The Best-Laid Plans: Implementation of the Dayton Peace Accords in the Courtroom and on the Ground

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> Without the political will of the parties involved in the conflict, and without the political will of the international community to take any measures necessary for peace, judicial institutions are unable to provide their essential contribution in the prevention of future wars. Without the international community's prosecution of the criminal acts committed by Bosnian citizens and officials, it is impossible to stop the potential inspirers of a war apocalypse.[1]
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> —Omer Ibrahimagić, President of the Constitutional Court of Bosnia and Herzegovina

When the parties to the General Framework Agreement for Peace in Bosnia and Herzegovina,[2] more popularly known as the Dayton Peace Accords, signed the Agreement in Paris on December 14, 1995, they ended one of the most shockingly brutal wars of this century. Yet the Framework Agreement marked not so much an end as a beginning: the beginning of the long, painful and difficult process of rebuilding political, military, economic, and

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1. Omer Ibrahimagić, *The Aggression Upon Bosnia and the Judicial Protection of Human Rights*, 12 CONN. J. INT'L L. 171, 186 (1997).

2. The General Framework Agreement for Peace in Bosnia and Herzegovina, 50th Sess., Agenda Item 28, U.N. Doc. S/1995/999 (Dec. 14, 1995) [hereinafter *Framework Agreement*].

legal institutions.[3] The people of the new state of Bosnia and Herzegovina[4] not only had to rebuild their homes and their interpersonal relations, but also their relationship with the government. The Bosnians would do so in a state cobbled together in a compromise brokered by an international coalition.

In December 1995, Bosnia was a shattered land with no functioning government, thousands of displaced persons, and a completely destroyed infrastructure. The country had been terrorized by ethnic violence breathtaking in its savagery. What remained were three ethnic entities, each numbed by loss and suspicious of their neighbors. The country was still menaced by the architects of ethnic cleansing and their military and paramilitary retinue. Refugees and internally displaced persons were—and still remain—understandably fearful of returning to their ethnically cleansed hometowns, where basic security from ethnic violence did not exist and housing was often hard to find.

In response to these challenges, the international community made the unprecedented move of creating two judicial institutions. It created the International Criminal Tribunal for the Former Yugoslavia during the war to prosecute individuals accused of violations of international humanitarian law. The Human Rights Chamber for Bosnia and Herzegovina was created at Dayton to provide a legal structure within which Bosnian citizens could seek legal redress for postwar governmental human rights violations. Ideally, these institutions would facilitate the development of a peaceful multiethnic state. This Article will examine these two institutions and evaluate their role in the implementation of peace. Part I of the Article will examine the unique formation of these institutions and the obligations they create for the international community, as well as for the Bosnian parties to the Framework Agreement. Part II explores how both the Bosnian parties and other states have failed to meet their legal obligations in connection with the work of the Tribunal and the Chamber. Part III, in turn, examines how this failure

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3. As Professor Reisman writes:

> Termination of conflict involves two distinct though inter-stimulating operations. The first operation is stopping a war. Belligerents put down their weapons. There is a "cease-fire," a *"cesser le feu,"* a *"waffenstillstand."* They stop hacking and firing at each other. They may separate physically. There is, however, an expectation, of varying probability, that the war may or will resume. This expectation is the distinguishing characteristic of a war that has only been stopped. The second distinct operation, making peace, involves permanently stopping the war by changing that critical expectation. Once that expectation has changed, perceptions of insiders and outsiders change as well. Hence, the breakdown of a cease fire and the resumption of a stopped war will excite considerably less legal dissonance than will the breakdown of a real peace treaty. Stopping a war is a useful, if not indispensable, step toward making peace, but it does not lead ineluctably to peace. Making peace is a separate operation, often applying many parts of the same armamentarium but in very different ways.

W. Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics*, 6 TUL. J. INT'L & COMP. L. 5, 16.

4. The new state is composed of two constituent entities, the Muslim-Croat Federation of Bosnia and Herzegovina and the Republika Srpska.

of will both within and outside Bosnia has impacted the implementation of the Framework Agreement and the creation of a lasting peace. Part IV briefly concludes with suggestions for bridging this disjunct between rhetoric and reality to create brighter prospects for real reconciliation in Bosnia.

I. THE INSTITUTIONAL STRUCTURE

Soon after the eruption of hostilities in Bosnia and Herzegovina in March of 1992, reports of human rights violations and violations of international humanitarian law across the region began to surface.[5] It quickly became clear that the parties to the conflict were unwilling or unable to prosecute those responsible for the atrocities themselves.[6] In response to these reports, the United Nations Security Council passed Resolution 780 in November 1992, requesting that the Secretary-General establish an impartial Commission of Experts to examine and analyze information on violations of international humanitarian law committed in the territory of the former Yugoslavia.[7] Reports chronicling concentration camps, mass killings, and ethnic cleansing were submitted from delegations of French and Italian jurists and the Conference on Security and Cooperation in Europe, as well as from the Commission of Experts.[8]

In the face of such overwhelming evidence, the Security Council decided to act. In May of 1993, after the creation of a draft statute for the Tribunal, the Security Council passed Resolution 827, establishing an international criminal tribunal under Chapter VII of the United Nations Charter.[9] The

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5. *See, e.g.*, Brian Hildreth, *Hunting the Hunters: The United Nations Unleashes its Latest Weapon in the Fight Against Fugitive War Crimes Suspects—Rule 61*, 6 TUL. J. INT. & COMP. L. 499, 509. *See also* Kadić v. Karadžić, 70 F.3d 232, 236–37 (2d Cir. 1995), Prosecutor v. Tadić, Opinion and Judgment, Case No. IT-94-1-T (7 May 1997), at 55–66; Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 (1994).

6. Jelena Pejić, *The Tribunal and the ICC: Do Precedents Matter?* 60 ALB. L. REV. 841, 842 (1997).

7. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992).

8. *See, e.g.*, M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AM.J. INT'L L. 784, 794–803 (1994).

9. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg., U.N. Doc. S/RES/827 (1993). The Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), 48th Sess., art. 29, U.N. Doc. S/25704 (1993) [hereinafter Tribunal Statute], states that the while the approach which would generally be followed in establishing an international tribunal would be the conclusion of a treaty whereby Parties would establish a tribunal and approve its statute, this would not be reconcilable with the urgency expressed by the Security Council in Resolution 808, passed in February 1993. Thus, in an unprecedented move, the Tribunal was established on the basis of Chapter VII of the U.N. Charter, as a measure to maintain or restore international peace and security. The Council had determined in Resolution 808 that the breaches of international humanitarian law occurring on the territory of the Former Yugoslavia were a breach of international peace and security. The Council had also mandated that all parties to the conflict were bound to comply with Resolution 771, which demanded that all parties to the conflict cease and desist from all breaches of international humanitarian law, and holding that should the parties fail to comply with the resolution, the Security Council would need to take further measures under the Charter. In the face of continued breaches of international humanitarian law, under Chapter VII the Security Council was authorized to create the Tribunal as an enforcement measure to restore international peace and security. *See generally* Tribunal Statute, ¶¶ 6–26.

impact of creating the Tribunal on the basis of a Chapter VII decision was to bind all member States to take whatever steps are required to implement the decision.[10]

The scope of this obligation on states extends to compliance with the Tribunal's Rules of Procedure and Evidence.[11] These rules provide that a state's failure to act within a reasonable time in response to a warrant of arrest or transfer order constitutes a failure to execute the warrant or order. In such instances, the Tribunal's President may notify the Security Council accordingly.[12] The Security Council, acting under Chapter VII authority, may then take any measures it deems necessary to restore international peace and security in response to the failure to comply with its decisions. Such measures may include the imposition of sanctions or even the use of force against a noncompliant state.[13]

In spite of the obligations thus imposed on all U.N. member states to comply with the Tribunal, in December 1995 the Tribunal remained a hollow promise of justice. Few suspects had been surrendered to the Tribunal and continued hostilities within Bosnia made investigation of violations of humanitarian law difficult. Violations of humanitarian law continued to occur, reaching a nadir in the U.N. safe haven of Srebrenica in July 1995.

