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Counterpoint: Taking Exception

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Taking Exception

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In calling for indicted Bosnian war criminals to be tried *in absentia*, Herman Schwartz and Lloyd Cutler advance an idea whose time has not come. Whether trials *in absentia* are better than impunity for notorious suspects like Ratko Mladić, Radovan Karadžić and Dario Kordić is beside the point. Messrs. Schwartz and Cutler's focus on trials *in absentia* risks deflating public pressure to assure the arrest of war criminals — a measure that can do far more to secure peace and justice than trying them *in absentia*.

Trials *in absentia* can be justified, if at all, only as a measure of last resort should it prove impossible to arrest

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these men. But such an effort has not, to put it politely, been seriously attempted.

The UN War Crimes Tribunal in The Hague has no police powers and must rely on national governments to effectuate its arrest warrants. Short of their voluntary surrender, the indicted suspects who bear chief responsibility for "ethnic cleansing" will come to The Hague only if they are turned over by their patrons — Yugoslavia's president, Slobodan Milosević, in the case of Mladić and Karadžić, and Croatia's president, Franjo Tudjman, in the case of Kordić — or if they are arrested by the NATO Implementation Force (IFOR) now in Bosnia to enforce the Dayton peace accords.

Although compliance with arrest orders of the Hague Tribunal is mandated by the U.S.-brokered accords, the United States has repeatedly undermined this duty. Remarkably, in July, U.S. officials pressed Milosević to provide a haven for Karadžić in the rump Yugoslavia's republic of Montenegro — in flagrant breach of the Dayton accords. At the insistence of U.S. mediators, those accords require Milosević to arrest Karadžić should he set foot on Yugoslav territory.

And while the Dayton plan allows IFOR to arrest suspects indicted by the War Crimes Tribunal, the U.S.-commanded forces have declined to do so. Far from searching for indicted criminals, IFOR has pursued a policy of avoidance. As one U.S. commander in Bosnia candidly put it, his troops will arrest suspects like Karadžić only if they literally stumble into an IFOR checkpoint. He exaggerates. IFOR troops have had numerous opportunities to stumble into suspects indicted by the Tribunal; none has led to an arrest. This past August, when IFOR inspectors learned that Mladić was inside a bunker they planned to inspect, they rescheduled their visit rather than confront the indicted war criminal within.

In recent months, IFOR has grown shamelessly cynical in its determination of what constitutes an "encounter" that would justify arresting suspects indicted by the Hague Tribunal. Two days before the September elections in Bosnia, the U.S. Commander of IFOR, Admiral Joseph Lopez, met with Serb officials in the headquarters of Radovan Karadžić, who was almost certainly inside the building, according to Serb sources. And in a virtuoso display of IFOR's talent for not "stumbling into" Mladić or Karadžić, none of the 53,000 IFOR troops deployed to provide security on election day had an arrest-worthy encounter with these men, although both reportedly turned out to vote.

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Determined to avoid an encounter that might imperil U.S. soldiers before November 5, President Clinton has allowed Mladić, Karadžić, Kordić and sixty-odd other indicted war criminals to flout the Hague Tribunal, undermining its authority while imperiling the Dayton peace.

The costs of continued inaction have been evident in each grim dateline from Bosnia. Emboldened by IFOR's repeatedly avowed resolve not to arrest him, Bosnian Serb leader Radovan Karadžić has undermined virtually every major non-military provision of the Dayton accords. The first significant test of these came last February, when Serb-held neighborhoods in Sarajevo were transferred to the authority of the Bosnian

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Point/Counterpoint is a regular feature of *The Human Rights Brief*. The purpose of the section is to encourage meaningful, intellectual discussion on contemporary issues in human rights and humanitarian law through the presentation of two diverse, though not necessarily opposing, opinions on the subject at hand. Commentaries for the Point/Counterpoint section are generally solicited by *The Brief;* however, the Editorial Board welcomes all submissions, comments, and suggestions. The newsletter does not facilitate the exchange of the authors' compositions prior to publication. The views expressed in the Point/Counterpoint section are those of the authors and do not necessarily reflect those of *The Human Rights Brief*, the Center for Human Rights and Humanitarian Law, or their Directors or staff.

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government. Coming in the early months of the peace, this transfer could have been a harbinger of reconciliation in the best spirit of Dayton. Instead, heeding the calls of Karadžić, Serbs abandoned these neighborhoods rather than live with returning Muslims — and torched their homes as they left.

By loudly broadcasting its resolve *not* to arrest these men, the United States has emboldened them to threaten violence in the event such an attempt is made.

