Introduction

In July 2011, Britain's Foreign Secretary offered some well-meaning but misleading counsel for Muammar Gaddafi. At a press conference in London, William Hague suggested several courses of action for the Libyan president who had been indicted by the International Criminal Court for war crimes and crimes against humanity as a result of his brutal response to emerging insurrection in his country.[1] Hague suggested Gaddafi had two options: he could relinquish power and retire with impunity in Libya or an alternate safe-haven country, or he could face prosecution by the International Criminal Court in The Hague.

When asked by a reporter if the offer of impunity contravened the indictment issued by the International Criminal Court (ICC) prosecutor, the British Foreign Secretary answered firmly but vaguely, "I think you are trying to take us down a hypothetical route." For the prosecutor's office, there was nothing hypothetical about the Libyan president's criminal status. Responding on behalf of ICC prosecutor Luis Moreno-Ocampo, a spokesperson from his office observed that the indictment was a "legal fact" not an option. Under international law there was only one course of action regarding Libya's president: "He has to be arrested."

The British position was particularly vexing for the Court. The United Kingdom had been among the first states to sign and ratify the Rome Statute of the International Criminal Court, which obligated member states to "cooperate fully with the Court in its investigation and prosecution of crimes." William Hague's offer of prospective immunity to Gaddafi, with its implication that the Court's indictments were non-definitive, contravened provisions for cooperation with the Court, particularly in the realms of investigation, prosecution, and compliance that included Article 89 of the Statute requiring the arrest and surrender of indictees, and Article 93 requiring full support in the investigation. If a state fails to cooperate and thereby interferes with the execution of the legal process, "the Court may make

[1] M. S. Ellis, "Peace for All or Justice for One?" *The New York Times*, August 11, 2011.

a finding to that effect and refer the matter to the Assembly of States Parties or [. . .] the Security Council," of which the United Kingdom is one of the five permanent members.

William Hague's offer of prospective immunity also appeared to run counter to Britain's voting record as a permanent member of the United Nation's Security Council. In February 2011, Britain voted for United Nations Security Council (UNSC) Resolution 1970, unanimously adopted by the fifteen-member body, referring the situation in Libya to the ICC prosecutor. One month later, Britain also supported UNSC Resolution 1973 that restated the Security Council's February referral to the ICC prosecutor and stressed "that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held to account." Britain's representative on the Security Council, Mark Lyall Grant, pledged that partners in the North Atlantic Treaty Organization (NATO) and the Arab League "were now ready to act to support the text."[2]

As a party to the Rome Statute, Great Britain had legally bound itself to cooperate with the ICC. As a member of the UN Security Council, it had twice voted for resolutions calling for the investigation that led to Gaddafi's indictments and arrest warrant. And yet, four months after the second vote, the British Foreign Secretary appeared to contravene these obligations by offering Gaddafi the option of safe haven from prosecution. The capture and killing of Gaddafi by opposition militia outside the coastal Libyan town of Sirte in October 2011 resolved the issue, but the public contretemps between the British Foreign Secretary and the ICC prosecutor's office highlighted the contradictions and complexities between the traditional practice of diplomacy – compromise and negotiation – and the less flexible parameters imposed by the emerging system of international humanitarian law.

Hague's position is not surprising from an historical perspective. There was a time when states were the only relevant actors within international law. Given distinctions of politics, culture, religion, and history, and the uncompromising nature of state sovereignty, it was impossible to apply a uniform set of rules at the international level except as a matter of state action and diplomatic effort. However, over the last half century there has been a shift away from the accepted doctrine that international law was the exclusive domain of the sovereign state.[3] Today, the interpretation of international law has expanded to include and recognize new actors as entities of legitimate concern. Nowhere has this been more relevant than in the sphere of international criminal and human rights law, where the preeminent focus is on the individual, even with the borders of sovereign states.

[2] "Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions," United Nations Press Coverage, March 17, 2011.

[3] See M. S. Ellis, "Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability – The Role of International War Crimes Tribunals" (2006) 2 *Journal of National Security Law & Policy*, 1.

