

Is International Law Compatible with Peace in a War-Torn Society? Trials and Tribulations in Bosnia

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***Abstract:** The role of law in an international system reflects a type of reciprocal justice in which states consent to fulfill certain obligations in the interest of maintaining a well-regulated and orderly society. International law is created through the will of states to promote structure in the international system. Thus, law and order are mutual outcomes. However, in certain circumstances, as seen in Bosnia-Herzegovina, law is used to create political justice, putting it in conflict with the order provided by the system and society of states. This article examines the contrast between the application of order in an attempt to settle disputes amidst social chaos, and the application of justice in an attempt to locate and punish individual perpetrators of universal crimes. The International Tribunal for the Former Yugoslavia was created in response to demands for justice in the face of horrific crimes in Bosnia. However, the US-sponsored Dayton Peace Agreement represented an exercise in dispute settlement focusing on the establishment of order regardless of the possible criminal histories of the negotiating parties. These two attempts to solve Bosnia's problems contradicted one another, vividly illustrating the inadequacy that comes from pursuing order and justice in mutual exclusivity.*

Introduction

The international system is widely perceived as one which is based on the relationship between interdependent yet equally sovereign states. The role of law in this system reflects a type of reciprocal justice in which states consent to fulfill certain obligations in the interests of a well-regulated and orderly society. International law is created through the will of states to promote structure in the international system. Thus, law and order in this sense, are mutual outcomes of one another.

In certain cases, however, a conflict arises which forces law and order into a hostile rather than cooperative relationship. These are cases involving a conception of law as justice, based on individual human rights. In the words of International Relations Theorist, Hedley Bull: "there is ...an inherent tension between the order provided by the system of society and states, and the various aspirations for justice that arise in the world politics".¹ The violent conflict in Bosnia-Herzegovina is such a case. The attempt by the international community to stop the fighting and create order was accompanied by an attempt to deal with the universal outcry at the crimes against humanity which were being committed in the region. This article will examine the contrast between the application of conceptions of order in an attempt to settle disputes amidst social chaos, and the application of conceptions of justice in an attempt to locate and punish individual perpetrators of universal crimes.

¹ Hedley, Bull. *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia Press. 1977) 86.

The International Tribunal for the Former Yugoslavia was created in 1993, by the UN Security Council, when there was no end in sight to the violence and hostilities. It was widely considered to be merely a symbolic gesture in response to international horror at the nature of the hostilities occurring in the region, yet the project has gathered momentum and now stands poised as the litmus test of the will of the world community to give effect to the declarations of the need to punish crimes against humanity. Meanwhile, the US-sponsored Dayton Peace Agreement represented an exercise in the dispute settlement which focused on the establishment of order regardless of the “justice” of the compromise and irrespective of the possibly criminal histories of the negotiating parties. Because of the methods and compromises use in the Dayton negotiations, the aims and activities of the Tribunal caused problems of contradiction for the Implementation Force. Likewise, the final settlement, without limiting the goals of the Tribunal, provided a compromise which allowed the imperative of justice in prosecuting war crimes to be paid mere lip service. These two attempts to solve Bosnia’s problems vividly illustrate the often stark choice between justice and order in the international system.

The Need for Justice

From 1991 onwards, the media world focused constant attention on the viciousness of the Yugoslav conflicts. Shocking photos of death camps and rape victims, coupled with the arrogant and defiant statements of Serb and Croatian nationalist leaders, gave the international public a sense of helplessness. Even when the U.N. declared safe-havens and sent in troops, the continued bombardment of Sarajevo and the relentlessly building number of civilian deaths caused a sense of outrage which could no longer be neglected outside of the region. The sense of “human justice”² had been so deeply violated that the Security Council, pursuant to its powers under Article VII of the Charter, created 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 (the Tribunal). Although individual persons have previously been prosecuted for such crimes, under the 1945 London Agreement which established the jurisdiction for the Nuremberg Tribunals, the creation of an international civilian court under the auspices of the U.N. is something quite new.

The creation of the Tribunal alone has opened up a floodgate of legal activity amongst human rights lawyers and activists – from those who advocate a permanent international criminal tribunal, to those who strive to see the standards developed in various humanitarian law conventions plainly applied, to women’s rights groups who demanded (and got) recognition of rape as a crime against humanity. The Tribunal “is being most closely watched as a test of whether the international community can apply the network of laws that it was been building since World War II to punish those who commit atrocities during wartime, either between nations or within the boundaries of a single country”.³ The consensus among international observers is that if this Tribunal can be seen to establish a legitimate process for the prosecution of the humanitarian crimes, then the entire international system will benefit from an enriched sense of moral justice and legal order, and the path to the permanent International Criminal Court will be made considerably smoother. If, however, the Tribunal fails, then the chance for a legal

² Hedley Bull’s term for justice in the moral sense.

