historical rivalries were bound to complicate this transition process. But, the factors that resulted in the eruption of ethnic and regional rivalries into systematic mass violence in Croatia and Bosnia-Herzegovina cannot be dismissed as the consequence of a "culture of violence" within a "crossroad civilization." As Warren Zimmermann observed:

Bosnia enjoyed long periods of tranquillity as a multiethnic community. Serbs and Croats, the most antagonistic of adversaries today, had never fought each other before the twentieth century. The millennium they spent as neighbors was marked more by mutual indifference than by mutual hostility. Serbs, though demonized by many as incorrigibly xenophobic, don't fit that stereotype. . . . With all the manipulative tools at Milošević's disposal, it still took him four years to arouse the Serbian population and that, even then, thousands of Serbs fled the country to avoid fighting in Croatia.<sup>91</sup>

He concluded that

the Yugoslav wars can't be explained by theories of inevitable ethnic hatreds, even when such explanations conveniently excuse outsiders from the responsibilities of intervening. There was plenty of racial and historical tinder available in Yugoslavia. But the conflagrations didn't break out through spontaneous combustion. Pyromaniacs were required.<sup>92</sup>

Similarly, in a leading study on the disintegration of former Yugoslavia, Susan Woodward pointed out that

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89. *Id.* at 10.

90. *Id.*

91. ZIMMERMANN, *supra* note 20, at 209.

92. *Id.* at 210.

despite the deterioration of the economy, social order, and political system over the decade 1979–89, there was also still room for major actors to pull back from confrontation, for political groups to emerge with an outcome other than militant nationalism, and for political management to divert the momentum of incompatible national interests and economic reform into a peaceful compromise and genuine political reform.<sup>93</sup>

She indicated that during 1988–1989,

the specific contests within republics and between republics and federal authorities began to interact at an escalating pace. Claims for control over economic resources or political authority were necessarily a denial of resources, authority, and rights to others. Protectionist economics and aggressive politics tended to incite defensive responses, and the interaction could escalate rapidly if not restrained.<sup>94</sup>

This situation led to popular protests, which, in turn, excited counter-protests,

and the rhetoric of national interest became increasingly nationalist in the sense of defining one group and its goals in opposition to another. The more assertive each republic became in its own political project, the more this impinged on politics in other republics and on the prospects for political and economic activities that crossed republican borders and ignored ethnic identity.<sup>95</sup>

In the end, both political groups and nongovernmental organizations that “made explicit efforts to reverse the nationalist momentum” lost the contest to

those who preferred to push their own political goals regardless of the consequences for Yugoslavia. Unwilling to compromise in what they still treated as a bargaining game within one system where maximalist tactics by the most powerful were rewarded, politicians and politically active intellectuals were also using nationalist tactics to mobilize support within their republics. Other republics or the federal government were increasingly identified as external enemies to be defeated.<sup>96</sup>

Perhaps the most telling account of the role played by political élites in manipulating ethnic identity during the violent disintegration of the Yugoslav federation is that of the distinguished Belgrade scholar, Dušan Janjić. The culprits, he asserted, are the “republican elites (Slovenia, Croatia, and Serbia), parts of the federal leadership, and the highest ranks of the military.”

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93. SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* 112 (1995).

94. *Id.*

95. *Id.*

96. *Id.* at 112–13.

He pointed out that the groups “operated on the premise that their political objectives should be realized at any cost.”<sup>97</sup> The methods that they initially employed included “the internal destabilization of ‘adversaries’ by means of encouraging ethnic conflicts on their territory, or by tolerating and allowing the drafting of ‘volunteers’ and mercenaries to be sent to areas affected by ethnic rebellion. Ultimately, such methods escalated into open war.”<sup>98</sup> Janjić concluded, therefore, that “to a considerable extent, the civil war in Yugoslavia . . . was the result of the intentional incitement of hatred between nations.”<sup>99</sup> The disintegration into mass violence was “the consequence of political recklessness on the part of leading personalities who played the key roles in politics during a highly sensitive period of social dislocation and uncertainty” as well as of “a restricted concept of social transformation formulated by national political elites who were interested, above all, in the perpetuation of their own power.”<sup>100</sup>

In this respect, it is amazing to consider the parallels between the 1991–1995 Yugoslav War and the Balkan War of 1912–1913. The report of the International Commission of Inquiry established in 1913 by the Carnegie Endowment for International Peace to inquire into the causes and conduct of the Balkan Wars recounts the way in which political leaders were instrumental in inciting war.<sup>101</sup> The Commission’s President, French Senator Baron d’Estournelles de Constant, wrote that

the real culprits . . . are not, we repeat, the Balkan peoples. . . . The true culprits are those who mislead public opinion and take advantage of the people’s ignorance to raise disquieting rumors and sound the alarm bell, inciting their country and consequently other countries into enmity. The real culprits are those who by interest or inclination, declaring constantly that war is inevitable, end by making it so, asserting that they are powerless to prevent it. The real culprits are those who sacrifice the general interest to their own personal interest which they so little understand, and who hold up to their country a sterile policy of conflict and reprisals.<sup>102</sup>

The parallels are striking, and they provide a powerful rebuttal to the expedient—if not somewhat romantic or even ethnocentric—notion of a culture of violence in a crossroads civilization.

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97. Dušan Janjić, *Resurgence of Ethnic Conflict in Yugoslavia: The Demise of Communism and the Rise of the “New Elites” of Nationalism*, in *YUGOSLAVIA: THE FORMER AND FUTURE: REFLECTIONS BY SCHOLARS FROM THE REGION* 29, 39 (Payam Akhavan & Robert Howse eds., 1995).

98. *Id.*

99. *Id.*

100. *Id.*

101. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, REPORT OF THE INTERNATIONAL COMMISSION TO INQUIRE INTO THE CAUSES AND CONDUCT OF THE BALKAN WARS 19 (1914).

102. *Id.*

The media represented the primary tool of manipulation employed by leaders in this effort to arouse interethnic violence. Their pivotal role in creating the conditions necessary for interethnic violence cannot be overestimated. Distortions of truth, if not outright misinformation, compounded by the cumulative effect of systematic indoctrination, generated a nationalist psychosis in which reality was obscured. Christopher Bennett has exposed in particular the manner in which political élites instrumentalized ethnicity for political gain through use of the media. He pointed out that the "Serb national psyche which has so revolted the world since 1991 is not the product of centuries of historical evolution but has been deliberately manufactured and intensively cultivated by the Serbian media since 1987."<sup>103</sup> Rejecting the "clash of civilizations" theory, Bennett suggested that the Serb insistence that their nation is "threatened by genocide on all fronts" and that they have been "mercilessly exploited in Yugoslavia" is the product of indoctrination by the media. He explained the media's contribution to the gradual blurring of the line between truth and illusion: "Myth, fantasy, half-truths and brazen lies were packaged each night into television news. The conspiracy theory dreamed up by frustrated nationalists in the late 1960s, 1970s and early 1980s became the literal truth, and anyone who challenged it was labelled an 'enemy of the Serb nation.'" As part of the campaign to use ethnicity as an instrument of political control,

[e]very conceivable event from Serb history was dredged up and distorted to feed the persecution complex of ordinary people, who were gradually taken in by the barrage of xenophobia. The atmosphere was so heated and the campaign so all-encompassing that people lost touch with reality and, with no alternative source of information, became ready to believe anything they were told.<sup>104</sup>

Warren Zimmermann provided a vivid example of how the media went to extraordinary lengths in order to distort the truth for the purpose of "building hatreds and prejudices."<sup>105</sup> He referred to the particularly invidious tactic of ascribing atrocities to the victims themselves:

It reached its apotheosis in the Bosnian war, where, according to the Serbian press, the shelling in May 1992 of a bread line in Sarajevo, killing seventeen Bosnians, was the work of the Bosnians themselves. So was the mortal attack on the Sarajevo market in February 1994, when sixty-eight Bosnian civilians were killed. And so was the second mortaring of the market in August 1995, which killed thirty-eight people. The doctors of demonology in the Serbian high command got a double payback for their grotesque distortions. Not only did

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103. CHRISTOPHER BENNETT, *YUGOSLAVIA'S BLOODY COLLAPSE: CAUSES, COURSE AND CONSEQUENCES* 96 (1995).

104. *Id.* at 97.

105. *Id.*

they transfer the blame from themselves; they also persuaded their audience that their enemies were so inhumane that they could murder their own people in cold blood.<sup>106</sup>

The continuing effect of these distortions were exemplified in the November 1996 elections in Serbia-Montenegro during which the state-run media "managed to recast Mr. Milošević, who rose to power as a virulent nationalist determined to create a Greater Serbia, as a tolerant peacemaker and internationally respected statesman."<sup>107</sup> The conflict and its millions of victims, including Serbs from Croatia and Bosnia-Herzegovina, were "rarely mentioned."<sup>108</sup> According to a Serbian opposition columnist, Stojan Čerović, the political campaign was really "'a war, directed by the state media, against our memory . . . and the state is winning.'"<sup>109</sup> Obviously, the monopolization of the media by the state, composed of essentially the same political élites who indoctrinated the people to begin with, makes the task of disseminating the truth all the more challenging.<sup>110</sup>

A picture emerges, therefore, not of a historically determined clash of civilizations or outburst of primordial tribal hatreds, but of a clash of political élites who were willing to resort to nationalist hysteria and mass violence as a means of maintaining or acquiring power. It was not objective differences among the peoples of the former Yugoslavia that resulted in the outbreak of mass violence, but rather the unrestrained distortion and exploitation of these differences as an instrument of retaining power for elements of the former communist élite and an instrument for the acquisition of power by the newly emerging nationalist élites. In this volatile transition stage, unrestrained opportunism prevailed where political restraint and a unifying leadership could have resulted in a peaceful outcome. Appealing to the base instincts of fear and hatred among the mass of the people, these "national saviours" elevated themselves to a position of ascendancy, at the cost of driving their compatriots into a cataclysm. It is against the foregoing background of politicized ethnicity that the ICTY's

106. ZIMMERMANN, *supra* note 20, at 156.

107. Chris Hedges, *A Campaign "Against Memory," Yugoslav Vote Expected to Cement Milošević's Rule*, INT'L HERALD TRIB., 4 Nov. 1996, at 5.

108. *Id.*

109. *Id.*

110. As recent events demonstrate, in certain circumstances it is possible for the international community to take preventive action against use of the media for incitement to hatred and violence. For example, in October 1997, SFOR troops seized four broadcasting transmitters in Republika Srpska in order to end inflammatory propaganda against other ethnic groups thus depriving Bosnian Serb hard-liners of their most effective instruments for indoctrination and misinformation. See William Drozdiak, *Bosnia TV Put Through Nato's Hoop*, GUARDIAN, 22 Dec. 1997, at 11; Tracy Wilkinson, *Trying to Extract War from Journalism*, L.A. TIMES, 26 Oct. 1997, at 8.



potential contribution to peace building in the former Yugoslavia can be best understood.

Based on the premise that incitement to hatred and organization of systematic violence by those in positions of leadership is at the root of the Yugoslav conflict, it is clear that in order to prevent a recurrence of mass violence, it is necessary to reveal the way in which élites manipulated ethnic identity to foment violence and consolidate political power. It is necessary to help internalize values of peaceful interethnic coexistence and respect for the rule of law, resting on the public consciousness that there was nothing inevitable about the war and the horrors of ethnic cleansing. By telling the truth of what transpired in the former Yugoslavia and ascribing individual guilt to those responsible for manipulating ethnic tensions, the ICTY can counter the campaign of collective demonization instigated by political élites. In doing so, furthermore, it can provide an official public forum for the acknowledgment and vindication of the suffering of the victims. The exposition of truth, therefore, will contribute to stability in the region by helping to prevent the recurrence of ethnic violence in the former Yugoslavia and by sending the message to would-be hate-mongers and warlords that they will be held accountable under international law.

#### IV. THE POWER OF TRUTH

The importance of truth-telling is reflected in the views of the ICTY's leading supporters. During the Security Council deliberations leading to the establishment of the ICTY in 1993, the US Ambassador Madeline Albright noted: "Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process."<sup>111</sup> Similarly, the representative of Hungary, suggesting that the conflict was the result of deliberate incitement to hatred rather than primordial ethnic sentiments, pointed out that the policy adopted by the international community with respect to the former Yugoslavia "will make either easier or more painful, or even impossible, the healing of the psychological wounds the conflict has inflicted upon peoples who for centuries have lived together in harmony and good neighborliness, regardless of what we may hear today from certain parties to the conflict."<sup>112</sup>

This view was subsequently echoed by leading members of the ICTY

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111. *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. SCOR, 3217th mtg., at 12, U.N. Doc. S/PV.3217 (25 May 1993) [hereinafter U.N. Doc. S/PV.3217].

112. U.N. Doc. S/PV.3175, *supra* note 42, at 19–20.

itself and became a central component of its ideology. The first President of the ICTY, Antonio Cassese, repeatedly emphasized the important role of the judicial process in countering the primitive and archaic concept of collective responsibility. "Far from being a vehicle for revenge," he maintained, the ICTY is an instrument for reconciliation: "If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal."<sup>113</sup> The history of the Balkan region, furthermore, "clearly shows that clinging to feelings of 'collective responsibility' easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes."<sup>114</sup> Drawing parallels with the International Military Tribunal at Nuremberg, the former ICTY Prosecutor Richard Goldstone similarly observed that the trials of the major Nazi war criminals "ensured that guilt was personalized":

[W]hen one looks at the emotive photographs of the accused in the dock at Nuremberg one sees a group of criminals. One does not see a group representative of the German people—the people who produced Goethe or Heine or Beethoven. The Nuremberg Trials were a meaningful instrument for avoiding the guilt of the Nazis being ascribed to the whole German people.<sup>115</sup>

In this way, truth-telling promotes interethnic reconciliation through the individualization of guilt in hate-mongering leaders and by disabusing people of the myth that adversary ethnic groups bear collective responsibility for crimes.

Truth telling will also enable victims to hear and see their stories told—either their own personal stories or stories like theirs—in an officially sanctioned forum before the international community. As former Prosecutor Goldstone noted, "[T]he Nuremberg Trials played an important role in enabling the victims of the Holocaust to obtain official acknowledgment of what befell them."<sup>116</sup> Similarly, Ambassador Albright explained before the Security Council that "among the millions" who will learn of the ICTY's establishment "are the hundreds of thousands of civilians who are the victims of horrific war crimes and crimes against humanity in the former Yugoslavia. To these victims we declare by this action that your agony, your sacrifice, and your hope for justice have not been forgotten."<sup>117</sup>

113. *International Tribunal for the Former Yugoslavia: First Annual Report*, at 11, U.N. Doc. IT/68 (28 July 1994), available in <<http://www.un.org/icty/rapportan/first-94.htm>> [hereinafter U.N. Doc IT/68].

114. *Id.*

115. Richard J. Goldstone, *Fifty Years After Nuremberg: A New International Criminal Tribunal for Human Rights Criminals*, in CONTEMPORARY GENOCIDES: CAUSES, CASES, CONSEQUENCES 215 (Albert J. Jongman ed., 1996).

116. *Id.* at 215–16.

117. U.N. Doc. S/PV.3217, *supra* note 111, at 12–13.

In this connection, it is important to emphasize that recollection and recognition of the past is a highly valuable commodity for victims that is often underestimated by external observers. Charles Maier spoke of the “memory industry,” stressing that public recognition of the truth is an irreplaceable remedy for those who have suffered injustice.<sup>118</sup> In the case of the Holocaust, he observed:

Former perpetrators and victims—preeminently, though not exclusively, Germans and Jews—have been locked into a special relationship. No matter what material or other public debts are paid, confessional memory is demanded as the only valid reparation. And as a claim upon official memory, the victim’s anguish comes to be seen as a valuable possession.<sup>119</sup>

Thus, the recognition of the truth through testimony is an irreplaceable remedy and a powerful catharsis that will contribute to deterrence by discouraging acts of vengeance and retaliation. As then President Cassese explained in vivid terms, the rule of law and political stability are unattainable if the perpetrators of these crimes remain unpunished:

How could a woman, who had been raped by servicemen from a different ethnic group or a civilian whose parents or children had been killed in cold blood quell their desire for vengeance if they knew that the authors of these crimes were left unpunished and allowed to move around freely, possibly in the same town where their appalling actions were perpetrated?