The General Framework Agreement,[14] signed by the Serb, Croat, and Bosniac (Bosnian Muslim) Parties on December 14, 1995, provided a basis

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10. *See* the commentary to Article 29 by the U.N. Secretary-General, Tribunal Statute, *supra* note 9, ¶ 125. Article 48 of the U.N. Charter creates an obligation on all member states of the United Nations to carry out the decisions of the Security Council. *See* U.N. CHARTER, art. 48, ¶ 1. In particular, Article 29 of the Tribunal Statute provides that

> states shall comply without undue delay with any request for assistance or an order issued by a trial Chamber, including:
> (a) the identification and location of persons;
> (b) the taking of testimony and the production of evidence;
> (c) the service of documents;
> (d) the arrest or detention of persons;
> (e) the surrender or the transfer of the accused to the International Tribunal.

Tribunal Statute, *supra* note 9, art. 29.

11. International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, Feb. 11, 1994, *as amended by* IT/32/Rev. 13 (July 9 & 10, 1998) [hereinafter Procedure and Evidence Rule].

12. *See id.*

13. *See* Pejić, *supra* note 6, at 846.

14. *See Framework Agreement*, *supra* note 2. For a clear presentation of the full text of the Framework Agreement, visit the Open Societies Institute website at *Abstract of Dayton Accords, General Framework Agreement* (visited Feb. 15, 1999) <http://www.osi.hu/ fmp/html/dayton_accords_summary.html>.

In Articles I and II of the General Framework Agreement, the Parties agree to adhere to recognized principles of international law set forth in the U.N. Charter, the Helsinki Final Act and other documents of the Organization for Security and Cooperation in Europe (OSCE), and to comply with the provisions in Annexes 1-A and 1-B (Military Aspects of the Peace Settlement and Regional Stabilization). In Article III of the Agreement, the Parties agree to endorse the arrangements concerning the inter-entity boundary line, as detailed in Annex 2. In Article IV of the Agreement, the Parties agree to endorse the elections program for Bosnia and Herzegovina, as detailed in Annex 3. In Article V of the General Framework Agreement, the Parties agree to endorse the Constitution of Bosnia and Herzegovina, as detailed in Annex 4 (Constituion of Bosnia and Herzegovina). In Articles VI and VII of the Agreement, the Parties

for the cessation of hostilities and for greater cooperation with the Tribunal to prosecute those ultimately responsible for the carnage. The obligation of the Serb, Croat and Bosniac parties to cooperate with the Tribunal was made explicit in Article IX of the General Framework Agreement, which mandated that the parties cooperate fully with all entities involved in the investigation and prosecution of war crimes and other violations of international humanitarian law.[15] This obligation was reiterated in Article II of the Constitution of Bosnia and Herzegovina, which was annexed to the Framework Agreement.[16] The parties also agreed that no person under indictment by the Tribunal would stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.[17]

Aside from specifying obligations to cooperate with the Tribunal, the Agreement also invited the Security Council to adopt a resolution authorizing member states to establish a multinational military implementation force (IFOR) to assist in implementing the military aspects of the Framework Agreement.[18] Acting on this invitation, the Security Council passed Resolution 1031, authorizing the states participating in IFOR to take all necessary measures to effect the implementation of the Framework Agreement, and imposing an obligation on all states to comply with arrest warrants issued by the Tribunal.[19] In December 1995, sixty thousand IFOR troops were deployed in Bosnia pursuant to the Agreement.[20]

Securing the success of the Framework Agreement depended on more than just outside military and diplomatic intervention. Bosnia needed to restore its remnants of civil society, particularly in the realm of law and order, in order to implement and ultimately fulfill the goals of Dayton, which transcend a simple ceasefire and anticipate the long-term reconstruction of a democratic, multiethnic Bosnia. To achieve this goal, the Framework Agreement seeks to entrench human rights norms in the new state both by incorporating existing international human rights agreements and by establishing new human rights institutions.

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agree to the establishment of an arbitration tribunal, a Commission on Human Rights, a Commission on Refugees and Displaced Persons, a Commission to Preserve National Monuments, and Bosnia and Herzegovina Public Corporations, as set forth in Annexes 5–9. In Article VIII of the Agreement, the Parties agree to endorse the arrangements which have been made concerning the implementation of this peace settlement, including those pertaining to the civilian implementation, as set forth in Annex 10 , and the international police task force, as set forth in Annex 11.

15. *Framework Agreement supra* note 2, Article IX.

16. Article II of the Constitution decreed that all authorities in Bosnia and Herzegovina would provide unrestricted access to the Tribunal and, in particular, would comply with orders issued by the Tribunal. *Id.* Annex 4, Article II.8.

17. *Id.* Annex 4, Article IX.1.

18. *Id.* Annex 1A, Article I.1.

19. S.C. Res. 1031,U.N. SCOR, 50th Sess., 3607th mtg. ¶ 15, U.N. Doc. S/RES/1031 (1995). *See generally* Walter Gary Sharp, *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?* 7 DUKE J. COMP. & INT'L L. 411, 444–45 (1997).

20. *Framework Agreement, supra* note 2, Annex 1A, Article 1.

In the Agreement on Human Rights laid out in Annex 6 to the Framework Agreement, the parties agree to secure to all persons within their jurisdictions the highest level of internationally recognized human rights and fundamental freedoms, noting in particular the rights covered by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols ("the European Convention")[21] and other prominent human rights conventions.[22] The Human Rights Agreement creates a highly sophisticated system of human rights protection for the citizens of Bosnia, modeled after that of the Council of Europe and the European Court of Human Rights in Strasbourg, France. In fact, the European Convention and other selected human rights agreements listed in Annex 6 are incorporated into the Bosnian constitution and have priority over all other law.[23] With the exception of the Universal Declaration, all of the instruments listed in Annex 6 are prescriptive and therefore impose legal obligations. By incorporating them directly into the Constitution, they are enforceable domestically and require no separate incorporating legislation. In most countries, economic, social and cultural rights are only aspirational, whereas in Bosnia such rights are immediately enforceable under the Bosnian Constitution.[24]

To guarantee these rights, Chapter 2 of Annex 6 creates a Commission on Human Rights, composed of the office of the Human Rights Ombudsperson and the Human Rights Chamber. The Commission deals only with postwar human rights violations, thus its *ratione temporis* begins on December 14, 1995, the date when the Framework Agreement entered into force. The Ombudsperson, appointed by the Organization for Security and Cooperation

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21. European Convention for Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953 [hereinafter European Convention], is the law governing the European Court for Human Rights in Strasbourg, France. Rights protected under the European Convention include: the right to life, the right not to be subjected to torture or to inhuman or degrading punishment, the right not to be held in slavery or to perform forced labor, the rights to liberty and security of person, the right to a fair hearing, the right to private and family life, home, and correspondence, the right to marry and found a family, the right to own property, the right to education, and the right to liberty of movement and residence. The European Convention also provides for freedom of thought, conscience, and religion, freedom of expression, freedom of peaceful assembly and association, and the enjoyment of these rights and freedoms without discrimination.

22. The Appendix to Annex 6 of the Framework Agreement obligates the Parties to adhere to the following human rights agreements in addition to the European Convention: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions I-V and 1977 Geneva Protocols I and II, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the 1961 Convention on the Reduction of Statelessness, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights and its 1966 and 1989 Optional Protocols, the 1966 Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

23. *Framework Agreement*, *supra* note 2, Annex 4.