More recently, negotiated out of public office but not political influence, Karadžić derailed the possibility of a credible voter registration process — causing the postponement of municipal elections originally slated for mid-September (although national elections went forward despite the same anomalies). Humanitarian aid programs administered in Serb-held areas of Bosnia by Karadžić's wife, for example, were flagrantly manipulated to secure a Serb victory that would ratify the results of ethnic cleansing. To qualify for aid packages, displaced Serbs reportedly had to agree to register in certain key locations.

Above all, Srebrenica, where thousands of Muslims were slaughtered by Serb forces last summer, stands as a tragic monument to the folly of letting Mladić and Karadžić remain at large. The largest massacre in Europe since World War II, this happened under the supervision of men who had *already* been indicted by the Tribunal. That it occurred before the Dayton accords were signed and IFOR was deployed to assure compliance does not affect the grim reality that an odious crime could have been avoided if any semblance of the rule of law had been enforceable only last year. Far more than symbolism is at stake in allowing these alleged war criminals to remain at large.

An attempt to capture Mladić and Karadžić would, to be sure, entail risks (as do most attempts to arrest serial murderers, but we would scarcely expect our police to decline the attempt on that account). But by loudly broadcasting its resolve *not* to arrest these men, the United States has emboldened them to threaten violence in the event such an attempt is made.

Even so — and equally important — those risks may not be as great as is generally perceived. This perception, like the U.S. policy which it reflects, ignores the more complicated reality that has been unfolding in Bosnia.

For one thing, it assumes that Bosnian Serb attitudes toward the Tribunal are implacably hostile, and monolithically so. In fact, however, Bosnian Serbs are now extending unprecedented cooperation to the Tribunal. Throughout the summer of 1996, the Tribunal was allowed to exhume mass graves in the vicinity of Srebrenica — within Serb-held territory. In late July 1996, prosecutors in The Hague met with a delegation of Bosnian Serbs to work out the terms of future cooperation. Serb officials agreed, among other things, to allow investigators to interview Bosnian Serbs who are potential witnesses in cases investigated by the Tribunal, a process that began this summer.

In light of Karadžić's continuing chokehold on Bosnian Serb political life, it is doubtful whether this cooperation could have proceeded without his authorization. This is significant, particularly since some aspects of the new cooperation by Bosnian Serbs with the Tribunal — notably including the excavations of mass graves near Srebrenica — will strengthen the prosecution's case against Karadžić himself.

These developments present opportunities that U.S. policy should exploit rather than undermine. Conversely, any course short of arresting men like Karadžić, Kordić and Mladić — in particular, holding trials *in absentia* — will do little to diminish their lethal influence on Bosnia's peace prospects.

During a recent visit to Bosnia, I met many Serbs who sought to distance themselves from their indicted leaders. Manifestly referring to Karadžić, one man said: "The President could be anybody. What is important is the people." By refusing to make the arrest of Karadžić and Mladić a priority, the United States has made it far more difficult for Serbs like this man to move forward into a truly democratic future — one in which their choices are not indicted war criminals or their acolytes.

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Petitioner argued that the declared state of emergency did not comply with the requirements of Article 27, and therefore, the right to freedom of expression should not have been suspended. The State argued that Article 13 is inapplicable because even though Sybille Olivera was convicted after the state of emergency was lifted, the crime took place during the time of the state of emergency.

Other sub-issues that were considered were whether the liability imposed on Mrs. Olivera's speech complied with the requirements of Article 13(2); whether Marelle was justified in punishing Mrs. Olivera's speech for constituting an "incitement to lawless violence" according to Article 13(5), and whether the language used to describe the crime of "apology of terrorism" was so imprecise as to constitute a violation of Article 9 of the Convention.

Awards

After months of preparation and research, and five days of opening arguments, judge's questions, rebuttals and surrebuttals, two teams advanced to advocate their positions in front of the Honor Panel of Judges. The final round of the competition came down to the Universidad Diego Portales (Chile) and the University of Maryland. When the decision came in, Nicolas Espejo Yaksic and Alvaro Jana Linetsky from Diego Portales won first place. The Best Oralist award went to Ms. Eddy Manzo from the Universidad Central de Venezuela. Two U.S. schools, Hamline University (State) represented by Colleen Beebe and Claudia Saavedra, and DePaul University (Petitioner) represented by Christine Kleiser and Derek Strain, won the Best Memorial awards.

** For the full text of the 1996 hypothetical, see the Inter-American Human Rights Moot Court Competition Internet site at http://www.wcl.american.edu/pub/humright/home.htm*