He concluded that the “only civilized alternative to this desire for revenge is to render justice,” for otherwise, “feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence.”<sup>120</sup>

It is easy, especially in the prevailing cynical mindset of political thought, to underestimate the significance of telling the truth and its capacity to influence power realities. It should be recalled that indoctrination and misinformation are vital ingredients of incitement to ethnic hatred and violence. Indeed, the restriction of information and distortion of reality are essential tools of political control. There is no doubt, Hannah Arendt said, “that truth and politics are on rather bad terms with each other, and no one, as far as I know, has ever counted truthfulness among the political virtues. Lies have always been regarded as necessary and justifiable tools not only of the politician’s or the demagogue’s but also of the statesman’s

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118. CHARLES MAIER, *THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY* 161 (1988).

119. *Id.*

120. U.N. Doc. IT/68, *supra* note 113, at 10.

trade.”<sup>121</sup> But it is a problematic proposition, she admitted, to say that the very essence of power is deceit and that of truth, impotence, for “what kind of reality does truth possess if it is powerless in the public realm, which more than any other sphere of human life guarantees reality of existence to natal and mortal men . . . [and] is not impotent truth just as despicable as power that gives no heed to truth?”<sup>122</sup>

Therefore, the power that emanates from telling the truth cannot be divorced from the presence of such truth in the public domain. Just as deception is a means of acquiring power, truth is a means of undoing power that is arrogated through deception. Arendt’s assertion that truth and politics are on bad terms—that truth has a “power” that can threaten existing “power realities”—is attested to by the experience of countries that have established truth commissions in post-conflict situations.<sup>123</sup> Here, it is evident that the mere recital of certain facts in the public domain may be construed a threat to power by those whose tool of control involves the distortion or repression of truth. In a comparative survey of fifteen truth commissions, for example, Priscilla Hayner concluded that despite the notable success of a number of such bodies, some have been “significantly limited from a full and fair accounting of the past—limited by mandate, by political constraints or restricted access to information, or by a basic lack of resources, for example—and have reported only a narrow slice of the ‘truth.’” In some cases truth commission final reports have been kept confidential.”<sup>124</sup>

### A. What is Truth?

But telling the truth is a matter of considerable complexity. What exactly is meant by truth? Is a shared truth among rival ethnic groups possible or even desirable? Is there a truth or historical record that may be called “objective”? Or is truth simply a subjective collective memory that each victim group creates for its own purposes? Is not the mere selection of particular facts, let alone their interpretation in a narrative, always filtered through the eyes of a particular people, with a particular historical experience? Charles Maier pointed out that the respective projects of history and memory, although interdependent, are not identical:

121. ARENDT, *supra* note 71, at 227.

122. *Id.*

123. *Id.*

124. Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 600 (1994). See also THE JUSTICE AND SOCIETY PROGRAM OF THE ASPEN INSTITUTE, STATE CRIMES: PUNISHMENT OR PARDON (1989).

History, I believe, must be reflective and inevitably discordant and plural. I am not claiming that history necessarily arrives at a more scientific end-point than memory; no savvy historian in the late twentieth century adopts a naive positivist stance. But historians must at least presuppose different life situations; they assume that individuals and groups bring limited perspectives to any conflict. Historians, moreover, must reconstruct causal sequences; they tell stories of before and after and explain events by their antecedents.<sup>125</sup>

As the "retriever of memory," however, the victim "does not have the same responsibility to establish causal sequencing. Triumphs, traumas, national catastrophes make their presence felt precisely by their re-presence or representation. Memories are to be retrieved and relived, not explained."<sup>126</sup> Indeed, "some of the oracles of memory, the mouths that speak for the dead, actually celebrate the anti-historical component of memory; they claim that memories retrieve experiences that must remain ineffable. They can never be fully communicated, much less ordered and explained as historical events must be."<sup>127</sup> Thus, unlike history, the objective of memory is not "causal sequencing," but rather "access to vivid and intense past experiences," and accordingly, "collective memories tend to focus not on the long history of an ethnic people but on their most painful incidents of victimization."<sup>128</sup> "*Chacun à sa mémoire*," Maier concluded, "the retrieval and reliving of a moment of transcendent victimhood is a people's choice. But we should recognize," he cautioned, "that it may well be exclusionary, must be sacral, and while it overlaps with and undergirds historical consciousness is not identical with it."<sup>129</sup>

Reflecting on historical objectivity, Hannah Arendt observed that although "facts" and "opinions" are distinct and separate, "they are not antagonistic to each other," because "[f]acts inform opinions, and opinions, inspired by different interests and passions, can differ widely and still be legitimate as long as they respect factual truth."<sup>130</sup> By analogy, "factual truth informs political thought just as rational truth informs philosophical speculation."<sup>131</sup> Arendt asked whether it can be said that facts do not exist independent of opinion and interpretation:

Have not generations of historians and philosophers of history demonstrated the impossibility of ascertaining facts without interpretation, since they must first be

125. Charles Maier, *A Surfeit of Memory?: Reflections on History, Melancholy and Denial*, 5 HIST. & MEMORY 136 (1993).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Hannah Arendt, *Truth and Politics*, in BETWEEN PAST AND FUTURE 227 (1954).

131. *Id.*

picked out of a chaos of sheer happenings (and the principles of choice are surely not factual data) and then be fitted into a story that can be told only in a certain perspective, which has nothing to do with the original occurrence?<sup>132</sup>

She argued, however, that there is a sphere in which factual truth exists, independent of opinion and interpretation:

No doubt these and a great many more perplexities inherent in the historical sciences are real, but they are no argument against the existence of factual matter, nor can they serve as a justification for blurring the dividing lines between fact, opinion, and interpretation, or as an excuse for the historian to manipulate facts as he pleases. Even if we admit that every generation has the right to write its own history, we admit no more than that it has the right to rearrange the facts in accordance with its own perspective; we don't admit the right to touch the factual matter itself.<sup>133</sup>

Of course, even if the ICTY can establish a factual record of what happened, it cannot contribute to national reconciliation if this record is not recognized and internalized by the peoples of the former Yugoslavia. Michael Ignatieff recognized that the "great virtue of legal proceedings . . . [is] that their evidentiary rules confer legitimacy on otherwise contestable facts. In this sense, war crimes trials make it more difficult for societies to take refuge in denial—the trials do assist the process of uncovering the truth."<sup>134</sup> But, at the same time, he questioned the power of facts to reconcile adversaries, because it is opinion and interpretation that are most important: "The truth that matters to people is not factual truth but moral truth; not a narrative that tells *what* happened but a narrative that explains *why* it happened and who is responsible."<sup>135</sup> Shared truth about the past, Ignatieff suggested, is not possible because it is inextricably intertwined with identity:

What you believe to be true depends, in some measure, on who you believe yourself to be. And who you believe yourself to be is mostly defined in terms of who you are not. To be a Serb is first and foremost not to be a Croat or a Muslim. If a Serb is someone who believes that Croats have a historical tendency toward fascism and a Croat is someone who believes that Serbs have a penchant for genocide, then to discard these myths is to give up a defining element of Serbian or Croatian identity.<sup>136</sup>

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132. *Id.*

133. *Id.*

134. Michael Ignatieff, *Articles of Faith*, in INDEX ON CENSORSHIP (Sept./Oct. 1996), reprinted in 294 HARPER'S MAG. 15 (Mar. 1997).

135. *Id.*

136. *Id.*

He went so far as to dismiss as an "illusion" the notion that "impartial" or "objective" "outsiders" could ever succeed in getting their "moral and interpretive account of the catastrophe" accepted by the parties to the conflict.<sup>137</sup> "The very fact of being an outsider," Ignatieff asserted, "discredits rather than reinforces one's legitimacy. For there is always a truth that can be known only by those on the inside."<sup>138</sup> Only an insider can appreciate the moral significance of facts, he maintained, and the truth, "if it is to be believed, must be authored by those who have suffered its consequences."<sup>139</sup>

But surely this is buying into the divisive falsehood that is the instrument of power for the unscrupulous politician. To reduce Serb and Croatian identity to such base stereotypes is to give credence to the notion of primordial tribal hatreds. Are we to say that short of hating each other, these peoples have no identity? Are we to say that for the peoples of the former Yugoslavia to surrender such myths is to surrender a defining element of their ethnicity and identity? If there can never be a shared truth, the notion of a common humanity becomes a mere illusion. To be sure, the truth established in a court of law should lay no claim to represent the deeper inner truth. It is no substitute for the retriever of memory who relives the trauma that belongs only in the aggrieved's sphere of experience. The ICTY does not claim to be a repository of the spiritual essence of the aggrieved. And surely, if the parties, including the insiders on all sides, could come to a truth without the mediation of outsiders, it would have obviated the need for the more remote justice of The Hague.

Some valuable lessons can be derived concerning the process of reaching a shared truth by considering the struggle of other peoples in conflict situations. In particular, achieving a truth common to adversaries is not so much an exhaustive historical record of events as it is an empathy for human suffering that transcends the bonds of blood and soil. As Charles Maier pointed out with respect to a shared truth among Palestinians and Israelis, it is necessary to distinguish between two forms of recognition:

In one form, acknowledgment entails one party appreciating the pain another has experienced. In the second form, acknowledgment is an identification of one version of the facts as authoritative. I could appreciate the pain of [a] family, who are refugees from Haifa. But I might not agree with his version of why his family left Haifa.<sup>140</sup>

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137. *Id.*

138. *Id.*

139. *Id.*

140. HARVARD HUMAN RIGHTS PROGRAM & WORLD PEACE FOUNDATION, TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT 77–78 (1997), available in <<http://www.law.harvard.edu/Programs/HRP/Publications/truth3.html>>.



Similarly, Lawrence Weschler explained that mutual acceptance among Israelis and Palestinians would obviate the need for "a truth commission that would arrive at an exhaustive, fifteen-volume account of everything that ever happened." Rather, it would allow them to "get together and write a fifth-grade history text-book. In the language of fifth graders it would point to the different interpretations of what happened. It would relate the facts and explain the various interpretations."<sup>141</sup> Ignatieff argued that shared truth "is not a compromise between two competing versions of events. Either the siege of Sarajevo was a deliberate attempt to terrorize and subvert the elected government of an internationally recognized state or it was a legitimate preemptive defense of the Serbs' homeland from Muslim attack. It cannot be both."<sup>142</sup> But, it does not have to be both in order for there to be a shared truth. For given the opportunity, Muslim, Serb, and Croat alike can appreciate the more elementary truths that snipers should not murder helpless civilians in cold blood, that the wanton destruction of historical monuments and civilian areas serves no legitimate purpose, that the pain of a bereaved mother or an orphaned child transcends ethnic affiliation.

But even if it is accepted that both factual and shared truth can be ascertained, is it always desirable? Is it not better to forget the injustice of the past in order to build a better future? Are reconciliation and peace not better served by evading bitter memories that exacerbate sectarian strife and national disunity? Sheldon Wolin suggested that the limits of justice are dictated by the limits of the "collective memory."<sup>143</sup> His view on the limits of the collective memory can be best understood in light of the remark of the French historian Ernest Renan that the "essence of a nation is that all the individuals share a great many things in common and also that they have forgotten some things. Every French citizen should have forgotten the Saint-Bartholomew" massacre.<sup>144</sup> Similarly, Wolin observed that although "Americans easily celebrated the bicentennial of their Constitution, most of them ignored the centennial of the Civil War. . . . [B]y forgetting the experience of a divided nation at war with itself, the nation was able to restore its sense of shared destiny."<sup>145</sup> Accordingly, Wolin questioned the wisdom of revisiting certain events in which "the members of society feel tainted by a kind of corporate complicity in an act of injustice done in their

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141. *Id.* at 78.

142. Ignatieff, *supra* note 134.

143. SHELDON WOLIN, *THE PRESENCE OF THE PAST* 33 (1989). The "collective memory" is defined as "the formation, interpretation, and retention of a public past . . . preserved in public art and architecture, public rites, ceremonies or rituals, the rhetoric of public authorities, the educational curricula, and the ideological themes that pervade these." *Id.*

144. ERNEST RENAN, *WHAT IS A NATION?* (1881), *quoted in id.* at 33.

145. WOLIN, *supra* note 143, at 34.

name," even if "temporal distance and historical accommodations have so far removed them from it that they do not feel responsible, only uneasy."<sup>146</sup> Often, he explained, such "collective wrongs" are not forgotten but only "publicly unrecalled."<sup>147</sup>

But what is at issue before the ICTY is not a compulsive attachment to the past or an unrelenting desire to reawaken age-old animosities. Rather, it is the ability of victims to put the past behind them. As Tina Rosenberg explained:

We should distinguish between truths that cause social danger and truths that cause mere political embarrassment or inconvenience. In the former Yugoslavia, no one wants the pursuit of truth to fuel ethnic tensions and start another cycle of violence. Yet in many situations, people feel that they have been the victims of abuses, but no justice has been done.<sup>148</sup>

The futility of self-induced or imposed amnesia has been demonstrated time and again as unresolved injustices of the past continue to haunt future generations. How can one explain Prime Minister Tony Blair's recent atonement for the Irish Potato Famine of 1845–1851? Why, after a lapse of one and a half centuries did he, on behalf of the British people, confess that "those who governed in London at the time failed their people through standing by while a crop failure turned into a massive human tragedy," emphasizing that "we must not forget such a dreadful event"?<sup>149</sup> Even more importantly, why did the Irish Prime Minister John Bruton praise his British counterpart's statement by remarking that "[w]hile it confronts the past honestly, it does so in a way that heals for the future"?<sup>150</sup>

In what Michael Ignatieff called "public rituals of atonement" can be found the lesson that without acknowledgment of truth, posterity is perennially doomed to revisit the injustices of the past.<sup>151</sup> He observed that when Chilean President Patricio Alwyn apologized to the victims of Pinochet's repression on national television, "he created the public climate in which a thousand acts of private repentance and apology became possible. He also symbolically cleansed the Chilean state of its association with these crimes."<sup>152</sup> Similarly, "West German Chancellor Willy Brandt's gesture of going down on his knees in the Warsaw ghetto had a similarly cathartic effect by officially associating the German state with the process of

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146. *Id.*

147. *Id.*

148. HARVARD HUMAN RIGHTS PROGRAM & WORLD PEACE FOUNDATION, *supra* note 140, at 70–71.

149. *Britain Accepts Blame in Irish Famine*, INT'L HERALD TRIB., 3 June 1997, at 8.

150. *Id.*

151. Ignatieff, *supra* note 134.

152. *Id.*

atonement."<sup>153</sup> Ignatieff contrasted these leaders' moral stewardship with the behavior of "the political figures responsible for the war in the Balkans" who remain unrepentant about the past. By way of example:

If, instead of writing books disputing the numbers of people exterminated at Jasenovac during World War II, President Franjo Tudjman of Croatia had gone to the site of the most notorious of the Croatian extermination camps and publicly apologized for the crimes committed by the Croatian Ustashe against Serbs, Gypsies, partisan resisters, and Jews, he would have liberated the Croatian present from the hold of the Ustashe past. He also would have increased dramatically the chances of the Serbian minority accepting the legitimacy of an independent Croatian state [i.e. in 1991].<sup>154</sup>

This he chose not to do because "he believed the Serbs to be just as guilty of crimes against the Croats."<sup>155</sup> However, a gesture of atonement helps reconciliation "precisely because it rises above the crimes done to your own side."<sup>156</sup> Ignatieff recognized that although reconciliation between nations cannot be compared with that of individuals, leaders "can have an enormous impact on the mysterious process by which individuals come to terms with the pain of their society's past."<sup>157</sup>

Thus, by exposing the truth before an official and impartial public forum, the ICTY can contribute significantly to altering power realities that are vestiges of indoctrination and misinformation to ethnic hatred and violence. But the ICTY can only be effective if it can establish facts, hard and inescapable facts, with a moral or interpretive narrative based on elementary humanitarian values, which can become part of a shared truth for all peoples in the former Yugoslavia. Even if it were possible, it is not necessary to establish an official and exhaustive historical record for all times in order to bring about reconciliation. With the world community as witness, the unifying power of truth telling can help heal the wounds, exorcise the specters of the past, and build a solid moral foundation for future generations.

