

The ICTY, War Crimes Enforcement and Dayton: The Ghost in the Machine

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ABSTRACT Commitment to detaining war crimes suspects, particularly through military operations, was the key factor in Bosnia's post-Dayton development. The decision in the mid-1990s to take arrests forward was the single most important element of the international strategy of peace implementation, with detentions in 1997 prefiguring and signposting the way for firm civilian implementation of the Bosnian peace by the High Representative, using authority strongly confirmed by the Peace Implementation Council's Sintra and Bonn meetings. Detention operations changed the strategic dynamic. While Bosnian progress remained slow, the war crimes action helped to create space for political cooperation and development, as well as for the kind of political coercion by the High Representative that would emerge half a year after the first detention operation. Without such action, international strategic momentum and credibility would not have been established, and Bosnia's peace agreement stasis would probably have remained. The war crimes issue was therefore the 'ghost in the machine' driving the positive evolution of post-war Bosnia and Herzegovina under the Dayton peace accords.

In the 10 years after agreement at Dayton, OH, signed formally in Paris, to end the war in Bosnia and Herzegovina,¹ there has been great criticism of political arrangements in that country. Criticisms concerned the quality of democracy, the effectiveness of political institutions and, particularly, the international role in Bosnian politics, notably that of the international High Representative.² However, the integral role of war crimes enforcement has not been noticed. The High Representative's role—whether with approval or not—has been seen as the crucial factor in Bosnia's political development since January 1998. However, as will be shown below, it was the war crimes suspect issue that crucially turned the tide and created the space for other aspects of the Dayton-agreed political arrangements in Bosnia to work as far as they did, including that of the High Representative. Indeed, from getting to Dayton, OH itself, for the talks that achieved agreement onwards, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the war crimes issue became the strategic ghost in the machine.

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This article argues that the ICTY and war crimes enforcement provided the invisible hand that made progress in Bosnia possible. It will do so first by establishing the character of the Bosnian constitution as one consciously intended to block political action that was not consensual—something that many later critics of the Constitution did not understand, as they criticized it for not permitting or creating swift and ‘efficient’ or ‘effective’ decision making. This is considered in the second part of the article, along with the international role in implementing the Dayton peace agreement. The final part of the article analyses the role of the International Tribunal and war crimes enforcement, especially the way in which active peace implementation and development in Bosnian politics were initiated and facilitated by the strategy of apprehending war crimes suspects. It was detention operations that necessarily determined the course of Bosnian peace and security, and of political development.

The Dayton Constitution

Dayton was, and remained throughout the decade following its emergence as a term, an approximation of peace. It serves as shorthand for two related but discrete things: the peace process that included agreements at Wright Patterson Air Force Base, Dayton, OH which ended the war in Bosnia and Herzegovina and were subsequently implemented in their variety; and the constitution for the country that was one part of those accords—Annex 4 to the General Framework Agreement for Peace.³ The Accords were initialled at Dayton on 21 November.⁴ They were then formally signed as a full peace agreement in Paris on 14 December. The agreement itself was relatively brief, comprising only 10 points. However, it had 11 annexes to supplement it, although there were 12 annexes in practice, as the first annex on military matters was in fact two separate documents. In addition to this, there were 102 maps. Initial attention focused on the military aspects of the agreement and the imminent deployment of a new NATO force to implement those aspects of it. In addition, that force was to provide a secure environment for other aspects of the agreement and to support implementation of them, where appropriate. However, in the decade following the end of the war, other parts of the accords came to have greater prominence, such as the right to return of refugees and displaced persons, the restoration of property and, above all, the implementation and effectiveness of the constitution agreed as one of the annexes to the General Framework Agreement for Peace.

While the early attention was to the military parts of Dayton, in reality these were the most straightforward and were relatively easily implemented—though not wholly without problem or tension (Gow, 1997, p 285f). Around five-sixths of the agreement involved civilian issues in the settlement, clearly the greater part. The longer-term fate both of the armed forces separated and reduced under the military parts of Dayton, and of the peace made in Dayton and Paris would rest with the civilian parts of the agreement and civilian implementation. Only if there were adequate implementation would there be a prosperous and viable state, and the elimination of conditions for a return to armed hostilities. The civilian aspects of implementation constituted the real test as the first decade of Dayton confirmed. Civilian implementation “would define the peace and would delineate Bosnia’s future” (Gow, 1997, p. 286).

Dayton defined a single state, called Bosnia and Herzegovina (dropping the previous designation ‘Republic of’). However, that state was in the anomalous position of being effectively partitioned. It had more than one army. Yet it maintained the political

independence, territorial integrity and sovereignty of the previous state (Framework, Annex 4, Article I.1). Dayton Bosnia was defined as the state of three constituent peoples and others, and comprised two entities—the Federation of Bosnia-Herzegovina and the Republika Srpska (Framework, Annex 4, Preamble and Article I.3). Each entity had authorities that were not specified as belonging to the Institutions of Bosnia and Herzegovina. The central institutions were responsible for foreign policy and various aspects of economic policy, as well as for inter-entity communications and criminal law enforcement (Framework, Annex 4, Article III.1). Crucially, however, despite the entities' relative autonomy and, even more, their right to establish "special parallel relationships with neighbouring states", their behaviour and relations had to be "consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina" (Framework, Annex 4, Article III.2a). The entities did not have the right to pursue their own discrete foreign policy. However, they could make specific agreements with states, or international bodies, subject to the consent of the Parliamentary Assembly. This allowed some scope for the Federation to maintain links with Croatia and for Republika Srpska to maintain links with Serbia and Montenegro—in effect this was an arrangement that provided cover for the reality on the ground and political attitudes in the communities. Beyond this, it could also be seen as a vehicle for future influence and change over the years, as those neighbours pursued policies more geared to Bosnia's territorial integrity, not division (and this in the light of international pressure and realisations concerning their own interests regarding the international community). This is what, over time, happened.⁵ Critically there was no provision to supervene the independent international legal personality of Bosnia and Herzegovina, or for the entities to gain independent international legal personality. This was important for Bosnia's fragile political-institutional fabric.