Modern international law now extends beyond the regulation of interstate conduct, and into regulation of the conduct between the state and the individual. A new doctrine – that individual human rights might, under certain conditions, take precedence over state sovereignty – changed the international legal order forever. One part of this emergent human rights doctrine is particularly relevant. The crime of genocide (according to the 1948 Genocide Convention[4]), crimes against humanity (as defined by the Nuremberg Charter[5]), grave breaches (as set out in the four Geneva Conventions of 1949[6] and their two Additional Protocols[7]), and torture (as defined in the 1984 Convention Against Torture[8]) have all been recognized as grave violations of international law. And with this new doctrine has come recognition that governments' power to grant impunity for these crimes should be limited.

The accountability mechanism for gross violations of human rights and mass atrocities is a relatively recent development. After World War II, the international military tribunals in Nuremberg and Tokyo established a preliminary practice of legal actions against the main perpetrators of such crimes, but the Cold War led to the suspension of the international fight for accountability for more than four decades. It was only after the end of the Cold War and the horrors witnessed in Cambodia, Rwanda and in the former Yugoslavia that international justice returned to the spotlight, resulting in an acceleration of the development of international human rights law and accountability mechanisms. But even this process was slow and dependent on negotiation and consensus among sovereign states.

It was not until May 25, 1993, two years after the beginning of violence in Slovenia, that the United Nations Security Council passed Resolution 827, establishing the International Criminal Tribunal for the former Yugoslavia (ICTY). It took more than six months following the start of the genocide in Rwanda, in April 1994, for the United Nations Security Council to adopt Resolution 955, in November 1994, establishing the International Criminal Tribunal for Rwanda. The case of

4 Convention on the Prevention and Punishment of the Crime of Genocide, Paris, December 9, 1948, in force January 12, 1951, 78 UNTS 277, Art. 1.

5 Charter of the International Military Tribunal, London, August 8, 1945, 82 UNTC 280, Art. 6(c).

6 Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, August 12, 1949, in force October 21, 1950, 75 UNTS 31; Convention (No. II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, August 12, 1949, in force October 21, 1950, 75 UNTS 85; Convention (No. III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, in force October 21, 1950, 75 UNTS 135; Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, in force October 21, 1950, 75 UNTS 287.

7 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, in force December 7, 1978, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, June 8, 1977, in force December 7, 1978, 1125 UNTS 609.

8 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, December 10, 1984, in force June 26, 1987, 1465 UNTS 85.

Cambodia is perhaps the most extreme example. It was only in April 2005 that an agreement between the United Nations and the government of Cambodia, which established a UN-sponsored tribunal within the Cambodian legal system, entered into force. The first indictment was issued in 2008, twenty-nine years after the fall of the Khmer Rouge regime in 1979. Oftentimes these tribunals take on a life of their own with dynamics unanticipated by their creators,[9] resulting in ever more complicated relations between the world of diplomacy and international justice.

The ICC, established in 2002 by the Rome Statute, was intended to replace the complex political process of ad hoc tribunals and to provide a permanent international mechanism for the prosecution of individuals for war crimes, genocide, crimes against humanity, and aggression. The ICC was a milestone development in international law. The notion that "crimes against international law are committed by men, not by abstract entities"[10] became the central pillar of international criminal law. And so did the responsibility to hold these individuals to account. Whereas states could grant amnesty or pardon individuals charged with violating national criminal law, that power would not extend to absolving gross human rights violations. Enforcing accountability over impunity became a hallmark of international law.

Still, the interplay between law and diplomacy is complex. It was never anticipated that accountability mechanisms like war crimes tribunals would be called upon to act in the midst of ongoing conflicts. Modeled after the post-World War II Nuremberg Tribunal, there was a presumption that justice was part of an accountability and reparations process, not something concurrent with continuing hostilities and diplomatic efforts to end them. However, the reality of multi-year conflicts in the post-World War II world created a "law and diplomacy equation" in which accountability has become part of the process of "unwinding the conflict."

The reach of international humanitarian justice has expanded significantly in recent decades, and although the principles and dynamics underlying judicial and diplomatic processes have remained essentially unchanged, judicial and political institutions are clearly and fundamentally different. International courts and tribunals are designed to function independently and render impartial justice. International institutions like the United Nations Security Council are designed to maintain peace and are necessarily political. When you have judicial and political institutions involved in the same situation, there is significant potential for confusion and contradictions.