³ *American Bar Association Journal* vol. 82 (April 1996), 53.

means of redressing such crimes will be proven a chimera, and the international system will be confirmed in its inability to enforce its own humanitarian standards.

Under the terms of its Statutes, the Tribunal is competent to prosecute Grave Breaches of the Geneva Conventions of 1949 (Art. 2), Violations of the Laws or Customs of War (Art 3.), Crimes of Genocide (Art. 4) and Crimes Against Humanity (Art. 5). One of the first questions that Tribunal had to face was a challenge to its own jurisdiction in the case of Dusko Tadic. Jurisdiction was attacked on the basis of three arguments:

[F]irst, that the Tribunal has not been validly established, because the United Nations Security Council lacked the power to do so; second, that the primary of the Tribunal's jurisdiction over that of national courts...was unlawful; and third, that the Tribunal lacked subject matter jurisdiction, because the articles of the Statute named in the indictment (Articles 2, 3, and 5) are applicable only to international armed conflicts, and the alleged crimes, if proven, were committed in an internal armed conflict.⁴

The challenges were rejected both by the trial and the appeals chambers of the Tribunal, but not without carefully reasoned opinions. It is evidence of the seriousness with which the Tribunal sees its task that the judges did not deal with the issues peremptorily by holding that they were not justiciable because of the Tribunal's origin as a creation of the Security Council. Instead, the approach followed was one which maintained the right of an accused person to challenge the validity of the procedure being used against him. "For a criminal tribunal in particular, it is reassuring to know that it finds inherent to the exercise of its judicial function the jurisdiction to examine the legality of its establishment."⁵

Even though the Tribunal was created in response to demands to justice in the face of horrific crimes, there was a common understanding amongst the judges of the need for procedural justice as well as human justice. Otherwise, the breach of justice would be confirmed rather than expiated. The Tribunal must continue to walk a delicate tightrope between protecting the rights of the accused (procedural justice), and protecting the rights of the of the victims as well as providing both a condemnation of and a deterrent to such rimes (human justice). In this struggle, the Tribunal has had to continually update and fine-tune its rules of procedure, which are based on an amalgam of various national systems. Among the difficulties has been an interpretation of Rule 75, which gives a judge the competence to "order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused."⁶ This rule, similar to one in Article 22 of the Statue, have led a trial chamber of the Tribunal to interpret the protection of witness identity to include withholding names of victims and witnesses indefinitely from the accused and defense counsel. This interpretation has been maintained through several versions of the rules of evidence and procedure, and has led one prominent legal analyst to comment:

From a legal policy point of view, it seems obvious that the Tribunal's priority should be to do justice to Tadic and at the same time maintain its credibility...[T]hat is most nearly consistent with international law as reflected in the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Universal Declaration of Human Rights.

⁴ George H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia". *American Journal of International Law* vol. 90 no. 1(January 1996), 64.

⁵ Aldrich, 65.

⁶ ABA Journal, 58.

It seems to me that axiomatic that the Tribunal should presume that the Security Council in establishing the Tribunal intended that its Statute should be interpreted in a way that is consistent with international law.⁷

With the eyes of the entire international community watching its every move, the Tribunal cannot afford a misstep. If it does not produce justice credibly and continuously for each of the accused defendants, it will not have produced justice at all.

Although the Tribunal was created eight years ago, it got off to a hopelessly slow start. Three years after its creation, it had only begun one trial due to the difficulty of gaining custody of indicted suspects. When the peace talks were beginning in Dayton in November 1995, members of the Tribunal staff feared that their ability to continue the business of prosecution would be hampered further. In a bid to keep its mission in the forefront of the Dayton proceedings, the Tribunal's Prosecutor issued second indictments against Bosnian Serb leaders Radovan Karadzic and Ratko Mladic. Deputy Prosecutor, Graham Blewitt, admits that they were hoping that "[t]he indictments would send a strong reminder to negotiators that there were major criminals who had to be dealt with. We wanted to make it harder for them to do away with the tribunal."⁸ The peace process, which focused on the cessation of hostilities, posed a definite risk to the justice process, which focused on individual accountability regardless of political (and negotiating) clout. The implications of taking the mission of the Tribunal seriously are that all individuals who have been indicted, no matter how powerful or politically crucial, be taken into custody to be politically impossible – but, international lawyers urged, such a principled stance would be justice to a region in desperate need of it.