How far the formal aspects of a single state stipulated in the agreements, backed by the provision prohibiting independent international activity, would result in a strong and united state depended on the way in which Bosnia's political institutions worked. As indicated already, the Parliamentary Assembly would be responsible for approving the external activity of the entities, as well as for regulating citizenship matters, approving budgets and preparing and promoting legislation. The Parliamentary Assembly was one of the key areas in which Dayton Bosnia's fate would be determined. It contained mechanisms to prevent radical legislation against the self-defined interest of any group, but also the possibility of freezing irreconcilable differences, risking pushing them to resolution in extra-parliamentary ways.

The Parliamentary Assembly was given two chambers, the House of Peoples and the House of Representatives (Framework, Annex 4, Article IV). The former had 15 members, five from each constituent people—that is ten from the Federation and five from the Republika Srpska. The Muslim and Croat delegates would come from the House of Peoples of the Federation; the Republika Srpska Assembly would nominate the Serbs. To be quorate, the House needed nine delegates in total and at least three from each community to be present. The House of Representatives had 42 members directly elected within the entities—two-thirds from the Federation and the remainder from the Republika Srpska. The key to Bosnia's future lay less in these structures themselves, however, than in the procedures operating around them.

The basic requirement for taking decisions in the Parliamentary Assembly was a majority vote of those present in both chambers. However, the Constitution offered an effective veto to any national group. The constituent peoples had the prerogative to

declare any prospective decision of the Parliamentary Assembly to be “destructive of a vital interest” (Framework, Annex 4, Article IV.3e). In the event of this mechanism’s being invoked, the proposal would then require “a majority of the Bosniac, of the Croat, and of the Serb Delegates present and voting” in the House of Peoples.⁶ This mechanism meant that decisions could only be made on the basis of a broad consensus and not against the declared vital interest of any national community.⁷

The ‘vital interest’ mechanism could be challenged in the event that a majority of one of the other communities’ delegates raised an objection. If this happened, the Chair of the House of Peoples would promptly convene a three-delegate Joint Commission (one from each community). If this commission failed to find a solution within five days, the matter would be referred to the Constitutional Court, which would review its procedural propriety (Framework, Annex 4, Article IV.3f). The Constitutional Court, therefore, theoretically and potentially had a very important and delicate role. Its decision would determine whether the ‘vital interest’ mechanism, or its rejection, was properly used and, therefore, would define the outcome of a particular decision. With international involvement this was a key stabilising element—one that should be of supreme importance (one fine day) when the High Representative’s role came to an end—as the Constitutional Court was formally the ultimate arbiter of issues under the Bosnian constitution.⁸

This constitutional mechanism for protecting ‘vital interest’ could be seen as a litmus paper for progress in Bosnia’s political reconstruction. Infrequent use would indicate a broad degree of consensus (or, perhaps more accurately, the absence of significant dissension—and so acquiescence and viability). Frequent and accepted use of the mechanism would indicate a politically stagnant and stalemated country in which decisions could not be easily made, but in which the failure to be able to take decisions was thought to require the use of alternative means to assure effectiveness (hence the generally forceful role of the High Representative over most of the first decade following Dayton—see below). Finally, constant recourse to the mechanism, accompanied by frequent challenge, would signal a lack of faith in these political institutions and lead in the direction taken by the Socialist Federative Republic of Yugoslavia—stagnation and constitutional-political deadlock. At a minimum, however, it meant that there was no formal or legal mechanism for making significant changes to the form, structure or composition of the country without broad consensus. This mechanism for inaction was also, however, a recipe for potential constant deliberate frustration of work in the Parliamentary Assembly.

The ‘vital interest’ mechanism was also present in provisions for the Presidency. This three-person body (one of whom would chair the Presidency) was stipulated to require one Muslim and one Croat, both to be directly elected from the territory of the Federation and one Serb, directly elected from the Serbian entity. Again, the procedures were designed to prevent radical steps being taken against the interest of one community. Although the Presidency was charged with endeavouring to adopt its decisions consensually, a majority decision was possible. However, a limitation was placed on a two-to-one decision. Provision was made for a three-day period following a decision, in which one of the Presidency members could declare a decision taken to be “destructive of vital interest” (Framework, Annex 4, Article V.2d). Should this mechanism be invoked, the decision would be referred to either the Republika Srpska Assembly, or either the Muslim or Croatian delegates in the House of Peoples in the Federation. A confirmation of the challenge by a vote of two-thirds of the relevant group within 10 days would render the decision null and void.

Taken together, the mechanisms for effective veto in the Parliamentary Assembly meant that the Bosnian Constitution foresaw little that could be done without broad agreement. Moreover, it also confirmed the importance of the entities and the role of ethnic politics. The Presidency was directly elected from the entities, on the basis of ethnicity. The 'vital interest' mechanism in the Presidency had to be validated by the relevant group in the entity assemblies. In the Parliamentary Assembly the 'vital interest' mechanism would be in the control of Delegates of a particular ethnic background from the entity assemblies. Thus the degree to which Bosnia would have a positive and cooperative future depended on the degree to which the ethnically defined politicians in the entity assemblies were prepared to see value in taking that option.

The final central political institution established by Dayton was a Council of Ministers—the government. The Council was appointed by the Presidency and approved by parliament, but was also subject to ethnic and territorial conditionality. No more than two-thirds of all ministers came from the Federation and deputy ministers were not from the same constituent people as the minister. Thus the Constitution agreed at Dayton enforced yet another ethnic control mechanism on a central institution, while creating the possibility of difficulties involving either friction between ministers and deputies from different entities or constituent peoples within the government, or unfilled ministerial posts because of a refusal by one party or another to cooperate with the others. To a lesser extent than the 'vital interest' mechanism this was, nonetheless, another device for creating inertia and impeding strong central government (in the absence of consensus).