## B. Prosecutorial Discretion: Constructing the Optimal Truth

A fundamental issue concerning the cathartic effect of ICTY prosecutions is the impossibility of punishing even a small fraction of the thousands who have perpetrated crimes. Because only a small proportion of the perpetra-

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

tors will be put on trial, is it realistic to suggest that symbolic prosecutions will somehow vindicate the suffering of victims?<sup>158</sup> Is it possible for truth in the abstract to affect healing and reconciliation, or must it be personal and specific to the victim's injustice? In its selection of cases, the ICTY Prosecutor must construct an overall picture of the conflict that provides optimal cathartic and reconciliatory potential. In doing so, the Prosecutor must consider to what extent it can be actuated by such motives without compromising the ICTY's independence and impartiality. But with very limited resources at its disposal,<sup>159</sup> and in view of the overwhelming number of serious crimes that have been committed, there is no way for the Prosecutor to avoid making broader strategic choices. Such choices may include the manner in which case selection will construct an overall truth or narrative of what transpired in the former Yugoslavia and how this may impact reconciliation and peace building in the region.

These considerations raise the issue of prosecutorial discretion. How should the Prosecutor's Office determine which cases to investigate and prosecute? Should the Prosecutor's Office focus on the big fish, those leaders who incited or otherwise organized ethnic cleansing, or should it focus on small fish, those subordinates who personally executed the criminal designs of the leaders? On a related point, should the Prosecutor's Office strive to achieve ethnic parity in its case selection in order to reflect the fact that abuses occurred on all sides, or should its prosecutions reflect the reality that some populations suffered more than others?

Because of the radically different context of international criminal justice in the wake of massive and systematic crimes, domestic criminal justice systems do not provide a useful model in this regard. By way of example, James Vorenberg observed that in the United States the powers of prosecutors are expansive and can escape limitations on discretion:

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158. As Henry Steiner asked:

Even if [the ICTY] is highly successful in its work, in the sense of convicting fifteen or twenty defendants including people of high position and responsibility for crimes, will the millions of Bosnians and others who bear the permanent scars of this conflict feel that . . . justice has been achieved—particularly if their situations continue to be desperate?

HARVARD HUMAN RIGHTS PROGRAM & WORLD PEACE FOUNDATION, *supra* note 140, at 59, available in <<http://www.law.harvard.edu/Programs/HRP/Publications/truth2.html>>.

159. Such constraints are not limited to constraints on funding and staffing, but include such seemingly simple issues as space: "A critical resource limitation of the Tribunal is its small capacity to hear trials. As there are only two Trial Chambers sharing, together with the Appeals Chamber, a single courtroom, a crucial and difficult area of prosecutorial policy is to ensure that only the most appropriate cases are referred for trial." SECOND ANNUAL REPORT OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, U.N. GAOR, 50th Sess., Agenda Item 49, at 13, ¶ 31, U.N. Doc. A/50/365, S/1995/728 (1995) [hereinafter SECOND ANNUAL REPORT].

The fate of most of those accused of crime is determined by prosecutors, but typically this determination takes place out of public view—in the hallways of the court-house, in the prosecutors' offices, or on the telephone. There is a broad and rather casual acceptance of the fact that prosecutors often exercise greater control over the administration of criminal justice than do other officials.<sup>160</sup>

The exercise of prosecutorial discretion, however, is not uniform. The reach of prosecutorial discretion depends on the gravity of a particular crime. "Prosecutors exercise the least discretion over those crimes that most frighten, outrage, or intrigue the public, such as murder, rape, arson, armed robbery, kidnapping, and large-scale trafficking in hard drugs."<sup>161</sup> The public visibility of such situations "focuses greater scrutiny on the prosecutor" such that "only a prosecutor whose political position is unusually secure can disappoint expectations that are part of the climate in which he works," taking into account the fact that "what is seen as outrageous varies with time and place."<sup>162</sup> By contrast, prosecutors "exercise the greatest charging discretion when dealing with minor offenses, such as consensual crimes, petty thefts, and assaults without serious injury."<sup>163</sup> Vorenberg explained:

Much of the accepted wisdom about why the charge decision must be discretionary relates to the need to deal with the large number of these offenses. When the harm is relatively slight and the offender is not seen as dangerous, there is a natural temptation to "have it both ways" by not prosecuting misconduct that most people are usually willing to let go unpunished, while still defining the conduct as criminal in order not to appear to condone it or weaken society's ability to intervene if it desires.<sup>164</sup>

It is immediately apparent that this type of prosecutorial triage cannot be applied by the prosecution in the ICTY. On the one hand, Article 1 of its Statute limits the jurisdiction of the ICTY to prosecutions of serious violations of international humanitarian law. Thus, there are no minor offenses. To be sure, as noted previously, certain inherently large-scale offenses, such as crimes against humanity and genocide, are considered more serious than others, such as isolated violations of the 1949 Geneva Conventions.<sup>165</sup> But even this distinction does not help because of the "need

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160. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981).

161. *Id.*

162. *Id.* at 1526–27.

163. *Id.*

164. *Id.* at 1531.

165. See, e.g., *Prosecutor v. Erdemović*, Case No. IT-96-22-A, 17–22 (5 Mar. 1998) (separate opinion of Judge Shahabuddeen) (noting that crimes against humanity are intrinsically more serious than war crimes), available in <<http://www.un.org/icty/erdemovic/trialc/judgment/980305sosh-e.htm>>.

to deal with a large number of offenses”—potentially thousands—that all qualify as serious crimes against humanity. Therefore, the criteria for the exercise of ICTY prosecutorial discretion is by necessity different from that ordinarily exercised in a domestic criminal justice system.

### 1. *The Big Fish v. Small Fish Debate*

This constellation of constraints was a key consideration behind the Office of the Prosecutor's decision "to give priority to the investigation of the *most serious violations* of international humanitarian law and those who may be *ultimately* responsible for them."<sup>166</sup> But defining the most serious violations and those who may be ultimately responsible is not as simple an exercise as it may seem and inevitably gives rise to the so-called big fish v. small fish debate. Should the Prosecutor only investigate and indict persons in positions of leadership in view of their overall responsibility? Or is there also good reason to punish low-ranking perpetrators such as Tadić and Erdemović? In addition to the fact that prosecuting leaders is more conducive to presenting the overall picture and deterring targeted leaders, resource constraints also dictate—somewhat paradoxically—a preference for investigating suspects in positions of superior responsibility.

In terms of telling a broader narrative of what transpired during the conflict in the former Yugoslavia, the position of the accused is a significant consideration. The prosecution of the leader of a particular region promises to tell a more complete story of a conflict than the trial of a low-ranking perpetrator. In other words, the overall contextual facts relevant to establishing the criminal liability of a low-ranking accused such as Tadić or Erdemović are necessarily more limited in scope than the corresponding facts that would establish participation in a widespread or systematic attack on the part of persons in positions of power. For example, in the Review of Indictment in the case of *Prosecutor v. Karadžić & Mladić* and in direct relation to the alleged liability of the accused, the Trial Chamber expressed the view that the evidence and testimony presented by the prosecution "suffice at this stage to demonstrate the active participation of the highest political and military leaders in the commission of the crimes by Bosnian Serb military and police forces in the detention facilities."<sup>167</sup> In particular:

The uniform methods used in committing the said crimes, their pattern, their pervasiveness throughout all of the Bosnian Serb-held territory, the movements of prisoners between the various camps, and the tenor of some of the accused's

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166. SECOND ANNUAL REPORT, *supra* note 159 (emphasis added).

167. *Prosecutor v. Karadžić & Mladić*, Case No. IT-95-5-R61 & IT-95-18-R61, 47 (1996) (Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence).

statements are strong indications tending to show that Radovan Karadžić and Ratko Mladić planned, ordered or otherwise aided and abetted in the planning, preparation or execution of the genocide perpetrated in the detention facilities.<sup>168</sup>

Accordingly, prosecutions of political and military leaders provide the most legitimate judicial context for overall truth telling. It should be pointed out, however, that in view of resource constraints—such as the shortage of investigatory and prosecutorial staff—coupled with the pressures of public opinion to act quickly, some early indictments were based on “stand-alone” incidents. Although not expressive of the overall picture of the conflict, such indictments provide solid evidentiary basis for an expedient and effective, though factually limited, prosecution. For example, the case of *Prosecutor v. Martić*, the former leader of the so-called Republic of Serbian Krajina, is based on four specific counts alleging the targeting with rockets of civilians and civilian objects in Zagreb, which resulted in a few deaths and casualties. The swift completion of this investigation was thanks to statements made in television, radio interviews, and interviews with newspaper journalists in which the accused admitted several times that he was the person who gave the order to attack civilian areas of Zagreb with rockets.<sup>169</sup> Martić is also allegedly responsible for systematic and large-scale ethnic cleansing in Croatia involving tens of thousands of victims. Therefore, in the context of criminal proceedings, the evidentiary basis for an indictment or conviction, even of a political or military leader, does not necessarily coincide with the telling of a broader narrative.

Perhaps paradoxically, resource constraints dictate that the Office of the Prosecutor pursue the prosecution of high-ranking leaders rather than low-ranking subordinates. At first glance, it may seem odd that investigations and prosecutions of high-ranking leaders is less resource-intensive than the preparation of cases against low-ranking perpetrators. This fact can best be understood in view of the criminal liability attached by Article 7(3) of the ICTY Statute to those in positions of superior responsibility. This provision stipulates that the commission of crimes

by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>170</sup>

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168. *Id.*

169. See *Prosecutor v. Martić*, Case No. IT-95-11-I, 10 (8 Mar. 1996) (Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence).

170. *Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., art. 7(3), U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993).



Based on this doctrine of command responsibility, it is possible to attribute individual criminal liability to superiors for acquiescence in the criminal conduct of their subordinates. Where a relationship of command or subordination is established and such criminal conduct is committed on a widespread or systematic scale, it becomes relatively easy to establish actual or constructive knowledge on the part of the accused. By way of example, it would be exceedingly difficult for Karadžić or Mladić to maintain that they were unaware of the existence of numerous detention camps, systematic deportations, wanton destruction of civilian areas, and other widespread atrocities that were part of the ethnic cleansing campaign of troops under their command. Accordingly, the temporal and geographical scope of evidence that may be invoked in support of prosecutions is very wide.

By contrast, indictments against low-ranking perpetrators, such as Tadić, are dependent on a much more limited range of evidence. It is relatively easy to establish that there was a death camp at Omarska in opština (region) Prijedor, that several thousand detainees were killed or subjected to torture and inhumane treatment, that the conditions in the camp were notorious as a result of media coverage and reports of UN human rights bodies and non-governmental organizations, that some such reports were brought directly to the attention of the leadership through diplomatic and other channels, that the leadership was under a responsibility to prevent and punish perpetration of such atrocities, and that it clearly failed to do so. Thus, criminal liability for the crimes in Omarska camp can be attributed to Karadžić and Mladić based on overall evidence of the camp's existence and their relationship of authority over those who were the direct perpetrators of the crimes. In the case of a low-ranking perpetrator like Tadić, however, it is necessary to establish more precisely that he was actually present at the camp and that he personally participated in the commission of specific offenses at specific times. Thus, the range of evidence that can be used in prosecutions is far greater in the case of Karadžić and Mladić than in the case of someone like Tadić.

Notwithstanding the instrumental role of leaders in inciting ethnic hatred and violence, it may also be asked whether in moral terms, low-ranking perpetrators are somehow less culpable than leaders. Why should greater criminal liability be attributed to leaders? Is it because the targeting of particular personalities or star villains somehow makes the attribution of guilt in a complex situation more determinate and manageable? Moreover, in terms of truth telling and vindicating the suffering of victims, will prosecuting Karadžić and Mladić more readily satisfy someone whose neighbor killed members of her family? Can a leader become a symbol for all that happened or do victims of a particular incident need to see someone in the dock with greater proximity to the crime from which they directly suffered?

Some have argued that trials of small fish do not satisfy the public in the way that trials of big fish do. It is interesting here to contrast the reactions of the Israeli public to the Eichmann trial as opposed to the Demjanjuk trial, which took place some twenty-five years later. Edward Morgan compared these two trials as follows:

Unlike the diminutive and cerebral architect of the “final solution” . . . the six-foot tall, overweight Demjanjuk did not conjure memories of the grand, pseudo-scientific Nazi scheme. Rather, he was accused and convicted of being the sadistic Ivan the Terrible of Treblinka, who “all too enthusiastically ran the . . . gas chambers, taking it upon himself to mutilate and whip the naked throngs of Jews to hurry them into death.”<sup>171</sup>

Furthermore, “it seems particularly ironic that this physically oversized defendant, who was by all accounts a brutal but peculiarly ‘small cog’ in the Nazi wheel, should follow twenty-five years of silence in the Jewish courts since the 1961 conviction of the physically petite genocidal grandmaster.”<sup>172</sup> Indeed, at the beginning of the Demjanjuk trial, an Israeli news magazine had asked: “Who Cares?”<sup>173</sup>

At the same time, Morgan noted that while the excesses of Nazism “are grasped by most of the world in the abstract, there have been few, if any, comparable occasions for graphically depicting the way in which the genocide unfolded on a daily basis.”<sup>174</sup> While Eichmann acknowledged that some six million Jews may have been killed during the Holocaust, the prosecutor in the Demjanjuk case promised to “bring home” the picture of the daily horrors of the genocide, to provide a historical microcosm of this narrative on a “juridically unprecedented personal level.”<sup>175</sup> Thus, in their own way, the trials of Tadić, Erdemović, and other small fish may bring home the daily aspect of the abstract narrative of ethnic cleansing, explaining how ordinary people participated in killing and brutalizing their fellow human beings. With respect to the ICTY, however, the Prosecutor’s Office does not always have the luxury of making choices between big and small fish. To date, the arrests of Karadžić and Mladić remain highly uncertain, whereas Tadić was already in custody in Germany at the time of his indictment. At the time, the prosecution of Tadić served other important purposes. With public pressure that something be done, his prosecution boosted the credibility of the ICTY in its highly delicate nascent phase. Indeed, the two major events that occurred during 1995 in terms of

171. Edward M. Morgan, *Retributory Theater*, 3 AM. U. J. INT’L L. & POL’Y 1, 55 (1988).

172. *Id.* at 56.

173. *Id.*, citing Clines, *Once Again into that Ashen Night of History*, N.Y. TIMES, 22 Feb. 1987, at E3.

174. *Id.* at 57–58.

175. *Id.*

establishing the ICTY's credibility were, respectively, "the announcement of investigations of Bosnian Serb leaders and the initial appearance of Tadić two days after his transfer to The Hague. That was the first time an accused found himself in the dock. *The image of a court in action was projected.*"<sup>176</sup>

Notwithstanding the desirability and legal requirement of providing a broader factual context in mass crime proceedings, such a mandate does present a significant risk that should not be overlooked. Although criminal proceedings ultimately individualize guilt, providing the overall picture of a particular conflict sometimes will implicate a reasonably significant portion of the ethnic group to which the perpetrators belong. Crimes against humanity, genocide, and other large-scale atrocities are rarely, if ever, committed by isolated individuals. They are, by their very nature, a collective criminal enterprise, a common plan or design in which numerous people are co-conspirators and accessories. As Ambassador Sacirbey argued with respect to the case against Serbia and Montenegro before the International Court of Justice for violations of the 1948 Genocide Convention: "What has been done in Bosnia and Herzegovina, could not have been just committed by group of individuals going crazy. It needed to have state institutions behind it. And the culpability of state institutions must be clearly addressed."<sup>177</sup>

But this aspect of collective responsibility does not run counter to the view that political élites play a decisive role in fomenting hatred among the masses and instrumentalizing ethnicity for their own ends. It does recognize, however, that once tensions erupt into mass violence, it is not unusual for ordinary people to become entangled in the resulting frenzy of killing and inhumanity. This is particularly so in fratricidal wars of secession in which neighbor-to-neighbor violence is more prevalent than the relatively organized means of violence in regular wars of the interstate type.

