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Civil War or Genocide? The United Nations Commission of Experts' Misunderstanding of the Third Balkan War of the 1990s

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Cover Page Footnote

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Civil War or Genocide?
The United Nations Commission of Experts' Misunderstanding of the Third
Balkan War of the 1990s

In July 1989, Robert Kaplan, a journalist for *The Atlantic*, analyzed and wrote on the economic and social unrest taking place in the Balkans, and commented on the worsening conditions within the Federal Socialist Republic of Yugoslavia. He began his article with a broad, misinformed statement about the genesis of Balkan present-day conflicts: “The violence of the twentieth century has derived in large measure from the ethnic hatreds of the Balkans.”¹ In the months that followed, the term “age-old hatreds” became a common description for the relationship between the nations of the Yugoslavia, especially after catastrophic dissolution in 1992. Coinciding with other geopolitical shifts in Eastern Europe in the late 1980s and early 1990s due to the crumbling Soviet bloc, members of the Slovene, Croat, Bosnian, and Kosovar intelligentsias advocated for greater autonomy and federal decentralization for a variety of purposes: republic-based educational systems independent of federal curricula and standards, modernization (i.e. political reform), market mechanisms, and other freedoms comparable to the capitalist economics of European Community and the United

¹ Robert D. Kaplan, “Europe’s Third World,” *TheAtlantic.com*, (originally published July 1989) <http://www.theatlantic.com/past/unbound/flashbks/balkans/kaplanf.htm>. For more on Kaplan’s influence see John B. Allcock, “The International Criminal Tribunal for the Former Yugoslavia” In *Confronting the Yugoslav Controversies*, ed. Charles Ingrao and Thomas A. Emmert, 346-389 (Washington D.C.: Purdue University Press, 2009).

States.² The resulting responses from Serbs and the Serb-dominated federal state were to maintain the federal government's power and later to exchange populations, eventually graduating from economic disagreements to nationalist rhetoric intended to preserve Serbian national unity. Journalists and news reporters observing the escalating tensions agreed with and repeated Kaplan's claims, and scathing documentaries and journalistic pieces covering the dire conditions of the war-torn country prompted the United Nations to deploy peacekeeping and military efforts.³

An *ad hoc* committee, the United Nations Commission of Experts, was formed for the purpose of investigating the violations of human rights – including ethnic cleansing, widespread war rape, mass unmarked graves, concentration facilities, as well as military and paramilitary forces targeting civilians, women,

² Kosovo was the epicenter for this disruptive infusion of economics and nationalism; as more (Muslim) Albanians migrated to Kosovo – and as more autonomy was awarded to the Yugoslav republics – many Serb intellectual and political leaders grew concerned of the growing economic arguments for Kosovo's independence and other decentralizing policies aimed to weaken federal power, which would in turn scatter the Serb nation across many states. What originated as decentralization and economic gains among non-Serbs led to xenophobia and nationalist goals among Serbs. For more on the Yugoslav Communist Party's decentralization as precursor to the conflict see Dejan Jović, "Yugoslavism and Yugoslav Communism: From Tito to Kardelj," in *Yugoslavism: Histories of a Failed Idea, 1918-1992*, ed. Dejan Djokić (Madison: University of Wisconsin Press, 2003), 157-81. For more on the non-Serb political annunciations of autonomy and market westernization in Yugoslavia, see Jasna Dragović-Soso, *Saviours of the Nation, Serbia's Intellectual Opposition and the Revival of Nationalism* (Montreal: McGill-Queen's University Press, 2002). For more on Slovenian dissent at the federal level, especially regarding the Yugoslav Writers' Union, see Jasna Dragović-Soso, "Intellectuals and the Collapse of Yugoslavia: The End of the Yugoslav Writers' Union" in *Yugoslavism: Histories of a Failed Idea, 1918-1992*, ed. Dejan Djokić (Madison: University of Wisconsin Press, 2003), 283.

³ See, for example, one of the earliest and most popular journalistic works on the Third Balkan War: Roy Gutman, *A Witness to Genocide* (New York: Macmillin Publishing Company, 1993).

and children – that were taking place in the former Yugoslavia.⁴ The reports of the Commission of Experts were involved in the UN Security Council’s decision-making process, as evidenced by the Security Council’s adoption of the Commission’s recommendation to establish the International Criminal Tribunal for the former Yugoslavia in 1993. The Commission’s research reports and investigations tended to repeat essentialist notions of ethnic incompatibilities promulgated largely by Serb nationalists. These essentialist notions reinforced a belief about the futility of intervention because they misguided the Commission’s writings on the genesis of the conflict. Given that the Commission misunderstood how the war erupted, their reports conflated elements of civil war with elements of genocide, and the UN Security Council – which reviewed and consulted the Commission’s findings – was provided unclear descriptions of the conflict and how it began, and consequently, how it should be addressed.

By treating the region’s massacres of the Second World War as evidence of inherent conflict, the Commission adopted and repeated Serbian national myths, and therefore the Commission presented an image of the South Slavs as violently fratricidal (between *civil war* and *genocide*). This juxtaposition between World War II and the Third Balkan War would have also perhaps given rise to onlookers’

⁴ “United Nations Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia;” M. Cherif Bassiouni, 1992, Examination and Analysis of Reports and Data Submitted To The Commission Between November 3-25, 1992, M. Cherif Bassiouni Papers, DePaul University Special Collections and Archives, DePaul University, Chicago IL (hereafter: The M. Cherif Bassiouni Papers).

hopes that resolution among South Slavs would present itself just as it had in the country's recent past.⁵ This is the greatest misunderstanding repeated by the Commission: in accepting Serbian national myths as fact, the Commission validated Serbian nationalist rhetoric. The Commission did not investigate *how* and *why* Serbian scholars and politicians presented this rhetoric, and therefore, the Commission (mis)understood the conflict by keeping their perspective within the evidential framework presented by Serb nationalists. In essence, Serb nationalists constructed and presented the war of the 1990s as an iteration of the war of the 1940s, not only to combat propositions of economic freedoms, but also to preserve Serbian national unity. This reaction came about during the 1980s, when Albanians, Serbs, and Slovenes debated questions about Kosovo's (and other republic's) independence and sovereignty.⁶ An investigation of this particular issue – how the Kosovo question was deliberated during the 1980s – would have revealed the federal administrative issues in balancing socialist decentralization/democratization with nationalist programs for independence.⁷ Within this nexus of issues arose further questions of how to address sovereignty, national rights, democracy, and cultural genocide – all ideas that the UN would

⁵ Given that the conflict of the 1940s had been resolved by the re-founding of Yugoslavia in 1945 by the Partisan socialists, comparisons between the 1940s and the 1990s conflicts would perhaps have conflated the likelihood of another political resolution, or support the appearance of “history repeating itself.”