The longer-term prospects for the Dayton–Paris deal, therefore, lay in the way in which the formal provisions of the documents would be put into practice and the degree to which future mechanisms adopted by the Parliamentary Assembly would help, or hinder, cooperative relations between the entities, between the entities and the central institutions, and between the constituent peoples. Much of this would, in turn, depend on the outcome of elections scheduled to take place between six and nine months after the signing of the peace agreement. The elections, provided for in Annex 3 to the agreement, were vital to renew Bosnia politically. They would be the critical instrument for ensuring that those indicted by the ICTY could not hold political or official positions. Elections would also provide validation for the new arrangements.

Successful elections were also to be a measure of the extent to which other parts of the settlement were being implemented. In particular, elections would demonstrate the degree to which aspects of the Accords, such as inter-entity cooperation, freedom of movement and the right of displaced people to return to their places of origin, were functioning. The situation of displaced persons was an especially sensitive matter. Citizens, according to the agreement, were expected to vote in the municipality where they had been registered in 1991, before the war, unless they had specifically requested otherwise (Framework, Annex 3, Article IV.1).⁹ In one significant respect, therefore, the Dayton Accords, while in many other ways firmly cementing an ethno-political partition within Bosnia, held out the prospect of resisting the reality of ethnic cleansing for those determined and brave enough to try to turn back the tide of the previous four years.

International Implementation of Dayton Bosnia

After years of war and deepening animosity, there was no real prospect that the complex arrangements for Bosnia's future could be implemented by the former warring parties

without an external helping hand. For this reason the agreements made significant provision for international involvement in implementation of the peace settlement. Overall coordination of civilian implementation was given to a High Representative under the authority of the UN Security Council (Framework, Annex 10, Article I.2). This job was to be given initially to Carl Bildt, who had been acting as EU mediator. He was succeeded by Spanish diplomat Carols Westendorp, Austrian Wolfgang Petritsch and eventually Briton Lord (Paddy) Ashdown.¹⁰ The High Representative had responsibility for coordinating all aspects of the civilian implementation, as well as coordinating his activities with those of the IFOR Commander and maintaining contact with the UN, the Contact Group and other important international actors. Most importantly, the High Representative was given the ‘final authority’ on interpreting Dayton’s civilian provisions (Framework, Annex 10, Article V).

Within Bosnia there was a serious international civilian involvement. This was the case, for example, with regard to appointments in key posts during the transition by international bodies of persons who were neither citizens of Bosnia, nor of its neighbouring states. These included: the Human Rights Ombudsman (Framework, Annex 6, Article IV.2), appointed by the Organisation for Security and Co-operation in Europe (OSCE) for the first five years of implementation; the first Governor of the Central Bank (Framework, Annex 4, Article VII.2), appointed by the International Monetary Fund for a six-year term; and the membership of the Constitutional Court (Framework, Annex 4, Article VI.1b), where three out of nine representatives were to be designated by the President of the European Court of Human Rights. These appointments held great saliency. For an initial period financial control would be outside day-to-day Bosnian politics and the critical issues that would face the Constitutional Court in the event of the ‘vital interest’ mechanisms being invoked would not be entirely subject to inter-communal differences.

The need for a strong international role in implementation was evident in other ways. International bodies had a key role in monitoring and overseeing the fulfilment of human rights agreements—with unrestricted access and cooperation—under the terms of the agreement (Framework, Annex 6, Article XIII). It was also evident in the role assigned to the OSCE over the preparations for and conducting of elections. The OSCE had responsibility for elections, as well as for forming a Provisional Election Commission to manage the various tasks of running polls to the several elected political institutions that made up Bosnia and its entities (Framework, Annex 3, Article II.2-3).

Justice was a vital element in making peace and peace building was the main issue. The real test for the international community, as well as for the various Bosnians themselves, was rebuilding Bosnia in such a way as to make it whole and functioning. This required vast resources to make the settlement work—and the responsibility for post-war reconstruction fell, above all, to the EU. Implementing the Bosnian peace was a major test of the international community as a whole, and of the EU in particular. In the absence of international success, Bosnia would continue to be a divided country with a plurality of armed forces, always vulnerable to a renewal of armed hostilities.

Peace implementation entailed practical state building and social notions of reconciliation.¹¹ Alongside this, it was necessary to ensure that the work of the ICTY was supported in the process of making the truth known and contributing to psychological, social and political reconstruction. This was central to any process of rehabilitation and reconciliation. Alongside this there was the pragmatic dimension of how the Tribunal was instrumentalized in order to foster peace and security.

The focus was on making the peace work. However, as the peace implementation process began at the end of 1995, it was not clear that civilian implementation would be as successful. This is because there was no evidence of an understanding that the same fundamental characteristics, which had been essential for successful international management of the Yugoslav war, were equally vital to building its peace—political will and commitment.

One major strand of criticism has concerned the role of the so-called international community. In particular, this focused on the international High Representative and the ‘corrective’ or ‘colonial’ role played by that person and his office: reversing bad decisions taken in one part of the Bosnian polity or another, sacking elected politicians because of their actions contrary to the interests of peace and security, to Bosnia’s political development, or against the spirit of Dayton.¹² Critics in this camp have generally argued that this international intrusion is anti-democratic because it overrides wishes expressed by segments of the population. Others have offered criticism of what they call ‘Dayton’, meaning the constitution for the country, which was Annex 4 of the General Framework Agreement for Peace, arguing that the complex, multidimensional, multi-layered political-legal fabric of Bosnia and Herzegovina is inefficient and unworkable. The conclusion drawn by members of this camp has been that ‘Dayton’ needs to be changed, whether this means significant amendment or, more radically, completely tearing it up as a failure and starting again, with ‘Dayton 2’ (European Commission for Democracy through Law, 2005; European Stability Initiative, 2004).