## 2. The Question of Ethnic Parity

Another important consideration with respect to prosecutorial discretion is the question of ethnic parity. As Ambassador Albright promised of the ICTY before the Security Council: "This will be no victors' tribunal. The only victor that will prevail in this endeavour is the truth."<sup>178</sup> The problem of victor's justice at Nuremberg and the concerns with ethnic parity before the ICTY are fundamental to the credibility of the judicial process. Notwithstanding the disproportionate scale of Nazi crimes, the fact that the crimes of the Allied powers were not on trial was the most significant blemish on

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176. *Id.* at 39 (emphasis added).

177. Sacirbey, *supra* note 21, at 58.

178. U.N. Doc. S/PV.3217, *supra* note 111, at 12.

the otherwise noble undertaking to do justice in the wake of the Second World War.<sup>179</sup>

On the one hand, it could be argued that the ICTY will better serve the rule of law if indicted accused belong to all parties to the conflict, whether Serb, Croat, or Muslim. But at what point does ethnic parity distort rather than represent the truth? The former Special Rapporteur of the UN Commission on Human Rights, former Polish Prime Minister Tadeusz Mazowiecki, concluded in his first report in 1992 that, "while human rights violations are being perpetrated by all parties to the conflicts . . . the situation of the Muslim population is particularly tragic: they feel that they are threatened with extermination."<sup>180</sup> Therefore, a prosecutorial strategy based on a strict one-to-one ratio of indictments against alleged perpetrators from the various ethnic groups may misrepresent the overwhelming victimization of the Muslim population in Bosnia-Herzegovina. Although it is virtually impossible to develop a strict criterion—let alone a mathematical formula—for ensuring an interethnic balance, it is a factor that must be taken into account.

In the final analysis, the truth will speak for itself in that the evidence and its corresponding legal categorization in indictments will reflect crimes with varying degrees of magnitude. To give but one example, there is simply no known equivalent to the July 1995 Serb massacre of more than 8,000 unarmed Muslim civilians at Srebrenica. This is an inescapable fact, irrespective of the political interpretations that may be attributed thereto. It must become a shared truth that Srebrenica represents the consummation, the apotheosis, of the evil that engulfed the peoples of former Yugoslavia during the fateful years of the war. This unbridled slaughter of the innocent, the worst act of genocide in Europe since the Holocaust, must become a monument to the excesses of hatred and the futility of vengeance.

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179. In fact, in some instances, there was even an effort to blame Nazi Germany for crimes committed by the Allied powers. The most notorious case is that of the Katyn Forest massacre in which numerous Polish officers were summarily executed by occupying Soviet forces following the partition of Poland in the Molotov-Ribbentrop Pact concluded by Hitler and Stalin in 1939. As Telford Taylor recalls, "[T]he German government publicly accused the Soviet authorities of the murder, and Moscow replied by blaming the Germans." It appeared that the authorities in Moscow "had concluded that failure to bring the charge would be publicly regarded as an admission of Soviet guilt" and thus, they insisted that it be included in the indictment before the Nuremberg Tribunal. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 117 (1992).

180. *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 14 of Commission Resolution 1992/S-1/1 of 14 August 1992*, U.N. ESCOR, Comm'n on Hum. Rts., 1st Sess., Agenda Item 3, at 11, U.N. Doc. E/CN.4/1992/S-1/9 (1992).

### C. Tribunal as Theater: The Limits of the Judicial Stage

Although truth telling is an important function of the ICTY, it must remain within the constraints of the judicial process. In particular, while truth telling requires that the Tribunal tell a broader narrative, the judicial context requires that only the specific acts of the accused be put on trial. Is it possible, therefore, to reconcile the right of an accused to limit consideration of facts to matters determining criminal liability with the desire to vindicate the victims' suffering through telling a broader narrative? Furthermore, even if the acts of the accused—e.g., a political or military leader—are such that a broader factual context can be legitimately considered, is it possible or desirable for the ICTY to establish an all-encompassing historical record or interpretive narrative of what transpired in the former Yugoslavia?

In this regard, there have been suggestions that the ICTY should play a broader role in reconciliation of the former Yugoslavia that would approach that played by a truth commission. For example, during Security Council deliberations on the establishment of the Tribunal, the Venezuelan representative went so far as to suggest that the Prosecutor "should not confine himself to bringing cases before the Tribunal, but should also present an overall report on all of the violations of international humanitarian law that come to his knowledge, which will provide him with an *historical record* of great importance."<sup>181</sup> Thus, it was argued that the Tribunal should act not only as a judicial organ, but also as a sort of truth commission. This proposition, though, seems to overlook the inherent limits to truth telling in the context of criminal proceedings before a judicial organ. As an international judicial body, the ICTY cannot and should not become a truth commission, establishing the definitive official historical record of the Balkan conflict for all time.

The limits of truth telling before the ICTY relate both to the rights of the accused in criminal proceedings as well as the misguided impulse to capture ineffable human suffering within the confines of the judicial process. With respect to the latter, the compulsion for a definitive disposal of the truth or an exhaustive moral and interpretive account of the Yugoslav war betrays a misapprehension of the extent to which the judicial process can relate to deeper aspects of human experience. In fact, attempting to conclusively capture the enormity of what transpired in the former Yugoslavia threatens to trivialize the travails of the victims. The ICTY can, however, realistically expose particular facts or slices of truth revolving around the individual accused and the victims. Depending on the context, such exposition can reveal to any fair-minded observer the sense of shared

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181. U.N. Doc. S/PV.3217, *supra* note 111, at 8 (emphasis added).

humanity that extreme suffering provokes. But the truth as demonstrated in the confines of a courtroom cannot capture the sacral aspect of remembrance. The two exist on different spheres of understanding. They are necessarily different, though sometimes overlapping. It is clear, for example, that the proceedings at Nuremberg are not proffered as the definitive interpretation of the Holocaust.<sup>182</sup> Indeed, as Lawrence Douglas remarked,

the very failure of the Nuremberg prosecution to represent adequately the nature and meaning of Nazi genocide also constituted a juridical success. By translating evidence of unprecedented atrocity into crimes of war, the Nuremberg prosecution was able to create a coherent and judicially manageable narrative about crimes so radically alien that they seemed to defy rational and juridical explanation.<sup>183</sup>

Similarly, it is the task of the ICTY as an outsider only to create “a coherent and judicially manageable narrative” of the tragedy that befell former Yugoslavia.<sup>184</sup> The moral and interpretive accounts are for the insiders, and they are sure to remain unresolved for many years to come. In this way, the ICTY can never replace local initiatives such as a truth commission based on popular participation. The ICTY never can be a substitute for the public ritual of atonement that future leaders in the former Yugoslavia must face with courage. It cannot dictate how history will be taught to Serb, Croat, and Muslim children in school. It is in this respect that extravagant expectations and judicial romanticism about what the ICTY reasonably can achieve should be avoided.

With respect to the confines of the judicial process in terms of the right of the accused to have heard only evidence that directly implicates him in crimes, the consideration is somewhat more practical though not without philosophical implications. The quandary of juxtaposing the accused and victim in the courtroom calls to mind Hannah Arendt’s critique of the *Eichmann* trial in which she claimed that the prosecution’s case “was built on what the Jews suffered” and “not on what Eichmann had done.”<sup>185</sup> While every effort must be made to vindicate the suffering of the victims during criminal proceedings, it must not be forgotten that “a trial resembles a play

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182. For example, Anton Kaes observed that “insistence on the impossibility of adequately comprehending and describing the Final Solution has by now become a *topos* of Holocaust research.” Anton Kaes, *Holocaust and the End of History: Postmodern Historiography in Cinema*, in *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE FINAL SOLUTION* 206, 208 (Saul Friedlander ed., 1992).

183. Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 *YALE L.J.* 449, 454 (1995).

184. *Id.*

185. ARENDT, *supra* note 71, at 6.

in that both begin and end with the doer, not with the victim. . . . In the center of a trial can only be the one who did—in this respect, he is like the hero in the play—and if he suffers, he must suffer for what he has done, not for what he has caused others to suffer.”<sup>186</sup> Thus, vindicating the suffering of victims through telling an overall narrative is necessarily subordinated to the requirements of a fair trial in which the accused is the central protagonist.

Although Arendt was correct to identify certain inherent limitations of the judicial process in presenting an overall picture, it should be pointed out that certain international offenses, such as crimes against humanity, require the telling of a story that is broader than just what the perpetrator has done in the narrow sense. These crimes denote inhumane acts when committed, as noted by the Trial Chamber in the *Tadić* case, on “either a widespread or in a systematic manner,”<sup>187</sup> thus requiring the accused to have knowledge of “the broader context in which his act occurs.”<sup>188</sup> Accordingly, in order to prove the requisite *mens rea*, or mental intent, for crimes against humanity, the prosecution must establish the participation of the accused in a widespread or systematic attack against a civilian population, thus requiring a broader narrative that sets forth the overall picture or factual context within which criminal liability is determined. Indeed, the International Law Commission points out that the “hallmarks of such crimes lie in their large-scale and systematic nature” and that “[t]he particular forms of unlawful act” such as murder, rape, or deportation, “are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part.”<sup>189</sup>

Although a charge of crimes against humanity is necessarily broad in scope, Article 18 of the ICTY Statute and Rule 47(B) of its Rules of Procedure and Evidence still require that an indictment set forth “a concise statement of the facts of the case and of the crime with which the suspect is charged.”<sup>190</sup> The apparent contradiction between this requirement and the broad scope of the notion of crimes against humanity was considered by the ICTY in the case of *Prosecutor v. Tadić* in which a Defence Motion on the Form of the Indictment sought, *inter alia*, “an order for the amendment of the Indictment to provide greater specificity and avoid alleged multiple

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186. *Id.* at 9.

187. *Prosecutor v. Tadić*, Case No. IT-94-1-T, ¶ 646 (7 May 1997) (Opinion and Judgment), available in <<http://www.un.org/icty/970507jt.htm>>.

188. *Id.* ¶ 656.

189. See *Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May–22 July 1994*, U.N. GAOR, 49th Sess., Supp. No. 10, at 76, U.N. Doc. A/49/10 (1994).

190. *Annex to the Report of the Secretary-General*, *supra* note 170, at art. 18. See also *Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev.11 (25 July 1997).



jeopardy for one and the same act.”<sup>191</sup> In its Decision, the Trial Chamber recognized that crimes against humanity, by their very nature, “will not be one particular act but, instead, a course of conduct” and that the crime of persecution in particular, conveys “an aura of continuity” over an extended time period, being six months in the particular case.<sup>192</sup> The Trial Chamber decided that three counts in the Indictment charging persecutions on political, racial, or religious grounds, deportations, and unlawful confinement should be amended “so as to provide the necessary degree of specificity.”<sup>193</sup>

It is instructive to consider how the crimes against humanity count allowed for consideration of a broader narrative in the trial of low-ranking perpetrators such as Tadić and Erdemović, but without pretending to establish an official historical record. It is also encouraging to consider the way in which the slices of truth emanating from these narratives challenge the primordialist tribal war thesis of interethnic conflict by exposing the contrived reality behind ethnic cleansing. It is even more gripping to consider the shared truth that the story of the victims brings to the surface, and to even consider that ordinary perpetrators are sometimes themselves the victims of circumstance.

### 1. *The Tadić Trial*

During the trial of Duško Tadić, the prosecution relied on the testimony of expert witnesses in order to provide evidence of a widespread or systematic attack against a civilian population within the meaning of the definition of crimes against humanity.<sup>194</sup> The Trial Chamber was willing to consider such testimony though not without questions about its immediate relevance to the case. At one point, the Presiding Judge Gabrielle McDonald asked an expert witness, James Gow: “Is it possible for you . . . to tell us, starting from the beginning and taking us to the end, the changes in terms of the ethnic composition in different areas, but beginning from the 14th Century?”<sup>195</sup> The expert witness explained that the purpose of such evidence

is to set the events of 1991 [*i.e.* when the Yugoslav war began] and afterwards in their military-political context. In order to do that I have been reviewing some of the factors which went to create the Yugoslav states which dissolved in

191. Prosecutor v. Tadić, Case No. IT-94-1-T, 2 (14 Nov. 1995) (Decision on the Defence Motion on the Form of the Indictment).

192. *Id.* at 4–5.

193. *Id.* at 5.

194. Prosecutor v. Tadić, Case No. IT-94-1-T (7 May 1996) (verbatim transcripts), available in <<http://www.un.org/icty/transe1/960507it.htm>>.

195. *Id.* at 85.

1991, and that has meant making reference to not only the 14th Century but the 4th Century, but I hope in both as cursory a way but also as useful a way as is possible to give a sense of the way in which the territories which went to make up the federation which dissolved came to be.<sup>196</sup>

At another point in the proceedings, the Presiding Judge asked the Prosecuting Attorney Grant Niemann whether the testimony being offered "relates to matters that are alleged to have occurred in the Prijedor region" in which the accused had allegedly committed crimes, or whether the purpose of the testimony was to give the Chamber "the overall picture of what was happening in Bosnia-Herzegovina."<sup>197</sup> In response, the prosecution submitted that the evidence goes, *inter alia*, "to the question of wide-spread and systematic, so that one looks beyond the Opština of Prijedor itself to see what happened in the whole of Bosnia-Herzegovina."<sup>198</sup> However, in an earlier Review of Indictment Pursuant to Rule 61 in the case of *Prosecutor v. Nikolić*, and in a fact situation similar to that of the Prijedor region, another Trial Chamber had indicated that ethnic cleansing in a single region alone "seems to have been so wide-spread as to fall within the Tribunal's jurisdiction" under the crimes against humanity article, obviating the need to provide evidence of the overall situation in Bosnia-Herzegovina.<sup>199</sup>

In the Opinion and Judgment in the *Tadić* case, the Trial Chamber dwelled at length on the historical background of the conflict in the former Yugoslavia "[i]n order to place in context the evidence relating to the counts of the Indictment."<sup>200</sup> The narrative begins by stating that "[f]or centuries the population of Bosnia and Herzegovina, more so than any other republic of the former Yugoslavia, has been multi-ethnic."<sup>201</sup> But the Trial Chamber was careful not to establish an official historical record. It based its historical narrative entirely on the testimony of expert witnesses called both by the Prosecution and the Defence, such evidence being "seldom in conflict" and noting that "in those rare cases where there has been some conflict the Trial Chamber has sought to resolve it by adopting appropriately neutral language."<sup>202</sup> At no time was there reference to "other sources or to material not led in evidence."<sup>203</sup>

196. *Id.*

197. *Id.* at 386 <<http://www.un.org/icty/transe1/960513IT.txt>>.

198. *Id.*

199. *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, 15 (20 Oct. 1995) (Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence).

200. *Prosecutor v. Tadić*, Case No. IT-94-1-T, 20 ¶ 53 (7 May 1997) (Opinion and Judgment), available in <<http://www.un.org/icty/970507jt.htm>>.

201. *Id.* ¶ 56.

202. *Id.* ¶ 54.

203. *Id.*

Furthermore, the Trial Chamber attempted throughout to relate historical events to the context of the armed conflict. For example, it pointed out that "the heroic but unsuccessful resistance of the Serb nation to Turkish invasion, culminating in [its] defeat in the battle of Kosovo" in 1389 "remains an emotional event" and that nationalist Serbs and Croats "rely on long-past days of empire in support of their [competing territorial] claims."<sup>204</sup> With respect to the Second World War, the Trial Chamber observed that "it left bitter memories, not least in Bosnia and Herzegovina, large parts of which, including opština Prijedor, were included in the puppet state of Croatia."<sup>205</sup> Having briefly surveyed the atrocities committed by the Ustaša, Četnik, and Partisan forces, the Trial Chamber noted that prior to the outbreak of the conflict in 1991, "despite past horrors or perhaps having learned better from them, the multi-ethnic population of Bosnia and Herzegovina apparently lived happily enough together."<sup>206</sup> However, subsequent events disclosed "that beneath that apparent harmony always lay buried bitter discord, which skillful propaganda readily brought to the surface, with terrible results."<sup>207</sup>

The Trial Chamber observed that the propaganda campaign for a "Greater Serbia" began in 1989 with the celebration of the 600th anniversary of the Battle of Kosovo: "During this celebration, the Serb-controlled media declared that Serbs had been let down by others in the area when the Ottoman Turks invaded" and that if the Serbs "did not join together they would be again subject to attack by 'Ustaša,' a term used to inspire fear in Serbs."<sup>208</sup> It pointed to the way in which "the propaganda escalated in intensity and began repeatedly to accuse non-Serbs of being extremists plotting genocide against the Serbs. Periodicals from Belgrade featured stories on the remote history of Serbs intended to inspire nationalistic feelings."<sup>209</sup> Serbs were systematically indoctrinated with the false notion that

they needed to protect themselves from a fundamentalist Muslim threat and must arm themselves and that the Croats and Muslims were preparing a plan of genocide against them. . . . The theme that, for the Serbs, the Second World War had not ended was expressed on television and radio by Vojislav Šešelj, Željko Ražnjatović, otherwise known as "Arkan," and other Serb politicians and leaders.<sup>210</sup>

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204. *Id.* at 21 ¶ 57.

