



International Justice and the Prevention of Atrocities

Case Study: Justice, Peace and Deterrence in the former Yugoslavia
by Leslie Vinjamuri

ECFR background paper, November 2013¹

The ongoing war in Bosnia, and efforts to negotiate a settlement that depended on the support of the Muslims, Croats, and Serbs for its success, strongly shaped European and American strategies towards the Yugoslav Tribunal. During the war in Bosnia, leaders in Britain and the USA demonstrated only reluctant support for an international tribunal. Even once they had publicly embraced the ICTY, their actions reflected an overarching concern that pushing ahead with investigations or prosecutions would impede efforts to bring stability to the region.

The pursuit of accountability for mass atrocities in the former Yugoslavia was initiated during ongoing conflict in Bosnia. A Commission of Experts was convened by the United Nations Security Council in October 1992 and conducted investigations in the former Yugoslavia. The Commission's work took place in the context of an international response that consisted of UN and EU led peace negotiations, a peacekeeping operation, and an emergency humanitarian relief response. According to its chairman Cherif Bassiouni, the British government turned virtually no information over to the Commission, only reluctantly supporting its work. And, the Commission's lack of adequate funding reflected the ambivalence of the European commitment to investigating crimes during the war. Bassiouni claimed that David Owen, lead peace negotiator acting on behalf of the Europeans, sought to obstruct the Commission because he feared that it might uncover evidence that the Serbs were more culpable than either the Muslims or Croats. Such a finding would threaten Owen's strategy for peace which depended

¹ This paper was prepared as part of a project of the European Council on Foreign Relations to compare the experience of different situations where international responses to crises involving mass atrocities have faced the dilemma of seeking accountability while trying to bring the crisis to an end. Please cite fully in the event of reference or quotation.

on the pretense that Serbs, Croats, and Muslims were equally responsible for the war and its horrors.² Without military intervention, which in 1992 and 1993 had been refused by governments in Europe and America, any prospect for peace depended on a negotiation strategy that could solicit the cooperation of the Serbs who held a clear military advantage.

In the Spring of 1993, during the most intense part of the war in Bosnia, the Security Council passed a resolution creating the International Criminal Tribunal for the former Yugoslavia (ICTY). The creation of the ICTY came during a chorus of rapidly growing demands by international NGOs and other advocates for military intervention, and in the midst of ongoing peace negotiations led by Cyrus Vance (representing the United Nations) and David Owen. The ICTY was the first international court created to prosecute war criminals since the International Military Tribunal at Nuremberg (1945-6), and the first international tribunal ever to be created under the authority of a Chapter VII resolution.

The creation of the Commission of Experts and, within months, the ICTY during the war in Bosnia was a response to the focused advocacy and ongoing pressure of many committed individuals and NGOs working together with the media to demand international intervention and also accountability. Roy Gutman of New York's *Newsday* published the first reports of Camps in Bosnia.³ Shortly after these, Penny Marshall of ITN and Ed Vulliamy of The Guardian visited Omarska. Following the publication of photographs they took of starving victims in detention camps in the former Yugoslavia during the summer of 1992, pressure mounted to create a tribunal. In August, Human Rights Watch released a report titled *War Crimes in Bosnia Hercegovina* that called for a tribunal to be created. The creation of a Commission of Experts to investigate atrocities came shortly on the heels of these newspaper images. The Security Council's decision to authorize a tribunal several months later was widely viewed as a welcome but compromised response that fell short of military intervention and reflected the general reluctance of the Europeans and the Americans to intervene with military force.

The ICTY was unique in many ways. This was not only the first time that the Security Council had used Chapter VII to authorize the creation of a tribunal, it was also the first time that a tribunal had been created during an ongoing conflict with the stated goal of producing 'justice in real time' and deterring ongoing conflict. Although the language of 'justice in real time' was used by those advocating for a tribunal, there was no clear strategy that guided the creation of a court, nor was there any concerted effort to choreograph the relationship between the court's work and the peace process. The most significant debate that surrounded the creation of the ICTY was how to authorize its creation. NGO advocates preferred a treaty and feared the

² Interview with Author, July 28, 1999.

³ Among those most notable reports written at this time by Roy Gutman, were "Hidden Horror" *New York Newsday*, July 19, 1992. And, in August 1992, "Death Camps", August 2, 1992.

political nature of a Security Council authorized court. Ultimately, though, they recognized the practical advantage of a Security Council Resolution in a rapidly moving conflict. The Security Council could move quickly and decisively to authorize a tribunal and could, at least in principle, require enforcement by member states. Discussions of the possibility of a regional European court authorised by the CSCE quickly passed.

The Tribunal created a paradox. It resolved an immediate problem for European and American leaders by providing a low commitment response to atrocities, but it intensified expectations that were difficult to meet in the midst of an ongoing war. From the ICTY's creation in 1993 until its first case in 1996, the tribunal was barely supported by the governments that helped create it. If anything, the chief response to the ICTY was low-level obstructionism.