Where discussion of ‘changing Dayton’ appeared, it was not necessarily evident which ‘Dayton’ was meant—the constitution or the peace agreement—nor what the implications of any change in the favour of one of them would be for the other. Any change to the agreement, including to one of its annexes, could only be achieved through a consensus of all the parties to the agreement. Anything else would risk jeopardizing the overall peace agreement. Weighed against the overriding central achievement of Dayton—stopping the war in Bosnia—changes that would risk the peace, as a whole, by shifting any element in a delicate arrangement, could not be justified. And the principal thing to bear in mind, whenever there is discussion of Dayton Bosnia, is that the agreement ended the war—and that it was almost not agreed.¹³ Thus it should be understood that the constitution, as part of a peace agreement, was intended to be inefficient in terms of decision making, as ‘efficiency’ might make decisions that went against the interest of one part of the Bosnian political fabric and so prompt a return to armed hostilities. Decisions had to be consensual, but consensual mostly means slow. That was the price of peace, leavened with international involvement to ensure stability and some degree of effectiveness as a fallback.

Five or 10 years on many critics had forgotten, perhaps, why the Bosnian constitution had been agreed the way it had, in order to end major armed hostilities marked by war crimes and crimes against humanity. Perhaps also reflecting years of international leadership and correction of Bosnia’s ethno-nationalist political leaders in applying the terms of this framework for the Bosnian polity, actors and observers appeared more concerned with making Dayton (meaning the constitution) more ‘effective’, or more like other constitutions, as noted above. In doing so, they appeared to have forgotten, or to be unaware, that, having ended the Bosnian war, the very purpose and merit of the constitution was to prevent decisiveness and decisions that were not fully consensual—with the exception of the international dimension, which provided for necessary direction in the interests of peace implementation and political development.

For all the critics there is a general sense that, as far as Bosnia has been seen to work at all, the role played by the High Representative is the reason why. The crucial moment, in this scenario, was the decision by the international Peace Implementation Council (PIC) to authorise the so-called ‘Bonn Powers’ in December 1997. This was seen as giving the High Representative the power to take such action as the person holding that office and his team deemed necessary to the interests of Bosnian peace, stability and unity.¹⁴ It was actually no more than a further confirmation of powers that had been embedded in the Dayton Accords from the outset—as already noted, the General Framework Agreement for Peace from the outset gave the High Representative “final authority” to interpret the civilian aspects of Dayton. Moreover, confirmation of that authority and increasing encouragement to use it had already been offered by the PIC at its earlier Sintra meeting.¹⁵ Nonetheless, the so-called Bonn Powers were seen as a watershed ‘expansion’ of the High Representative’s role (Friedman, 2004, p. 72). While that role, as noted, was criticized intensely by some for what was seen as a quasi-imperialist character (in fact, it was the antithesis of imperialism, given that the latter had been about control of countries and exploitation of them by one individual country, whereas Bosnia was a case of massive transfers of resources to the country in order to foster its development by a broad range of countries), there appears general agreement that it was the Bonn powers and the High Representative’s role that had made ‘Dayton’ work as much as it had. To a large extent the High Representative’s interventionist role has been significant not only in safeguarding democratic development and peace and stability in the country, but also in transforming the political landscape to the extent that, by 2004, the situation had been altered so impressively that the role itself was on the road to redundancy. During the first six months of Lord (Paddy) Ashdown’s tenure as High Representative, he used his special powers over 180 times, but in the subsequent 18 months, only six, a simple statistical measure of the degree to which Bosnia’s politicians were taking their fate into their own hands in a responsible manner (Ashdown, 2003).

The date of 12 December 1997, therefore, is seen as the key moment in moving Bosnia forward politically. However, while the significance of an activist High Representative cannot be overlooked, the confidence to follow an activist course and the credibility of actions taken was prefigured, facilitated and ultimately reinforced by an earlier decision to enforce orders of the International Criminal Tribunal for the former Yugoslavia (ICTY). This was done by carrying out international forceful detention operations, where needed, of war crimes suspects. The watershed moment was, therefore, as argued in the following section in July 1997, a full six months before the Bonn Powers’ decision.

ICTY, War Crimes Enforcement and Strategic Detention Operations

The ICTY was established as an *ad hoc* court, under Chapter VII of the UN Charter.¹⁶ Security Council Resolution 827 (25 May 1993) and Security Council Resolution 857 (20 August 1993) created the Tribunal. ICTY was based on existing international humanitarian law and the laws of international armed conflict, including the Geneva Conventions and Protocols, and the Genocide Convention. It represented perhaps the most ambitious of the precedent-setting initiatives arising from the international involvement in the dissolving Yugoslavia. The Tribunal, established in The Hague, was under great pressure, with severely limited resources to deliver results. The test of the Tribunal, and again of international political will, over time, was to bring an element of international

justice to Bosnia in the future, but its primary mission was to contribute to the restoration and maintenance of international peace and security. That role meant that, although the Tribunal was a judicial body, it had to be seen as having been created by political authority for a political purpose. The ultimate measure of its success, therefore, was the degree to which it could make this contribution. This implied not only a legal role, but that ICTY might be instrumentalized in the interests of peace and security.