205. *Id.* at 22 ¶ 61.

206. *Id.* at 23 ¶ 64.

207. *Id.*

208. *Id.* at 31 ¶ 88.

209. *Id.* at 32 ¶ 91.

210. *Id.*

These events finally lead the narrative to the scene of the crime and in particular, the notorious Omarska, Keraterm, and Trnopolje camps, established for the terrorization and expulsion of non-Serbs from the opština Prijedor. It is here that the campaign of hate propaganda orchestrated by political leaders bears fruit in the person of Duško Tadić. It is here that the evil designs of élites meet the ordinary man who exploits the circumstances for his own ends in a scenario that has been repeated countless times in the former Yugoslavia and in history. To give but one illustration of facts without interpretation, a slice of shared truth as to the inhumanity of what transpired, the Trial Chamber recounted the horrors to which prisoners were subjected in the Omarska camp:

Drinking water at Omarska was often denied to the prisoners for long periods and was, in any event, unsuitable for human consumption, causing sickness. There was very little in the way of lavatories; prisoners had to wait hours before being allowed to use them, and sometimes risked being beaten if they asked to use them. Prisoners were often forced to excrete and urinate in their rooms. There were no effective washing facilities, and men and their clothes quickly became filthy and skin diseases were prevalent, as were acute cases of diarrhoea and dysentery.<sup>211</sup>

Women who were held at Omarska were routinely called out of their rooms at night and raped. One witness testified that she was taken out five times and raped and after each rape she was beaten.<sup>212</sup>

The white house was a place of particular horror. One room in it was reserved for brutal assaults on prisoners, who were often stripped, beaten and kicked and otherwise abused. Many died as a result of these repeated assaults on them. Prisoners who were forced to clean up after these beatings reported finding blood, teeth and skin of victims on the floor. Dead bodies of prisoners, lying in heaps on the grass near the white house, were a not infrequent sight. Those bodies would be thrown out of the white house and later loaded into trucks and removed from the camp.<sup>213</sup>

This narrative revolves around horrendous suffering and barbarous cruelty in the camps, but it also describes the way in which an ordinary man such as Tadić became entangled in such cruelty. The story of the perpetrator appears as relevant as that of the victims in understanding the truth of what transpired.

It is curious to consider how the Trial Chamber reflects the personal circumstances of Tadić in determining an appropriate penalty in its

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211. *Id.* at 48 ¶ 161.

212. *Id.* at 49 ¶ 165.

213. *Id.* at 49 ¶ 166.

Sentencing Judgment. The “awareness” and “enthusiastic support” of Tadić for the attack on the non-Serb civilian population, as “manifested in his actions, gave rise to Duško Tadić’s liability for crimes against humanity rather than just war crimes” and are considered as aggravating factors.<sup>214</sup> But the Trial Chamber treated as a “mitigating factor” the exacerbation of ethnic tensions in opština Prijedor “by the use of propaganda and political manoeuvres.”<sup>215</sup> It noted that such propaganda

portrayed non-Serbs as enemies and less than human; Muslims were known as “Balijs,” while Croats were described as “Ustaša” who had threatened to make a wreath from the fingers of Serbian children. The media also reported the extreme views of the Serbian led Crisis Staff which advocated that the largest percentage of non-Serbs acceptable on the territory designated as Greater Serbia was 2 percent. Another major leader presented in the media his decision not to allow any non-Serb women to give birth at the Banja Luka Hospital and asserted that children of mixed marriages “were good only for making soap.” Efforts, such as the peace rallies held in the city of Banja Luka to counter both these appeals to ethnic hatred and also the call to arms for the killing or expulsion of non-Serbs, were halted by means of a blockade utilising check-points manned by a Bosnian Serb paramilitary unit.<sup>216</sup>

The Trial Chamber emphasized that “[t]o condone Duško Tadić’s actions is to give effect to a base view of morality and invite anarchy.”<sup>217</sup> It recognized, however, that “the virulent propaganda that stoked the passions of the citizenry in opština Prijedor was endemic and contributed to the crimes committed in the conflict and, as such, has been taken into account in the sentences imposed on Duško Tadić.”<sup>218</sup> This also is part of the narrative of justice, that ordinary men are not wont to commit such heinous crimes absent the direction and instigation of leaders. Just as the narrative may help demonstrate the truth to a Prijedor Serb, just as it may provide a catharsis for the predominantly Muslim victims by making the world a witness to their suffering, so too is there a shared truth or what Michael Ignatieff called “the democracy of the dead, the equality of all victims, the drastic nullity of all struggles that end in killing, and the demonstrable futility of avenging the past in the present.”<sup>219</sup>

214. Prosecutor v. Tadić, Case No. IT-94-1-T, 32–33 (14 July 1997) (Sentencing Judgement), available in <<http://www.un.org/icty/70714se2.htm>>.

215. *Id.* at 36.

216. *Id.* at 35.

217. *Id.* at 38.

218. *Id.*

219. Ignatieff, *supra* note 134.

## 2. *The Erdemović Case*

Despite the tremendous media focus on the *Tadić* case, the less publicized case of Dražen Erdemović tells a somewhat different, and perhaps more penetrating story.<sup>220</sup> This is the story of the nonethnicity of ethnic conflict and the way in which élites can manipulate ethnic identity to produce a human tragedy that transcends one's identity as a Serb, Croat, or Muslim. It is an intriguing twist of historical fate that in a war characterized by a deliberate policy of ethnic cleansing, conceived and implemented by leaders in the highest echelons of power, the first conviction for crimes against humanity before the ICTY was that of a diminutive ethnic Croat in the Bosnian Serb Army who had reluctantly participated in the mass killing of Muslim civilians after the fall of the Srebrenica enclave in July 1995, apparently in order to protect himself and his family against harm.<sup>221</sup> Here the narrative turns to war's moral ambiguities, how it consumes within its violent vortex the lives of ordinary men and women, placing them in unimaginable predicaments. Indeed, the case of Erdemović was somewhat of an anticlimax for the public as it frustrated the public's expectation of bloodthirsty Muslim-killing Serb war criminals standing unrepentant before an international court. After telling the story of how the war had destroyed him and his family and breaking down in tears of remorse for what he had done, Erdemović appeared to be as much a war criminal as he was a victim of the war. His tragic story challenged the sometimes self-righteous perception of war consisting of perpetrators and victims, of good guys and bad guys.

Erdemović was born in 1971 in Tuzla, Bosnia-Herzegovina and considers himself an ethnic Croat. His wife is a Serb from Bosnia-Herzegovina and the mother of his son born during the war in 1994. According to his own testimony, he grew up in a multiethnic community, with friends who were Serbs, Croats, and Muslims, with whom he maintained cordial relations. Erdemović testified that during the war, he was mobilized into the Bosnia-Herzegovina Army contrary to his will. Subsequently, he was mobilized into the military police of the Bosnian Croat Defence Council (HVO). He was described by a witness as "a vivacious person . . . always outgoing" who "hated the war and hated the army."<sup>222</sup> By 1993, he testified, his position became "insecure" because he had been arrested and beaten by

220. Prosecutor v. Erdemović, Case No. IT-96-22-T (29 Nov. 1996) (Sentencing Judgement); Prosecutor v. Erdemović, Case No. IT-96-22-A (7 Oct. 1997) (Appeal); Prosecutor v. Erdemović, Case No. IT-96-22-A (7 Oct. 1997) (Judgement).

221. *Id.*

222. Prosecutor v. Erdemović, Case No. IT-96-22-T, 53–54 (29 Nov. 1996) (Sentencing Judgement), available in <<http://www.un.org/icty/erdemovic/trialc/judgment/980305ju2-e.htm>>.

HVO soldiers “for having helped Serbian women and children to return to their territory.”<sup>223</sup> He decided to leave for Republika Srpska where he was to meet with a man who would provide him with identity papers to enable him to go to Switzerland with his wife. The man failed to appear and Erdemović, having wandered for five months, finally joined the Bosnian Serb Army “based on his need for money to feed himself and his wife, his desire to obtain identity papers in order to travel freely, and ‘the assurance of some status as a Croat in Republika Srpska.’”<sup>224</sup> He joined the 10th Sabotage Unit because it was comprised of a few Croats, a Slovene, and a Muslim, and not only Serbs. The unit’s mission was to carry out reconnaissance of the Bosnia-Herzegovina Army, including placing explosives in the midst of artillery weapons. He experienced no difficulties in the Bosnian Serb Army until October 1994, when particularly nationalist soldiers joined his unit. He emphasized that after this period, he had lost his rank of sergeant because he had refused to carry out a mission likely to cause “civilian losses.” After his demotion, he claimed, “he was no longer in a position to oppose the orders of his superiors.”<sup>225</sup>

The key event transpired on the fateful morning of 16 July 1995 at the Branjevo farm in the Srebrenica enclave, the scene of Europe’s worst single massacre since the Second World War. Erdemović and seven other members of the 10th Sabotage Unit of the Bosnian Serb Army were ordered to leave their base and go to the farm. When they arrived, they were informed that buses from Srebrenica carrying Muslim civilians between 17 and 60 years of age who had surrendered to Bosnian Serb forces would be arriving throughout the day. From 10 o’clock in the morning, the men began to arrive. They were escorted to a field adjacent to the farm buildings where they were lined up with their backs to the firing squad. Erdemović and other members of his firing squad then executed them. The killings continued until late in the afternoon. Some 1,200 unarmed civilians were killed at Branjevo farm alone. By his own estimates, Erdemović personally killed at least seventy people.<sup>226</sup> During his initial appearance before the Trial Chamber, Erdemović confessed to his crime and expressed his genuine remorse. As he broke down and wept, he explained his terrible predicament:

Your honour, I had to do this. *If I had refused, I would have been killed together with the victims.* When I refused, they told me: “If you are sorry for them, stand up, line up with them and we will kill you too.” I am not sorry for myself but for

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223. *Id.* at 40–41.

224. *Id.*

225. *Id.* at 40–42.

226. *Id.* at 39–40.



my family my wife and son who then had nine months, and I could not refuse because then they would have killed me.<sup>227</sup>

Here was the story of a young man, the father of a newborn, who woke up to find himself in a hellish nightmare. Those hapless souls whom he helped kill in cold blood should not be forgotten. But nor should the reality that in a sense, he too was a victim of the war. He too was destroyed for the rest of his life.

### 3. *The Inaccessibility of Truth*

It is clear, then, that in order for the ICTY to have any appreciable effect on interethnic reconciliation, the truth that its proceedings proffer must reach all the peoples in the former Yugoslavia—the Muslims, Serbs, and Croats alike—for reconciliation cannot be achieved by one group in isolation. It is not enough that the narrative of Omarska have a cathartic effect on Muslim victims. The Serbs must also come to terms with the crimes that have been perpetrated in their name. Only then will Serbs and Muslims have a shared truth that can advance the healing process. Moreover, this truth must also reach people who were the victims of misinformation and hate propaganda broadcast by their own leaders. In order to build civic values and a democratic culture, this population also must be disabused of the distorted narrative that they have been told. As David Forsythe astutely observed, “It is not legitimacy in the eyes of Western supporters that matters so much, but rather legitimacy of the court for various Serb, Croat, and Bosnian Muslim parties.”<sup>228</sup>

Consequently, in order to counter the destructive influence of the media and other forms of divisive propaganda, the people of the former Yugoslavia must have access to the truth as told before ICTY proceedings. To the extent that peoples in the former Yugoslavia are denied access to the proceedings of the ICTY, the truth exposed through the judicial process may have no appreciable impact on interethnic reconciliation. Despite the importance attached to this truth-telling function, the proceedings of the ICTY remain somewhat inaccessible to peoples of the former Yugoslavia. As a result, the forces that fomented ethnic violence in the first place remain free to influence the way in which the work of the Tribunal is perceived. For instance, Vojin Dimitrijević explained the way in which the frame of mind

227. Prosecutor v. Erdemović, Case No. IT-96-22-D, 9 (31 May 1996) (Transcript, initial appearance hearing) (emphasis added), available in <<http://www.un.org/icty/transe22/960531it.htm>>.

228. Forsythe, *supra* note 5, at 10.

generated by the state-controlled media has created hostility towards the ICTY in Serbia:

News about the Tribunal, especially about its indictments of conationals and the trials of those in custody at The Hague, is unpleasant stuff. People undoubtedly fear the Tribunal as a remote and mysterious punitive institution, attached to great powers. But very little is reported in the media or made intelligible to ordinary citizens. Information appears in some of the independent papers, but these are naturally the ones with the smallest circulations. As might be expected, the majority of the population is heavily influenced by official propaganda and has not gone out of its way to receive news it expects to be disagreeable.<sup>229</sup>

Dimitrijević noted that valiant efforts by nongovernmental organizations, such as the Open Society Fund, to provide satellite coverage of the Tadić trial “have had practically no effect.”<sup>230</sup> Only the affluent can afford satellite dishes “and one corrosive result of the war is the impoverishment of the middle and educated classes, and the enrichment of those who profited from the war and who do not relish being reminded of its ugly sides.”<sup>231</sup> Furthermore, even where coverage of ICTY proceedings is available, these proceedings are inaccessible to a lay viewer: “court proceedings as ‘raw material,’ based on a procedure that differs from the continental criminal trial system, in a foreign language with simultaneous translation and without editing or summation by experts, has never been easy or attractive media fare.”<sup>232</sup>

In Republica Srpska, the situation is even more desperate. As Lawrence Weschler observed in August 1997, the media there is still in the hands of “the same parties and mafias whose hyper-nationalist exhortations back in the early nineties had set the stage for war in the first place.”<sup>233</sup> Despite rampant corruption in the leadership and the depredations of ordinary Serbs, ICTY indictments have been portrayed by the all-pervasive media as

an aspersion against all Serbs—an especially ironic charge, since the tribunal has repeatedly insisted that it is endeavoring to establish individual criminal culpability precisely as a way of dispelling imputations of collective guilt. That message is clearly not getting through. Even more chillingly, the indictments are repeatedly cast as a potential personal threat to each and every individual Serb.<sup>234</sup>

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229. Vojin Dimitrijević, *The War Crimes Tribunal in the Yugoslav Context*, 5 E. EUR. CONST. REV., Fall 1996, at 87–88 n.4.

230. *Id.*

231. *Id.*

232. *Id.*

233. Lawrence Weschler, *High Noon at Twin Peaks*, NEW YORKER, 18 Aug. 1997, at 32.

234. *Id.*

It is evident that the state monopoly on information cannot be easily diluted, especially when the international community has not chosen to invest any significant resources in this area. The fact that a private foundation, the Open Society Fund, was the primary source of coverage betrays this lack of interest. The lack of access to local media by the ICTY is a significant impediment to its reconciliatory role. It should be noted, however, that the international community is coming to the realization that costly peacekeeping efforts can be easily undermined if the media continues to foment ethnic hatred through indoctrination and misinformation. In particular, in a dramatically positive development with far-reaching consequences for peacebuilding in Bosnia-Herzegovina, in October 1997, SFOR troops seized four broadcasting transmitters in Republika Srpska in order to end inflammatory propaganda against other ethnic groups, thus depriving Bosnian Serb hardliners of their most effective instruments for indoctrination and misinformation.<sup>235</sup> Although broadcasts on the work of the ICTY still may be restricted and biased, the recognition that control of the media is an important element of peace and security bodes well for the overall enterprise of truth telling and reconciliation in Bosnia-Herzegovina.