These aspects of the Tribunal's mission have become more and more visible in the last five years, and the continued partisanship of the three parties to the Bosnian conflict, in the face of the Dayton mandate for cooperation, have given new credibility to the idea that order cannot be imposed without a widespread trust that justice has been done. The Tribunal now has a respectable 42 proceedings currently underway, not including the most recent and visible public relations victory of gaining custody over the infamous former president of Yugoslavia, Slobodan Milosevic. Thus, in a short span, the court has gone from a shaky half-hearted gesture by the international community to the glittering feature topic of evening news across the globe.

The Need for Order

The voluntary handover of Milosevic by the government of Yugoslavia has recalled international attention to the unheeded indictments of the Bosnian Serb leaders, Karadzic and Mladic. Fears of widespread rioting and disorder by the Bosnian Serb population if their arrests were attempted now seem overrated, and many international figures (including Dayton architect, Richard Holbrooke) are now calling for these two accused war criminals to share Milosevic's fate. How did they manage to evade international justice for so many years? Again, the contradictory goals of justice and order go far in explaining a strange discrepancy. During the course of the summer of 1995, events in the Balkan conflict began to unfold in ways which made negotiation a possibility rather than a pipe dream. The fall of the UN "safe areas" gave momentum to U.S. and European attempts to bring about a settlement. Additionally, the Bosnian Serbs suffered from Croat and federation attacks and the authority for forces on the ground

⁷ Monroe Leigh. "The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused". *American Journal of International Affairs* vol. 90 no. 2 (April 1996). 238.

⁸ *ABA Journal*, 61.

changed from the UN to NATO.⁹ This combination of events led to a situation in which, while still having broadly different expectations and goals, all parties could agree that stopping the fighting was a desirable achievement. Still, it is unlikely the parties could have met without the forceful invitation and participation of the United States. Playing the role of host and mediator, the U.S. put its diplomatic prestige at risk. Having practically guaranteed to help enforce any agreement with some of its own troops, U.S. negotiators were not going to lightly give up the unique opportunity to be the architects of peace.

The tactics used at Dayton to make an agreement more likely ranged from seclusion, to high-tech computer map simulations, to sleep deprivation. Assistant Secretary of State, Richard Holbrooke, presented the parties with a long draft treaty and then proceeded to steer them through all the necessary alterations and compromises, badgering them past any entrenched difficulties. His methods were so relentless that the victims of his particular brand of persuasion coined the term “getting Holbrooked” to describe it.¹⁰ In fact, Holbrooke may have developed a whole new method of dispute settlement – coercive conciliation. Questionable as they were, the methods got results. But at what expense? U.S. officials were not under any illusions about the lack of commitment to a unified Bosnian state. One official described the different goals of the three leaders as completely contradictory, including the fear of Milosevic “that after a so-called decent interval he’ll try to absorb all of Bosnia. He may try for an Anschluss.”¹¹ Even with these grave doubts about the value of the parties’ promises, the teams of negotiators in Dayton struggled to achieve an agreement.

Although a deal was finally signed, the chaotic mess of Bosnia has yet to develop into a stable peaceful state. The compromises were many and difficult and have continued to haunt the peace. The Bosnians have up effective control over the entire region that would come to be known as Republika Srpska and had to settle for an extremely weak central government structure. The Bosnian Serbs gave up eastern Slavonia and the idea of a divided Sarajevo, and the Croats gave up various parts of territory conquered from the Serbs. Although the agreement contains strong language about human rights standards and laws, provisions are only made for reporting and monitoring, not enforcing. Political will to make the bifurcated state structure work remains lacking. One of the major problems in guaranteeing the validity of the parties’ agreement was the lack of a permissible Bosnian Serb representative, since the leader at the time, Karadzic, was a suspect indicted by the Tribunal in the Hague. Although he was denied a presence at Dayton and in the subsequent Bosnian state, his influence and methods continue to be felt. Slobodan Milosevic served as an official representative for the Bosnian Serbs at Dayton, but there is reason to doubt that they felt their interests were preserved. One of the Bosnian Serbs who served in the small delegation accompanying Milosevic declared “[t]he agreement that has been reached does not satisfy even a minimum of our interests.”¹² Not only does a statement like this distract from the likelihood of the terms of the agreement being honestly pursued, but it casts doubt upon the credibility of the method of negotiation. Again the requirements of justice and order seemed at loggerheads. A better order could have been achieved by giving voice to the chosen representative of one of the parties rather than his proxy. Yet, the demands of justice required that no indicted person be involved in any internationally sponsored process since that