24. Ibrahimagić, *supra* note 1, at 192–93.

in Europe (OSCE) for a non-renewable term of five years, is responsible for investigating alleged or apparent violations of human rights covered by the various human rights agreements listed in Annex 6. In addition to investigating complaints brought by Bosnian individuals or the Parties, she also has the power to initiate *ex officio* investigations of particularly serious human rights violations by visiting places of detention, examining documents and hearing witnesses.[25] After completing her investigation, the Ombudsperson issues reports detailing her findings and legal conclusions, facilitates friendly settlements, and refers cases to the Human Rights Chamber.[26]

The Human Rights Chamber, like the European Court for Human Rights, gives individuals a private right of action against one or more of the government entities (the state as a whole, or the Federation and/or the Republika Srpska). The Chamber has the power to order provisional measures (for example, to prevent evictions or stay the execution of the death penalty), facilitate friendly settlements, conduct public hearings, and adopt and publish final and legally binding decisions on the merits. If the Chamber does indeed find a violation of human rights, it has the power to determine appropriate remedies, including monetary compensation.[27]

The Human Rights Chamber is a *sui generis* institution.[28] It is the highest human rights court in Bosnia, yet it hears cases brought directly to the Chamber by individuals, rather than appeals from lower Bosnian courts. Although it was established in an international treaty, it is essentially a Bosnian national institution whose expenses are to be borne by the government of Bosnia.[29] Yet the Chamber's composition is primarily international: six judges are Bosnian (two Bosniacs and two Croats from the Federation and two Serbs from the Republika Srpska), and eight are European "jurists of recognized competence" appointed by the Council of Europe.[30] This arrangement is unlike that of the Constitutional Court of Bosnia (created in Annex 4, Article VI of the Framework Agreement), which houses six national judges and only three international judges, and hears referrals and appeals from other courts in Bosnia.

The Chamber's procedure is similar to that of the European Court of Human Rights. When the Chamber receives a complaint from an applicant, it decides whether to accept it according to the admissibility criteria listed in Article VIII of Annex 6.[31] As applications are rarely found inadmissible

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25. Manfred Nowak, *The Human Rights Chamber for Bosnia and Herzegovina Adopts its First Judgments*, 18 HUM. RTS. L.J. 174, 176 (1997). Like the Human Rights Chamber, the Office of the Ombudsperson is based in Sarajevo, with a branch office in Banja Luka, the capital of the Republika Srpska.

26. *Framework Agreement*, *supra* note 2, Annex 6, arts. IV–V.

27. *Id.* arts. VII–XI.

28. See Nowak, *supra* note 25, at 176.

29. Of course, given Bosnia's on-going financial hardship, the Chamber is in reality funded by various outside donors. *See* The Human Rights Chamber for Bosnia and Herzegovina, 1996–1997 ANN. REP. Annex 7 for a list of donor countries.

30. *Framework Agreement*, *supra* note 2, Annex 6, Article VII.

31. In deciding upon the admissibility of a particular application, the Chamber considers whether ef-

prima facie, the Chamber then transmits the application to the respondent Party and invites the Party to submit written observations to the Chamber, which will transmit those observations to the applicant. The Chamber then decides whether to request further observations from the applicant, hold a public hearing, or both. The Chamber fixes strict time limits, usually a month, for the submission of observations.[32]

II. IMPLEMENTATION AND ENFORCEMENT

The international legal system has no real means of enforcement independent of state action, and the Security Council itself cannot act independently of the will of U.N. member states.[33] The Tribunal and the Chamber themselves have no powers of arrest, search or seizure[34] and no enforcement agency, thus they must depend on the will of states to enforce their orders. Throughout their tenures, the experience of the Tribunal and the Chamber has been characterized by a failure of political will, both in terms of the failure of states to cooperate with them and a failure of the international community to penalize these failures.

A. Failure of National Will

1. Refusal to Cooperate with Proceedings

The Chamber depends on the cooperation of the respondent Parties in order to successfully fulfill its judicial duties. Under Articles X and XI of Annex 6 of the Framework Agreement, "the Parties undertake to provide all relevant information to, and to cooperate fully with, the Chamber . . . [and] implement fully decisions of the Chamber."[35] Despite the unique and preeminent position afforded to the Chamber by the Framework Agreement, in practice the Chamber has faced serious obstacles due to the parties' refusal to cooperate fully with the Chamber's proceedings.

The state of Bosnia and Herzegovina (the federal body encompassing both the Federation and the Republika Srpska) is perhaps the most egregious of-

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fective remedies exist and, if so, whether the applicant has exhausted them not more than six months before filing an application before the Chamber; whether the application is substantially the same as a matter already examined by the Chamber, or has already been submitted to another procedure or international investigation or settlement; whether the application is manifestly ill-founded or an abuse of the right to petition; or whether the matter is currently pending before another international human rights body or another commission established by the Framework Agreement. See *Framework Agreement supra* note 2, Annex 6, Article VIII.

32. The Human Rights Chamber for Bosnia and Herzegovina, RULES OF PROCEDURE 53 (in ANN.REP.16).

33. *See* Sharp, *supra* note 19, at 416.

34. *See generally* Antonio Cassese, *Remarks Given at the Old State House, Hartford, Connecticut, October 18–19, 1996, The University of Connecticut School of Law, Hartford, Connecticut, in Symposium: Law, War, and Human Rights: the International Court and the Legacy of Nuremberg*, 12 CONN. J. INT'L. L. 201, 205–12 (1997).

35. *Framework Agreement, supra* note 2, Annex 6, Articles X–XI.

fender. As of March 1998, the State had appointed no agent to act as a liaison between the Ministry of Justice and the Chamber and had submitted observations in only one application out of several hundred filed against it.[36] The State had also never participated in any of the public hearings in which it has been a respondent Party.[37] In addition, the State failed to include the Chamber in its assessed budget for the first two years of its functioning; similar neglect by the major international organizations operating in Bosnia led to the resignation of the Chamber's first president in June 1997.[38]

The Federation's record on cooperation with the Chamber is also spotty at best. In the Chamber's first two years, the Federation submitted observations on only five out of forty-eight applications.[39] The Federation also frustrates the Chamber's proceedings by often limiting its pre-hearing written observations to one page, when in principle they should be comprehensive enough to enable the applicant to formulate his or her strongest case before the hearing. The Federation generally delivers its observations orally during the public hearing and submits them in written form afterwards. Because the Chamber is obligated to transmit these observations to the applicant and solicit his or her comments, the Federation's stalling tactic lengthens the procedure considerably and delays a final decision on the merits.[40] The second Registrar of the Chamber attempted to tighten the screws on the Federation by refusing to admit into evidence observations submitted by the respondent Parties after the deadlines set by the Chamber. This tactic has met with some success, as the Federation has been submitting observations with increasing speed in the past year.

The Human Rights Chamber transmits all applications to the Ministry of Justice of the appropriate respondent Party, but the presence of notorious wartime human rights violators in the government of the Republika Srpska creates yet another stumbling block to establishing viable cooperation between the Dayton human rights institutions and the government. For example, the Minister of Justice for the Republika Srpska (RS) under RS Prime Minister Milorad Dodik is Petko Čančar, a Bosnian Serb war crimes suspect (not yet publicly indicted by the Tribunal) who served as the former mayor of Foča and leader of the Foča "Crisis Committee" during the war. Foča was the scene of some of the most heinous war crimes committed during the war, and the Foča Crisis Committee was responsible for organizing and supervising the takeover of the municipality. The Crisis Committee used summary executions, torture, rape, "disappearances," and mass expulsions to achieve the goal of an ethnically pure Bosnian Serb Foča.[41] When the Chamber transmits applications, especially those dealing with missing

36. The Human Rights Chamber for Bosnia and Herzegovina, 1996–1997 ANN. REP. 15–17.
37. *See id.*
38. *See id.* at 17.
39. *See id.*
40. *See id.* at 16.
41. *See* A Closed Dark Place, note 42, *infra.*

persons detained in Foča during the war under Čančar's leadership, to the RS Ministry of Justice, it is impossible to imagine that the Ministry would be anything less than obstructionist in investigating such serious human rights abuses as missing persons and illegal detention. To make matters worse, Velibor Ostojić, another leader of the Foča Crisis Committee, has served as head of the Human Rights Commission of the Bosnian Parliament.[42]

