

**The ‘Butcher of the Balkans’? The
Crime of ‘Joint Criminal Enterprise’
and the Milošević Indictments at
International Criminal Tribunal at The
Hague**

This is a slightly amended version of a draft ICTY Expert Witness Report, written at the request of Mr Milošević and his legal team but not submitted to the Tribunal as the proceedings were halted with Milošević’s death on Saturday 11 March 2006.

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1) Introduction

This report is compiled to provide an analysis of the international political context relevant to the determination of the indictments against Slobodan Milošević. The author is Professor of International Relations at the University of Westminster, London, and an established international authority in the field of international relations theory and the international context of Yugoslavia's disintegration and subsequent reconstruction; he is the author of numerous books and international journal articles as well as undertaking government, media, and international institutional advisory work, for example, presenting expert written and oral evidence to the UK House of Commons Foreign Affairs Committee Report on the Western Balkans (Third Report of Session 2004-5).

In 1989, Yugoslavia was a federal state consisting of six republics, Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, Montenegro and Serbia. By the end of 1999 only two republics, Serbia and Montenegro, remained within the rump of the federation which was undergoing further disintegration with Montenegro seeking greater autonomy and Serbia having lost control of the province of Kosovo. The disintegration of Yugoslavia over the decade of the 1990s was a bloody and protracted one. In 1991, Slovenian and Croatian independence was marked by armed conflict, in the next four years the war in Bosnia-Herzegovina took central stage and then, in the late 1990s, armed conflict in Kosovo, culminating in the NATO bombing of Serbia and Montenegro.

The causes of Yugoslavia's disintegration are often located within former-Yugoslavia itself - either in long-standing ethnic divisions or in the territorial ambitions of Serb President Slobodan Milošević. The ICTY indictments, in particular with the legal conception of a number of related 'joint criminal enterprises', in which it was alleged Milošević played a central role, deploy a potent mixture of the two. These ICTY indictments set new legal precedents in using a uniquely broad conception of 'joint criminal enterprise' to charge one individual with criminal responsibility for every breach of international and humanitarian law allegedly committed by Federal Yugoslav, Serb and allied forces that occurred in the armed conflicts in Kosovo (Case No. IT-99-37-PT), Croatia (Case No. IT-02-54-T), and Bosnia-Herzegovina (Case No. IT-02-54-T). The indictments against Milošević for all the death and destruction of the wars of Yugoslavia's disintegration have been widely seen in the West as evidence of his guilt on all counts, with little examination of the legal basis upon which the blame for the Yugoslav past can be laid entirely upon one man.

In our allegedly post-modern age it is as if the 'Great Men' version of history has come back in spades in the case of Milošević. Who has been transformed from dull communist apparatchik to the 'ruthless manipulator of Serbian nationalism who became the most dangerous man in Europe', allegedly single-handedly confounding the will of the United Nations, United States, European Union and all the other local and international actors in the drama of Yugoslavia's violent and prolonged collapse.¹ Commentary which greeted his death confirmed this view with 'the butcher of the

Balkans' accused of having 'presided over the wars and slaughter of the former Yugoslavia in which more than 250,000 people died'² and to have been the 'pied piper' who stirred the ethnic nationalist divisions and called 'the evil genie out of the bottle' which led to the destruction of and break up of his country.³

In the view of many Western advocates, bloodshed could have been avoided or minimised had the 'international community' assumed a more pro-active relationship to the situation and acted decisively to prevent elected leaders, such as Milošević, from stirring the ethnic caldron in the Balkans. According to this perspective, the Western powers stood by and did little to stop the conflict spreading from Slovenia to Croatia and then to Bosnia and Kosovo. It was only the NATO actions against Serb forces in Bosnia in the summer of 1995, after nearly four years of war, and further NATO action against Serbia in the spring of 1999, after the breakdown of the Rambouillet talks on Kosovo, which demonstrated the will of the international community to take action to help the peoples of former Yugoslavia achieve some level of peace and democracy.⁴ The establishment of the tribunal and its indictment of Milošević is seen as a sign that the international community will never stand by again and let evil individuals conspire in a 'joint criminal enterprise' with such destructive consequences.

This expert report seeks to question the above assumptions about the process of Yugoslav disintegration and, in turn, the implications drawn about the Joint Criminal Enterprise of Slobodan Milošević. In tracing the process of fragmentation over the decade of the 1990s, this study highlights that rather than there being a 'criminal enterprise' by Slobodan Milošević 'and known and unknown others' the context within which crimes and abuses occurred had much to do with the policies pursued by the Western powers who intervened in the process of Yugoslav disintegration and through the ICTY have sought to distance themselves from the consequences of their actions.

The horrors of war were not brought to Kosovo, Croatia and Bosnia by the actions of one man - Slobodan Milošević - or by those with whom he is alleged to have participated in a 'criminal enterprise'. International intervention, it will be suggested,

was a determining factor in the process of disintegration from 1989 onwards. It was a variety of external diplomatic, economic, political and military interventions by major Western powers and international institutions which undermined regional mechanisms of conflict resolution.