It should be noted that this book does not address in detail the peace versus justice debate, which has been extensively explored. Instead, these case studies provide an examination of those moments in international crises where parallel diplomatic and judicial processes meet and occasionally collide. The purpose is to permit diplomats

[9] Note for instance that the death penalty in Rwanda was abolished as a result of the Rwanda Tribunal.
[10] Nuremberg International Military Tribunal, "Judgment" (1974) reprinted in 41 AJIL, 172, pp. 221–223.

and jurists alike to derive insights and lessons that can better inform future decision-making processes.

CASE STUDIES

The case studies in this volume highlight several critical issues that diplomats and jurists have confronted at the intersection between diplomatic and judicial processes. These include the impact – positive and negative – of timing and signaling both in judicial and diplomatic processes; understanding the practical implications for states in the use of legal terminology, such as the terms genocide, war crimes and crimes against humanity; and the obligations for cooperation and compliance with accountability mechanisms under existing international law.

Each case study focuses on a particular issue, detailing the diplomatic and judicial processes, identifying points of contradiction, examining "lessons learned," and outlining parameters for action within the framework of international law. Each case is clearly unique, with its own complexities of actors and imperatives, and although the lessons may or may not be applicable to a specific case in the future, it is the hope of the editors that fresh insights can be derived for both diplomats and jurists in facing such situations.

The case of *Bosnia* reviews the impact of criminal indictments on diplomatic negotiations to end the war in Bosnia and Herzegovina and raises the question whether legal accountability can be developed as a more effective tool in diplomatic negotiating strategies. The *Rwanda* case was chosen as an example where confusion about legal terminology among diplomats caused procrastination in taking timely action in responding to the genocide occurring in Rwanda in 1994. In the *Kosovo* study, the complex diplomatic and judicial processes involved in executing an international arrest warrant for sitting and former high-level government officials is examined. More specifically, it illustrates the challenges facing diplomats in negotiating with indicted heads of state, and the political and diplomatic mechanisms through which cooperation with international tribunals can nevertheless be encouraged or enforced. In regard to *Darfur*, the first instance where the United Nations Security Council passed a resolution referring a potential case of genocide by the head of state to the International Criminal Court, the problem of timing and signaling between judicial and diplomatic efforts in pursuit of the respective goals of justice is discussed. In particular, this case study analyzes the signals resulting from contradictory actions of diplomats trying to end decades of regional conflict in Sudan and the UNSC referring the situation to the ICC as a response to the findings of an International Commission of Inquiry alleging that genocide was occurring. The *Libya* study reveals the difficult tension between peace and justice and underscores the need for diplomats to understand the full implications of a Security Council referral to the ICC.

Understanding and appreciating the fragile, yet potentially beneficial relationship between law and diplomacy is the core thesis of this book. Diplomats and jurists alike must be informed about the international justice system and the delicate web of political acts and contingencies upon which it rests. It is also imperative that the international community treats the contradictions, complications and failures of the past as lessons for the future.

1

Accountability

Diplomatic Negotiation and Judicial Process

FOCUS: BOSNIA

Executive summary: This case study examines the impact of criminal indictments on diplomatic negotiations to end the war in Bosnia and Herzegovina. On July 24, 1995, the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) indicted Bosnian Serb President Radovan Karadžić and Serbian military leader Ratko Mladić on sixteen counts of grave breaches of the laws or customs of war, crimes against humanity, and genocide. On November 16, 1995, an additional twenty counts of war crimes and crimes against humanity were added to the indictments, as well as two counts of genocide for "the summary executions of Bosnian Muslim men and women" pertaining to the massacre at Srebrenica. Both indictees – key actors in the conflict – were excluded from participating in the November 1995 negotiations at Wright-Patterson Air Force Base near Dayton, Ohio, which resulted in the General Framework Agreement for Peace in Bosnia and Herzegovina to end the Yugoslav wars. In so doing, the indictments, initially seen as an obstruction to the diplomatic process, bolstered a US-led strategy to isolate the Bosnian Serbs and to negotiate with Slobodan Milošević, president of Republic of Serbia, as the exclusive representative of the Serb delegation to the talks.

The case study illustrates how a judicial act – indictments that initially appeared to complicate diplomatic efforts to resolve the Bosnian conflict – was exploited to diplomatic advantage at the negotiating table. The case raises the following questions: Can judicial and diplomatic processes be aligned in order to meet the imperatives of both international law and conflict resolution? Can such alignment occur by design or simply by coincidence? Can legal accountability be developed as a more effective tool in diplomatic negotiating strategies without politicizing judicial processes, which could undermine the legitimacy of international tribunals? The case study underscores how diplomatic efforts that harness accountability mechanisms, such as indictments, can bolster the aims of conflict resolution by sidelining potential spoilers.