The European commitment to a negotiated solution was also driven by a concern for the security of the ground troops that states had committed to Bosnia from as early as March 1992. Prior to 1995, the United States' priority was to stay disengaged from the war and so did not face the threat of possible reprisals against its troops. Its strong support of a tribunal was driven by a coalition of advocates many of whom were located in the Office of the Legal Adviser in the State Department, but even then it refrained from pursuing a more concerted effort to help with investigations or arrests until after the 1995 signing of the Dayton Accords and subsequent efforts to consolidate peace had progressed.

The ICTY was as a result too weak to substantially impact the conflict in Bosnia. Because this was the first tribunal created since the International Military Tribunal at Nuremberg, and the first international tribunal ever to be created during an ongoing conflict, there was neither widespread fear of prosecution by perpetrators of war crimes, nor a general institutionalized threat to prosecute on which it could draw to leverage compliance.

The capacity of indictments and arrests to marginalize key perpetrators from peace negotiations is claimed to be a primary mechanism through which justice can help deliver peace. The most contentious claim about the impact of the ICTY on the 1995 Dayton peace negotiations is that the ICTY's indictment of Radovan Karadzic and Ratko Mladic, the Bosnian Serb political and military leaders, paved the way to Dayton's success. In July 1995, the ICTY issued arrest warrants for these two leaders for crimes against the civilian population of Bosnia-Herzegovina and for the sniping campaign against civilians in Sarajevo, among other incidents (the indictment was later expanded to include charges relating to the Bosnian Serb capture of Sarajevo).

The argument that these arrest warrants had a transformative impact on peace negotiations rests on the erroneous assumption that in the absence of arrest warrants, Richard Holbrooke, the lead US negotiator, would have included Karadzic as a key negotiating partner, and also that

Karadzic would have successfully obstructed peace negotiations from progressing. It appears more likely that in 1995, Holbrooke made a strategic decision to negotiate directly with Slobodan Milosevic, and to demand that Milosevic deliver the cooperation of the Bosnian Serb forces. The Serb leadership in Belgrade had sought to give the impression that Bosnian Serb forces were independent of their control. Holbrooke effectively called their bluff, and pushed successfully ahead with peace negotiations without any direct Bosnian Serb participation. It appears that in this case a political strategy drove negotiations, rather than a judicial one, although this strategy was later reinforced by the arrest warrants.

The notion that in 1995 an arrest warrant would have driven negotiators to relinquish diplomatic contacts with key individuals is also suspect given the subsequent decision taken by American negotiators to negotiate with Milosevic in 1999 over Kosovo even after he was served with an arrest warrant. At this time, the rules were even less clear than in the current period, leaders were informed but also surprised by the timing of the indictment, and little if any precedent existed to advise on the implications of negotiating with indicted war criminals. The willingness of the international community to turn a blind eye as Karadzic and Mladic moved freely in the year after Dayton also undermines the credibility of any claim that indictments drove the American negotiating strategy. Only later did Karadzic and Mladic become more wary of public sightings and eventually go into hiding where they remained for well over a decade (nearly 16 years in Mladic's case) before they were arrested.

Several other factors were also crucial to the success of the Dayton peace negotiations. First, the Serbs had begun to lose their military advantage on the ground over Croat forces. Second, NATO used limited military force through a 1995 air campaign to coerce the Serbs and the Bosniak Muslims to accept the terms of peace. Third, the weight of three years of ongoing violence contributed to the general fatigue and readiness of parties to agree a peace. Taken together these factors and the renewed enthusiasm and determination of the United States government to pursue a concerted diplomatic strategy aimed at producing a successful peace agreement paved the way for the end of war in Bosnia and the conclusion of the Dayton negotiations.

Little evidence exists to suggest that the work of the Commission of the Experts in 1992, or the creation of the ICTY in 1993 had any significant deterrent impact on the commission of crimes in Bosnia, the most horrific example of failed deterrence being the mass killings of more than 8,000 mostly men and boys in Srebrenica in July 1995. The ICTY also appears to have had little if any impact on the decisions that were taken by those responsible for war crimes in Kosovo in 1998 and 1999. In 1995, the tribunal was too weak to provide a deterrent to the Serb leadership and, perhaps more importantly, prior to 1999, there was no indictment against Milosevic. Even if there had been, the willingness of European and American partners to

embrace him as central to the Dayton peace process and as the leader of the former Yugoslavia would likely have diminished the deterrent potential of the Tribunal.

The impact of the ICTY more generally on accountability in Bosnia, Croatia and the former Yugoslavia is of course hotly debated. Its relevance to the politics of the former Yugoslavia increased dramatically over time and especially after the indictment of then President of the former Yugoslavia, Slobodan Milosevic. Even the most ardent advocates of war crime trials, though, have been reluctant to claim its success as a deterrent.⁴ And, public opinion polls have turned up mixed results about the perceptions of the ICTY. The most obvious impact of the ICTY has arguably been through its encouragement of local trials, its contributions to jurisprudence (many of which remain controversial and contested), and its impact on subsequent initiatives to build institutions designed to hold perpetrators of mass atrocities legally accountable.

Leslie Vinjamuri is Co-director of the Centre for the International Politics of Conflict, Rights and Justice and a Senior Lecturer (Associate Professor) in International Relations at the School of Oriental and African Studies, University of London.

⁴ Diane F. Orentlicher, *That Some Guilty be Punished: The Impact of the ICTY in Bosnia*, Open Society Foundations, July 2010, p. 38.