⁶ Tea Sindbæk, *Usable History? Representations of Yugoslavia's Difficult Past from 1945-2002* (Copenhagen: Aarhus University Press, 2012), 139-88.

⁷ See Dragović-Soso, 'Saviours of the Nation,' 115-45.

litigate and address in the next decade – though prior to any successful intervention efforts. References to “ancient hatreds” or “age-long” disputes among South Slavs were, therefore, loaded phrases intended to distract from the economic reality and disparities among the Yugoslav republics; furthermore, the Commission’s ignorance of the conflict’s genesis and their adoption of Serbian-constructed mytho-history was detrimental to peacekeeping efforts.

When members of the Commission shared their observations of the conflict, they tended to feel the need to explain that the conflict was a long-standing one – “age-old.” This view of the conflict’s genesis was due to the tremendous amount of evidence the Commission gathered and consulted: much of the evidence was first-hand experiences and testimonies from victims and aggressors, which often repeated a propagandized lexicon for describing the nature of the conflict. In expressing lengthy, detailed histories of South Slav conflicts, the Commission’s reports communicate the notion that the conflict was both a civil war and also the result of ongoing ethnic incompatibilities. Because the Commission portrayed the parties engaged in conflict in this way, their reports provided a wealth of evidence supporting and recapitulating popular misunderstandings (i.e. nationalist myths) about the Yugoslav conflict.⁸ It is plausible that because the UN Security Council reviewed the Commission’s

⁸ The Commission provided several hundred pages of reports and histories of the conflict(s), in addition to 65,000 pages of digital evidence, interviews, maps, and narratives stored and presented to the Security Council and the ICTY.

reports, members of the Security Council adopted the myth of the age-old hatreds. Due to the armed conflicts emerging in other places of the world and requiring UN and United States attention and vigilance (Somalia, Rwanda, Iraq, Kuwait, former Soviet bloc countries, etc.), the Security Council may have viewed any UN-sponsored attempt to intervene in an age-long war as futile – or perhaps conveniently so. Since these reports informed military/peacekeeping action and portrayed the conflict in distorted terms, and since the actions of the Security Council in the years following the Commission's Final Report are recorded in great detail, it is plausible to suggest that the Security Council could not reconcile the legal ideation and information presented by the Commission – in addition to applying UN established principles uniformly.

The fairly ineffectual nature of various UN efforts throughout the former Yugoslavia also suggests that the Commission's reports did not expedite intervention efforts and/or perhaps may have halted the Security Council from further involvement. Though the Commission of Experts was determined to end systematic exterminations, their misunderstandings of both the region's history and of the forces that led to inter-communal conflict allowed the Security Council to stall additional intervention efforts. While the Security Council litigated definitions of genocide, crimes against humanity, conflicts of international or internal nature, and dozens of UN principles and declarations, the conflict continued to worsen until the United States spearheaded the NATO bombing of

regions occupied by the Yugoslav National Army and Bosnian Serb paramilitary forces escalating in February 1994.⁹

Although the conflict was described as “age-old,” it was popularly recognized as the Yugoslav civil war, which had also carried unintended repercussions given the fact that it was presented alongside the ancient hatreds narrative. Misunderstanding the conflict to be a civil war paralyzed intervention efforts, because the parties that were engaged in conflict were discernable largely along national fault lines. If the various national identities contained within the umbrella identity of “Yugoslav” were *essentially* different, this meant that the conflict between Croats, Bosnians, and Serbs was an example of what the UN categorized as *self-determination*; evidenced by the immediate and widespread recognition of statehood following Slovenia’s, Croatia’s, and Bosnia’s secessions from Yugoslavia in the early 1990s. When politicians, nongovernmental organizations, and journalists misinterpreted histories of inter-communal violence in the region, they agreed with prevailing assumptions and yet easily dismissed the conflict by simultaneously identifying it as a civil war resulting from an imagined lengthy history of constant civil war. The Security Council legitimized recognition

⁹ That is not to say that the NATO bombing was an appropriate means of action; despite the devastation of many Serb paramilitary occupied zones, the NATO strikes turned the tide of massacres, transferring the balance of power in the war torn former Yugoslavia from the Serb paramilitary to Croatian and Bosnian forces (which began working together since the Serb paramilitary and JNA greater outnumbered and outgunned bands of Croatian and Bosnian citizens). Moreover, the NATO air raids alone were highly destructive and effective, having devastating residual costs: casualties, broken urban infrastructure, and disconnected roadways, which further disrupted military mobilization.

of the conflict as civil war because Yugoslavia had more or less existed for the entirety of the twentieth century, during which the populations had coexisted under various regimes. Yet, since the warring populations broke along national barriers (largely the Serbs, Croats, and Bosnians) and for the purposes of creating new national states uninhibited by a Yugoslav federation, the conflict was treated as one of self-determination. As a conflict of self-determination, the UN had no precedent for intervention – hence “self.”