Far from contributing to peace and stability, the policy and actions of Western powers undermined the federal institutions that held Yugoslavia together and then prevented compromise solutions, between and within republics, which could have minimised the conflict. From Croatia, to Bosnia, to Kosovo the horrors and abuses of war have been well documented by the Court. What is less well documented is the context which I suggest raise major questions about the indictments and the concept of Milošević's role in a Joint Criminal Enterprise which is at the centre of them.

2) 'Joint Criminal Enterprise'

While prosecutions under the ICTY have found individuals guilty of breaches of international humanitarian law, crimes of war and acts of genocide, these individuals have been prosecuted on the basis of their individual actions established on evidence of intent and the actions committed. It is likely that any major armed conflict would involve individual actions liable for criminal prosecution, as can be seen, for example, in the prosecutions of US and British servicemen and women for actions in the war and occupation of Iraq or the prosecutions, by sending governments, of individual international peacekeepers on UN mandated missions.

The prosecution of individuals for actions which breach international laws in war and conflict situations is not unusual. Conflict situations tend to produce contexts in which acts of barbarity and degradation can take place, under situations and pressures quite alien to civilian life. This fact was clearly acknowledged by the Nuremberg Judgement that: 'Aggression is the supreme international crime; it differs only from the others in that it contains within it the accumulated evil of the whole.' In appreciation of this, Winston Churchill once stated: 'The statesman who yields to war fever must realize that once the signal is given, he is no longer the master of policy but the slave of unforeseeable and uncontrollable events.'⁵

The ICTY prosecution of Slobodan Milošević for his part in ‘joint criminal enterprises’ in Kosovo, Croatia, and Bosnia seeks to prove something completely different: that these acts of barbarity and degradation were part of a systematic criminal enterprise of which he has criminal responsibility.

According to the ICTY’s 1999 Tadic Appeal Judgement, the category of ‘joint criminal enterprise’ is a broad one which, at its broadest (category three) consists of ‘a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable outcome of the effecting of that common purpose’. (*Prosecutor v. Tadic*, IT-94-1-A, ‘Judgement’, 15 July 1999, para. 204) Once the third category of ‘joint criminal enterprise’ comes into play, as it does in the indictments of Milošević, it appears that the scope for potential prosecutions, and for retrospective indictments of those in political and military authority, will go well beyond the previous bounds of international law, covered by the concept of command responsibility.

The Court has ruled with reference to Milošević that:

The essence of this [third] category of joint criminal enterprise is that an accused person who enters into such an enterprise to commit a particular crime is *liable for the commission of another crime outside the object of the joint criminal enterprise*, if it was reasonably foreseeable to him that as a consequence of the commission of that particular crime the other crime would be committed by other participants in the joint criminal enterprise. (*Prosecutor v. Milosevic*, IT-02-54, ‘Decision on Motion for Judgement of Acquittal’, 16 June 2004, para 290)

This would be akin to indicting President George Bush and the UK prime minister Tony Blair for the actions of their servicemen and women in Iraq and, more importantly, those of the US and UK trained Iraqi military and police after the conflict. Any such indictment would not be on the basis of their initial decision to undertake an aggressive war without UN Security Council consent but on the basis of

the abuses committed by those in their service or connected to their intervention, which would be held retrospectively to have been ‘natural and foreseeable’ by those judging the Western political leaders. The crime of those whose actions are alleged to be connected to the earlier decisions would retrospectively make those decisions also criminal.

This would, in effect, be a retrospective judgement on the actions of those in positions of public authority who could take political, military, or policing decisions which were perfectly lawful in themselves but could be retrospectively found to be unlawful if the consequences of these decisions led other people, with no involvement in the initial decisions, and not necessarily with any direct relation to the agencies empowered or mandated by those decisions, to commit acts which were deemed to be unlawful. Based on these arbitrarily connected acts, the initial decisions or actions which were in themselves lawful could then be found to retrospectively constitute a ‘joint criminal enterprise’.

The ICTY, in indicting Slobodan Milošević, is suggesting that the aim of Federal Yugoslav, Serbian and allied forces in these armed conflicts was a criminal one. This is a retrospective judgment. However, the law goes further in distancing itself from the accepted norms of Western legal systems by suggesting that, on this logic, anyone connected with the conflicts could run the risk of being charged with ‘committing’ all the crimes alleged to be involved. This runs perilously close to a doctrine of ‘collective guilt’ or ‘guilt by association’. Despite the untested nature of these departures from traditional legal norms, the court is willing to use this new framework to establish crimes of the highest international importance. The Court has further ruled that the *mens rea* required for the third category of ‘joint criminal enterprise’ could also apply for establishing the required intent for a conviction of the crime of genocide (following *Prosecutor v. Brdjanin*, IT-99-36-A, ‘Decision on Interlocutory Appeal’, 19 March 2004, paras 5-6):