The parties to the Framework Agreement have not only failed to meet their obligations to comply with orders issued by the Chamber, but also those issued by the Tribunal. For example, in January 1997, the Tribunal issued *subpoenae duces tecum* to the Government of Croatia in connection with their prosecution of Tihomir Blaskić, a Bosnian Croat wanted by the Tribunal for ethnic cleansing carried out in the Lašva Valley of central Bosnia and related atrocities.[43] The Government of Croatia protested that the Tribunal did not have the authority to issue such subpoenae. In a July 1997 decision, however, the Blaskić Trial Chamber held that while the Tribunal did not have the authority to issue subpoenae carrying a threat of a penalty against a state, it did have the authority to issue orders to states and individuals for the production of documents required for the preparation or conduct of a trial.[44] The Appeals Chamber affirmed that the legal authority to issue binding orders to states resulted from the fact that the Tribunal had been established by Security Council Resolution 827, issued under its Chapter VII authority.[45] As discussed above, failure to comply with the Tribunal renders member states subject to potential enforcement action by the Security Council. Despite this possibility, as well as the Appeals Chamber's finding that other collective enforcement action might be authorized, Croatia still has not provided the documents requested in response to the binding order issued on January 30, 1997.[46]

In contrast to Croatia's failure to comply with the Tribunal subpoena, Blaskić's defense counsel have not lacked for cooperation from the Croatian authorities in Bosnia. Indeed, in May 1998, Anto Nobilo, one of Blaskić's defense attorneys, told a *Los Angeles Times* reporter, "it's easy to find witnesses

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42. For a detailed account of these and other absurdities, and an engrossing account of the wartime situation in Foča, see Human Rights Watch, *Bosnia and Herzegovina: "A Closed, Dark Place": Past and Present Human Rights Abuses in Foča*, Vol. 10 HUMAN RIGHTS WATCH No. 6 (D), ¶ 7 (July 1998) <http://www.hrw.org/ reports98/foca/> [hereinafter A Closed Dark Place].

43. Monroe Leigh & Murray Shenk, *International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 32 INT'L LAW. 509, 511–12.

44. *Id. See* Prosecutor v. Blaskić, Case No. IT-95-14-T, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum (July 18, 1997).

45. *The Appeals Chamber Subpoena Decision*, TRIBUNAL UPDATE 50 (Oct. 27–31, 1997) (on file with authors).

46. *Hearing on Binding Order Issued to Croatia*, TRIBUNAL UPDATE 73 (Apr. 20–25, 1998) (on file with authors).

and documents. We got 20,000 documents through the veterans' association. I go and say I'm defending Blaskić and I can do almost anything."[47]

2. Failure to Enforce Judgments

The Human Rights Chamber has also confronted obstacles in securing cooperation from the Parties during the judicial proceedings. Then, once the case has been decided, the Chamber must rely on the Parties to enforce its decisions. Under Article XI of Annex 6, the Chamber must specify in its decisions the steps to be taken by the respondent Party to remedy any breach of the European Convention or the other Annex 6 instruments. Such remedies include orders to cease and desist, monetary relief for pecuniary and non-pecuniary injuries and provisional measures.[48] Of course, the Chamber's remedies are only as good as the Parties' efforts to enforce them.

In a series of cases brought by individuals sentenced to death in violation of the European Convention,[49] the Chamber ordered the respondent Parties to lift the death sentence against the applicants without delay.[50] In these cases, the Federation did indeed stay the applicants' executions and eventually repealed the death penalty.

The great majority of cases before the Chamber have been brought by individuals either who cannot access property they left during the war or whose property purchase contracts were annulled. Among these cases, which currently number several hundred, the facts are almost identical. In the winter of 1991-1992 (before Bosnian independence from Yugoslavia), the Yugoslav National Army (JNA) sold the socially owned apartments it controlled to their inhabitants, typically at a very low price made possible by contributions the applicants had been making to the JNA Housing Fund throughout their careers with the JNA. The Federation of Bosnia and Herzegovina passed legislation annulling these contracts shortly after the Framework

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47. Tracy Wilkinson, *One Reason to Take on War Crimes,* L.A. TIMES, May 15, 1998, at A1, *available in* 1998 WL 2427504. Wilkinson also reported that Blaskić's defense attorneys were not being paid by the Tribunal, as is customary, but by a special fund set up by supporters of Blaskić and other defendants. Residents of the Croatian areas of Bosnia paid a tax levied on a percentage of their income into the fund. *Id.*

48. *Framework Agreement, supra* note 2, Annex 6, Article XI. Recent remedies awarded by the Chamber shed some light into the uniquely personal nature of the cases before the Chamber. In *Čegar v. Federation of Bosnia and Herzegovina*, the Chamber ordered the Federation to pay a Republika Srpska farmer DEM 3,500 to compensate him for agricultural tools stolen when he was detained by Bosnian Croat police officers with the goal of exchanging him for prisoners held by the Republika Srpska, and an additional DEM 5,000 to compensate him for non-pecuniary damages suffered while illegally detained for six weeks. Čegar v. Federation of Bosnia and Herzegovina, CH/96/21, Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS JANUARY–JUNE 1998, 10–11 (1998).

49. European Convention, *supra* note 21, art. 2(1) and Protocol 6, art. 1.

50. *See* Damjanović v. Federation of Bosnia and Herzegovina, CH/96/30 Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS JANUARY–JUNE 1998, 28 (1998); Rizvanović v. Federation of Bosnia and Herzegovina, CH/97/59 Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS JANUARY–JUNE 1998, 155 (1998); Herak v. Federation of Bosnia and Herzegovina, CH/97/69 Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS JANUARY–JUNE 1998, 169 (1998).

Agreement entered into force in December 1995 and later adjourned any proceedings the applicants may have initiated in domestic courts.[51] Finding this legislation to be in violation of Article 1 of Protocol No. 1 of the European Convention,[52] the Chamber has ordered the Federation:

> to take all necessary steps by way of legislative or administrative action to render ineffective the annulment of the applicants' contracts . . . and to lift the compulsory adjournment of court proceedings instituted by the applicants and to take all necessary steps to secure the applicants' right of access to the court.[53]

Thus far the Federation and state have refused to repeal the legislation.[54]

Despite the factual and legal similarity of these JNA cases, the Chamber has not amended its Rules of Procedure to provide for a class action-type procedure. Instead, it has continued to proceed with this mountain of cases on a time-consuming individual basis (JNA cases usually take at least six months to process), tying up the lawyers' and judges' time. This time would perhaps be better spent resolving some of the more pressing cases pending before the court, such as those dealing with illegal detention, missing persons, discrimination and unfair judicial proceedings. This combination of legislative and procedural intransigence has therefore frustrated many of the Chamber's goals.

3. Failure to Transfer Indictees

Similar national intransigence has plagued the Tribunal. Three years after Dayton, only 28 of the 58 parties publicly indicted by the Tribunal are in custody.[55] Of the three parties to the Framework Agreement, only Bosnia has fully complied with its obligation to transfer indictees to the Tribunal.[56]

The record of Croatia and Yugoslavia has been less satisfactory. The Croatian press has reported that Ivica Rajić, a Bosnian Croat wanted for the killings of Muslims at Stupni Do in Central Bosnia in 1995, had been living in a government-owned hotel in the Croatian city of Split, though it is not known whether he remains in Croatia.[57] More recently, the top aide to Croa-

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51. Decree with force of law, SLUŽBENI LIST ("Official Gazette") RBH 50/95 (Dec. 22, 1995), *adopted as law*, SLUŽBENI LIST RBH 2/96 (Jan. 18, 1996).

52. Article 1 of Protocol No. 1 of the European Convention, *supra* note 21, guarantees the right to the peaceful enjoyment of one's possession.

53. Medan and Others v. Federation of Bosnia and Herzegovina, CH/96/3, Human Rights Chamber for Bosnia and Herzegovina, DECISIONS ON ADMISSIBILITY AND MERITS 1996–1997, 65 (1997).

54. *See id.* at 64.

55. *War Crimes Tribunal's Detainee List Now Stands at 27*, Agence France-Presse, Sept. 27, 1998, *available in* 1998 WL 16607462. General Radislav Krstić was arrested by American SFOR troops on December 2, 1998, bringing the number of detainees to 28. Steven Erlanger, *Bosnian Serb General is Arrested by Allied Force In Genocide Case*, NEW YORK TIMES, December 3, 1998, at A1.

56. *See* Pejić, *supra* note 6, at 849.