This interpretation of the UN’s ideologically based response to the Yugoslav conflict is not entirely new in scholarship. Rosalyn Higgins, a professor of international law at the University of London, articulated the danger of treating the conflict as civil war in an edited text of a speech she delivered at the eighteenth Martin Wight Memorial Lecture at Sussex University.¹⁰ However, she delivered her speech on March 1, 1993 – a year after Bosnia had declared independence – so her account does not include an analysis of the UN’s treatment of the conflict as civil war, because the conflict was still young. Political scientist Peter Alan Sproat wrote a scathing analysis of the UN’s principle of self-determination, and he claimed that UN charters ambiguously discuss the principle, which he believes was responsible for the aggression and ethnic cleansing in the former Yugoslavia. While it is not the purpose of the present article to condemn the UN (as Sproat

¹⁰ Rosalyn Higgins, “The new United Nations and former Yugoslavia,” *International Affairs* 69, no. 3 (1993): 465-83.

explicitly states as one of his purposes), his perspective sheds light on the paradox of self-determination and its application to the Third Balkan War.¹¹ William Maley, also a political scientist, addresses how the UN problematically applied three UN principles – sovereignty of states, self-determination, and human rights – when considering the best course of action.¹²

Though the aforementioned scholars have analyzed the UN and its principles in relation to Yugoslavia, no historical account exists that analyzes the reception of reports generated by the Commission of Experts Special Rapporteur M. Cherif Bassiouni and the International Human Rights Law Institute, which managed the research and investigations overseen by the Commission. However, historian Jonathan May analyzed the underlying worldview that informed one particular British politician, Jeremy “Paddy” John Durham Ashdown, who served as the High Representative for Yugoslavia from 2002 to 2006. Like Bassiouni in the present article, May selected Ashdown as the subject of his micro-historical study because of Ashdown’s knowledge of political action during the Yugoslav conflict. May demonstrates a shift in Ashdown’s worldviews and ultimately argues that Ashdown subscribed to the “ancient hatreds” theory of Yugoslavia’s

¹¹ Peter Alan Sproat, “The United Nations’ Encouragement of Aggression and Ethnic Cleansing: Time to Abandon the Right to Self-Determination?” *Terrorism and Political Violence* 8, no. 1 (1996): 93-113.

¹² William Maley, “The United Nations and Ethnic Conflict Management: Lessons from the Disintegration of Yugoslavia,” *Nationalities Papers* 25, no. 3 (1997): 559-73.

dissolution.¹³ An investigation of the Commission and their reports is invaluable given the deficit of historical knowledge about the information and reportage provided to and utilized by the UN Security Council.

When describing the nature of the Yugoslav conflict, Bassiouni and the Commission adopted the idea of age-old hatreds – a concept based on essentialism. According to this thinking, perpetual ethnic incompatibility legitimized the conflict because the warring peoples each had a right to self-determination. When Slovenia, Croatia, and Bosnia-Herzegovina seceded from Yugoslavia, the UN almost immediately recognized the statehood of each; but, when the Bosnian Serbs basically utilized the same principle of self-determination when seceding from newly independent Bosnia (under control of the Serb paramilitary) with intentions of rejoining what was left of Yugoslavia (i.e. Greater Serbia), the conflict was treated as a civil war. As a civil war of self-determination, the UN had no precedent for intervention. Effectively, the Security Council was not able to maneuver through all of the applicable UN principles established over decades by UN charters and declarations.

The Serb nationalist narrative has since been discredited by experts in this field, but not before it had a significant impact on the international reaction to the conflict. Few scholars of Yugoslavia, if any, argue that the country's dissolution

¹³ Jonathan May, "How Bosnia Changed Paddy," *East European Politics & Societies* 27, no. 4 (November 2013): 593-618 <http://eep.sagepub.com/content/27/4/593>.

was inevitable or that the South Slav populations have deep seeded hatreds toward one another. Most scholars believe conflict between the nations of Yugoslavia in the 1990s was solely a product of the twentieth century, which is to say the country's purpose for existence and what the country meant to each of these nations were the only real sources of tension.¹⁴ For example, Yugoslav scholar Bogdan Denitch states that aside from “communal massacres of Serbs by Croatian fascist Ustaša and massacres of Muslims and Croats by Serbian Chetniks during the Second World War, Serbs and Croats have lived together more or less tolerably for four centuries.”¹⁵

Months after Kaplan's article in *The Atlantic*, many of Kaplan's predictions about the political dissolution of Yugoslavia matched the realities of the country. Decadal constitutional concessions since the 1950s provided greater autonomy to the Yugoslav republics (Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and Macedonia) and this decentralization weakened the federal power and influence of Yugoslavia. Competing interpretations of the Yugoslav national identity surfaced in elite political discussions from the early 1960s

¹⁴ Originally named the Kingdom of Serbs, Croats, and Slovenes, the country was renamed the Kingdom of Yugoslavia (literally, “Land of the South Slavs”) in 1929 in order to promote cultural integration, but over the course of the twentieth century, identity discussions on what constitutes “South Slav” and which populations (should) belong to the country bore sociopolitical importance.

¹⁵ Denitch, *op. cit.*, 62. Scholars using a variety of approaches agree: Dragović-Soso analyzes the development of twentieth-century Serbian intellectuals, Dragović-Soso, *op. cit.*; Wachtel uses popular print culture to understand changing constructions of national identity, Wachtel, *op. cit.*; and historian Tia Sindbæk comes to similar conclusions in her historiographical review of Yugoslav scholars writing on the genocide that occurred during the Second World War, Tia Sindbæk, *op. cit.*

through the late 1980s, which fuelled these constitutional concessions.¹⁶ Shortly thereafter, the republics of Slovenia, Croatia, Bosnia, and Macedonia seceded from the Federal Socialist Republic of Yugoslavia. The secessions of Croatia and Bosnia prompted a full-scale military response by the Serb-dominated Yugoslav National Army in order to protect the national unity of the Serb nation by preserving a single state in which all Serbs lived. Bosnia was the last of the three republics to secede, declaring independence in March 1992. With the secession of Bosnia, Croatian militias, Bosnian civilians, and Serbian paramilitary forces erupted in conflict, each fighting the other two. Nonstandard soldiers from each of these nations began committing atrocities; quickly after the conflict began, Radovan Karadžić, the President of the newly founded Republika Srpska – a region controlled by Bosnian Serb rebels – encouraged a policy of “ethnic cleansing,” a euphemism to disguise a gravely nationalist genocidal movement largely executed by Bosnian Serb paramilitary units. The United Nations Protection Force (UNPROFOR), the United Nations Commission on Human Rights (UNCHR), and various European countries sent UN troops into Bosnia and Croatia, but these efforts were inadequate in stopping the rampant violations of