...there is no incompatibility between the requirement of genocide and the *mens rea* requirement for a conviction pursuant to the third category of joint criminal enterprise; it is therefore not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction

can be entered on this basis of liability. (*Prosecutor v. Milosevic*, IT-02-54, ‘Decision on Motion for Judgement of Acquittal’, 16 June 2004, para 291)

The Court is not judging the right of any of these forces to act in Kosovo, Croatia or Bosnia; whether these armed conflicts are understood to be international or domestic. Rather, the indictments allege not only that all these forces acted under the influence or ‘command responsibility’ of Milošević (which is not easy to establish regarding the indictment for Kosovo and highly problematic regarding Croatia and Bosnia) but also, more importantly, that they acted to carry out the ‘joint criminal enterprises’ he is alleged to have been involved in.

In the circular reasoning of the Court, it is the ‘joint criminal enterprises’ – which can only be established retrospectively on the basis of his conviction - which constitute Milošević’s alleged crimes. His responsibility for ‘committing’ the crimes and abuses detailed in the three indictments flow from his alleged intent or *mens rea* asserted in the claim that these abuses flowed from the criminal purpose or intent of the ‘criminal enterprise’ with regard to Croatia, Bosnia and Kosovo. Regarding Kosovo, Milošević is alleged to have “committed” the crimes listed in the indictment because of his:

...participation in a joint criminal enterprise as a co-perpetrator. The purpose of this joint criminal enterprise was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province. (IT-99-37-PT, p.5)

The ‘joint criminal enterprise’ is at the centre of the indictment as the crimes enumerated in the counts are held to be ‘within the object of the joint criminal enterprise’, or, ‘alternatively...natural and foreseeable consequences of the joint criminal enterprise and the accused were aware that such crimes were the likely outcome...’. The indictment continues that: ‘Despite...awareness of the foreseeable consequences... Milošević...knowingly and willingly participated in the joint criminal enterprise’ therefore he ‘shared the intent and state of mind required for the commission of each of the crimes charged...’ (IT-99-37-PT, p.5).

Similarly, regarding the Croatia and Bosnia indictments, Milošević is alleged to have “committed” the crimes of which he is accused only by means of his ‘participation in a joint criminal enterprise’. ‘By using the word committed in this indictment the Prosecutor does not intend to suggest that the accused physically committed any of the crimes charged personally’ (IT-02-54-T, p.2). The criminal enterprise regarding Croatia is stated:

The purpose of this joint criminal enterprise was the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb dominated state... (IT-02-54-T, pp.2-3)

Regarding Bosnia the criminal enterprise is described as: ‘the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina’ (IT-02-54-T, p.2).

The implication behind the similarly worded indictments is that the joint criminal enterprise is in essence the same – whether in the context of Croatia, Bosnia or Kosovo – the goal being the forcible removal of non-Serbs, in order to ensure Serbian control in these regions. The implication being that these armed conflicts can only be understood in the context of a ‘joint criminal enterprise’ based on an ethno-political consolidation of a ‘Greater Serbia’ – which could only be made possible by the forced removal or expulsion of non-Serbs from areas of Croatia, Bosnia and Kosovo. It is his role in this enterprise which then is alleged to make Milošević culpable for all the crimes committed in these conflicts.

The development of the concept of ‘joint criminal enterprise’, and its use by this Court, has not been uncontroversial.⁶ Even with its ambiguous scope, it is held to be necessary for the prosecution to prove the existence of a common purpose and/or joint criminal enterprise and the existence of a common criminal plan within the criminal enterprise as well as the participation and intent of those accused of participating in

such an enterprise.⁷ It is by no means clear that the prosecution has been able to establish sufficient evidence that Milošević was a member of a ‘joint criminal enterprise’, nor the existence of the criminal purpose. This is notwithstanding the fact that the court has ruled that the prosecution ‘could find the evidence sufficient to sustain a conviction’ (*Prosecutor v. Milosevic*, IT-02-54, ‘Decision on Motion for Judgement of Acquittal’, 16 June 2004).

If the ‘smoking gun of evidential proof existed to connect Milošević directly to any of the well documented crimes and abuses across the wars of Yugoslavia’s collapse then indictments on the basis of joint criminal enterprise would be unnecessary. This makes the success or failure of the indictments dependent upon a political interpretation of the facts. In the absence of any hard evidence of a ‘joint criminal enterprise’ with the ‘purpose’ of the forced removal of the non-Serb civilian population, circumstantial evidence has been called upon to justify the charge of ‘joint criminal enterprise’, for example, through allegations that there is a pattern of widespread or alleged ‘systematic’ violence. The implication being that if it can be demonstrated that violence or abuse was ‘systematic’ then a plan emanating from a ‘joint criminal enterprise’ can be imputed.