⁹ *Time Magazine* vol. 146, no. 19 (November 6, 1995).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *TIME DAILY* 11/22/95 [found at <http://pathfinder.com>].

would undermine the chances of bringing him to justice in the future. In fact, it is precisely this point – in reverse – that has led some to criticize the trial of Milosevic in the Hague, on the theory that peaceful negotiations with criminally inclined leaders will become impossible in future conflicts.

The side effect of all the compromises involved in the agreement is that difficulties with implementation have been plaguing the UN and SFOR since the beginning. Originally, the Bosnian President, Alija Izetbegovic, refused to negotiate until promises were made to extradite the indicted leaders, Karadzic and Mladic. This demand was softened to the point where Article IX of the General Framework Agreement (GFA) merely states the “obligation of all parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.”¹³ This has meant that Bosnia’s first six years as an independent republic have been marred by perceptions that those guilty of war crimes may escape the rule of law with impunity. Additionally, Article IX of the Constitution of Bosnia and Hercegovina (Annex 4 of the GFA), categorically states that “No person who is serving a sentence imposed 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 Hercegovina.”¹⁴ Although Karadzic resigned his post as Bosnian Serb President, subsequent Serb leaders who emerged to fill the void were seen as operating under his influence. This situation has been slow to change – due in part to an active partisan media campaign by all three parties to the conflict operating within Bosnia that has perpetuated the agenda of hard-line nationalists and separatists.¹⁵

The ironic tragedy of the Dayton peace is that the cease-fire it upheld undoubtedly preserved lives, yet, by hastily seizing the moment, the negotiators created a rickety peace and an exceptionally weak central government, which has been picked at and thwarted from its very beginning. Peace and order are of undoubtedly great moral and political value. But if order is perceived to have been established in a careless or overly compromised way, it will not be observed. All three parties to the Bosnia conflict have been guilty of tailoring the peace to their own needs rather than attempting to rebuild and cooperate. Just after the Paris signing of the Dayton agreement, Croatia released a man indicted by the Hague Tribunal who had been in a local jail on an unrelated charge. A journalist covering the area stated bleakly that “[n]o one should be optimistic that there will be sufficient justice to convince the various populations in Bosnia that the wicked have been punished.”¹⁶ Even the ethnic “cleansing” continued after the agreement: a group of elderly Muslims were driven out of Banja Luka, and towns were returned to the respective entities in looted and burnt out condition. The sense lingers that the peace in Bosnia relies primarily on the presence of foreign soldier and not on local institutions. Although the conflict is no longer hot, the stability of the peace undoubtedly depends on the willingness of foreign leaders to remain involved. This is hardly a successful outcome for the Dayton negotiators.

¹³ General Framework Agreement for Peace in Bosnia in Hercegovina, (*The Dayton Agreement*, November 21, 1995).

¹⁴ Bosnia Peace Agreement: Annex 4: Constitution of Bosnia and Hercegovina (<http://www.state.gov/www.regions/eur/bosnia/dayann4.html>)

¹⁵ Daniel Deluce, “Media Wars” *NATO Review* vol. 48 (Winter 200-2011), 16-21.

¹⁶ *TIME DAILY* 12/08/95 [found at <http://pathfinder.com>]