¹⁶ Andrew Wachtel, *Making a Nation, Breaking a Nation: Literature and Cultural Politics in Yugoslavia* (Stanford: Stanford University Press, 1998), 130. Wachtel, a literary historian, traces the cultural contours and complex conceptions of Yugoslavism beginning with the turn of the twentieth century. He argues that Yugoslavism changed multiple times since the creation of the “first Yugoslavia” (1918-1941). Coinciding with the constitutional concessions of 1965 and 1974, Yugoslavism was reinterpreted as “multinational Yugoslavism,” allowing for local identities to be expressed. When these local identities came into conflict, the political sphere fractured along ethnic boundaries, and when the western republics seceded, the country dissolved.

human rights.¹⁷ Although almost every scholar of Yugoslavia would agree that the country dissolved for complex reasons and motives that were legitimized by imagined national histories, that is exactly how Cherif Bassiouni and other members of the Commission of Experts understood and portrayed the genesis of the ethnic conflict: as the result of primordial hatreds.

For the nineteen months that the Commission of Experts existed, the group was limited in UN-sponsored resources and therefore had to operate efficiently and independently (i.e. privately). When the Commission was established in October 1992, the United Nations Security Council appointed as Chairman of the Commission Frits Kalshoven, Professor of International Humanitarian Law at Leiden University (Netherlands), but less than a year later, Kalshoven resigned due to medical and personal reasons. Until his resignation, DePaul University Law Professor and world-renowned expert of international law, Cherif Bassiouni, had served as Special Rapporteur for the Gathering and Analysis of Facts, and in Fall 1993 Bassiouni was made Chairman in Kalshoven's absence.¹⁸ As one of the central founding members of the newly formed International Human Rights Law Institute (IHRLI) at DePaul University School of Law, Bassiouni utilized the legal

¹⁷ Bogdan Denitch, *Ethnic Nationalism: The Tragic Death of Yugoslavia, Revised Edition* (Minneapolis: University of Minnesota Press, 1996), 206-7.

¹⁸ The United Nations Commission of Experts, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), 27 May 1994, The International Criminal Tribunal for the former Yugoslavia, http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf, 7-8, 10. (hereafter: Final Report of the Commission of Experts).

and research capabilities of the IHRLI when conducting research for the Commission. Additionally, the Commission was provided a severely limited budget, which prompted Bassiouni and IHRLI staff members to pursue \$800,000 (USD) in private funding for investigative trips to the former Yugoslavia: “In less than eight months, from July 1993 to March 1994, the Commission undertook thirty-five field missions, conducted several extensive investigations, gathered a large amount of evidence and information, and produced several major reports – all of which constitutes a starting point for the Prosecutor of the ICTFY.”¹⁹ Bassiouni’s efforts were integral to the UN Security Council’s decision-making process *vis-à-vis* IHRLI-supported Commission status reports on the former Yugoslavia. Because Bassiouni was a central member of both the IHRLI and the Commission of Experts, his papers provide insight to the inner concepts that the groups and its members interacted with and reconciled. The majority of the sources interrogated herein were thus gathered from the M. Cherif Bassiouni Papers at DePaul University’s Special Collections and Archives, and most of these sources are administrative/legal documents with few exceptions: articles and letters mostly composed by Bassiouni.

¹⁹ The Journal of the American Medical Association, 1993, Human rights II – Cherif Bassiouni condemns ‘psychology’ of Balkan crimes, The M. Cherif Bassiouni Papers; and M. Cherif Bassiouni, 1994, The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), The M. Cherif Bassiouni Papers. Over the course of their involvement with the Commission of Experts, the IHRLI contributed over one million US dollars; Final Report of the Commission of Experts, 9.

Perhaps the most informative experience Bassiouni had while managing the investigation of war crimes occurred in 1993, during a four-day trip to Sarajevo, capital of Bosnia-Herzegovina.²⁰ While driving outside the city limits of Pale in an armored personnel carrier (APC), Bassiouni, William Fenrick (another member of the Commission of Experts), and their UN escorts were stopped when a Renault containing a Bosnian Serb paramilitary crashed into the side of the APC. More paramilitary arrived from the headquarters located up the road from the accident, and Bassiouni engaged in conversation with one English-speaking commander that had come to the scene. Bassiouni recalls in a letter shortly after the dangerous incident:

During the long discussion I had with the unit “commander,” he made the case that the Croats [*sic.*] were the “aggressors” against the Serbs, that the Serbs had been victimized so long by the Croats (particularly during WW II) and by the Muslims (particularly during the Ottoman occupation) and that what they (the Serbs) were doing to the Croats and to the Bosnian-Muslims was justifiable because they were defending themselves or exacting revenge, ultimately only trying to regain the territory they believed was theirs.²¹

Bassiouni repeated two prominent Serbian national myths: (1) recurrent Serb victimization by Muslim populations since the Battle of Kosovo in 1389 (“particularly during the Ottoman occupation”); and (2) that Serbs were the *sole*

²⁰ It was informative because Bassiouni references this trip in an article he wrote: M. Cherif Bassiouni, *The Christian Science Monitor*, 1993, An Argument for Peace at Serbian Checkpoint, The M. Cherif Bassiouni Papers. He also explains the trip in great detail in a letter to a member of the IHRLI: M. Cherif Bassiouni to Julio A. Baez, 1993, The M. Cherif Bassiouni Papers. And lastly, Bassiouni recalls the trip in court: United States District Court, Southern District of New York, *Jane Doe v. Radovan Karadzic* court transcription, 1993, The M. Cherif Bassiouni Papers.

²¹ M. Cherif Bassiouni to Julio A. Baez, 1993, The M. Cherif Bassiouni Papers.

victims of genocide during the Second World War.²² This reporting does not prove Bassiouni bore a view of essentialism. It could mean just that: Bassiouni reporting on what basis Serb paramilitary legitimized their military actions in Bosnia and Croatia. Except, Bassiouni states in his letter to Julio Baez that the commander was “a graduate of Sarajevo University in history and had travelled abroad,” and in an article Bassiouni authored in *The Christian Science Monitor*, Bassiouni identifies the man as “[a]n English-speaking militiaman, a Serbian university graduate.”²³ It is significant that Bassiouni portrays this commander as educated because Bassiouni viewed him as having some degree of intellectual authority, and Bassiouni incorporated the experience into his understanding of the conflict.