This expert report seeks to offer counter evidence which suggests that the absence of hard evidence of intention and of the existence of a ‘joint criminal enterprise’ is in fact consistent with the context in which these conflicts took place. It is suggested here that the available evidence and the international context of these conflicts indicates that these conflicts were not products of some preconceived criminal plan hatched by Milošević and others and therefore that the consequences were not ‘natural and foreseeable’.

3) The End of Federal Yugoslavia and the war of Croatian independence

The problem of Yugoslav fragmentation had been a subject of concern since the mid-1960s, as economic reform and increasing exposure to the world market highlighted the uneven economic development within the federation. More industrialised republics

which had greater financial contacts with the West, such as Slovenia and Croatia, came to resent the subsidies and cross-payments to the less developed regions, such as Montenegro, Macedonia and Kosovo. They wanted more control over their foreign earnings and less federal say over the state budget. Once the early attempt to overcome economic differentials by state-management had failed, Tito attempted to minimise the political fall-out over budgetary policy by a mixture of repression and liberalisation, sacking regional bureaucrats that were too outspoken while giving republics greater autonomy and veto powers at federal level. In the 1980s federal life ossified further under the toll of rising foreign debt, the imposition of IMF austerity packages under emergency legislation and the autarchic economic policies pursued in the republics as a response to the economic crisis. The weakened federal state had trouble collecting tax and custom revenues from the wealthier republics and, without funding for subsidies, maintaining order in the poorer provinces such as Kosovo.

Although under strain, until 1989 there was little possibility of these economic disagreements leading to the collapse of the federal state. The key factor that meant the richer republics had little choice but to negotiate a solution at federal level was the international situation. A bulwark of Western policy during the Cold War was the United States' support for Yugoslavia's unity, independence and territorial integrity. For the West, Yugoslavia's brand of market-communism was an example to the rest of the Soviet Bloc to leave the constraints of the Soviet Union and open up to Western influence. Yugoslavia had special access to Western credits to keep the economy afloat in exchange for Yugoslav neutrality and rejection of the Warsaw Pact. In the late 1980s the IMF attempted to reinforce the federal institutions and weaken the republics' veto powers in order to push economic reform against those regional elites who sought greater control over local economic resources. Without international support, no separatist development strategy was possible for Slovenia and Croatia.

In 1989, Yugoslavia's international position changed dramatically with the end of the Cold War. The federal state was no longer of vital geo-strategic importance to the United States. The weakness of the federal state and its inability to restore order in Kosovo was now portrayed as an issue of human rights by US officials keen to reshape their links in the region.⁸ The federal government failed to receive economic

assistance from the US, for its radical market reform programme, and its bid to join the Council of Europe was blocked. The threat of exclusion from avenues of essential international support was heightened by the newly independent states in Central Europe defining themselves, and appealing for inclusion in Western institutions, on the basis of historical and cultural criteria. This historical and cultural division ran through Yugoslavia and reinforced the separatist arguments being made by Croatia and Slovenia, keen to become integrated into the new pan-European political structures and eager not to be dragged down by the parlous economic condition of the rest of the federal state.⁹ In this context, the already weakened federal government was under new pressure both from within and without.

In 1989 the disagreements over economic reform became re-presented as a struggle between state sovereignty and human rights. Even before the US had raised the issue of human rights in Kosovo, the Slovene president had linked the promotion of human rights with greater autonomy for his republic. The US focus on the human rights issue, as justification for de-prioritising assistance for Yugoslavia, fed into and encouraged Slovene and Croat demands for greater autonomy and linked the separatist demands with a pro-human rights position. The Slovenes played on the Kosovo issue as a way of legitimising their own position and weakening federal constraints. The US stated its support for federal unity but at the same time undermined the legitimacy of the federal state by asserting that this unity could not be 'imposed or preserved by force'.¹⁰

The federal Communist Party collapsed in 1990 and free elections were held at republic level. In all the republics nationalist parties and politicians came to the fore although none of them contested the elections on the grounds of complete separation from the federation. Talks over the federal budget continued as the Slovene and Croat elites declared their right to sovereign powers and argued for a looser federal arrangement. The US and European states publicly declared their support for the federation and opinion surveys, as late as the summer of 1991, showed that in Slovenia and Croatia the public were strongly divided on the question of separation while in the rest of Yugoslavia there was strong support for the maintenance of the federation.

Under the public show of international unity, leading politicians in Austria and Germany were sympathetic to the claims of Slovenia and Croatia, encouraging them to hold back from accepting a new deal at federal level. At the end of June 1991, negotiations broke down and the two republics unilaterally declared their independence. The Yugoslav Peoples' Army (JNA) acted to secure the federal state's borders with Italy and Austria, clashing with Slovene defence forces. The European Community (EC) insisted on a peaceful settlement of the dispute and only the defensive use of force. The actions of the JNA in securing the federal borders were judged to be aggressive and the EC applied sanctions to the federal government. The EC mediated a cease-fire, at the Brioni peace conference, in early July, which, in effect, recognised Slovene claims to territorial separation.