Ultimately, however, the lack of access to the media does not render the proceedings of the ICTY entirely irrelevant. Although it may appear to be élitist exercise removed from truth telling among the population at large, the ICTY must look for its primary mission in the punishment of tyrants and hatemongers in the former Yugoslavia and the deterrence of their brethren in the international community at large. It is the wielders of power that are the primary audience of the ICTY and not the ordinary people. Even if it cannot reach the masses of people in the former Yugoslavia, at least in the short term, the ICTY clearly can reach the contumacious tyrants for whom access to media is not much of a problem. Unlike the ordinary people who cannot afford satellite dishes to watch the broadcasts of the Open Society Fund, there would be few problems communicating the threat of punishment to those who hold the reigns of power. This is yet another reason why the ICTY should not be considered as a popular commission of truth as distinct from an instrument for the deterrence of overly ambitious political élites.

## **V. ARRESTING THE ACCUSED, ENDING THE HYPOCRISY: TIME AND TREPIDATION**

The international community cannot arrogate to itself the moral right to speak on behalf of the victims if it is unwilling to make the sacrifices

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235. See Drozdiak, *supra* note 110, at 11; Wilkinson, *supra* note 110, at 8.

necessary to arrest indicted persons, particularly leading accused such as Karadžić and Mladić. Such hypocrisy will seriously undermine the credibility of international criminal justice for years to come. It is also an insult to the victims who cried in the wilderness as the world community became a spectator to genocide during the tragic years of the war. Ambassador Sacirbey stated poignantly that, in the eyes of many, the ICTY "now is a Court of cultural imperialists" because it has done nothing more than "transferred legal jurisdiction to some far away place called The Hague but in no way has committed the international community to the most basic aspects of justice: which is bringing the responsible before the Court."<sup>236</sup> The ICTY is not intended or equipped to be a commission of truth, establishing a historical record without bringing culprits to justice. It is a judicial institution, a criminal court, that can only satisfy its essential and primary purpose by prosecuting indicted persons. Its ultimate contribution to deterrence will come through the effective punishment of those ultimately responsible for the Yugoslav cataclysm. This alone will send the message to would-be warmongers that fomenting ethnic dissension and genocidal violence will not be tolerated by the international community. Absent the willingness to pay in blood and treasure to bring culprits to justice, what is the purpose of the ICTY? Is it for the victims? Or is it an empty affirmation of our righteousness?

Central to the premise that the ICTY is an instrument of general deterrence is the credible threat of punishment of those leaders who are at the root of the ethnic hatred and violence from which former Yugoslavia is now slowly recovering. Moreover, if the ICTY is to be an instrument of peace building, it must address the destabilizing influence of warlords and hate-mongers who must be removed from the political stage to allow for the development of effective power sharing arrangements and democratic stability. Indeed, it has become widely recognized—even among the realists—that the primary threat to security in post-Dayton Bosnia-Herzegovina is the continued corrosive political influence of indicted leaders like Karadžić. This influence manifests itself in the continued use of ethnic hysteria as a crude but effective instrument of political control, undermining attempts at refugee repatriation, interethnic reconciliation, and consolidation of confederal government institutions in the fractured Bosnian state. It is also manifested in rampant corruption and mafia-like practices that have discouraged foreign investment and significantly thwarted attempts at economic reconstruction that provide powerful incentives for cooperation across ethnic lines. In other words, the failure to arrest the indictees is undermining the very essence

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236. Sacirbey, *supra* note 21, at 56.

of the Dayton Peace Agreement and the reconciliation process within Bosnia-Herzegovina for which the international community has invested so heavily.

In a situation as complex as that of former Yugoslavia, there are a myriad of ways that the international community can contribute to the arrest and detention of indicted accused. These responses depend on varying degrees of investment and commitment on the part of the international community. First, diplomatic isolation of indictees is a significant detriment to the international prestige and influence of a leader. Second, externally imposed political exclusion from domestic government institutions—even if somewhat symbolic—can restrict further the political fortunes of an indictee. These two options are limited in their impact, but clearly preferable to the customary alternative of conferring international legitimacy to genocidal killers. Such stigmatization is at least an irritant, and at most an impediment to long-term political aspirations. The third option involves the sporadic arrest of indictees, which, as a side effect, will instill in other indictees a real fear of eventual capture and reduce symbolic indictees to genuine fugitives. Even the forceful arrest of a limited number of indictees will send a threat to others similarly situated such that the anticipation of punishment may itself become a deterrent. Over time, the uncertainty and trepidation of eventual arrest can erode defiance and result in voluntary surrender when an accused decides to come clean. Despite initial reluctance for fear of reprisals, this means of arrest now has been resorted to with respect to accused in Bosnia-Herzegovina, especially in Republika Srpska. The fourth option is the systematic arrest of all indictees. The ubiquitous presence of SFOR allows for the direct arrest of indictees through the use of armed force. An additional response, which can be pursued in conjunction with the foregoing four options, is to provide an incentive to national authorities for arrest and surrender through the application of international pressure, in particular economic aid conditionality, as a means of increasing the cost of non-cooperation for recalcitrant entities. A sixth and related response, though long-term and unpredictable, is to encourage democratic transformation in the hope that internal power shifts will result in voluntary cooperation by new moderate leaders eager to lift the pariah status of their polity. It is important to note that these options are not mutually exclusive, and that there is a complex overlap and interaction between them. A comprehensive analysis of all the options is beyond the scope of this article. For present purposes, it suffices to consider some of the preliminary lessons that may be gleaned from the practice of the international community to date with respect to the ICTY.

### A. The Soft Options: Imprisonment at Home, Removal from Office

Conscious of the difficulty of arresting suspects—especially in 1993 when the conflict was still raging in Bosnia-Herzegovina with no foreseeable intervention by the international community—Ambassador Albright stated before the Security Council that

those skeptics—including the war criminals—who deride this Tribunal as being powerless because the suspects may avoid arrest should not be so confident. The Tribunal will issue indictments whether or not suspects can be taken into custody. They will become international pariahs. While these individuals may be able to hide within the borders of Serbia or in parts of Bosnia or Croatia, they will be imprisoned for the rest of their lives within their own land. Under today's resolution, every Government, including each one in the former Yugoslavia, will be obligated to hand over those indicted by the Tribunal.<sup>237</sup>

In short, the “imprisonment” of indicted persons in their own land was viewed as a form of “interim justice,” pending the eventual capture and prosecution of the accused.<sup>238</sup> Accordingly, on 25 July 1995, after intensive investigations lasting several months, the Republica Srpska President Radovan Karadžić and the most senior general of the Bosnian Serb Army, Ratko Mladić, were indicted for genocide, crimes against humanity, and war crimes, based on their participation in ethnic cleansing and other atrocities committed against civilians throughout the territory of Bosnia-Herzegovina.<sup>239</sup> These crimes included, in particular, unlawful confinement, murder, rape, torture, and other inhumane treatment of detainees in detention camps; mass deportations of civilians; the deliberate and indiscriminate targeting of civilians and civilian objects in urban areas such as Sarajevo; and the destruction of property including religious sites. Subsequent to this indictment, Karadžić and Mladić, seemingly indispensable participants in international peace negotiations, were never to step foot outside the former Yugoslavia.

This small triumph was short-lived. In July 1995, after the fall of the Srebrenica safe area, some 8,000 Muslims were executed by Bosnian Serb forces. This calculated massacre disabused many in the international community of any hope that the ICTY somehow could deter further atrocities in an ongoing war by simply issuing indictments. It became clear

237. U.N. Doc. S/PV.3217, *supra* note 111, at 13.

238. It could be argued, of course, that the statement of Ambassador Albright appeared to be an implicit recognition that this may be the only justice that the ICTY can render absent the use of armed force or other effective measures to capture indicted persons.

239. *Prosecutor v. Karadžić & Mladić*, Case No. IT-95-5-I (25 July 1995) (Indictment), available in <<http://www.un.org/icty/950795A.htm>>.

that without the credible threat or use of armed force against the perpetrators, the ICTY could have little impact on the ground. The Prosecutor's Office responded to this atrocity with a thorough investigation that resulted in the issuance of a second indictment against Karadžić and Mladić on 15 November 1996.<sup>240</sup> The confirming judge, Fouad Riad of Egypt, moved by the unparalleled immensity of this tragedy, captured the horror of what had transpired:

The evidence tendered by the Prosecutor describes scenes of unimaginable savagery: thousands of men executed and buried in mass graves, hundreds of men buried alive, men and women mutilated and slaughtered, children killed before their mothers' eyes, a grandfather forced to eat the liver of his own grandson. These are truly scenes from hell, written on the darkest pages of human history.<sup>241</sup>

In the weeks following the Srebrenica massacre in July 1995, the military and political situation in Bosnia-Herzegovina changed dramatically. This change of circumstance eventually led to the proximity talks at Wright-Patterson Air Force Base in Dayton, Ohio, and the conclusion of a General Framework Agreement for Peace in Bosnia and Herzegovina.<sup>242</sup> The Dayton Peace Agreement was signed by Bosnia-Herzegovina, Croatia, and the Federal Republic of Yugoslavia at the Paris Peace Conference on 14 December 1995. During this time, the question of the participation of Karadžić and Mladić in the negotiations was a matter of considerable controversy. It was feared by some observers that the ICTY would be used as a bargaining chip, resulting in its dissolution or at least a de facto amnesty for indicted leaders.

The American mediator, Richard Holbrooke, recalled how he and then Secretary of State Warren Christopher had considered whether they should only negotiate with President Milošević, "holding him accountable for the actions of the Bosnian Serbs" or whether they should also meet with Karadžić and Mladić who had been indicted as war criminals:

I was influenced by the examples of Raoul Wallenberg and Folke Bernadotte, two legendary Swedes who had negotiated, respectively, with Adolf Eichmann and Heinrich Himmler in 1944 and 1945. Wallenberg and Bernadotte had dealt directly with these Nazi murderers in order to save lives; their decisions had

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240. Prosecutor v. Karadžić & Mladić, Case No. IT-95-18-I (16 Nov. 1995) (Indictment), available in <<http://www.un.org/icty/95-18-i.htm>>.

241. International Criminal Tribunal for the Former Yugoslavia, *Radovan Karadžić and Ratko Mladić Accused of Genocide Following the Take-Over of Srebrenica*, Press Statement CC/PIO/026-E (16 Nov. 1995), at 1, available in <<http://www.un.org/icty/p026-e.htm>>.

242. The Dayton Peace Agreement, *supra* note 3.



resulted in the rescue of tens of thousands of Jews. As we descended toward the military airport in Belgrade, everyone agreed that we should meet with Karadžić and Mladić if it would help the negotiations.<sup>243</sup>

But Karadžić and Mladić were not present either at Dayton for the crucial phase of negotiations, or at Paris for the highly visible signing ceremony. Most significantly, the Dayton Agreement contained several important provisions calling for the cooperation of the parties with the ICTY.<sup>244</sup> In particular, the Constitution of Bosnia and Herzegovina included two important provisions that incorporated into the basic law of the state an obligation to cooperate with the ICTY. Article II(8) provided in general terms: "All competent authorities in Bosnia and Herzegovina shall cooperate with . . . the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders [i.e. for the arrest, detention, or surrender of accused individuals] issued pursuant to Article 29 of the Statute of the Tribunal)."<sup>245</sup> Of particular significance was Article IX(1) of the Constitution, which stipulated that

No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.<sup>246</sup>

This process of political marginalization and legal exclusion was consummated on 18 July 1996 when political pressures led to an official statement, signed by the Republica Srpska leadership and witnessed by President Slobodan Milošević of Serbia and his Foreign Minister Milan Milutinović, in which Radovan Karadžić was forced to resign from public office in categorical terms in order to ensure the legitimacy of the Bosnian elections, which were to be held in September of that year under international supervision.<sup>247</sup> In this remarkable Statement, the signatories "reaffirm their commitment" to comply with the Dayton Agreement.<sup>248</sup> Although there is no express reference to the ICTY, paragraph 1 states that effective immediately Dr. Karadžić "has relinquished the office of President of the Republica Srpska and has relinquished all powers associated therewith" and that Dr. Biljana Plavšić will assume the office of Temporary Acting President

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243. Richard Holbrooke, *The Road to Sarajevo*, NEW YORKER, 21–28 Oct. 1996.

244. For an overview, see Akhavan, *supra* note 4, at 274–83.

245. The Dayton Peace Agreement, *supra* note 3.

246. *Id.*

247. Statement of Mr. Karadžić, Mr. Krajišnik, Mr. Buha, and Madame Plavšić, 18 July 1996 (on file with author).

248. *Id.*

of Republica Srpska.<sup>249</sup> Paragraph 2 provided that "Dr. Karadžić states that he shall withdraw immediately and permanently from all political activities. He will not appear in public, or on radio or television or other media or means of communication, or participate in any way in the elections."<sup>250</sup> Finally, paragraph 3 provided that Dr. Karadžić "relinquishes the office of President of the SDS [political party] and all the functions, powers and responsibilities of the President of the SDS shall be frozen until the SDS chooses a new President."<sup>251</sup>

To be sure, Karadžić continued to exercise considerable influence behind the scenes. To give but one example, during negotiations concerning the refusal of the Bosnian Serbs to participate in the three-man presidency of Bosnia-Herzegovina, observers remarked that Momčilo Krajišnik "left the room three times . . . and drove to Karadžić's house in the center to town."<sup>252</sup> According to a Western diplomat, "[e]ach time he came back from Karadžić's place, he was paler. . . . It was obvious he did not fear to come to Sarajevo. He feared returning to Pale after the ceremony—not for his life but for his political standing."<sup>253</sup> But the humiliation and arm twisting that culminated in this Statement was unprecedented in modern diplomacy and peacekeeping. Such diplomatic isolation and removal from political office was clearly not the end of the road for Karadžić, but it was not without effect either.

The consequences on powerful leaders of such delegitimization and ostracization in diplomatic and political circles should not be underestimated. Such political downfall and pariah status is particularly devastating if one considers the fragile psychology of warmongers and ethnic demagogues, many of whom suffer from delusions of grandeur and other megalomaniac tendencies. Here the deterrence effect of social disapproval is relevant, especially in elite international, as well as domestic, political circles. It is instructive to consider the following account of the two leaders, once seemingly invincible, in the immediate aftermath of the Dayton Agreement:

Crushed by what he regards as betrayal at the negotiating table and thwarted on the battlefield, General Ratko Mladic, the Bosnian Serbian warrior charged with the massacre of thousands of Muslim men, now spends much [of] his time isolated in a mountain bunker surrounded by a coterie of officers. His moods are said to swing from rage to uneasy calm.

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249. *Id.*

250. *Id.*

251. *Id.*

252. John Pomfret, *Officials Say Ex-Serb Chief Still a Force*, WASH. POST, 11 Oct. 1996, at A29.

253. *Id.*

His partner, Radovan Karadžić, the psychiatrist-turned-politician, had his political program swept out from under him by the Bosnian peace accord. Those who have seen him say that his speech is often slurred, apparently the effect of medication, and his robust physique has been withered by anxiety as he faces an uncertain future that includes an indictment for war crimes.

This is the picture acquaintances draw of the two men: beaten men desperately dealing to save their jobs and stay away from the International War Crimes Tribunal at the Hague.<sup>254</sup>

Clearly these measures of political isolation were a minimum requirement for there to be any semblance of congruity between the peace process and ICTY indictments. At that point, the question of the international community's commitment to mounting full-scale arrests of the accused remained unresolved. The real test lay in effecting the arrest of indictees through use of armed force, if necessary.

### **B. Approaching the Hard Option: SFOR Arrest and Strangulation**

Although there was no real victor in the Bosnian war, the Bosnian Serb leadership was in a sense defeated by the Dayton Agreement. Karadžić did not succeed in establishing an independent state or in partitioning Sarajevo, and he was forced to surrender significant territory, all as a result of the combination of NATO bombings, the onslaught of the reorganized forces of the Bosnian-Croatian Federation, and abandonment by President Milošević and the Yugoslav National Army. On 14 September 1995, upon signing the document that required the Bosnian Serbs to "cease all offensive operations" in the Sarajevo area and to remove all heavy weapons therefrom within one week, Richard Holbrooke explained how he was "beginning to get a sense" of Karadžić and Mladić: "they were headstrong, given to grandiose statements and theater, but they were essentially bullies. Only force, or its credible threat, worked with them."<sup>255</sup> It was at this time, in the period immediately following the conclusion of the Dayton Agreement when the post-conflict political configuration was being negotiated and the 60,000 strong Implementation Force (IFOR) was being deployed, that there was a window of opportunity to arrest the demoralized Karadžić and Mladić through the credible threat or use of force.