Bassiouni eventually retold the story of being seized outside of Pale while on his four-day trip to Bosnia, but this time instead of writing an article or a letter, Bassiouni was expert witness to the defense in *Jane Doe v. Radovan Karadžić*:

And if you forgive me just a little [anecdote], when I was seized by a group of militiamen outside Pale and held there for a while I sort of engaged them in conversation [...] and one of them came up and *in broken English* and said, remember the Battle of Kosovo, and I said, this was 1398 [*sic.*] and he said, no, no, no, this is today. And whether it's by belief or not, the point is

²² For more on the national myth of Serb victimization and the Battle of Kosovo, see Denitch, 72, and Wachtel, 197-219. For more on the thematization of Second World War genocide perpetrated against Serbs, especially in Serbian scholarship, see Sindbæk, 155.

²³ M. Cherif Bassiouni to Julio A. Baez, 1993, The M. Cherif Bassiouni Papers; and M. Cherif Bassiouni, *The Christian Science Monitor*, 1993, An Argument for Peace at Serbian Checkpoint, The M. Cherif Bassiouni Papers.

that many of these things are still extremely present in the minds of people.²⁴

Seven years after the conversation with the paramilitary commander, Bassiouni was still citing the experience, but he no longer referred to the commander as educated – as a university graduate – like before. In the years that had elapsed, Bassiouni became more critical of the commander's words and portrayed him as less intelligible than in Bassiouni's previous iterations of the encounter, likely because he could scrutinize the source based on his experiences and research. But by the time the trial convened in 2000, Bassiouni had already substantially incorporated the commander's words – Serbian nationalist myths – into the reports he had written for review by the UN Security Council.

Greater digital and communications technology promulgated media coverage of the war in Bosnia and had great political influence because the media climate of the early 1990s was overloaded with images and reports of detention camps, mass graves, besieged cities, and battles between the Yugoslav populations and UN forces. Journalist pieces by Roy Gutman, Ed Vulliamy, John Burns, Penny Marshall, and Maggie O'Kane, for example, all contributed dramatically to the shift in public concern for the war in Bosnia.²⁵ At the same time that these media sources called for greater global attention to the Balkans crisis, many sources

²⁴ United States District Court, Southern District of New York, *Jane Doe v. Radovan Karadžić* court transcription, 2000, The M. Cherif Bassiouni Papers, 32, emphasis added.

²⁵ Allcock, *Confronting the Yugoslav Controversies*, 357.

repeated Kaplan's claim that the conflicts were due to innate ethnic hatreds. Because of the availability of media resources, one of the first major reports of the UN Commission of Experts was produced months after the establishment of the Commission in 1992. In preparation for the report, Bassiouni and two IHRLI research assistants analyzed hundreds of reports collected by the UNPROFOR, the UNHCR, nongovernmental organizations, and news accounts on the Yugoslav conflict, producing a single, compiled report of their findings. This report is significant because: (1) Bassiouni based his general conclusions on highly detailed examinations of potentially ahistorical claims; and (2) given the meticulousness of the report, the UN Security Council enacted some of the recommendations outlined. There are five major conclusions:

[1] Most of the territory of the former Yugoslavia, and in particular Bosnia-Herzegovina, is the scene of massive and systematic violations of human rights as well as grave violations of humanitarian law. [2] Human rights violations are being perpetrated *by all parties to the conflict* [3] Acts of violence are supported and encouraged by those in power. [4] The situation of those detained in camps is dramatic. [5] UNPROFOR and UNHCR cannot adequately protect the affected populations and cannot prevent violations of human rights.²⁶

Again, the Security Council was informed that all parties were committing violations, which could appear to constitute civil war. Given that deployment of the UNPROFOR and the UNHCR were the most exhaustive measures the UN could take at the time, the Security Council's inability to increase involvement

²⁶ M. Cherif Bassiouni, 1992, Examination and Analysis of Reports and Data Submitted to the Commission Between November 3-25, 1992, The M. Cherif Bassiouni Papers, 22-3, emphasis added (Hereafter: Examination and Analysis of Reports).

prompted the Council to adopt other solutions Bassiouni recommended. For example, he proposed: “A warning of possible prosecution should be issued by the United Nations to authorities responsible for violations and human rights violations.”²⁷ Coupled with his vehement support in establishing an international criminal court, Bassiouni’s effort was one prominent factor in the formation of the International Criminal Tribunal for the former Yugoslavia (ICTY) on May 25, 1993.²⁸

Another enacted solution of the Security Council originated from a series of recommendations in the same report based on media coverage:

Establish an investigative commission. [...] Establish an information agency, apart from local authorities, in order to disseminate objective information and given appropriate radio and television time in Zagreb, Belgrade and Sarajevo. Systematically collect data and documentation of war crimes to be used in subsequent prosecutions. Establish a commission to investigate cases where prosecution may be warranted.²⁹

These propositions were integrated into the overall purpose and direction of the Commission of Experts. Over the next two years, the IHRLI created a massive database of the Commission’s findings, and private funding allowed for the

²⁷ Bassiouni, 1992, Examination and Analysis of Reports, The M. Cherif Bassiouni Papers, 23.

²⁸ For more on Bassiouni’s advocacy of an international criminal court, see: M. Cherif Bassiouni, “The Time Has Come for an International Criminal Court.” *Indiana International & Comparative Law Review* 1, no. 1 (Spring 1991): 1-43. Also: M. Cherif Bassiouni, “The Need for an International Criminal Court in the New International World Order,” *Vanderbilt Journal of Transnational Law* 25, no. 2 (1992): 151-182. For more on Bassiouni’s integral influence on the ICTY, see Allcock, *Confronting the Yugoslav Controversies*, 358.

²⁹ Bassiouni, 1992, Examination and Analysis of Reports, The M. Cherif Bassiouni Papers, 23-4.

deployment of thirty-five field missions, which generated an impressive amount of evidence and material for the ICTY.³⁰ The significance of this particular report by the Commission is that the members were exposed to a large array of sources on Yugoslavia, some recapitulating myths, others expressing the urgency of new and improved involvement.