57. *Bosnian War Crimes Suspect Living In Croatia: Paper*, Agence France-Presse, Oct. 23, 1996, *available in* 1996 WL 12163658. *See generally War Criminal Watch*, (visited Nov. 14, 1998) <http://www.

tian president Tudjman announced that Croatia may stop all cooperation with the Tribunal if the Tribunal indicts Croatian commanders for atrocities committed during the Croatian offensives in 1995.[58] In some cases, the Parties to the Framework Agreement have even promoted war crimes suspects within government positions. Veselin Šljivančanin, a Serb wanted in connection with atrocities committed during the Serbian siege of Vukovar in 1991, was promoted to head of the Center of Advanced Military Schools in Belgrade in 1996.[59]

B. Failure of International Will

Like other peace settlements negotiated by third parties, the Framework Agreement faces a distinctive barrier to its own success. That is, parties to such settlements often treat the period provided for implementation as an opportunity to obstruct, revise and sabotage the Agreement to which they have committed themselves. During this period, the judgments and actions of third parties in the international community are therefore decisive, either "enabling spoilers or curbing them, either giving robust support to those genuinely committed to peace or weakening them with inadequate assistance."[60]

This built-in reliance on third party action has significant implications for the successful operation of the Tribunal and the Human Rights Chamber, both of which have no specific powers for enforcing their own orders. Both the Tribunal and the Human Rights Chamber came about as the result of concerted international efforts to create a legal framework for peace in the region, yet the members of the international community have been less than resolute in carrying out the mandate they themselves created for these institutions.

1. Failure to Enforce Compliance

When the Chamber orders the respondent Parties to remedy a violation of human rights, the Chamber also sets a time limit within which the Parties must report the steps taken to comply with the Chamber's order.[61] If the respondent Parties fail to respond within the specified time limit, the Chamber refers the case to the Office of the High Representative (OHR) under Annex 10 of the Framework Agreement.[62]

The international High Representative, a position currently occupied by the Spanish diplomat Carlos Westendorp, is charged with coordinating and

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wcw.org.>.

58. *Croatia to Review Cooperation with Hague?*, RFE/RL NEWSLINE, ¶ 57 (Dec. 29, 1998) <http://www.rferl.org/newsline/1998>.

59. Svijet [Sarajevo], Apr. 25, 1996. *See generally War Criminal Watch, supra* note 57.

60. Elizabeth M. Cousens, *Making Peace in Bosnia Work*, 30 CORNELL INT'L L.J. 789, 804 (1997).

61. Human Rights Chamber for Bosnia and Herzegovina, 1996–1997 ANN. REP. 11–12 (1998).

62. *See id.*

monitoring the panoply of civilian efforts currently operating in Bosnia under the Framework Agreement. Unfortunately, the High Representative commands minimal operational authority to exercise his responsibility for coordinating international activities, especially those extending beyond information-sharing to developing common strategies and implementing common plans. The High Representative does, however, command authority as the interpreter of last resort of the Dayton Agreement's civilian provisions and has the power to establish new mechanisms (such as commissions or task forces) to help him execute his mandate.[63]

Although the Chamber and the OHR have enjoyed excellent cooperation in information-sharing, staff development and public education initiatives, the OHR has experienced many of the same difficulties as the Chamber in compelling the respondent Parties to implement the Chamber's decisions. This has been especially true when attaining compliance involves changing legislation, as in the "JNA cases," or a highly political and contentious issue.

The major implementation problems confronting the Chamber are shared by all the civilian Dayton institutions operating within Bosnia. Despite the seeming comprehensiveness of the settlement, the Dayton Agreement is indeed a "*framework* agreement," above all in the civilian-judicial context. For example, on the strictly military side, the Agreement provides a highly detailed calendar to which the Parties must adhere. But on the political and civilian side, the Agreement imposes an explicit timetable on only two obligations: reaching an arbitration decision on the status of Brčko, and holding national elections.[64] Yet effective coordination of all of the provisions in the Framework Agreement is indispensable to the success of Dayton due to their basic interdependence. The success of elections, for example, depends on free media and an impression of basic civilian security.

The Tribunal has been similarly plagued by a lack of international support in its efforts to prosecute those who violate international humanitarian law. The international community has been disinclined to use the enforcement measures available to it under Chapter VII of the U.N. Charter. For example, the Security Council has not taken affirmative action in response to the refusal of parties to the conflict to surrender indictees on their territory to the Tribunal.[65] According to Rule 59 of the Tribunal's Procedure and Evidence Rule, the President of the Tribunal may inform the Security Council when an arrest warrant has been transmitted to a state.[66] Exercising this right in May 1996, Tribunal President Antonio Cassese informed the Security Council of the Federal Republic of Yugoslavia's failure to cooperate with the Tribunal when it failed to arrest two indicted war criminals, former Bos-

63. Cousens, *supra* note 60, at 802.

64. *See* Cousens, *supra* note 60, at 803.

65. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 410 (1998).

66. *See* Procedure and Evidence Rule, *supra* note 11, Rule 59.

nian Serb General Ratko Mladić and JNA officer Veselin Šljivančanin, at a funeral in Belgrade.[67] In response, the Security Council merely issued Presidential Statements deploring the failure of the recalcitrant state to comply with the orders of the Tribunal.[68] Though a similar Presidential Statement issued subsequently in August 1996 appeared to indicate an intent to consider the application of economic sanctions in response to the continued noncompliance of states with the orders of the Tribunal,[69] such sanctions have thus far not been implemented.

Even more egregious instances of noncompliance with the Tribunal have been ignored by the international community. The Bosnian Serb President Biljana Plavšić informed U.N. Secretary-General Kofi Annan in January 1997 that there would be no cooperation with the Tribunal within the Republika Srpska since matters being handled by the Tribunal did not fall within the jurisdiction of the Security Council. Despite the fact that such a statement flew in the face of the obligations agreed to by the Republika Srpska under the Framework Agreement[70] and the Bosnian Constitution, a spokesman for the Office of the High Representative indicated that Plavšić's lack of cooperation made no difference to matters such as the flow of reconstruction aid.[71]

2. Failure of Police Reforms

Human rights protection and the return of refugees and internally displaced persons also depend largely on police reform, which will remain little more than a pipe dream if the International Police Task Force (IPTF) fails to fulfill its mandate. The IPTF was established by Annex 11 of the Framework Agreement for the purpose of assisting, advising, monitoring and training local law enforcement personnel and advising governmental authorities, in order to facilitate the creation of a democratic police force in Bosnia and Hercegovina.[72] The IPTF receives its mandate from U.N. Security Council

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67. *See* Pejić, *supra* note 6, at 850.

68. Statement by the President of the Security Council, U.N. SCOR, 3663d mtg., U.N. Doc. S/PRST/1996/23 (1996). *See* Brown, *supra* note 65, at 410.

69. Statement by the President of the Security Council, U.N. SCOR, 3687th mtg., U.N. Doc. S/PRST/1996/34 (1996). *See generally* Brown, *supra* note 65, at 410. In addition, five previous refusals to respond to binding orders to produce documents were taken to the Security Council, and the only result were Presidential Statements deploring the conduct of noncompliant states. *See The Appeals Chamber Subpoena Decision*, *supra* note 45.

70. A conditionality clause bars any party not cooperating with the Tribunal from receiving economic aid. Susan L. Woodward, *Bosnia After Dayton: Year Two*, CURRENT HISTORY, Mar. 1997, at 100.

71. Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737, 807 (1998).