Ambassador Sacirbey described his impression of the prevailing climate at that point in time:

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254. Jane Perlez, *Karadžić and Mladić: No More Swagger for 2 Losers*, INT'L HERALD TRIB., 16 Dec. 1995, at 16.

255. Holbrooke, *supra* note 243.

I remember, immediately after the Dayton Agreement was signed, all of a sudden people like Karadžić and Mladić all started disappearing like cockroaches when the light was turned on. And then, strange things started happening between the people of Bosnia. People started to move across this inter-entity boundary line, the[re] were actually Muslims working in Serb areas, Serbs working in Muslim areas, people visiting each other, people visiting graves. And time went on.<sup>256</sup>

The uncertainty surrounding their political future and their possible apprehension through armed force diminished the influence of Karadžić and Mladić and directly contributed to the beginnings of interethnic reconciliation. This moment represented a decisive opportunity to capitalize on the momentum of Dayton and dictate the terms of the peace from a position of strength. Could the Bosnian Serbs have resisted international insistence that they hand over Karadžić and Mladić? Would they have had the resolve to confront IFOR troops if the latter arrested the co-indictees through the decisive use of armed force? Were the crimes of these culprits and their security implications not at least comparable to that of Manuel Noriega for whom a full-scale armed invasion of Panama was orchestrated? Alas, this window of opportunity was squandered. The international community did not react and indictees remained at large. In fact, Ambassador Sacirbey recalled a comment by an American general at the time to the effect that "[i]t is not worth risking the life of one American soldier to arrest Karadžić" at which point, Ambassador Sacirbey observed that "people like Karadžić and Mladić once again began to reassert their authority and the so called boundary line between the two parts of Bosnia has become almost a border."<sup>257</sup> As a result of this inaction, the Dayton peace process lost some of its momentum and the ICTY indictments lost much of their credibility.

After this disappointment, it was claimed that the successor to IFOR, the 30,000 strong Stability Force (SFOR), would give a "much higher priority" to the arrest of indictees.<sup>258</sup> According to a NATO diplomat: "We will want to harass them and to suffocate them by gradually hemming them into places where they can be more readily apprehended."<sup>259</sup> This new strategy was described as "moving beyond the present low-key role on the war crimes issue, though stopping short of 'turning [SFOR] into a police force.'"<sup>260</sup> The Canadian foreign minister, Lloyd Axworthy, went so far as to say that "[t]he continued freedom of indicted war criminals is one of the greatest threats to a durable peace, and if [SFOR] departs without having contributed to the

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256. Sacirbey, *supra* note 21, at 57.

257. *Id.*

258. John Palmer, *Nato to Pursue War Wanted*, *GUARDIAN*, 11 Dec. 1996, at 2.

259. *Id.*

260. *Id.*

apprehension of these people, I believe we will have left the seeds of future conflict in Bosnia to germinate.'"<sup>261</sup>

These expressions of apparent resolve were met with understandable skepticism. As David Forsythe remarked:

It remains to be seen what will happen to the arrest and prosecution of indicted suspects after the first International Implementation Force (IFOR) is reduced in size. Recalcitrant parties know not only that IFOR has resisted demands that it take the offensive to arrest those indicted, probably because of fear of taking casualties and provoking negative political reactions as in Somalia, but also that a smaller force will operate from the end of 1996.<sup>262</sup>

Contrary to these expectations, however, the increasingly apparent link between accountability and stability eventually resulted in a resolve to use armed force in the arrest of ICTY indictees by elements of the international community. But it was not to be in Bosnia-Herzegovina, at least on the first attempt. On 27 June 1997, the former mayor of Vukovar, Slavko Dokmanović, was arrested in the Eastern Slavonia region of Croatia in what was described by the media as "a carefully-planned United Nations snatch operation."<sup>263</sup> Dokmanović was arrested pursuant to a sealed indictment that accused him of involvement in the execution of some 261 hospital patients after the fall of Vukovar to the Yugoslav National Army and Serb paramilitary forces in November 1991. This arrest caught many by surprise, including some Washington officials who "scrambled for details" of the operation.<sup>264</sup> The fact that the arrest was made by peacekeeping forces of the United Nations Transitional Authority in Eastern Slavonia (UNTAES) was of considerable significance. The UNTAES forces were very lightly armed and somewhat vulnerable, especially in comparison with SFOR. Their willingness to engage in such an operation embarrassed SFOR and put decisionmakers under increasing pressure to arrest indicted war criminals.

On 10 July 1997, SFOR finally became involved in the arrest of indicted war criminals. British SFOR commandos arrested Milan Kovačević, who was under a sealed indictment for his complicity in the genocide of non-Serbs in opština Prijedor during 1992. An anesthetist by profession, Kovačević oversaw the transport of thousands of Muslims and Croats to the notorious Omarska, Keraterm, Trnopolje, and Manjača camps. He had since been promoted to director of Prijedor Hospital where he had been siphoning several hundred thousand dollars of international relief assistance

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261. *Id.*

262. Forsythe, *supra* note 5, at 10.

263. See, e.g., Steven Lee Myers, *Serb is Held in the Killing of 261 Croats*, N.Y. TIMES, 27 June 1997, at 5.

264. *Id.*

for himself. Kovačević offered no resistance to arrest and was immediately transferred to the jurisdiction of the ICTY in The Hague. But his counterpart, Simo Drljača, the infamous police chief of opština Prijedor also under sealed indictment for genocide, fired upon British troops and was killed as they fired back in self-defense. The killing of Drljača was unfortunate, in part because he had apparently been the key player in the ethnic cleansing of more than 50,000 non-Serbs from opština Prijedor. Furthermore, he could have provided valuable information about the role of Pale, and possibly Belgrade. But the forceful and decisive response of SFOR sent a much-needed message to Karadžić and his ilk that the international community had crossed the threshold of non-confrontation and was willing to use deadly force if necessary. Indictments were no longer a merely symbolic threat outside the borders of Republika Srpska.

Although those reluctant to employ force in the region anticipated violent retaliations, the Bosnian Serbs reacted with only small-scale acts of terrorism against international observers and troops, perhaps as a warning that an SFOR attempt to arrest Karadžić would result in more serious reprisals. Such threats failed to intimidate leaders such as the British Foreign Secretary, Robin Cook, American General George Joulwan, or the Civilian High Representative, Carlos Westendorp or to dissipate the new resolve to confront at least some of the Bosnian Serb indictees with decisive force. NATO Secretary-General Javier Solana went so far as to state that NATO's mission would be incomplete without the arrest of indicted war criminals.

Sporadic arrests have continued as the previously passive stance of SFOR is gradually being abandoned. On 18 December 1997, Dutch SFOR troops in Bosnia, including special commandos flown in for the operation, arrested two indicted Croatian war criminals: Vlatko Kupreskić, charged with killing Muslim women and children and burning the village of Ahmići in 1993, and Anto Furundžija, accused in a sealed indictment of war crimes that include "allowing prisoners to be raped and beaten while he conducted interrogations."<sup>265</sup> According to one commentary following the arrests: "The raid will remind Bosnian, and especially Bosnian Serb, communities that although the Nato effort to apprehend named suspects has so far been poor, the allies have no intention of simply forgetting about past atrocities."<sup>266</sup> It is notable that the raid on Kupreskić's home occurred in the middle of the night, hardly in keeping with the fiction that SFOR troops would arrest indictees only as they came across them.

Most recently, the infamous "Serb Adolf," Goran Jelisić was arrested by

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265. *Dutch Courage*, TIMES, 20 Dec. 1997.

266. *Id.*

US SFOR troops on 22 January 1998.<sup>267</sup> He is charged with genocide, crimes against humanity, and war crimes for his role in the killing of hundreds of Bosnian Muslims who were detained in the Luka camp in Brčko. The horror of his reign of terror over the Luka camp is captured in the following account:

In an apparent attempt to leave no trace of the countless killings at Luka, prisoners were sometimes ordered to kneel with their heads over a duct that drained into the river so it would carry away traces of blood. Jelusic and other camp guards would then shoot the defenseless victim in the back of the head.<sup>268</sup>

This arrest prompted one observer to note that "the pace of arrests is accelerating."<sup>269</sup> In particular, the involvement of American troops, albeit reluctantly and with respect to a relatively minor target, was a long overdue indication of support from a key international actor.

The change in attitude exemplified by these sporadic but important arrests has undoubtedly generated uncertainty on the part of indictees like Karadžić and Mladić. Could they be next? Moreover, to the extent that they can implicate others, they may also have considered that the greatest threat to their life may be from within from those who may want to preemptively silence them. Could voluntary surrender to The Hague become the safest option among more ominous alternatives? At the least, is voluntary surrender not a more honorable option than the humiliation and danger of being forcibly arrested in a military operation? This latter concern may have played a part in the unprecedented voluntary surrender on 16 February 1998 by two Bosnian Serbs, Miroslav Tadić, <sup>270</sup> followed by the 24 February 1998 surrender of Simo Zarić,<sup>271</sup> all indicted for their role in ethnic cleansing in Bosanski Šamac. Another Bosnian Serb, Dragoljub Kunarac, who is charged with the commission of war crimes and crimes against humanity for his role in commanding the Foča camp in which scores of women were raped repeatedly, also turned himself in to the ICTY recently.<sup>272</sup> These recent arrests and surrenders suggest the early glimmerings of credibility for international justice. The anxiety of being hunted, the fear of a fugitive on the run, is beginning to take shape for the most wanted in Bosnia-Herzegovina.

267. See Tom Walker, *Western Troops Seize "Serb Adolf" in Bosnia*, TIMES, 23 Jan. 1998.

268. Mike Corder, *Bosnia's "Serb Adolf" Pleads Innocent to Atrocity Charges*, AP WIRE, 26 Jan. 1998.

269. *A Welcome Arrest*, INT'L HERALD TRIB., 24–25 Jan. 1998, at 6.

270. See *Deux Serbes de Bosnie se rendent à La Haye*, LE SOIR, 16 Feb. 1998; *2 Bosnian Serbs Surrender to Face U.N. Court*, INT'L HERALD TRIB., 16 Feb. 1998.

271. See Tom Walker, *Another Serb Surrenders for War Trial*, TIMES, 25 Feb. 1998.

272. See Aida Cerkez, *Bosnian Serb War Crimes Suspect Surrenders to NATO Troops*, AP WIRE, 18 Mar. 1998.



### C. Economic Aid Conditionality as an Incentive for Cooperation: Impunity as an Impediment to Economic Reconstruction

In lieu of arrests by international troops, there remain other means of achieving the arrest of indictees through international pressure on local authorities. In particular, measures such as economic aid conditionality can provide a powerful incentive for cooperation with the ICTY. At the 1996 London Summit on the Bosnian peace process, donor nations had vowed to increase pressure on authorities in the former Yugoslavia who had failed to extradite indicted persons and had warned that reconstruction aid would be closely linked to cooperation with the ICTY. Despite this position, the Bosnian Serb President Biljana Plavsić, in a letter addressed to the UN Secretary-General Kofi Annan in early January 1997, stated in categorical terms that there will be no cooperation with the ICTY as the matter does not fall within the jurisdiction of the Security Council, and warned that the arrest of suspects would cause massive civil and military unrest. A spokesman for the office of the Civilian High Representative, entrusted with the task of implementing the civilian aspects of the Dayton Peace Agreement, expressed disapproval of the letter but indicated that "it makes no difference . . . on the flow of reconstruction aid," that the "legal arguments" contained in the letter are "proper and appropriate even if one disagrees with the arguments made," and that it is preferable that "people make legal arguments than solve problems out of a barrel of a gun."<sup>273</sup> Despite earlier reassurances from international donor conferences, it appeared that "[r]econstruction aid would go on flowing into Bosnian Serb territory despite the refusal of its leadership to extradite indicted war criminals."<sup>274</sup>

The "constructive engagement" approach, therefore, appears to be prevailing. This deprives the ICTY of one of its few means of exerting pressure on recalcitrant authorities. In this respect, commentators such as Susan Woodward have argued that the "threat to withhold funds until a party complies" with its international obligations including cooperation with the ICTY "undercuts the goal of rapid economic revival and the positive incentive of commercial gain to entice those very parties to abandon their separatist interests."<sup>275</sup> Furthermore, while Croatia and the Federal Republic of Yugoslavia may be responsive to such pressures, it has been argued that the international isolation of entities such as Republika Srpska actually will

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273. *Id.*

274. Dan De Luce, *Bosnian Serb Defiance Won't Affect Aid—Official*, REUTERS WORLD SERVICE, 10 Jan. 1997.

275. Susan L. Woodward, *Implementing Peace in Bosnia and Herzegovina: A Post-Dayton Primer and Memorandum of Warning*, in BROOKINGS DISCUSSION PAPERS 37 (1996).

work in favor of extremists who have an interest in perpetuating the martyr complex among Bosnian Serbs. Because the end of hostilities dilutes the perception of a common enemy against which the entire nation must unite behind a particular leader or political party, such isolation will provide leaders with a convenient pretext to deflect attention from more pressing issues of government by continued reference to the myth of Serbs as victims. Indeed, as discussed below with respect to public reaction against the SFOR arrests, this theme remains a valuable political instrument.

This process of constructive engagement is short-sighted. The rampant corruption of the Bosnian Serb leadership and its mafia-like practices hardly are a solid foundation for economic reconstruction. After a visit to the region, Lawrence Weschler noted the way in which "the economy of the Republica Srpska lay mired in corruption so thick that neither international investment nor international assistance seemed likely to come flowing in anytime soon in anything more than a trickle. History seemed to have got stuck at high feudalism."<sup>276</sup> So endemic is corruption that President Plavić, much to her nation's amazement, appeared on Pale television in Karadžić's stronghold describing Republica Srpska as "a state in which the budget actually does not exist, where police are involved in smuggling and stealing from their own state, and where a majority of the population is living in abject poverty."<sup>277</sup> She elaborated that "while bribes and illicit profits coursed regularly into the pockets of a few individuals, the state, bereft of revenue, was unable to pay its teachers or its doctors, or even to bankroll the proper upkeep of its Army."<sup>278</sup> Apparently, if the grip of Karadžić on power is not loosened, further investment is likely to make his circle even more powerful without benefiting ordinary Serbs.

That sustained international pressure such as economic aid conditionality can affect the behavior of the parties over time is beyond question. To give but one example, on 31 July 1996, in a move that few had imagined possible in the early days of the Tribunal's life, a high-level delegation from the Republica Srpska including the Justice Minister Marko Arsović, arrived in The Hague on an official visit to the ICTY. The delegation met with senior ICTY officials and a joint press statement indicated agreement that "it is essential for the re-establishment of the rule of law in Bosnia and Herzegovina and for the creation of a lasting peace in the region, that all perpetrators responsible for serious violations of international humanitarian law, be brought to justice, regardless of their ethnic or religious background."<sup>279</sup> This delegation appears

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276. Weschler, *supra* note 233, at 32.

277. *Id.*

278. *Id.*

279. International Criminal Tribunal for the Former Yugoslavia, *Joint Press Statement: Visit to The Hague by Delegation from Republica Srpska*, Press Release CC/PIO/101-E, 31 July 1996, at 1.

to have realized the detrimental consequences of refusing to cooperate with the ICTY when Bosnia-Herzegovina was actively providing evidence and witnesses against Serb perpetrators. Accordingly, they "urged the Prosecutor to intensify the investigation and prosecution of cases involving Serbian victims and undertook to provide to the Prosecutor the relevant evidence and witnesses."<sup>280</sup> But it was also clear that the discussions "did include the question of surrender of indicted accused to the Tribunal, and although it was considered by the delegation that there were some legal obstacles in that regard, they would do all that they could to fully co-operate with the Tribunal to bring all perpetrators to justice."<sup>281</sup> Subsequently, on 25 October 1996, the Justice Minister Arsović indicated that "Serb prosecutors have interrogated indicted Serb war criminals living in Bosnian Serb territory in preparation for their possible arrest and extradition."<sup>282</sup> This limited cooperation was viewed with skepticism by some as "an attempt to stave off more serious demands for the extradition of wanted men, especially the Serbs' leader, Radovan Karadžić, and his military commander, General Ratko Mladic."<sup>283</sup> But it did demonstrate Republica Srpska's responsiveness to international pressures.