The Final Report of the Commission of Experts (1994) and its annexes is a large compilation of writings and research gathered by the members of the Commission – as such, it presents both unclear descriptions of the conflict as well as clear, direct statements about genocidal acts. As it states in its introduction, the Report in its entirety is the result of twelve sessions in which the members reviewed and edited the text until its final version.³¹ One of the most integral notions of the Final Report is the plurality of conflicts taking place throughout the former Yugoslavia; more often than not, the authors refer to the war as a collection of separate conflicts and crimes (against humanity) instead of describing it as a uniform, single war. This would suggest each conflict be addressed individually, rather than collectively, thereby dividing peacekeeping efforts and ultimately leading to a selection of conflicts with which to intervene and those with which to

³⁰ In addition to the private funding allocated to the IHRLI, the UN solicited UN member governments to donate a trust fund supporting the Commission's operations – approximately \$1,320,600 (USD) was donated, which was made available to the Commission of Experts in the summer of 1993; Final Report of the Commission of Experts, 9.

³¹ Ibid., 8.

standby and monitor. In the section in which the authors discuss the international/non-international character of the conflict(s), they write:

To date, the major conflicts in the territory of the former Yugoslavia have occurred in Croatia and in Bosnia and Herzegovina. Determining when these conflicts are internal and when they are international is a difficult task because the legally relevant facts are not yet generally agreed upon. This task is one which must be preformed by the International Tribunal.³²

Throughout the Final Report, the authors repeat that each conflict individually must be scrutinized and if applicable, be addressed by the ICTY, but a process of scrutiny implies that some conflicts are neither suited for the ICTY nor further UN involvement. The authors of the report concluded in their case study of Opština Prijedor, a Bosnian town overtaken by Serbs in the spring of 1992: “It is unquestionable that the events in Opština Prijedor since 30 April 1992 qualify as crimes against humanity. Furthermore, it is unlikely to be confirmed in court under due process of law that these events constitute genocide.”³³ Interestingly, they imply that the events constitute genocide (or less specifically, “crimes against humanity”) – but the authors make no mention of the larger body of conflict scattered about the former Yugoslavia and express doubt that this particular conflict would be resolved internationally.

The authors of the Final Report addressed this very issue of
categorizing

³² Final Report of the Commission of Experts, 13.

³³ Ibid., 43.

individual conflicts in the introductory section of the report:

Classification of the various conflicts in the former Yugoslavia as international or non-international depends on important factual and legal issues. If a conflict is classified as international, then the grave breaches of the Geneva Conventions [...] apply as well as violations of the laws and customs of war. The treaty and customary law applicable to international armed conflicts is well-established. [...] These legal sources do not use the terms ‘grave breaches’ or ‘war crimes.’ Further, the content of customary law applicable to internal armed conflict is debatable. As a result, in general, unless the parties to an internal armed conflict agree otherwise, the only offenses committed in internal armed conflict for which universal jurisdiction exists are ‘crimes against humanity’ and genocide, which apply irrespective of the conflicts’ classification.³⁴

In this passage, the authors reinforce the notion that the UN is dealing with *conflicts* and they concede that laws applicable to internal armed conflict are unresolved questions. This meant that a conflict would first have to be scrutinized and classified as either internal or international, then if the conflict were international the Security Council still had to ensure its actions were in accordance with the statutes, protocols, declarations, and principles of the UN. Additionally, the authors point out the “applicable law” as the Geneva Conventions as well as several UN protocols. Altogether, these authors acknowledge that in cases of internal conflict, international intervention cannot be applied until evidence of genocide is confirmed, thus internal conflicts (or conflicts chosen to be interpreted as such) posed great decisional challenges to the UN Security Council. Moreover, the author’s statement about crimes against

³⁴ Final Report of the Commission of Experts, 13.

humanity constituting an international conflict contradicts the aforementioned example of Opština Prijedor, where evidence of crimes against humanity was present, though the Commission believed it would not be enough to classify the conflict as genocide in a court of international law.

In the case of international conflict, the UN would have been obligated to enact many if not all of the solutions proposed by the authors of the Final Report because the UN relied on its declarations and protocols for legal guidance and precedence. As the authors wrote: “The Commission also concurs with respect to the provisions of applicable law contained in the statute of the International Tribunal. Indeed, in its first interim report (paras. 36-46), the Commission had taken the position which the Security Council later adopted in Resolution 827 (1993).”³⁵ But, UN involvement throughout the duration of the conflict remained fairly ineffectual, and the ICTY scarcely prosecuted perpetrators. The website of the ICTY reports that as of September 2016 – more than two decades since the ICTY was formed – only 161 individuals have been charged, with only 78 indicted individuals having charges that include sexual violence and misconduct.³⁶

³⁵ Final Report of the Commission of Experts, 71.

³⁶ The United Nations International Criminal Tribunal for the former Yugoslavia, In Numbers, September 2016, The United Nations, <http://www.icty.org/en/in-focus/crimes-sexual-violence/in-numbers>

Although the Final Report also provides clear, direct statements about the war-torn conditions of the former Yugoslavia, these statements appear to not have had as much weight as the more problematic sections of the Report with regard to the members of the Security Council. Overall, the Report is unclear about applicable law in the case of crimes against humanity and internal conflict in relation to the former Yugoslavia. The dozens of applicable international laws created by the United Nations had great bearing on the members of the Security Council when considering the implications of the Final Report. It therefore seems that the authors (likely unknowingly) provided a type of framework and language that allowed decisions to be suspended pending litigation of UN statutes and principles, international versus internal, genocide, perpetrators, victims, and consequences.