While the withdrawal of the JNA from Slovenia was unproblematic, the situation in Croatia was more contested as the 600,000 Serb minority wished to remain part of Yugoslavia and had proclaimed their right to secede. In August, the European Community declared the use of force by the federal army 'illegal' and stated that the Serb minority could not receive JNA support for their claims. The EC established the Badinter Commission of international jurists, to arbitrate on the question of secession, and opened a peace conference in The Hague, in September, to organise a new confederal framework, with republics, which desired it, having the right to seek independence. Before the Badinter Commission could make its rulings, Germany forcefully argued for 'preventive recognition' of Slovenian and Croatian sovereignty to enable international forces to intervene on the ground without the assent of the Yugoslav government. Germany unilaterally recognised the independence of the two separatist republics in December and the European Community states followed, keen to preserve unity ahead of the Maastricht talks.

The international recognition of Slovenia and Croatia prior to any settlement on the situation of the Serb minority, which had declared their autonomy in the Croatian regions of Krajina and Slavonia, was to prove disastrous. Conflict within Croatia flared up as the emboldened Croatian state felt little need to compromise with its Serb minority which, in turn, became more desperate to remain within the federation. The possibilities of a negotiated solution with the federal state, involving border changes

or regional autonomy, were further undermined by the Badinter Commission's ruling that republic borders were inviolate. This decision made little sense in the Yugoslav context where borders were drawn largely for administrative purposes and deliberately designed to prevent larger national groups establishing separate republics, for this reason 30 percent of the Serbs and 20 percent of the Croats were left out of 'their' respective republics, Serbia and Croatia.¹¹ The artificial nature of the borders of the Croatian republic was demonstrated by the fact that the new state could not impose its rule in nearly a third of its claimed territory. The six-month Croatian conflict over the status of the Serb-controlled areas was caused not by a 'joint criminal enterprise' to create an ethnically homogenous region but by the removal of any mechanisms of conflict reconciliation by international intervention. In effect the Badinter Commission and the premature recognition of Croatia ensured that conflict was inevitable. This conflict was brought to a temporary halt by the establishment of four UN Protected Areas.

4) The Disintegration of Bosnia

Germany's campaign for Croatian and Slovenian recognition was opposed by leading international mediators from the European Community and the United States, Lord Carrington and Cyrus Vance, as well as Bosnia's President Alija Izetbegovic and the United Nations General-Secretary Perez de Cuellar, on the grounds that the premature break-up of the federation would lead to regional conflicts and 'the most terrible war in Bosnia'.¹² Germany's prime concern, however, was not Yugoslavia but matters closer to home. The campaign's focus was the international rehabilitation of the newly united Germany. Bonn claimed a new legitimacy to take a lead on the international stage, and intervene in Yugoslav affairs, on the basis of anti-militarism and human rights, in direct contrast to the discredited language of German expansionism in the past.¹³ In order to rehabilitate German power it was necessary to moralise the conflict in Yugoslavia and represent it not as a civil war with economic causes but as an ethnic conflict and war of external aggression. Germany therefore led the campaign to recognise Croatia and, in the process, began the Western demonisation of the Serbs and Serb President Slobodan Milošević, now deemed to be the aggressors.

The European Community-negotiated Brioni agreement, of July 1991, and acceptance, in December 1991, of the German policy of 'preventive recognition' together ended the effective sovereignty of the Yugoslav state. The European Community had abandoned its previous support for the federal government and decisively weakened the federal regime by prejudging the actions of the federal army, in attempting to restore order in the republics, as acts of aggression and therefore illegitimate. Taking over from the Yugoslav people and their elected representatives the EC established the framework for the disintegration of the federal state, calling into existence new states along the lines of largely artificial republic boundaries.

Instead of offering economic and diplomatic support for the federal state's attempt to push through IMF market reforms and integrate into new pan-European institutions, Western policy-makers attempted to 'mediate' in a political stand-off between the state and the separatist republics. This process of mediation legitimated separatist claims and weakened the legitimacy of the state, further encouraging the process of fragmentation. In the context of greater instability and armed clashes, the Western powers then intervened more directly to impose a settlement on the separatists' terms, fatally undermining the federal mechanisms of regulation. The federal state, with its system of checks and balances, to protect the rights both of republics and national groupings, was no longer able to play a cohesive role at either the federal or republic level. This meant the region fragmented further as the new states, with the exception of Slovenia, had little political consensus binding society together.

Prior to the breakdown of the federal order, Bosnia had been recognised internationally as a model of multi-cultural co-existence and symbolic of federal Yugoslavia's progressive minority policies. Only six months before the first free elections in the republic, 74 percent of the population had been in favour of a ban on nationally- or confessionally-based parties, later overturned by the Bosnian constitutional court. The November 1990 elections were held against the background of uncertainty as to constitutional reform and new federal arrangements, the results reflected these concerns as nationalist parties took the majority of the votes among all three groups. The Serbian and Croatian minorities, roughly half the population (31 percent and 17 percent, respectively), previously guaranteed protections through the

federal framework, were concerned for their future, and the larger Muslim community (43 percent of the population) feared the consequences of the republic disintegrating.