The first example of the Tribunal's wider instrumental role occurred already in getting the Bosnian warring parties to Dayton for the proximity peace talks. This involved the exclusion of Bosnian Serb political leader Radovan Karadzic and his military counterpart, General Ratko Mladic. The US authorities hosting the talks insisted that no persons publicly indicted by ICTY could attend the talks, which meant that Karadzic and Mladic, both of whom had been indicted, could not be party to the agreement. This facilitated agreement, as it meant that Serbian leader Slobodan Milosevic acted for the Bosnian Serbs at the talks—ensuring a commitment to finding an agreement, as it had become clear that Milosevic wanted out of the war. Even though Momcilo Krajisnik, President of the Bosnian Serb Assembly, was present, Milosevic was able to negotiate and act in a way that would not have been possible had either of the other two been present (Silber & Little, 1996). Beyond the talks, the agreement extended the principle of excluding those indicted by the Tribunal to Bosnian politics, meaning that no one in this category—including Karadzic—could run for, or hold, political office, until they had faced trial. This gave a boost to the initial phase of peace, leading to the first elections in September 1996, as neither the Bosnian Serb political leaders, nor others publicly indicted could run for office, nor hold public positions. The weight of this provision fell on the Bosnian Serb side, but generally it meant that those who might be deemed most responsible for the war and, especially, for the widespread atrocities committed, and so who had the greatest interest in opposing peace and the success of the agreement, were impeded from doing so. This was a significant boost to the cause of implementing the Dayton Accords.

Despite the positive effect of excluding indicted war crimes suspects from public office, this neither meant that those individuals were necessarily brought into the custody of the Tribunal, nor that others indicted subsequently, or whose indictments were published later, would necessarily be arrested. The primary responsibility for this formally lay with the authorities in Bosnia, both central, and also (particularly) at the entity level. However, the recent history of the country that had led to the divisive political situation meant that there could be no immediate, realistic expectation of action to enforce indictments by those authorities. Therefore, as a complement to international political pressure on the entity and community leaders to comply with the Tribunal's orders and warrants, international action was required. There were two possible avenues for direct international action: the International Police Task Force (IPTF) and the NATO-led military implementation force, IFOR (later to be transformed into SFOR (Stabilisation Force) and EUFOR (EU Force)).

The IPTF could have been one of the most vital elements for addressing war crimes issues, as well as for facilitating the conditions for elections and returning Bosnia to some kind of order. This was especially true, arguably, in light of IFOR's initially narrow, military focused mission and the twin demands for freedom of movement within and between the entities, and for cooperation with the ICTY. Although the IPTF's mandate was apparently weak—to assist and advise, and to monitor and observe (Framework, Annex 11, Article III.1)—interpretation of the mandate and the nature of

its implementation could have given it a role in war crimes arrests. The IPTF mandate was intended to encourage the Bosnian police and the entity police forces to take primary responsibility for law enforcement. However, the IPTF could advise, in principle, on who a known war crimes suspect was, where that individual was and how an arrest might be made. 'Facilitating' might mean helping the local police to investigate and even arrest persons indicted by ICTY, particularly given that the various local police forces and authorities were obliged to grant IPTF personnel access to anything requested in accordance with the force's duties (Framework, Annex 11, Article IV). Interpretation of the IPTF mandate by the Commissioner, the High Representative and others could have been flexible enough, had they chosen to operate this way, to permit strong interpretation, while behaving in a manner acceptable under Dayton.

The key was the IPTF's reserve potential, should cooperation be unavailable. If the IPTF met any obstruction or "refusal to comply with a request" which might, hypothetically, be a request to apprehend an indicted war crimes suspect (Framework, Annex 11, Article V.1), then the Commissioner was obliged to notify the High Representative and the IFOR Commander of the failure, and could request the High Representative to "take appropriate steps" (Framework, Annex 11, Article V.2). Moreover, the IPTF had special responsibilities regarding human rights violations, where relevant information was to be passed to the Human Rights Commission, established under Annex 6 of the 'Framework Agreement', to ICTY or to "other appropriate organisations" (Framework, Annex 11, Article VI.1). The 'Parties' to the agreement were then compelled to cooperate with the designated organizations (Framework, Annex 11, Article VI.2). The degree to which the agreement bound the local police and local authorities to cooperate with the IPTF meant that the latter's activity was only constrained, in principle, by its own interpretation of its mandate.¹⁷ However, in practice the IPTF mandate was interpreted gently and, as arguments over who was responsible for war crimes suspect arrests circulated, the burden increasingly appeared to fall on the military implementation force.¹⁸

IFOR comprised around 60 000 troops, three-quarters from NATO countries, and had a simple and single principal mandate: to enforce the line of separation between the parties and cantonment of weapons. In practice, this was a primary mandate. There were also secondary mandates to assist in the creation of conditions for other agents to carry out their part of any implementation plan. But the secondary mandates were very much secondary, in the early phases of implementation. Only if the tasks involved could be accomplished as a by-product of carrying out the primary mission would they be fulfilled. Anything needing a diversion from the military mission, or the use of additional forces, was unlikely to happen in the first phase of military implementation.

IFOR was a very large, quasi-peacekeeping force with the task of reminding the armies on either side of the zone of separation that they had decided to cease combat. Its main mission was to enforce a demilitarized zone of separation four kilometres wide. It was also mandated to patrol either side of the line of separation in which the opposing armed forces would still have military capability, albeit that such forces should have withdrawn to barracks by set dates. IFOR's rules of engagement were robust. They permitted prompt and comprehensive military action to suppress any breach of the ceasefire. However, there was every chance that, whatever local problems IFOR might face, it was in no one's interest to return to armed hostilities—and, therefore, that military implementation would be relatively straightforward. Nevertheless, once initial stability

had been assured, it became ever more imperative that IFOR's successor, SFOR would become more active in secondary roles, in particular regarding war crimes suspects.