Under the subheading of “Collection and analysis of information” within the Final Report, the Commission of Experts summarize different types of crimes against humanity and note that the presence of these types of crimes is not necessarily indicative of genocide. They conclude their summary on types of crimes with a description that allowed for crimes during a particular conflict (usually in a city or province, not the entirety of the war) to be viewed as evidence as crimes against humanity instead of evidence of genocide:

Crimes against humanity are *not* confined to situations where there exists an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, which are preconditions for genocide. Crimes

against humanity are, however, serious international violations directed against the protected persons, in contradistinction to a fate befalling them merely as a side-effect, for example, of a military operation dictated by military necessity.³⁷

This implies that crimes against humanity in the former Yugoslavia could be viewed as independent of crimes of genocidal nature, and furthermore, some conflicts could be interpreted as internal – fracturing the larger body of conflict into smaller categories of internal, international, and genocidal conflicts. Furthermore, the authors provide the similar unclear language in their section summarizing the widespread nature of the acts, implicitly but ineffectually hinting at the policy of ethnic cleansing:

Crimes against humanity may also amount to extermination of national, ethnical, racial, religious, or other groups, whether or not the intent that makes such crimes punishable as genocide can be proven. [...] The scale and nature of such crimes become of special significance and of concern to the international community because of the abhorrent character of the overall policy, the means employed to carry out the policy and the number of victims in produces.³⁸

In this passage, the authors use the standard definition of genocide, but replace it with “crimes against humanity.” It appears the authors were interchanging *crimes against humanity* and *genocide* in hopes that if either were further identified throughout the former Yugoslavia, the UN would increase involvement. However, given that the authors stated that crimes symptomatic of genocide could instead be labeled as crimes against humanity – and given the authors’ aforementioned

³⁷ Final Report of the Commission of Experts, emphasis added, 22.

³⁸ Ibid., 24.

expressed doubt at the likelihood of international recognition of the crimes against humanity as in the aforementioned example of Opština Prijedor – the authors may have unknowingly created a paradox in which involvement would be stayed pending resolution of evidence, categorization, and applicable law.

An important issue related to the laws applicable to the conflicts as international was the issue of self-determination in the case of the Bosnian Serbs that insisted they were entitled to secede and form a Greater Serbia. In the Final Report, the authors frequently dismiss all Bosnian Serb-run administrations and undermine any potential legitimacy of these Serb rebel republics. In their General Conclusions section, the authors make clear statements that simultaneously address the internal vs. international issue, as well as the issue of Bosnian Serb self-determination. They write that state disintegration is frequently regarded as a civil conflict, but add that:

[when] the respective States of Slovenia, Croatia, and Bosnia and Herzegovina declared their independence, received international recognition and were admitted to membership in the United Nations, the conflict with respect to each of these States became an international conflict [...] the precise time at which the different stages of this multi-party conflict became *or ceased to be a conflict of an international character* must be determined by a review of legally relevant facts. In the event the Tribunal concludes that the conflict is of an international character, the ‘grave breaches’ provisions of the Geneva Conventions of 12 August 1949 shall apply.³⁹

³⁹ Final Report of the Commission of Experts, 70-1; the authors also used quotation marks around the name of any rebel Serb-founded republic, immediately indicating to the reader the Commission’s belief in the illegitimacy of these rebel zones.

The authors were explicitly discounting the legitimacy of the “Serb Republic of Krajina” and other rebel Serb-founded governments in order to resolve the paradox created after acceptance of the secessions of Croatia and Bosnia as legitimate and denial of the seceding (Bosnian) Serbs. Because these republics were founded almost entirely on the war criminal actions of the Yugoslav National Army and Serb paramilitary, the authors easily dismissed these states. Nonetheless, the UN had to consider and fully dismiss the applied principle of self-determination that these Serb forces claimed before they could assess individual conflicts as internal or international, and finally, assess further involvement or not.

Due to the limited space of the Report, the authors appear to have relied a great deal on their compiled findings that constituted the annexes in order to explain in greater detail the intricacies of the Commission’s understandings. In the section titled “Genocide,” the authors make no strong statements supported with evidence about acts of genocide in the former Yugoslavia – perhaps because most of the evidence was contained to the annexes. Instead of using one of numerous examples they had at their disposal, the authors of the Final Report chose to describe genocide in theoretical ways:

If there are several or more than one victim groups, and each group as such is protected, it may be within the spirit and purpose of the Convention to consider all the victim groups as a larger entity. The case being, for example, that there is evidence that group A wants to destroy in

whole or in part groups B, C and D, or rather everyone who does not belong to the national, ethnic, racial or religious group A.⁴⁰

Unfortunately, the ICTY did not publish the annexes with the Final Report, nor were they donated to Special Collections and Archives at DePaul University where Bassiouni transferred his materials. It is unclear why the annexes were not published: some likely contained sensitive, confidential, or personally identifiable information, while others were analyses of all facets of the conflict – including its alleged past.

Bassiouni does, however, summarize an important annex that delves into the history of conflicts in an article he published in 1994, the same year the Final Report was published by the Security Council. In his summary of the investigations into the region's history, Bassiouni and the Commission compiled hundreds of years worth of conflicts in order to demonstrate that the warring populations of the Third Balkan War have always been at odds with one another:

Annex IV [of the Final Report] pertains to the policy of ethnic cleansing. This 90-page report contains three sections: first, a history of conflicts in the former Yugoslavia dating back to the first century A.D.; second, an analysis of the policy of ethnic cleansing; and, third, a study of the town of Zvornik [...] Since the ethnic rivalries in the territory of the former Yugoslavia are historically rooted, the first section describes the origins of the rivalries and the region's turbulent past in the hope of providing an understanding of the perspective of the parties involved in the current conflict.⁴¹

⁴⁰ Final Report of the Commission of Experts, 25.

⁴¹ M. Cherif Bassiouni, "The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia," *Criminal Law Form: An International Journal* 5, no. 2 (1994): 328.

A history of conflicts dating back to the first century A.D. was the result of overzealous research, and it is clear that since the Commission perceived centuries of conflicts to be connected to the present populations, they ascribed to an essentialist depiction of Balkans history. By suggesting that the populations were identical to their progenitors two millennia prior, the Commission was offering an ahistorical image of cultural preservation over time and unchanging criterion for the identities of Balkan nations.⁴² Moreover, by depicting these nations with a long-standing history of conflict (though untrue), the UN Security Council encountered difficulty in settling on a more effective solution than their efforts thus far.⁴³

Though Bassiouni led the Commission of Experts, he was not the only author to contribute to the Commission's Final Report. Bassiouni credits two IHRLI staff attorneys for their contributions on Annex IV, one of these attorneys being Jan Brakel. While structuring the fourth annex of the Report, Brakel analyzed the 1986 draft "Memorandum" of the Serbian Academy of Arts and Sciences (SANU) because of its heightened media attention. Throughout the 1990s, journalists often mislabeled the SANU Memorandum as a blueprint for

⁴² For more theory on the role of historical antecedents in nationalist movements, see Anthony Smith, *Nationalism* (Cambridge: Polity Press, 2010).