Several days later, on 11 November 1996, the Republica Srpska President Biljana Plavsić dismissed General Ratko Mladic from the Bosnian Serb Army, having thanked him "for all he had done for Bosnian Serbs during the war."<sup>284</sup> The influence of the ICTY's indictment in the decision to dismiss Mladic was not clear. There was a longstanding conflict between the Bosnian Serb Army, with its close ties to Belgrade, and the Republica Srpska political leadership, which had been at odds with President Milosević ever since his reversal of support for an independent Bosnian Serb entity. The fact that the entire general staff of the army was also dismissed underscored this political factor. There were indications, however, that external political pressures figured prominently in the decision of President Plavsić, who explained that "international opposition to General Mladic had made it impossible for him to remain."<sup>285</sup> Four days earlier, she had held meetings with US Assistant Secretary of State John Shattuck who had said that "'isolation and political pariah status will go along with those who maintain their resistance to the tribunal.'"<sup>286</sup> The fact that President Milosević had also held a meeting with Shattuck in which the same demands were

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280. *Id.* at 2.

281. *Id.*

282. John Pomfret, *Bosnian Serbs Begin to Work with Tribunal, Some Alleged War Criminals Questioned*, WASH. POST, 25 Oct. 1996, at A29.

283. *Id.*

284. John Pomfret, *Bosnian Serb Leader Ousts Mladic*, INT'L HERALD TRIB., 11 Nov. 1996, at 5.

285. *Id.*

286. *Id.*

made led to speculation that he and Plavsić may have coordinated their action. Once again, it was apparent that sustained international pressure and the threat of pariah status can produce results, however limited they may be in the short run.

The Republic of Croatia has demonstrated an even greater responsiveness to international pressures—especially economic aid conditionality—which has resulted in significant cooperation in recent times. On 6 October 1997, ten Bosnian Croats—including the Vice President of the Croatian Community of Herzeg-Bosna Dario Kordić, one of the most wanted war crimes suspects for his role in orchestrating a campaign of ethnic cleansing in the Lašva Valley of Bosnia-Herzegovina—surrendered themselves to the ICTY.<sup>287</sup> These surrenders occurred after months of negotiations between Croatia and the United States during which the former was told that unless the men were extradited, the United States would block crucial international loans from the International Monetary Fund and the World Bank to Croatia.<sup>288</sup>

#### D. The Distant Promise of Democracy

Despite the still uncertain prospects of arresting indictees through armed force or prompting cooperation through economic aid conditionality, it should not be overlooked that the post-conflict political transformation of the former Yugoslavia may itself prove to be a significant factor in bringing about the transfer of indictees to The Hague. Authoritarian power structures are often the best architects of their own demise through the internal contradictions and zero-sum power struggles that they generate. Political co-existence is not a characteristic of such systems and the indictment of leaders by the international community can become a convenient weapon for the elimination of political rivals in transitional power struggles. The international community is in a position to exploit such divisions judiciously in order to achieve both justice and long-term stability.

The power struggle between Karadžić and his successor, President Plavsić, is a case in point. Frustrated by the endemic corruption in Karadžić's inner circle and his control of the notorious security police through the Interior Minister Kijač, Plavsić—with the encouragement of Ambassador Albright after a June 1997 meeting in Banja Luka—took her case before Pale Television. In terms that implicated Karadžić, she stated

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287. See Chris Hedges, *10 Bosnian Croats Surrender to War Crimes Tribunal*, N. Y. TIMES, 7 Oct. 1997, at 3.

288. See Louis-Marie Tattavin, *Ten Bosnian Croat War Crimes Suspects Surrender to UN*, AGENCE FRANCE PRESSE, 6 Oct. 1997.

that the Interior Minister may be "receiving instructions from somebody else, who, according to the constitution, has been barred from such activities since the September elections"—referring to the exclusion of Karadžić from public office pursuant to the Statement of July 1996.<sup>289</sup> She went on to demand Karadžić's resignation and plead for "respect for the law" as well as an end to the "gray economy, to crime, and to the habits of the past."<sup>290</sup> It is interesting to note the way in which Plavsić invoked the above-mentioned Article IX(1) of the Bosnia-Herzegovina Constitution on the exclusion of indicted persons from public office as well as the Statement of 18 July 1996 by which Karadžić abdicated in favor of Plavsić. Not surprisingly, Karadžić rallied the SDS-dominated parliament in his favor and, in a special session, attempted to remove the President. Plavsić began to address rallies with thousands of supporters, especially in Banja Luka where anti-Karadžić sentiment was growing. For Karadžić, all that remained was control of the secret police and the state television, which he used to accuse Plavsić of selling out the Serbs to the Americans, that is until Pale Television was wrested from his control by SFOR.

Other less significant foes of Karadžić had earlier gone so far as to suggest that he should be arrested because of his indictment, but that trials should take place before national courts rather than the ICTY. For example, the President of the Republika Srpska Social Liberal Party, Zivanović, was in principle supportive of prosecutions, and said that "we should do that work ourselves . . . [although] it is impossible to expect such a thing from the existing regime, because that would mean that they have to be liable for their own actions."<sup>291</sup> He warned, however, that for the moment "such arrests could have a counter-effect, because the media would once again create a picture of an international plot against the Serbs."<sup>292</sup> After the arrest of Kovačević and Drljača's killing by SFOR troops in July 1997, this prognosis proved to be true at least in the short term. Pale Television repeatedly broadcast footage of Plavsić meeting with Albright, "intimating that the President was guilty of treason." The SFOR operation "was portrayed once again as an attack on all Serbs, and they were once again enjoined to hunker down, themselves against the world—a struggle that Plavsić was clearly no longer in a position to lead."<sup>293</sup>

Despite these short-term setbacks, there is evidence that some form of genuine constitutional democracy is taking root in the former Yugoslavia.

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289. Weschler, *supra* note 233.

290. *Id.* at 33.

291. *Id.*

292. *Sarajevo Devni Avaz*, 16 Dec. 1996 (on file with author).

293. *Id.*

The progress of this post-conflict transitional process can be seen in the defeat of the ruling Socialist Party in the 17 November 1996 municipal elections in Serbia and the uproar of the population at the annulment of the results. Furthermore, "rising discontent over plummeting living standards in what was once the region's showpiece economy has added to the anger of demonstrators who have taken to the streets."<sup>294</sup> Similarly, on 18 January 1998, the Bosnian Serb Parliament elected the moderate Milorad Dodik as Prime Minister. As was noted by one observer, in "just a couple of weeks, Mr. Dodik has allowed the international war crimes tribunal to open an office in his capital and has encouraged Serbian indictees to turn themselves in; three have done so."<sup>295</sup> Furthermore, he "has wrested control of the police from the war criminals hiding out in the eastern town of Pale."<sup>296</sup> In one of its first major decisions, the Parliament also voted to relocate the capital of the republic from Pale to Banja Luka, a decision that has been described as a "fresh blow" to Karadžić and "a move to wrest not just the levers of power but the premises of government away from Mr. Karadžić and his hard-line nationalist supporters in Pale."<sup>297</sup>

In the long term, the peace process will help to eradicate a wartime political culture that is founded on the fear and hatred of a common enemy. The end of the conflict does not bode well for warlords and demagogues because "as the excitement of the war subsides and the country returns to relative normalcy, it will become clear that guns and nationalistic slogans are no substitute for bread."<sup>298</sup> There are already growing indications that with the end of the armed conflict, democratization is taking root, and it is not operating in favor of the demagogues who previously satisfied people with visions of national triumph and grandeur. The political fortunes of leaders are changing, and it is unclear what the future may bring. Indeed, as Theodor Meron pointed out: "It is not absurd to suggest that in a few years Belgrade, Zagreb, or even Pale might have more responsible leaders and more credible criminal justice systems, and might be ready to prosecute before their courts some of those indicted by the tribunal."<sup>299</sup> This process of marginalization raises the question of whether the big fish may in fact be apprehended and turned over to the tribunal in The Hague by their former followers. In this way, as justice contributes to peace, so too will peace make justice a more feasible prospect.

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294. *Serb Economy Is Teetering on the Abyss, Analysts Say*, INT'L HERALD TRIB., 11 Dec. 1996.

295. *Serbs Set an Example*, INT'L HERALD TRIB., 23 Feb. 1998.

296. *Id.*

297. Colin Soloway, *Big Setback to Karadžić Power Base*, INT'L HERALD TRIB., 2 Feb. 1998, at 5.

298. Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order*, 15 HUM. RTS. Q. 262, 281–82 (1993).

299. Meron, *supra* note 39, at 8.

In order to reap the benefits of this process, the ICTY needs time and support. There can be no expectation that the ICTY can deliver justice as swiftly as its historical antecedents at Nuremberg or Tokyo. Indeed, it should not be forgotten that despite the military defeat and unconditional surrender of Nazi Germany, it took several decades to punish even leading criminals. A case in point is Adolf Eichmann, the chief executor of the Final Solution, who was not captured and tried by the Israeli courts until 1961.<sup>300</sup> The Foreign Minister of Bosnia and Herzegovina, Ambassador Sacirbey, pointed out to the Security Council that "the Jewish survivors of the holocaust were able to look forward only by knowing that their tormentors would be pursued by the most unforgetting justice indefinitely in the courts and in our common historical recollection."<sup>301</sup> Whatever setbacks there may be in the short run, it is clear that punishment and deterrence are long-term propositions. The international community should not be under the illusion that justice for the former Yugoslavia is possible without time and determination. Deterrence and peace building are part of a long-term equation and the ICTY requires a long-term investment and a broader commitment on the part of the international community to the eradication of the prevailing culture of impunity.

## VI. SPECTERS OF THE PAST, PROMISES OF THE FUTURE

In placing the ICTY within a broader historical context, it is befitting to recall the portentous remarks of the US Chief Prosecutor Justice Jackson, before the International Military Tribunal at Nuremberg, who underscored the transcendent dimension of punishing the major war criminals of the Axis powers: "What makes this inquest significant," he intimated, "is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust."<sup>302</sup> The prosecution "will show them to be living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalisms and of militarism, of intrigue and war-making which have embroiled Europe generation after generation."<sup>303</sup> If civilization were to triumph over barbarity, there could be no compromise with the evil forces "which would gain renewed strength if we deal ambiguously or indecisively with the men in

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300. See *Attorney-General of Israel v. Adolf Eichmann*, 36 INT'L L. REP. 5-7 (1968).

301. *Provisional Verbatim Record of the Three Thousand Five Hundred and Ninety-Fifth Meeting*, U.N. SCOR, 3595th mtg., at 21, U.N. Doc. S/PV.3595 (1995).

302. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1947).

303. *Id.*



whom those forces now precariously survive."<sup>304</sup> Indeed, history has amply demonstrated that the men in the dock at Nuremberg were merely a transient repository of greater currents, devastating in the past, and bound to resurface in the future absent the deterrent effect of international criminal justice.

Following the trials of the major war criminals of the Axis powers before the Nuremberg and Tokyo Tribunals, in 1948 the General Assembly of the United Nations requested the International Law Commission to study the possibility of establishing a permanent international criminal court.<sup>305</sup> Stymied by the political paralysis of the Cold War, the establishment of such a judicial organ was relegated to the realm of utopic aspirations. Moreover, the tenuous peace that prevailed on the European continent distanced the memory of war's inhumanity from the consciousness of the major powers. The paranoiac contest for superpower supremacy was played out elsewhere—in Asia, Africa, and Latin America—and the slaughter of millions was dismissed as an inevitable sacrifice on the path to a greater, ideologically-defined justice. Throughout this period, the project of international criminal justice fell into oblivion and a culture of impunity prevailed.

Depending on the resolve of the world community, the end of the Cold War inadvertently may become a significant turning point for international justice. The same currents that had liberated Europe from Soviet domination also destroyed its false stability, creating a massive political dislocation. The sinister influences of nationalism and militarism that Justice Jackson had warned would lurk in the world long after Nuremberg, were to plague Europe once more, providing the catalyst for an unexpected resumption of the struggle for international criminal justice. The violent disintegration of the Yugoslav federation and the attendant scourge of ethnic cleansing brought the horrors of war to the doorstep of the Western world at a time when superpower rivalry was no longer an impediment to collective action by the United Nations. It was some fifty years after Nuremberg, with this confluence of circumstances, that the beginning of an end to this culture of impunity came within reach of the international community in the form of the ICTY.

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304. *Id.*

305. This request was made in General Assembly Resolution 260 B (III) of 9 December 1948, pursuant to which the International Law Commission studied the question at its 1949 and 1950 sessions, concluding that such a court was desirable. See *Report of the International Law Commission Covering its Second Session 5 June–29 July 1950*, 5 U.N. GAOR, Supp. No. 12, at ¶ 145, U.N. Doc. A/1316. The General Assembly appointed two successive Committees on International Criminal Jurisdiction, which submitted reports with draft statutes for an international criminal court in 1951 and 1953. See 7 U.N. GAOR, Supp. No. 11, at 21, U.N. Doc. A/2136 (1952); 9 U.N. GAOR, Supp. No. 12, U.N. Doc. A/2625. However, no further action was taken by the General Assembly and the matter was indefinitely postponed.

The ICTY is a phenomenal development by the sorry standards of state practice in international law. Idi Amin, Mengistu, Pol Pot, Sadaam Hussein, and a litany of other mass murderers living without fear of punishment underscore the tragic culture of impunity that has prevailed in the international arena for so long. Against this backdrop, the imposition of individual criminal liability—let alone on public officials and heads of state—is truly radical. While resort to international aggression has largely become a relic of the past, crimes against humanity and genocide continue to be committed as a means of arbitrating power struggles. The punishment of such egregious human rights abuse has become the next frontier of international law and a central challenge for world order. But the development of effective judicial institutions in the international sphere is an evolutionary process. The former UN Secretary-General Boutros Boutros-Ghali explained that the world “is still in some ways in its ‘Middle Ages’ when it comes to international organizations and cooperation. Centuries were required before the struggle among monarchical and baronial forces was transformed into states capable of carrying out responsibilities in the fields of security, economy and justice.”<sup>306</sup> Clearly, the progressive establishment of an international criminal jurisdiction is an essential part of this process, and the ICTY is a test case that, if successful, could lead the way to a credible permanent International Criminal Court.

The punishment of leaders such as Karadžić and Mladić will contribute in significant measure to a much needed internalization of human rights norms and considerations for justice in the international political culture. An effective ICTY will send a decisive message of social disapproval in cynical elite circles, and within the world public opinion at large, that massive human rights violations will not be tolerated. Over time, as a culture of deterrence takes hold, the power reality will be that punishment awaits those who foment ethnic hatred and genocide. In the long run, it is such lofty moral ideals that will establish the foundation for lasting international peace and security.

Grave injustice and our responses thereto are defining moments in history. They reveal much about who we are as distinct from who we claim to be. The protagonist in this recurring drama is human nature itself, engaged in an epic battle between good and evil in which the noble self fights against a capacity for appalling cruelty. The cast of characters includes not only those who find themselves on the stage, but also those who are mere spectators, wishing for the most part that evil will not triumph in the end, but not always willing to unseat themselves in order to influence

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306. Boutros Boutros-Ghali, *Empowering the United Nations*, 71–72 FOREIGN AFF. 100 (Winter 1992/93).

the outcome. It is a macabre spectacle that is revisited time and again, and we are given the opportunity each time to improve upon our past performance. Fifty years after the Holocaust, humankind has made tremendous advances, but the specter of genocide still haunts a world community yet unwilling to respond to injustice with courage and determination. The former Yugoslavia, Rwanda, and other nameless tragedies that have failed to capture our attention, are a central challenge for this generation of leaders. It is hard not to conclude that we have failed in significant ways. However, with every tragedy there is also an awakening, which we must seize and exploit for the future. This then is yet another chapter in the ongoing struggle to make justice the foundation of peace. Its outcome will tell us much about who we are, who we claim to be, what sort of future we are building.