The reason for this was a need for strategic momentum. The initial priorities had been military implementation (separation of forces, cantonment of weapons, etc.) and ensuring that elections were held that would confirm the constitutional arrangements agreed at Dayton. The latter constituted the overriding strategic political imperative, because until these arrangements had been validated by elections, one party or another might challenge them, claiming that they were illegitimate and seeking to disrupt the peace process. Elections consolidated one year of peace, as well as the Dayton–Paris political and constitutional arrangements. The first year of implementation had been accomplished and elections successfully held.¹⁹

At that point the principal focus shifted to how to take the peace forward. Local initiatives could develop—but these could not create real momentum. Momentum required a focus on the major issues: the return of refugees; institution building and integration of the two entities; solutions to the disputed towns of Brcko and Mostar; and apprehension of those indicted for war crimes. Of the four, Brcko was bound to present a serious challenge to the mission overall and to the future of the peace deal until other circumstances had changed. The best, therefore, in this case was to defer the matter. The same was true of local elections, which were, indeed, deferred. Refugee return was far too big a problem to look at in the short term—even though the Office of the High Representative made 1998 “the year of return”.²⁰ Return, in the end, would be a longer-term by-product of other developments, spearheaded by the overall change spurred by the detention operations. The apprehension of war crimes suspects entailed high risks. Yet, strategically it was the most straightforward and achievable of the relevant objectives. This is why the risks of war crimes suspect detention operations had to be accepted, as they provided the most viable opportunity for taking the strategic initiative internationally.

The apprehension of individuals indicted under suspicion of having committed war crimes provided a positive defining moment in Bosnia's development. On 10 July 1997 the first war crimes suspect operation occurred. British SFOR led the way, setting the precedent in Bosnia and Herzegovina of carrying out the first detention operation there, going on to conduct 12 of the first 20 operations.²¹ However, the strategy of apprehending indictees was an international mission, in which a variety of countries contributing to SFOR took part. That first operation, at Prijedor, in northern Bosnia, had a major impact, on various levels. First, it ensured momentum and self-respect for SFOR. Second, it offered a clear message to all concerned that the international force was proactive and prepared to take firm action. Third, a salient strategic effect was that those implicated in the suspected commission of war crimes and crimes against humanity ran into hiding, reducing the degree to which the peace implementation process was obstructed. They either left Bosnia, or just retreated from the scene—or they were prepared to surrender, in some cases even where they had not been indicted.²² At the same time this opened opportunities for others, more open to cooperation, to emerge on the Bosnian political scene.

This is exactly what happened in the Serbian entity, Republika Srpska. Leaders prepared to cooperate with implementation—such as President Biljana Plavsic—gained strength for some time. This meant that implementation could be taken forward, albeit temporarily and in a stuttering fashion. Plavsic, it emerged, later, had been indicted by the Tribunal. It can be surmised that her cooperation was founded, at least in part, on an assumption that she might well have been a candidate for indictment and possible

detention, but that cooperation over implementation might help to avoid arrest. It is also possible that, in some part, her eyes had been opened to the horrors of the Bosnian Serb campaign and to possible errors in her own ways—something confirmed by the apparent honesty of her contrition when, having cooperated with Tribunal, she admitted guilt when tried in The Hague.²³ Plavsic's tenure as Bosnian Serb president was limited by the strong mobilization of support in the Republika Srpska against cooperation, which meant her losing elections, in 1998, to Nikola Poplasen, a hardliner against any cooperation in implementation of Dayton. However, High Representative Carlos Westendorp formally removed Poplasen from office within a few months, following persistent obstruction of the peace process and political development.²⁴ This use of the High Representative's authority confirmed the strong international approach prefigured by the detention operations started the previous year—as well as the confidence that emerged following the first of those operations that cooperative political figures could be found in the Republika Srpska, let alone the rest of Bosnia. Progress might be two steps forward one step back, but it was possible through cooperation.

This pattern was confirmed during the period in which Milorad Dodik (Plavsic's choice) was prime minister. Another cooperative figure to emerge, he was able to take progress forward. This included arranging for the surrender of some lesser war crimes suspects, who were clearly made to understand that there was a choice. A cooperative avenue could be followed that might be looked on favourably at trial and would gain all support in terms of informational support and defence lawyers from the Republika Srpska authorities; or an obstructionist one, where eventually the coercive means of SFOR would be deployed. However, in line with the pattern, Dodik's cooperation on implementation and the war crimes issue meant strong opposition to him within the Repbulika Srpska, which eventually ended his time as prime minister. Even though neither Plavsic, nor Dodik, could sustain their position indefinitely, the scope for cooperation and incentives for it were not removed. Thus, the first detention operation was a salient moment, defining the course of the Bosnian peace process. In time it became supplemented by further operations that ensured the direction of Bosnia's political development.

Inevitably those in authority were concerned that action would be too risky. These concerns had to be pitched against the overriding sense that, if strategic momentum were to be created, or sustained, then some kind of action was needed, however risky. The security policy and strategic interests which led the various states and international bodies to be involved in Bosnia meant that the risks of not taking such action outweighed those of doing so.

Such enormously sensitive operations have a number of key requirements. First, they need extremely careful intelligence and gathering of information—information not only carefully garnered and managed, but often also difficult to gain. Next, there must be a clear understanding of the legal basis on which each part of the action is being taken. Third, there has to be a clear understanding of procedure, including rules of procedure for the Tribunal—the last thing anyone would want is to undertake a venture of this kind and then find that the accused walks free from court on a technicality, because it was an unlawful arrest. Fourth, these operations require patience, taking time and looking for the right opportunity, as well as the skills to execute it safely, once the moment is ripe. Finally, these operations require understanding of how much is involved, but having the courage to commit, despite the enormous investment involved and the

associated risks. Acting, despite these considerations, is a tribute to the strategic contribution of war crimes suspect detention operations in taking forward the process of peace implementation and political development in Bosnia and Herzegovina over the past 10 years.