1.1 INTRODUCTION

The ICTY was created in the midst of ongoing conflicts between Bosnian Muslims, Serbs, and Croats. International pressure, galvanized by media reports depicting grave human rights abuses, from ethnic cleansing to genocide, sparked calls for intervention to end the violence. This case study examines the relationship between dual processes of intervention: judicial intervention by the ICTY, and diplomatic/military intervention by the USA and its NATO allies. Specifically, it centers on the indictment of Serb officials Radovan Karadžić and Ratko Mladić by the ICTY, and the impact of accountability mechanisms on efforts to resolve the Yugoslav wars.

1.2 ESTABLISHING THE ICTY AND EARLY WESTERN ENGAGEMENT

The ICTY was a unique institution in the sense that it was created by the UN Security Council to prosecute violations of humanitarian law in the territory of the former Yugoslavia while the conflict in the territory was still *ongoing*.[1] Established on May 25, 1993, the Tribunal's function was not simply to prosecute perpetrators of international crimes but also to "contribute to the restoration and maintenance of peace."[2] Advocates employed the language of "justice in real time" to suggest the Tribunal could take an active role in deterring further violence through criminal accountability.[3]

The ICTY represented the first time the UN Security Council used its authority under Chapter VII of the UN Charter to create a tribunal. Despite bearing the imprimatur of the Security Council, the lofty ambitions for the ICTY were not initially met with sufficient support to create effective mechanisms of enforcement. It took over a year for the Tribunal to gain enough staff and resources to function.[4] Yet, as the conflict raged and political pressure grew for some form of intervention, more investigators and funding were deployed, particularly from the USA, and South African Judge Richard Goldstone took the helm as Chief Prosecutor.

The Tribunal began its work by indicting low-ranking criminals.[5] In November 1994, Dragan Nikolić, a minor official known as "Jenki," was indicted for his role as commander of the Serb-run Sušica Detention Camp in the municipality of Vlasenica. However, the Tribunal had only held a Rule 61[6] hearing in which evidence against the accused had been publicly aired. The first official trial

[1] Security Council Res. 808 (February 22, 1993), UN Doc. S/RES/808.
[2] Security Council Res. 827 (May 25, 1993), UN Doc. S/RES/827.
[3] L. Vinjamuri, "Case Study: Justice, Peace and Deterrence in the Former Yugoslavia" (November 2013), European Council on Foreign Relations, p. 2.
[4] J. R. McAllister, "On Knife's Edge: The International Criminal Tribunal for the Former Yugoslavia's Impact on Violence Against Civilians," PhD thesis, Northwestern University (2014), pp. 79–80.
[5] M. Schrag, "Lessons Learned from ICTY Experience" (2004) 2 *Oxford Journal of International Criminal Justice*, 2, pp. 427–433.
[6] Rules of Procedure and Evidence, February 11, 1994, as amended July 24, 2009, ICTY IT/32/Rev. 43, Rule 61.

before the ICTY was for Duško Tadić, a former bar owner and president of a local Serb Democratic Party board in the small town of Kozerać. Such minor achievements revealed the challenges facing ICTY investigators. The Office of the Prosecutor met resistance from both regional and international officials, and it struggled to gather evidence and share information with allied organizations.[7]

Despite the absence of a unified strategy to align diplomatic and judicial efforts, Western officials – particularly US policy makers – were closely intertwined with the creation and institutional development of the ICTY. Western involvement in the conflict in the former Yugoslavia was generally uncoordinated in the aftermath of the Cold War.[8] The United States, for its part, remained largely disengaged in the early years of the war, hoping European nations would find a resolution and preempt any need for US involvement in a regional conflict. But as a European-led resolution seemed increasingly untenable, an intensified US initiative to end the conflict also spurred increasing activity at the ICTY.[9] ICTY Chief Prosecutor Richard Goldstone recalled being "warmly welcomed by Madeleine Albright, who had played a leading role in having the tribunal established."[10] He also observed that Albright appointed David Scheffer "to take special responsibility for moving the work of the tribunal forward."[11]

The nature of Western engagement in the region, along with existing links between key stakeholders, set the background against which both the ICTY indictments and the Dayton process unfolded. This context is important for understanding how US officials leveraged the indictments in pursuing a peace accord. The US role in, and commitment to, the creation and effective functioning of the ICTY presaged a willingness to seize upon the coincidental yet complementary indictments to facilitate a diplomatic resolution.