The text of the agreement describes an orderly state which allows each entity to form associations with its affiliated neighboring state, a state in which much attention is paid to human rights and freedoms, and which incorporates all of the humanitarian conventions already present in international law. And yet, there is no specified mechanism for identifying and capturing war criminals. The dirty work is left up to the piteously understaffed Tribunal in the Hague – which depends upon the will of the local police for obtaining custody over the accused. Even for IFOR troops, which include the best-trained and staffed military forces in the world, regard the arrest of war criminals as something of a nuisance. NATO commanders have “balked at doing anything to either seek out war crimes suspects or to safeguard sites of reported crimes, including mass burials sites that were discovered” claiming that those activities would be “mission creep” and would “jeopardize the safety of their troops.”¹⁷ Although the troops have pledged to arrest the accused criminals they come into contact with in the course of their duties, these duties have proven to be remarkably without incident in terms of local confrontations. There is a widespread feeling of cynicism regarding the task of the troops in Bosnia, since many of the people indicated by the Tribunal are within their easy reach. Recently there has been increased pressure on NATO to make the effort to arrest and transport the indictees in Bosnia. The situation reflects a sea of change in perception of the legitimacy of the Tribunal vis a vis the Dayton Accord. Today, out of 67 persons indicted by the Tribunal, the Court has custody or contact with 42 persons (3 have been provisionally released) there are 24 accused currently at large. The Court’s recently acquired custody over Milosevic has simply driven the starkness of the contrast home. Despite Milosevic’s personal remarks to the Court that it was not a legal body and he did not recognize it, the Court entered a plea of “Not Guilty” on his behalf, and he will be extended all of the protections elucidated in the Tribunal’s statute. A former head of state is being prosecuted before and international tribunal – and yet order in Yugoslavia has not come to an end.

Just as the Tribunal in the Hague is founded upon the necessity of an apparent political impossibility, the Dayton Agreement rests upon a cornerstone which seems to require the silencing of the claims of justice. The peace envisaged at Dayton requires the sanctioning of the results of the war. The spoils of force and ethnic cleansing have been endorsed for the sake of order. Theoretically, the two institutional solutions to the Bosnian problem cancel each other out. But the Tribunal and the Peace Agreement need each other to work – each is based upon principles that shore up the foundations of the other. Prosecuting individuals who relied on criminal terror to achieve political aims is a necessary part of healing a country torn up by nationalist hatred, but merely writing the rules does not create the society envisioned by them. Political settlement that addresses the concerns of all the groups comprising the society is necessary for law and prosecution of criminals to be seen as legitimate. On the other hand, establishing an orderly society by force without attempting to address concerns for justice regarding past events is counter-productive. The specter of recent unpunished crimes, especially those of a widespread, organized political nature, will obstruct the worth of civic trust so necessary for long-term order.

Conclusion

The most powerful indictments being issued in Bosnia are those of civilian residents who suffered more from the denial of their humanity than from the bullets and shells:

¹⁷ *ABA Journal*, 61.

[T]he world has only shown us that nothing is sacred when it comes to promoting its own order at the expense of ordinary people reduced to being miserable, hungry and cold. After Dayton, all the actors with bloody parts in the play have kept their roles. The winners are criminals and thieves, demagogues and warmongers, the ideologues of totalitarianism, of one nation and one state, controlled by one party. The defeated are those who believed people find happiness in justice and diversity. Between such sides, there can only be control but never peace.¹⁸

What the Bosnian conflict starkly reveals is the utter impossibility of pursuing order and justice in mutual exclusivity. The need for the creation of a Tribunal that could fairly pursue justice in a war-torn wreck of a country was profound and imperative. Yet to create the Tribunal without any kind of orderly control over the raging chaos of Bosnia was to condemn it to play a role of symbolic gestures and inconvenient snooping regarding the powers-brokered peace process. In contrast, the Dayton peace was almost perceived as an end in itself. If a document was signed, any kind of document, then there would be peace – and the conference would be deemed a success. But this goal-oriented approach applied sterile problem-solving techniques to an intensely psychological situation, without regard for the need of these peoples to heal, and the necessity of justice for that social healing. One fears that Bosnia may no longer be susceptible to a reconciliation of order and justice, but perhaps the lesson may still be learned.

Although he favored a conservative and somewhat instrumental approach to international relations, even Hedley Bull recognized that Order and Justice can not exist in isolation. They must be regarded as complementary, and mutually reinforcing:

Any regime that provides order in world politics will need to appease demands for just change, at least to some degree, if it is to endure; and thus an enlightened pursuit of the goal of order will take into account also of the demand for justice. Likewise the demand for just change will need to take account of the goal of order; for it is only if the changes that are effected can be incorporated in some regime that provides order, that they can be made secure.¹⁹

The future of international law and dispute settlement, then, lies in pursuing as far as possible the idea the idea of “enlightened order”. For settlement will never be complete without an accompanying sense of human justice done, and justice will be reduced to empty symbols in the absence of accompanying security and order.

¹⁸ Zlatko Dizdarevic, “City Divided, City Defeated” *Time Magazine* vol. 146, no. 24 (December 11, 1995).

¹⁹ Bull, 95.