The significance and strength of the strategic commitment and contribution made by enforcement of the war crimes issue can be gauged by understanding the complexity and sensitivity entailed by detention operations. Two examples here can demonstrate the potential difficulties involved. First, the initial operation at Prijedor in northern Bosnia, which saw police chief Simo Drljaca killed and doctor Milan Kovacevic detained, highlighted two issues. One was that these operations are not necessarily easy or blood-free for the wanted men and women: Drljaca was killed in a fire-fight while resisting detention. Second, those carrying out the operation risked bloody costs: one of the British soldiers involved was wounded as Drljaca fired at the troops seeking to detain him. The dead suspect and wounded British soldier confirm the difficulties of such operations—they are not necessarily a matter simply of tapping suspects quietly on the shoulder, and inviting them to accompany the detaining troops, with the suspect's peacefully agreeing. Detention operations could not be undertaken without thorough intelligence and enormous care. Nor could they be carried out without real political and military commitment.²⁵

The second example of how detention operations might go badly wrong concerns the Banovic twins, Predrag and Nenad. These identical twins were wanted in connection with alleged crimes with the Omarska and Keraterm camps in northern Bosnia. However, in the same village, there was another pair of twins, the Vukovics. The latter had the misfortune to live there and to be mistaken for the Banovics. Understandably, no one considered the possibility that two pairs of identical twins might live in the same place in Bosnia. Nonetheless, they did—and the SFOR troops got the wrong pair. Ironically, the way in which the mistake was handled, and the subsequent reaction of the mistakenly detained twins, had a positive strategic effect. The Vukovic twins appear to have told many people how well they had been treated, even though one of them had been injured in the course of the wrongful arrest. Checks were made immediately and British SFOR discovered that it had made a mistake; the twins were well treated and returned to Bosnia. However, it would have been disastrous if one, or both, of them had been maimed, or even killed, during the operation. The local population, international public opinion and the political leaders authorizing these missions would have reacted negatively. A potential nightmare turned out well because the twins were treated well and the error was swiftly recognized. The Vukovic twins, in a small, local way, became a positive propaganda instrument. The testimony of the 'wrong twins' was more powerful than anything public relations experts could have dreamed up. In addition, it added a further positive dimension to the role of strategic detentions operations in pushing enforcement forward by positive persuasion, not just compulsion, and demonstrated that cooperation could bring benefits.²⁶

It is important to understand that these were strategic operations, because they had an impact in terms of the situation on the ground and on the overall political condition in Bosnia. That impact and understanding about enforcement indicates that enforcement should not only be undertaken for its own sake—upholding international law and the will of the Yugoslavia Tribunal *per se*, but also because it has wider strategic implications. Indeed, to recognize this is to understand the true purpose of the ICTY—not as a purely

judicial body, but as an instrument of international peace and security under UN Security Council authority. As an instrument of international peace and security, the Tribunal's role also includes its instrumentalization to further and foster international peace and security in the former Yugoslavia. It is unlikely that political leaders, or military commanders, would have decided to undertake enforcement purely and simply for the sake of the law, which is not to say that doing it for its own sake would have been wrong. However, it is the broader context of peace operations that gives weight to the issue of enforcement in the Bosnian case. This was the aim and the outcome of taking this action.

Conclusion

The crucial moment in Bosnia's post-war development, it can be concluded, was 10 July 1997. This was the day on which British SFOR troops carried out the first forcible detention operation in Bosnia and Herzegovina. With this action the way was opened for gradual political change and development, particularly in the Republika Srpska. After that moment, both international political will to implement the arrangements agreed at Dayton and Paris, at the end of 1995, and the necessity of cooperation in that process among the different political-military forces in Bosnia and Herzegovina was shown. Thereafter, the initial straightjacket in Bosnian political arrangements—deliberately and necessarily embedded in the Bosnian constitution agreed at Dayton and signed in Paris to make major political decisions possible only with effective consensus among entities and communities, and their political representatives—could be loosened.

While Bosnian political dynamics remained uneasy and progress slow, the war crimes action helped to create space for political cooperation and development, as well as for the kind of political coercion by the High Representative that would emerge half a year after the first detention operation. Without enforcement of the war crimes issue, it is highly conceivable that agreement would not have been reached at Dayton, with figures such as Karadzic and Mladic in a position to hinder success. It is also quite probable that indictees would not have been excluded from running for, or holding, public office in Bosnia, which would have left the country, even with an agreement at Dayton, still completely in the hands of the authors of war and mass murder. Certainly, without action to detain those indicted by ICTY, thereby removing some figures from the political and social scene directly, while inducing others to remove themselves, the degree of progress witnessed in Bosnia since the end of the war, and particularly since mid-1997, would not have been possible.

Commitment to detaining war crimes suspects, particularly through military operations was the key moment in Bosnia's post-Dayton development. This showed a real dedication to the idea of enforcement and to making both international law as an instrument of international peace and security, and Bosnia's Dayton-authored institutions, work. The decision in the mid-1990s to look at how to take arrests forward and then to do so was the single most important element of the international strategy of peace implementation. Detention operations changed the strategic dynamic. Overnight, after the first operations were conducted, spaces opened up politically and operationally in Bosnia, which were not there before. Those spaces opened up because, in the first instance, one particular obstacle to progress was removed. They opened up all the more because numerous other obstacles either removed themselves, fleeing over the border into Serbia (and, even without being indicted, by their flight was perhaps evident their guilt), or retreated quietly into the

hills, or underground to hide, while others became cooperative. The crucial element in this strategic understanding was that, by taking action to enforce, not only was there an individual enforcement action itself, but there was also wider short-, medium- and long-term enforcement of, and compliance with, the law. This strategy could not be expected to work instantly—some aspects were part of a slow, evolving process, which, complemented by the High Representatives' actions and the gradually increasing cooperation of all the Bosnian parties, edged peace implementation forward, along what emerged as Bosnia's likely eventual journey towards Brussels.