Public opinion polls in May and June 1990 and in November 1991 had shown overwhelming majorities (in the range of 70-90 percent) against separation from Yugoslavia and an ethnically divided republic. However, with the recognition of Slovenian and Croatian independence, Bosnia was facing sharp division over the question of whether to leave the federation and seek independence. The failure to agree on a new federal framework, before dismantling the institutions of the Yugoslav state, put to question the guarantees of security and equal treatment, for the three main ethnic groups. Without the guarantees provided by the counterbalancing mechanisms of the federal state, questions of security became even more closely tied up with those of ethnic or nationalist orientation. Bosnian Croats and Serbs threatened moves towards autonomy to guarantee their security.

The breakdown of inter-ethnic co-operation in Bosnia was a direct consequence of external pressures on the political mechanisms holding the republic together within a federal framework, as opposed to the product of external invasion or a resurgence of ancient ethnic hatreds. With US encouragement, the Muslim-led government decided to seek international recognition for independence despite the wishes of the Serb community, bringing to an end the government of national unity. The Bosnian republic had little to hold it together in the absence of elite consensus and fragmented on ethnic and regional lines as the state institutions began to collapse. The Muslim leadership believed that, with international support, UN troops would be able to secure their control over the republic.

The European powers were reluctant to provide this support, by recognising Bosnian independence without a consensus between the three major ethnic groupings. This was also the opinion of the Badinter arbitration commission. The EC-led negotiations at Lisbon, in March 1992, led to an agreement on independence with minority groups protected by regional cantonisation and a high level of autonomy. A week later the Muslim leader, Alija Izetbegovic, rejected the agreement after US encouragement to hold out for a greater say.¹⁴ The US then moved the process of disintegration further

by recognising Bosnian independence in the face of European opposition. As in Croatia, recognition directly led to a higher level of conflict as negotiations between the republic and the rest of the federation broke down and all sides tried to strengthen their positions on the ground. This led to a rising casualty toll and refugee flows as Serb and Croatian separatists carved out areas under their own control.

Recognising the Bosnian state on the grounds that this would enable international troops to protect its sovereignty was a circular argument. More to the point, it was a fiction. Any new settlement in Bosnia would have relied on the republic and federal representatives negotiating a compromise settlement that satisfied minority demands and avoided conflict. US pressure encouraged the Muslim leadership to refrain from reaching such a compromise and fed Bosnian Croat and Serb fears that only autonomy and closer links with Croatia and Serbia would safeguard their interests. In this context, international recognition did not stabilise the situation in the divided republic, in fact, it destroyed the possibility of it, ensuring that conflict was inevitable.

Once independence had been recognised by the international community there was no longer an equitable basis for negotiations. The Muslim government claimed the mantle of international legitimacy and portrayed the Serb and Croatian autonomists as belligerents trying to undermine Bosnian independence and claim ethnic territory. The United States publicly shared this view, arguing that the Europeans were wrong to try to negotiate a political solution between the representatives of the three main ethnic constituencies, and encouraging Izetbegovic to hold out against successive European and UN deals.¹⁵ While the Europeans looked to mediate a settlement between the Bosnian parties and contain the conflict, Washington called for a war crimes tribunal for Serb leaders, threatened to lift arms sanctions to supply Muslim forces and to launch NATO strikes against Serb positions. For the Americans, this was a low risk strategy - the Europeans could be accused of compromise while the US demonstrated leadership and coherence at home, defending moral absolutes and international norms, although at the cost of continuation of the war. As Susan Woodward notes, moralising the war was given priority over the European goal of a political solution.¹⁶

The international politicisation of the Bosnian war meant the moral language of human rights shaped the course and conduct of the war itself. The war was no longer seen as the predicted result of the collapse of state authority, leading to ethnic and regional fragmentation, but as an assault on multi-ethnic democracy by Serb and Croat extremists. As campaigning journalist and author, David Reiff, explained: ‘I and many other foreign writers, photographers, and television journalists kept choosing ... to spend time on the Bosnian [government] side. We did not just think that what was going on was tragic – all wars are tragic – but the values that the Republic of Bosnia-Herzegovina exemplified were worth preserving’.¹⁷ For the beleaguered Sarajevo government, with few resources to fall back on, fighting the war soon became of secondary importance to winning support for international intervention. Weakness became an asset as the war became increasingly staged for international media crews with the government attempting to provoke incidents around Sarajevo and UN-declared safe areas to encourage military intervention. This strategy included exaggerating numbers of war casualties, preventing the reconnection of water supplies to Sarajevo, halting the evacuation of civilians from war zones and government shelling of their own territory.¹⁸ These were rational responses to US human rights rhetoric which encouraged the Muslim government to play the victim card and refuse to negotiate a settlement in the belief that international aid was around the corner.