72. Article III of Annex 11 of the Framework Agreement charges the IPTF with the following tasks: monitoring, observing, and inspecting law enforcement activities and facilities, including associated judicial organizations, structures, and proceedings; advising law enforcement personnel and forces; training law enforcement personnel; facilitating, within the IPTF's mission of assistance, the Parties' law enforcement activities; assessing threats to public order and advising on the capability of law enforcement agencies to deal with such threats; advising governmental

Resolution 1088, which authorizes the IPTF to conduct investigations into alleged police abuses and violations of human rights.[73] As a recent Human Rights Watch report details, however, many IPTF field monitors are not even aware that they possess the authority to conduct human rights investigations independent of the local police.[74] The IPTF leadership insists that the local police investigate such abuses (in essence, investigate themselves), limiting the IPTF's role to monitoring these investigations and intervening only in selected cases.[75] Few IPTF officers have any professional background in human rights investigations, and they often receive insufficient training from their home countries and the United Nations in fulfilling their expanded responsibilities under the human rights mandate.[76]

3. Failure to Arrest Indictees

The IPTF's minimalist approach is shared by SFOR[77] in its self-styled mandate regarding the arrest of individuals indicted by the Tribunal. The War Criminal Watch website, created by the Coalition for International Justice, maintains a page entitled "Whereabouts," where sightings of ICTY indictees are tracked and reported.[78] According to the site, a journalist spotted Gojko Janković, a Bosnian Serb indicted for crimes committed in Foča, at a Foča café where French IFOR soldiers were leaning against a nearby wall smoking cigarettes and paying no attention to Janković.[79] In October 1997, CBS News secretly videotaped another indictee from Foča, Janko Jan-

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authorities in Bosnia and Hercegovina on the organization of effective civilian law enforcement agencies; and assisting by accompanying the Parties' law enforcement personnel as they carry out their responsibilities, as the IPTF deems appropriate. The accord also authorizes the IPTF to have access to any site, person, activity, proceeding, record or event in Bosnia and Hercegovina deemed by the IPTF to be necessary in carrying out its responsibilities.

Framework Agreement, Annex 11, Article III–IV.

73. S.C. Res. 1088, U.N.SCOR, 3723d mtg., U.N. Doc. S/RES/1088 (1996).

74. Human Rights Watch, *Bosnia and Herzegovina: Beyond Restraint: Politics and the Policing Agenda of the United Nations International Police Task Force*, 10 HUMAN RIGHTS WATCH No.5 (D), ¶ 7(June 1998) <http://www.hrw.org/reports98/bosnia/# 1 1>.

75. *See id.*

76. *See id.*

77. In November and December of 1996, NATO defense ministers decided that a reduced military presence would be necessary in Bosnia to provide a stable environment for the consolidation of peace. The stabilization force (SFOR) was activated on December 20, 1996, with 31,000 troops. Although NATO had initially planned an 18 month mission for SFOR troops, they are still on the ground in Bosnia. *See generally* NATO Official Homepage, *The NATO-Led Stabilization Force (SFOR) in Bosnia and Hercegovina: NATO Basic Fact Sheet No. 11*, (April 1997) <http://www.nato.int/docu/facts/sfor.htm> [hereinafter *NATO Fact Sheet*].

78. Human Rights Watch has also created a map of Bosnia, indicating the proximity of SFOR base locations and indicted war crimes suspects. Human Rights Watch, *Bosnia and Herzegovina: Location of SFOR Bases and Indicted War Crimes Suspects, Index of/campaigns/bosnia* (visited Feb. 2, 1999) <http://www.hrw.org/campaigns/bosnia/map/>.

79. *Hunting Down the Fugitives: Indicted by Hague Court but Living Freely Under NATO's Nose*, THE OBSERVER, Aug. 17, 1997, at 14, *available in* 1997 WL 12997274. *See generally War Criminal Watch*, *supra* note 57.

jić, sitting on a café patio in Foča as French officers sat at an adjacent table.[80] In March of 1998, three indictees walked past and greeted Dragan Kunarac, another Tribunal indictee, while several SFOR soldiers sat nearby drinking coffee.[81] Former President of the Republika Srpska Krajina Milan Martić reportedly lives in Banja Luka within walking distance of the IPTF building and within five miles of 5000 British soldiers.[82] Radovan Stanković, a Bosnian Serb also wanted for crimes in Foča, walked into an IPTF police station near Sarajevo in 1996, but IPTF did not recognize his name. He was later stopped by local police but fled and afterwards filed a complaint with the IPTF alleging that the Bosnian police fired shots at his car.[83] As of this writing, Janković, Janjić, Martić, and Stanković remain at large.

Since these incidents, the approach of NATO has changed somewhat. SFOR troops have been involved in operations to arrest Tribunal indictees.[84] Nonetheless, as recently as January 1998, NATO Secretary-General Javier Solana told the French press that it is not the task of SFOR to seek out Bosnian war criminals and arrest them. According to Solana, "we arrest them when we find them and we will continue to do so. We must do things so as to avoid big risks. We must proceed intelligently."[85]

Within the past year more disturbing reports have surfaced about SFOR, indicating that in addition to passive noncooperation with the work of the Tribunal in the apprehension of suspects, some SFOR soldiers have actually interfered in the arrest of indictees. According to a report in the *Washington Post*, American and other SFOR troops abruptly dropped plans to capture Bosnian Serb ex-president Radovan Karadžić in late summer 1997, after it was discovered that a senior French military officer had held clandestine meetings with Karadžić over a lengthy period in 1997.[86] U.S. officials reported they were convinced that details of the SFOR arrest plans might have

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80. Philip Smucker, *War Crimes Suspects Remain Unfinished Business in Bosnia,* WASH. TIMES, Mar. 1, 1998, at A7, *available in* 1998 WL 3441145.

81. *Id.*

82. Tom Walker, *Serb Suspect Defies War Crimes Court with Death Threats,* TIMES OF LONDON, May 10, 1997, at 19, *available in* 1997 WL 9203183. *See generally War Criminal Watch, supra* note 57.

83. Jovan Kovačić, *U.S. Envoy Warns Serb President to Aid Tribunal,* BOSTON GLOBE, Nov. 8, 1996, at A2, *available in* 1996 WL 6885098. *See generally War Criminal Watch, supra* note 57. Things in Foča may be changing. French SFOR forces shot and killed indictee Dragan Gagović in an attempted arrest on January 9, 1999. *NATO Troops Kill Bosnian Suspected of War Crimes,* N.Y. TIMES, Jan. 10, 1999, at A4.

84. SFOR troops have now arrested nine indictees. *See* Erlanger, *supra* note 55. *See also* discussion at Section II.B.3, *infra.*

85. *Solana Pledges Tough Stand on War Criminals,* RFE/RL NEWSLINE, ¶ 30 (Jan. 22, 1998) <http://rferl.org/newsline/1998/01/220198.html>. This reluctance has been a source of great frustration to other members of the international community active in Bosnia. Carlos Westendorp, the High Representative for Bosnia, told the French press in August that NATO did not want to be "hustled" into arresting Radovan Karadžić. "I don't know where he is, but NATO officials know where he is," Westendorp said. "They don't want to say where he is because they have an obligation to arrest him. They don't want to arrest him at the moment. They don't want to be hustled into this operation." *NATO Won't Be Hustled into Arresting Karadžić: Westendorp,* Agence France-Presse, Aug. 20, 1998, *available in* 1998 WL 16582311.

86. R. Jeffrey Smith, *Secret Meetings Foiled Karadžić Capture Plan; U.S. Says French Jeopardized Mission,* WASH. POST, Apr. 23, 1998, at A1, *available in* 1998 WL 11576363.

been leaked directly to Karadžić by a French Army major named Herve Gourmillon, who had served as the French military's principal liaison officer to the Serbs.[87] French SFOR troops are responsible for patrolling the town of Pale, where Karadžić has a home. Though Gourmillon was transferred back to Paris, he was never disciplined despite French promises to do so.[88]

Such interference and noncooperation with arrests of Tribunal indictees seem to fly in the face of SFOR's mandate under Chapter VII of the U.N. Charter. The involvement of these multinational forces in the work of the Tribunal is ultimately governed by Article 48 of the U.N. Charter, which requires member states to carry out the decisions of the Security Council "through their action in the appropriate international agencies of which they are members."[89]

While the mandate of these forces is to "take such actions as required, including the use of necessary force, to ensure compliance with this Annex,"[90] which includes cooperation with the Tribunal, these forces have claimed that their mandate does not include the arrest of Tribunal indictees.[91] Colonel John Burton, the Legal Counsel to the Chairman of the United States Joint Chiefs of Staff, stated in 1995 that although the U.S. viewed the arrest warrants as legally binding as a matter of *state* obligation, this obligation did not flow to the soldier, the platoon leader, or the commander in the field. According to Burton, it was within the discretion of the state as to how it would implement its obligation regarding the warrants.[92] In a memorandum of understanding between the Tribunal and NATO, however, IFOR had subsequently agreed to arrest indicted war criminals "when coming into contact with them in carrying out its duties as defined by the Military Annex of the Peace Agreement."[93]

Despite the lack of a pronounced mandate, over the past year SFOR troops have become far more proactive in their operations to capture Tribunal indictees. In July 1997, Milan Kovačević was arrested and Simo Drljača was killed by elite British troops serving in SFOR.[94] Both were the subjects of sealed indictments related to alleged acts of genocide against non-Serbs in

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87. One senior U.S. official was quoted as saying: "[w]e know, definitely, that he passed information about NATO operations related to efforts to eventually get Karadžić ." *Id.*

88. *Id.*

89. U.N. CHARTER, art. 48, ¶ 2. NATO would presumably be included in the ranks of international agencies within the scope of Article 48. *See* Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59-Fall LAW & CONTEMP. PROBS. 41, 60 (1996).