Notes

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1. The form Bosnia and Herzegovina is used throughout the article to conform with the journal's house style. However, it is noted that the correct formulation for the country, as per official English language versions of its constitution and official business, is 'Bosnia and Hercegovina' with a 'c'. Meanwhile, one of the two entities which comprise the country is formally expressed in the constitution as the Federation of Bosnia-Herzegovina—where a hyphen replaces the conjunction, and a 'z' replaces the 'c'.
2. Some of these criticisms are noted later in the article.
3. The General framework agreement for Peace in Bosnia and Herzegovina, Wright Patterson Air Base, Dayton, OH, 21 November 1995 (hereafter "Framework").
4. The present interpretation of the Bosnian constitution draws on Gow (1997, ch. 10).
5. Both Zagreb and Belgrade have altered their approaches to proxies and communities in Bosnia over the years. From 2000 onwards Zagreb had a programme of disengagement with the Bosnian Croat military, which would occur gradually over a few years, under cover of cooperation. Confidential interview with a member of the Croatian president's cabinet, March 2001. Belgrade was slower to disengage—and by 2005 still had integrated links with the Bosnian Serbs, although there had been significant changes in policy and approach, as well as some moves towards disengagement. Confidential interviews with Western officials in Belgrade, and senior officials of the Belgrade government, April 2004.
6. The term Bosniac was used to refer to the Slav Muslim population in Bosnia.
7. The assumption was inherent in this mechanism that the representatives in the House of Peoples would be the best placed to define the vital interests of the Muslims, Serbs and Croats in Bosnia.
8. One of Wolfgang Petritsch's actions as High Representative was to use his authority to confirm that of the Constitutional Court, as the latter sort to override provisions in the entity constitutions which prevented participation in elections on grounds of ethnicity. See Friedman (2004, p. 73).
9. The infamous 'P2' formula that accompanied this arrangement left open the possibility of abuse—which was widely taken in the initial elections—for persons to register to vote where they intended to live, conditions permitting. In practice large numbers of voters, especially in the Republika Srpska, were registered as wishing to live, and so vote, in places with which they had no connection. The reality was that party activists had 'managed' this process, so as to increase the number of putative residents and so actual voters in disputed, desired municipalities.
10. On the different characteristics and performance of each of the High Representatives, see Friedman (2004, pp. 69–72).
11. For a valuable preliminary study of the aspects of peace building in the Bosnian context, see Bojicic *et al.* (1995).
12. Bose (2002, pp. 253–236) offers samples of different perspectives on these issues. See also Chandler (2000).
13. See Holbrooke (1998), as well as Silber and Little (1996), and Gow (1997, ch. 10), on which the present section draws.
14. 'Bosnia: a turning point?', BBC News, 10 December 1997, at: <http://news.bbc.co.uk/1/hi/world/analysis/38390.stm>, accessed 27 May 2005.

15. While the December 1997 PIC formally catalysed the process and Sintra had already confirmed it, that authority already existed within the Bosnian constitutional framework. However, the significant issue is that, after this decision, the powers came to be used more extensively and effectively.
16. For the best treatment of the establishment, role and functioning of the Tribunal, see Kerr (2004).
17. The initial signs, however, were that the IPTF would struggle to gain its full complement or receive sufficient backing to act with authority.
18. It is ironic—and a dubious distinction—that the author was possibly one of the very few people to be directly detained by the IPTF, when taking photographs in north-western Bosnia, while those implicated in war crimes and organized criminal activity were left untroubled by it.
19. The elections were successful, despite inevitable doubts about their propriety and outcome. Many observers at the time saw the flaws as seriously undermining democracy and as an indication that elections should not have been held so soon, not registering that even imperfect elections were necessary strategically to validate the process. See Singer (2000) and Cousens and Cater (2001).
20. It might be noted that the delineation of an unrealistic aim as the theme for a year was a hostage to fortune, likely to result in negative definition of the mission's success.
21. By mid-2002, of 28 operations conducted (including those which did not succeed), the UK had led 15.
22. One Bosnian Serb attempted to surrender to Dutch troops, who reported that he was not actually on the detention lists the latter had. Before any of the Dutch soldiers had found the wit to offer the person, who clearly had a sense of his own guilt, a cup of coffee while someone checked with The Hague, the individual had made off, no doubt breathing a great sigh of relief, disappearing before a full picture and a possible warrant emerged. Confidential interview with British official involved in the planning, preparation and conduct of detention operations, November 1997.
23. At trial, Plavsic demonstrated contrition when she admitted that “many thousands of innocent people were victims of an organized effort to remove Bosnian Muslims and Bosnian Croats from territory claimed by Serbs”, adding that at the time she had convinced herself that it was a matter of survival and self-defence, but that such an “explanation...offers no justification”. Bosnian Serb leader ‘blinded by fear’, BBC News, 17 December 2002, at: <http://news.bbc.co.uk/1/hi/world/europe/2582851.stm>, accessed 27 May 2005.
24. Friedman (2004, p. 73f.) discusses the tensions between outright hardliners, the more cooperative figures, such as Plavsic, and the High Representative's role, reflected in this paragraph.
25. The above is based on confidential interviews with two British officials closely involved in the planning, preparation and conduct of the operations themselves, July 1997 (both) and December 2004 (one).
26. While highlighting the potential for mistakes, it should be noted that the right pair of twins found their way to The Hague. The Banovic twins were apprehended in Serbia by Serbian Special Forces, who were effectively duped by the government into carrying out the operation, on the grounds that the pair were illegal immigrants. The so-called ‘Red Berets’ proceeded to block a Belgrade highway in protest once the Banovics had been transferred to The Hague and the special forces had realized what had happened (Sunter, 2001). Nenad Banovic was released on 10 April 2002, after the Prosecutor filed a motion to withdraw the indictment against him. His twin was sentenced to eight years imprisonment on his 34th birthday, 28 October 2003.

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