The more the Bosnian war became seen as a morality play of good against evil the less relationship the rhetoric had to the reality on the ground. In fact, it would be an exaggeration to see the war as primarily driven by the separatist desire for ethnic and religious division. Once the state institutions collapsed, the struggle for some form of security took on a regional as much as an ethnic shape. People searched for security in different ways according to locality. In the northern Bihac pocket, Muslim leader Fikret Abdic made alliances with local Serbs and Croats in a direct challenge to government policy, this split in the Muslim camp resulted in fierce fighting between two Muslim-led armies. Around Vares and Kiseljak, Serbs and Croats allied against Muslim militias, and around Mostar, Serbs and Muslims allied against Croat-led forces. The breakdown of the mechanisms of government authority resulted in increasingly localised, and criminalised, military configurations. Territories under nominal Croat, Serb or Muslim control fragmented into disparate enclaves as the

process of political and social fragmentation continued.¹⁹ Ignoring the reality on the ground, the major Western powers continued to support the Sarajevo government, which had become a small coterie around Alija Izetbegovic (whose elected term as state president expired in December 1991), despite the fact that the government's writ extended to no more than twelve percent of the territory claimed.²⁰

In a repeat of the process of disintegration at federal level, Western powers' intrusion into negotiations between the Bosnian parties resulted in a breakdown of co-operation, as the side favoured by external powers had less incentive to compromise. This led to the institutionalisation of ethnic and regional divisions on the ground, and an increase in the levels of conflict. Failed intervention then led to greater international involvement and, finally, direct Western intervention to impose a settlement. In March 1994, the United States established a cease-fire between the Croat and Muslim forces, creating a Muslim-Croat Federation, offered military support and economic assistance. The Bosnian Croats were encouraged to sign up by the Croatian government, which was promised US diplomatic and tactical support for retaking the Serb-held areas of Krajina and Slavonia.²¹

The following year, the tide of war and diplomacy turned fully against the Bosnian Serbs, who suffered military defeats at the hands of the Federation forces and US-led NATO air strikes in August, 1995. The Serbs had little choice but to accept the US-peace plan, in the face of military defeat and international sanctions. The Dayton Peace Agreement divided Bosnia between two separate entities, the Muslim-Croat Federation, which held 51 percent of the territory, and the Serb-held region, Republika Srpska (RS), which held 49 percent. A settlement little different to the Lisbon proposals rejected by the US, prior to the war, back in 1992. What had changed over the intervening years was the rising toll of death and destruction within Bosnia and, internationally, the discrediting of UN principles of neutrality and respect for state sovereignty. The US and NATO claimed the credit for ending the Bosnian war and the peace was signed at the US Air Force base in Dayton, Ohio. The detailed agreement laying out Bosnia's constitutional structure was drawn up by US government advisors and imposed on the parties separately.²²

5) The Crisis in Kosovo

In Kosovo the ethnic-Albanian movement for greater autonomy was given succour by the fragmentation of the Yugoslav federation. In October 1991 an illegal independence referendum was held and a republic declared with the establishment of a government in exile. There was uneasy co-existence between the ethnic-Albanian independence movement led by Ibrahim Rugova's LDK and Belgrade, where parallel institutions paid under a dual tax system were allowed as long as there was no threat to the formal institutions of Serbian control. It was only with the emergence of the KLA, a radical and military competitor to the LDK, that this uneasy compromise was challenged. In the wake of the 1997 institutional collapse of the Albanian state, arms looted from army barracks and finances transformed the KLA into a force capable of assaults on Serbian forces. Initially the guerrilla tactics brought condemnation, with US Special Envoy to the Balkans Robert Gelbard describing the KLA as a 'terrorist organisation'.

Despite its arms and finances the KLA was still a marginal force, capable of small-scale provocations which in the spring of 1998 provoked Serbian military offensives and condemnations of violence on both sides from the UN and the Contact Group. As the violence increased throughout the summer the UN Security Council called on both sides to end the conflict but was divided on how to handle the issue. The US stepped in unilaterally with US envoy Richard Holbrooke leading the policy intervention with the use of threat-diplomacy. Under US-leadership NATO stepped into the fray in September with a demand that Milošević accept Holbrooke's plans for an internationally monitored ceasefire or face air strikes. Under the October agreement, Serb forces drew back and 2,000 unarmed OSCE observers constituted a Kosovo Verification Mission. NATO had threatened Serbia with air strikes but there were no sanctions on the KLA and they took advantage of the vacuum left by the withdrawal of Serb forces to strengthen their hold in the region.

Furthermore, with the NATO threats of air strikes and the experience of US-led military intervention in Bosnia in mind, the KLA strategy 'became that of inducing NATO-based military intervention rather than a diplomatic compromise'.²³ The

shootings at Râcak in January 1999 were used to portray the Kosovo conflict as a black and white question of Serb human rights abuse and ethnic-Albanian victims, legitimising the US and NATO's increasingly assertive approach of the use of military threats to force a peace settlement. This was counterproductive as 'the stronger the [NATO] threat was the less inclined was the KLA to yield. This was the dilemma of enforced negotiations.'²⁴ The US and NATO assumed the mantle of self-appointed enforcers of UN Security Council resolutions and at Rambouillet attempted to force both sides to agree to a settlement drawn up by Washington.