90. *See Framework Agreement*, *supra* note 2, Annex 1A, Article I.2(b).

91. Elizabeth Neuffer, *Bosnia Arrest Bid is Backed: 'Mockery' Made of West, Aide Says*, BOSTON GLOBE, Nov. 13, 1996, at A2.

92. Sharp, *supra* note 19, at 445–46.

93. Justice Richard Goldstone, *The Responsibility to Act*, TRIBUNAL 4 (June/July 1996) (on file with authors). SFOR has reiterated this mandate. Their fact sheet states that "the North Atlantic Council has authorized SFOR to detain and transfer to the ICTY persons indicted for war crimes, when SFOR personnel come into contact with them while carrying out their duties." *NATO Fact Sheet*, *supra* note 77.

94. Michael Evans and Tom Walker, *Bosnia Snatch Ends in Storm of SAS Fire*, TIMES OF LONDON, July 11, 1997, at 11, *available in* 1997 WL 9214319.

the Prijedor municipality during 1992. Though the Bosnian Serbs reacted with small-scale acts of violence against international observers and troops, these threats failed to intimidate the international community leaders on the ground in Bosnia.

In fact, the July 1997 actions set a precedent for further action by SFOR troops. In December 1997, Vlatko Kupreskić and Anto Furundžija were apprehended by Dutch SFOR forces in Vitez. Both were wanted by the Tribunal in connection with attacks on Bosnian Muslim civilians in the Lašva Valley.[95] In January 1998, Goran Jelisić was apprehended by SFOR in Bijeljina by a multinational force that included U.S. troops. Jelisić was indicted for war crimes including genocide against Muslim and Croat detainees in Brčko in the summer of 1992.[96] Mladen Radić and Miroslav Kvočka, both wanted for atrocities committed in the Omarska camp, were apprehended by British forces near Prijedor in April of 1998. French and German troops arrested Milorad Krnojelac in June in connection with his tenure as a prison camp commander in Foča. On December 2, 1988, American and other SFOR troops arrested General Radislav Krstić in Bijeljina.[97] Krstić was second in command of the troops allegedly responsible for the massacre at Srebrenica. Krstić's superiors, Ratko Mladić and Radovan Karadžić, remain at large.[98]

In addition to increasing SFOR action, the international community has become more proactive in making use of the threat of sanctions to promote capture of Tribunal indictees. In October 1997, ten Bosnian Croat indictees were transferred to the Hague, including Dario Kordić, the wartime vice-president of the Croatian para-state of Herceg-Bosna.[99] Prompting the transfer was the United States threat to block a $30 million IMF loan to Croatia, which had been frozen since March, if the suspects were not delivered to the Hague.[100]

III. THE ROAD AHEAD

As recently as June 1998, High Representative Westendorp stated that Radovan Karadžić was so isolated within Bosnia that his arrest was unlikely to have an impact on the elections to be held in Bosnia in September.

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95. Human Rights Watch, *Bold Arrest Action in Bosnia Contrasts with Clinton Statement on Karadzic*, ¶ 1 (Dec. 18, 1997) <http://www.hrw.org/hrw/press97/dec/vitez.htm>.

96. *Serb Adolf in the Hands of the Tribunal*, TRIBUNAL UPDATE 60, (Jan. 19–25, 1998) (on file with authors).

97. *Bosnian Serb Arrested by Hague*, ODRAZ B-92 (December 2, 1998) <http://brazil.tcimet.net/arch/odrazb/N_981005/1202982e.htm>

98. The Bosnia Action Coalition, *News Bulletin: Serb General Arrested for Srebrenica Massacres*, THIS WEEK IN BOSNIA-HERZEGOVINA (on file with authors).

99. *Stop Press*, TRIBUNAL UPDATE 46 (Sept. 29–Oct. 3, 1997) (on file with authors).

100. *Bosnian Croat War Crimes Suspects Leave for Hague*, RFE/RL NEWSLINE (Oct. 6, 1997) <http://www.rferl.org/newsline/1998/10/061098.html>. *See also* Sabine Gillot, *U.N. Court Rejects Bosnian Appeal, Prepares to Try Ten Others*, Agence France-Presse, Oct. 10, 1997, *available in* 1997 WL 13409231.

Westendorp was quoted by the French press as stating that "Karadžić's arrest, I think would have no effect, no real effect, on the elections . . . . On the contrary, once he's in The Hague, what's the need for voting for his old friends?"[101] Nonetheless, the fact that Radovan Karadžić, and other Tribunal indictees, remain at large may have had a great effect on the September 1998 elections, just as it continues to affect implementation of the Framework Agreement. The continued presence of indictees in positions of power and influence symbolizes the failure on the part of the Parties to the Framework Agreement and the international community to fulfill their domestic and international obligations. This lack of resolve has placed a noticeable barrier in the path to reconciliation and peace in Bosnia.

In the weeks leading up to the elections in Bosnia, diplomatic sources were quoted as stating that there was no need to risk lives to capture Karadžić because he was no longer an influential personality.[102] At the time, however, the election campaigns in Bosnia appeared to belie this assertion. For example, Karadžić's picture was displayed at Serbian Democratic Party (SDS) rallies, despite a ban on images of Tribunal suspects.[103] Two weeks after such displays, Nikola Poplašen, a Karadžić supporter and a member of the Radical Party, the most nationalistic Serbian party in Bosnia, was announced the victor in the race for the Republika Srpska presidency.

Poplašen's connections to Karadžić and to nationalism are strong. He began his political career at the beginning of the Bosnian war, during which time he quickly entered the inner circle of Karadžić advisors and commanded a student brigade that fought in western Bosnia.[104] Since he was elected, Poplašen has shown no sign of abandoning these roots. In fact, *U.S. News and World Report* quotes Poplašen averring that Karadžić is a hero who defended the honor of the Serbs,[105] while the Scottish press cites Poplašen's demand for a wall separating Serbs from Croats and Muslims.[106]

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101. *Karadžić Too Isolated to Affect Bosnia Polls: Westendorp*, Agence France-Presse, June 24, 1998, *available in* 1998 WL 2308373.

102. Robert MacPherson, *Karadžić Not Worth NATO Soldier's Life*, Agence France-Presse, Sept. 11, 1998, *available in* 1998 WL 16596480.

103. *Id.*

104. Katarina Kratovac, *Nikola Poplašen: Bosnian Serb Ultranationalist Becomes President*, AP Political Service, Sept. 26, 1998, *available in* 1998 WL 7449687.

105. Philip Smucker, *Bosnian Serbs Dig In: a Hardliner Wins Election as Voters Say NATO Can't Force Us to Live Together*, U.S. News and World Report, Oct. 5, 1998, at 45, *available in* 1998 WL 8127362.

106. Chris Stephen, *West Given Lesson in Serb Nationalist Politics*, The Scotsman, Sept. 26, 1998, at 10, *available in* 1998 WL 19800286. More recently, Poplašen told the Belgrade press that the citizens of the RS were "completely certain that they would eventualy be reintegrated into Serbia and Yugoslavia." *Poplašen: Bosnian Serbs Believe They Will Rejoin Yugoslavia*, ODRAZ B-92 (December 28, 1998) <http://brazil.tcimet.net/arch/odrazb/n_981204/1228981e.htm>. The international community's patience with Poplašen was short-lived. On March 5, 1999, High Representative Carlos Westendorp removed Poplašen from power. *International Officials Dismiss Bosnian Serb*, N.Y. TIMES, Mar. 6, 1999, at A5. Westendorp cites Poplašen's "disturbing and unacceptable pattern" of obstructing the Dayton peace agreements. *News Bulletin: Srpska President Sacked; Brčko to be Jointly Administered*, Bosnia Action Coalition Bulletin, Mar. 5, 1999 (on file with authors).