⁴³ For more on the deficit of national identity-driven conflict between 600 AD and 1800 AD in the Balkans, see John V. A. Fine, Jr., *When Ethnicity Did Not Matter in the Balkans: A Study of Identity in Pre-Nationalist Croatia, Dalmatia, and Slavonia in the Medieval and Early-Modern Periods* (Ann Arbor: University of Michigan Press, 2006).

Serbian expansion, but scholars have demystified the document's ideologies *vis-à-vis* Serb nationalist expansion during the war.⁴⁴ Brakel identifies a level of intellectual poverty within the economically focused portion of the Memorandum, and he also writes in his analysis of the document:

Finding a connection between the Memorandum and subsequent events may in this instance also betray a common journalistic overestimation of the power of the written word, as distinct from crediting the account to the more complex interplay of large forces (social, economic or political), mass psychology and its symbols, spoken exhortations, inspirational personalities, and the dynamic of open conflict itself once sparked by the intractable mix of things contemporary and historical.⁴⁵

What is particularly significant about Brakel's review of the SANU Memorandum is that he critically responds to media sources that claim the Memorandum is a clear expansionist plan for belligerent Serb nationalists. Yet, Brakel, like Bassiouni, subscribed to the notion of age-old hatreds. Brakel's usage of the term

⁴⁴ As historian Jasna Dragović-Soso points out, the Memorandum's propositions were largely not radical: "It does not advocate the redrawing of borders or ethnic cleansing, as has so often been alleged. In fact, it can hardly be called a 'blueprint' or even a 'national programme', if this is understood to mean a set of objectives and coveted territories, a time frame or a series of instructions for action." Dragović-Soso, *Saviours of the Nation*, 181. A possible explanation for why news media outlets promulgated the Memorandum as a "blueprint for Serbian expansion" was the perceived connection between the document as a reaction to the movement for Kosovar independence and the bloodshed that started in the 1990s. In 1986, a draft Memorandum was leaked to a Yugoslav regime tabloid, and due to the Memorandum's Serb nationalist content, the document set off widespread concern for the future of the Yugoslav federation and its republics. As Serbian politicians and members of the Belgrade intelligentsia perceived the country's power-relations and economics in increasingly Serbocentric terms, Slovenes and Croats distanced their respective republics and cultural institutions from the federal center. While the document was not a blueprint for Serbian nationalist expansion, it did, however, further open up discussions of nationalisms – Serbian, Kosovar, Croatian, and Slovenian – at the federal level, thereby bringing the country even closer to sociopolitical collapse given its vast economic problems. For more on the perspective of Croatian intellectuals in relation to Yugoslavia and Yugoslavism, see Tihomir Cipek, *op. cit.*; for more on the Slovenian intelligentsia's perspectives on Serbian hegemony, see Mitja Velikonja, *op. cit.*

⁴⁵ Jan Brakel, 1994, The SANU "Memorandum," The M. Cherif Bassiouni Papers, 2-3.

“historical” here refers to the Commission’s generalized history of Balkans region conflicts dating back to the first century AD, further indicating that the associates to and members of the Commission of Experts conceived of the populations as essentially different from one another while also simultaneously conceiving the populations as unchanged for nearly two millennia. Given Brakel’s skepticism toward media sources, it appears highly likely that Brakel either acceded to essentialism prior to his work with the Commission or he developed it while investigating. Regardless, Brakel believed the Yugoslav peoples had long-standing hatreds for one another, and his research efforts were part of the reports that informed the United Nations Security Council.

Though it is difficult to determine if Bassiouni held an essentialist worldview prior to his appointment to the Commission, he certainly continued to conceive the nations of the former Yugoslavia within the framework of essentialism for years after the completion of the investigations. While serving as expert witness to the defense in *Jane Doe v. Radovan Karadžić*, Bassiouni was asked if the commission had looked into the history leading up to the events. He explained, “It was not part of our investigation. We did not have a mandate to look into the political evolution, but it was important to understand how things came about, for us to see how this conflict evolved. [...] There has *always* been in Serbia

a very strong nationalistic streak.”⁴⁶ This distortion of historical fact, or at the very least a significant misreading of history, had unintended disastrous consequences.

In depicting the conflict as both *perpetual* and as *having victims on both sides*, it comes as no surprise that the UN Security Council could not conceive of more effective intervention efforts; the UN was dealing with a fractured civil war – a habitual conflict that had always existed and would, perhaps, always exist. To complicate matters further, the UN honored the self-determination of the Slovenes, the Croats, and the Bosnians by recognizing the statehood of each of these three nations. This meant when the rebelling Bosnian Serbs attempted to break away from newly independent Bosnia and rejoin Serbia, the UN could not honor the action as one of self-determination. As William Maley succinctly observes: “The UN was faced in the former Yugoslavia with a conflict not simply between groups, but between principles – of the *sovereignty of states*, of *self-determination*, and, of *human rights*. These were all principles which the UN had played a major role in propagating.”⁴⁷

Though Cherif Bassiouni and the other members of the Commission of Experts intended to end the grave violations of human rights in the former Yugoslavia, their reports paired with the exhausted UNPROFOR and UNHCR worked against these humanitarian aspirations. In the end, the essentialist portrayal

⁴⁶ United States District Court, *Jane Doe v. Radovan Karadžić*, The M. Cherif Bassiouni Papers, 24, emphasis added.

⁴⁷ Maley, “The United Nations and Ethnic Conflict Management,” 563, emphasis in original.

of ancient hatreds, the complications in applying the principle of self-determination uniformly, and widespread victimization paralyzed the United Nations; and under these circumstances, ethnic cleansing and other grave breaches of international law persisted until military action interrupted the Yugoslav conflict and slowly ended it through the 1990s.

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