1.3 THE INDICTMENTS OF KARADŽIĆ AND MLADIĆ

On July 25, 1995, the ICTY succeeded in indicting Bosnian Serb leaders Ratko Mladić and Radovan Karadžić on sixteen counts of genocide, crimes against humanity, and war crimes.[12] The first formal indictment proceedings against Mladić and Karadžić had begun as early as the spring of 1995. In April, the OTP

7 McAllister, "On Knife's Edge," pp. 82–83.

8 For an analysis of Western involvement in the Yugoslav conflict, see J. Glaudric, *The Hour of Europe: Western Powers and the Breakup of Yugoslavia* (New Haven: Yale University Press, 2011), p. 8.

9 The US involvement will be discussed in more detail below. For an account of the intensifying strife to achieve peace in Bosnia within the US Administration, see D. Chollet and B. Freeman, *The Secret History of Dayton: US Diplomacy and the Bosnia Peace Process 1995* (National Security Archive Electronic Briefing Book No. 171, 2005), especially chapter 1.

10 R. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000), p. 78.

11 Ibid.

12 M. Fiori, "The Indictment against Radovan Karadžić: An Analysis of the Legal Developments in the ICTY's Crucial Upcoming Trial" (2008) 3 *The Hague Justice Journal*, 6.

publicly requested that Bosnian authorities defer their investigations of Mladić and Karadžić to the jurisdiction of the ICTY given the scope of crimes at issue.[13] The first indictment accused Mladić and Karadžić of perpetrating genocide, crimes against humanity, and other violations tied to the sniper campaign in Sarajevo. It also accused the Serbian leaders of abetting the seizure and use of 284 UN peacekeepers as human shields.[14]

Two weeks earlier, on July 11, nearly 25,000 Bosnian Muslims began to flee escalating violence in the eastern town of Srebrenica. Serb forces intercepted the refugees, separating men and boys from women, children, and the elderly. Over the following days, Serb forces summarily executed between 7,000 and 8,000 civilians, predominantly Bosnian Muslim males.[15] On November 16, 1995, the OTP issued a second indictment against Mladić and Karadžić, adding new charges of war crimes, crimes against humanity, and genocide to reflect the egregious violations of international humanitarian law during the Srebrenica massacre.[16]

This indictment was not intentionally timed to coincide with diplomatic processes. Indeed, Goldstone acknowledged that the announcement of the Dayton process hastened the indictment, but the precise timing of indictment remained coincidental.[17]

As discussed in more detail below, the indictments marginalized Karadžić and Mladić from the Dayton talks, thereby bolstering the US strategy to negotiate exclusively with Milošević. The following section will look at the development of diplomatic relations in the preparatory phase of the Dayton Peace Talks and the nature of the relationship between Western diplomats and the Bosnian Serb leadership. In particular, it will focus on the months between the first indictment and the beginning of the talks, highlighting the coincidental timing of the indictment and the *strategic* decision by US diplomats to use the indictments to facilitate diplomatic objectives.

1.4 MARGINALIZING MLADIĆ AND KARADŽIĆ

The Dayton Peace Talks followed two failed attempts at brokering peace in Bosnia and Herzegovina: the Carrington-Cutileiro plan, rejected in 1992 by the Bosnian-Muslim leader Alija Izetbegović, and the Vance-Owen plan, rejected in 1993 by the Bosnian Serbs. The Dayton Peace Talks were premised on the three basic assumptions, or "pillars," for peace, formulated by the Contact Group comprised of the

[13] "The Judges Will Soon Consider Two Applications for Deferral in Matters Related to Bosnian Croats and the Bosnian Serb Leadership," International Criminal Tribunal for the Former Yugoslavia Press Release, April 24, 1995.
[14] McAllister, "On Knife's Edge," p. 112.
[15] Ibid., p. 107. See also S. Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002).
[16] McAllister, "On Knife's Edge." [17] Goldstone, *For Humanity*, p. 229.