It is no secret that at the extended talks the Kosovo-Albanian delegation were pressured to sign in order to facilitate NATO intervention, while Annex B of the 'agreement', which gave NATO personnel unrestricted access throughout FRY, meant that Belgrade could not accept the proposals. It was the US insistence that a NATO led military implementation force in Kosovo was non-negotiable that was the sticking point rather than the political settlement.²⁵ As Lord Gilbert, Minister of State in the UK MoD from 1997-1999 told the Defence Select Committee: 'I think certain people were spoiling for a fight in NATO at that time... If you ask my personal view, I think the terms put to Milošević at Rambouillet were absolutely intolerable; how could he possibly accept them; it was quite deliberate.'²⁶

It was the NATO bombing campaign that caused the exodus of refugees and the forced removal of the civilian population, over 90 percent of the Kosovar population was displaced during the military campaign in which around 500 civilian lives were lost to NATO bombing. For the advocates of the bombing campaign these facts make uncomfortable reading, much better that there should be some pre-existing plan to cleanse Kosovo of its population, or some 'joint criminal enterprise' masterminded by Milošević whose indictment by the ICTY coincided with the conflict. At the time, hard evidence of this 'criminal enterprise' was held to have been found with the alleged discovery of 'Operation Horseshoe' announced to the press by German Foreign Minister Joschka Fischer on 6 April, but since discredited.²⁷

After the 78 day bombing campaign, NATO's reputation had been apparently saved, and the agreement was one which could have been accepted prior to the war, the

sovereignty of the FRY was formally upheld, there was no final agreement on Kosovo's status and it was the UN, not NATO, which took responsibility for overseeing the peace agreement. Rather than Western military intervention bringing peace to the region, the desire to use the diplomacy of force continually upped the stakes putting pressure on NATO's credibility at the same time as it made any negotiated settlement much more difficult by marginalizing moderate Kosovo-Albanian forces and encouraging the KLA to choose conflict rather than negotiation. Inter-ethnic reconciliation is rarely helped by external powers dropping bombs on the problem and the situation in Kosovo today is one where there is little likelihood of reconciliation or the return of Kosovo's Serb and Roma populations.

5) Conclusion: Law in International Political Context

Putting the conflicts in Croatia, Bosnia and Kosovo in context reveals that the one-sided view of the indictments that allege that Slobodan Milošević took part in a 'joint criminal enterprise' with the 'purpose' of the ethnic cleansing of these regions in the cause of Greater Serbia is a myth. A myth that has been generated by those who seek to absolve Western intervention from blame for the tragic break-up of Yugoslavia and the unnecessary blood shed in these conflicts.

At every stage of the process, external intervention undermined regional mechanisms of conflict prevention and mediation. As this report demonstrates, the conflict in Croatia was an unnecessary product of hurried international recognition of the republic which failed to provide any protection for Croatian-Serb minorities, who struggled to protect their rights as citizens in the new state, or any incentive for the Croatian state to grant equal rights to its non-Croatian minorities. To assert that this conflict was part of a planned criminal enterprise with the 'purpose' of ethnic homogeneity in the cause of Greater Serbia is to entirely ignore the circumstances in which this conflict took place. In particular, it seeks to ignore the role of Western intervention in establishing the basis on which the Croatian government was unwilling to cede rights to its Serbian minority and the genuine concerns driving the Croatian-Serb desire for political autonomy. These concerns were confirmed when, with US support, Croatian forces were encouraged to rapidly cleanse the Krajina region (this is

the subject of other indictments issued by the ICTY, although US leaders are not charged with participation in any ‘joint criminal enterprise’). Today, while Serbia is a multi-ethnic state, Croatia is close to mono-ethnic.

To accuse Milošević of taking part in a criminal enterprise with the ‘purpose’ of ethnic cleansing in Bosnia and Kosovo does even more violence to the facts in ignoring the role of the US government in undermining peace talks and negotiations led by the EC and the UN. In both cases the US encouraged weaker parties to resist negotiated solutions and to hope for external military intervention. The fact that the final agreements in both cases were little different from the agreements that Milošević assented to prior to the conflicts indicates that the military conflicts were hardly part of some preconceived criminal plan to ethnically cleanse large areas in both these regions.

There is no doubt that the armed conflicts in the former Yugoslavia in the 1990s resulted in much needless bloodshed and tragedy – but to argue that these abuses can be corrected or that a correct historical record could be established by convicting Milošević for the perpetration of numerous ‘joint criminal enterprises’ risks extending international law beyond the bounds which would be acceptable in any other circumstances. There is a clear risk that if law was to be extended in this way it would be open to accusation of being subordinate to international political concerns rather than independent of them.

NOTES

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