Poplašen's election did little to help already faltering state institutions in the Republika Srpska. Following his election, Poplašen repeatedly blocked efforts to form a government in the Srpska legislature, and attempted to remove moderate prime minister Milorad Dodik from office.[107] The election of nationalist hardline elements in the Croat-Muslim federation, has similarly impeded government institutions that are already near paralysis.[108] For example, on October 20, the opening session of the Republika Srpska parliament broke up after deputies of the various ethnic groups failed to agree on a speaker and Muslim and Croat deputies protested the use of Serbian Orthodox elements in the swearing-in ceremony.[109]

The resurgence of radical nationalism in an environment where individuals suspected of atrocities and ethnic cleansing have been allowed to operate with immunity is no accident. War crimes of the magnitude seen in Bosnia are not isolated attacks perpetrated on individual victims. The systematized internment, rape, torture, and killing that became known as ethnic cleansing forged collective ethnic identities in hatred and violence. If those most responsible for atrocities are not penalized for their actions and removed from power, the culture of ethnic enmity will never be turned around and reconciliation will never be realized.[110]

The effects of both this culture of mistrust and the continued influence of Tribunal suspects are seen most graphically in regions where indictees continue to operate. In July 1998, Human Rights Watch reported that the war crimes suspects in Foča who continue to hold positions of power have been responsible for the perpetual noncompliance with the provisions of the Framework Agreement, as well as for widespread human rights abuses in the postwar period.[111] There have been no refugee returns, no vetting of the police, and no freedom of movement or expression in Foča.[112] Officials in Foča who have tried to cooperate with the international community have been replaced with more nationalistic and isolationist elements.[113] Only two of the nine individuals indicted for the atrocities committed at Foča have been

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107. Bosnia Action Coalition, *supra* note 107.

108. Stephen, *supra* note 106.

109. *Discord in Bosnian Serb Parliament,* RFE/RL NEWSLINE, ¶ 46 (Oct. 30, 1998) <http://www.rferl.org/ newsline/1998/10/301098.html>.

110. Payam Akhavan argues that it has become widely accepted that:

> the primary threat to security is the continued corrosive political influence of indicted leaders like Karadžić. This influence manifests itself in the continued use of ethnic hysteria as a crude but effective instrument of political control, undermining attempts at refugee repatriation, inter-ethnic reconciliation, and consolidation of confederal government institutions in the fractured Bosnian state.

Akhavan, *supra* note 71, at 73.

111. *See A Closed Dark Place, supra* note 42.

112. *Id.* Despite this intransigence, various members of the international community have continued to provide Foča with investment. Human Rights Watch reported that the Italian government, the European Union, the European Bank for Reconstruction and Development, and the United Nations High Commissioner on Refugees have all invested in Foča within the past year. *Id.*

113. *Id.*

delivered to the Tribunal. Those who remain are free to continue on with their everyday lives, many in positions of power.[114]

The influence still exerted by Tribunal indictees within their ethnic group is mirrored by a barely contained malice felt by members of other Bosnian ethnic constituencies. When this extant animosity transforms itself into vigilantism, it jeopardizes the path to lasting peace and rule of law in Bosnia. The recent case of the SFOR capture of Stevan Todorović is a graphic example. Todorović was indicted by the Tribunal for war crimes committed against Muslims and Croats in the town of Bosanski Šamac while he was police chief there in 1992.[115] He was apprehended by SFOR forces on September 27 but apparently had been delivered to SFOR in a badly beaten state.[116] The head of the SDS in Bosanski Šamac reported that Todorović had been abducted from his home in Serbia by four masked Bosnians. He was transported by boat across the river to Bosnia and delivered to an SFOR base.[117] SFOR quickly denied sending troops to capture Todorović; indeed, NATO has no mandate outside Bosnia.[118]

Episodes such as this indicate that the road to peace and reconciliation remains a long one. Given the currently precarious state of inter-ethnic relations in the region, an abandonment of the obligations undertaken by the international community could mean a precipitous unraveling of both the Framework Agreement and the state forged by the creativity and resolve of the international community.

IV. CONCLUSION: PROSPECTS WITHOUT JUSTICE

The increasingly active role SFOR has been forced to play reflects Bosnia's continuing dependence on the international community to impose rule of law in the region. The return of the rule of law and ending impunity in Bosnia will not occur spontaneously; no number of dedicated lawyers and jurists, both in the Hague and in Sarajevo, can overcome political intransigence without domestic and international institutional support. The continuing presence of war criminals has fostered an environment of impunity and ethnic intimidation, both antithetical to the ideals of democracy and ethnic integration espoused in Dayton. War criminals directly obstruct the return of refugees and displaced persons, suppress internal dissent and ex-

114. Other Foča residents suspected of war crimes have been promoted to positions of power within the Bosnian government. Vojislav Maksimović sits on the Republika Srpska National Assembly. *Id.*

115. *Todorović Izjavio Da Nije Kriv* [*Todorović Declares Himself Not Guilty*], ODRAZ B-92 (Oct. 28, 1998) <http://moumee.calstatela.edu/~sii/odrazb/n981004/1028982.htm>.

116. Todorović's attorney reported that Todorović had received blows to his head with a baseball bat during the capture operation. *Todorović Odbio da se Izjasni o Optužnici,* [*Todorović Refuses to Argue his Indictment*], ODRAZ B-92, (Sep. 30, 1998) <http://brazil.tcimet.net/arch/odrazb/n980904/0930981.htm>.

117. *Serb Speakers Took Bosnian War Crimes Suspect: Official,* Agence France-Presse, Sept. 30, 1998, *available in* 1998 WL 16609970.

118. *NATO Denies Snatching Bosnian Serb suspect in Yugoslavia,* Agence France-Presse, Sept. 28, 1998, *available in* 1998 WL 16607936.

ploit fear to realize their goal of ethnically pure states.[119] While SFOR has made significant progress in fulfilling its mandate to arrest indictees, it cannot stop short of apprehending Radovan Karadžić and Ratko Mladić.

A number of steps can be taken to increase the implementation of the Framework Agreement and its institutions. The recent U.S. proposal envisioning a $5 million reward for information leading to the capture and sentencing of those indicted by the Tribunal for war crimes is one such step in the right direction.[120] High Representative Carlos Westendorp has done much to win the respect of Bosnians, individuals and officials alike. He should use the OHR's mandate and its ever-growing influence and prestige to pressure the state and entity governments to comply with the Chamber's decisions and to remove such egregious, yet unindicted, human rights offenders as Petko Čančar from office.[121] And as an American Marine stationed in Tuzla told the *New York Times*, "If we're ever going to implement the Dayton accords, we need to get SFOR more involved."[122]

The judicial institutions themselves can contribute to improved implementation by reforming their procedures in order to better allocate scarce resources. For example, the Human Rights Chamber can create a class action-style procedure for the disposition of the numerous JNA cases that are currently clogging the system.[123] Only when these steps have been taken on all levels will the disparity between implementation in the courtroom and on the ground be bridged.

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119. Human Rights Watch, *Arrest Now! Why Focus on War Criminals? See* Human Rights Watch website. <http://www.hrw.org/hrw/campaigns/bosnia/whyfocus.htm.>

120. *Milioni Dolara za Hvatanje Karadžića i Mladića [Millions of Dollars for the Capture of Karadžić and Mladić]*, ODRAZ B-92 (December 5, 1998) <http://brazil.tcimet.net/arch/odrazb/n_981105/1205982.htm>

121. Westendorp has been taking an increasingly activist approach to the domestic political situation. See supra note 107 for a discussion of his removal of Republika Srpska president Nikola Poplašen from office in March 1999.

122. Steven Lee Myers, *Force in Bosnia Fails at One Task: A Pullout*, N.Y. TIMES, Oct. 4, 1998, at A1.

123. See discussion Part I.A.2, *supra*.