TOMORROW JERSUALEM:
Lawfare as a Means of Defining Military Doctrine in the 21st Century, IDF as an example to the CDF in the Wake of the ITFY in the Hague

By dr. Peter Anthony Ercegovac
& Marinko Tomašić

"The military leadership represents the part, while the national political leadership represents the whole, the inclusive vision of the nation's resources in its striving for survival"
Major General Israel Tal, IDF

It was in the Spring of 2007 whilst working with the Assistant Director of Croatia Caritas Vice Batarelo that a conversation arose that was to provide the inspiration for this essay. Discussing the plight of the Croatian state and national identity in the wake of then seven years of the post-Tuđman era Batarelo mentioned to me that what struck him, after years of preparation for his doctorate, was the strength of desire for return amongst world diasporas and how in many ways they recognized the need for a strong national identity tied to the nation-state at a more deeper fundamental level than those who had never left their homelands. For him it was a hunger for belonging, survival and continuum best summed up by the old Jewish blessing given when families gathered to celebrate the Passover that they would one day return to Jerusalem, or as the family elder would recite "tomorrow Jerusalem". For me, as a specialist in the field of counter-terrorism with field experience with national and religious movements from Northern Ireland and the Basque Country to Indonesia and the Middle East, the question took a different slant, ie, what to do once one we arrived in Jerusalem? Does this mean that all goals were achieved and now the nation could rest on its laurels? What if others coveted Jerusalem? Who would then ensure the place of the nation once it returned to the international fold through the attainment of statehood.

For us the answer was obvious. If one was to use such an allegory then why not look at the very nation-state at the core of the phrase as an example for our people. Hence, when looking at Israel as an example for Croatia, the whole question of identity in a fledgling state surrounded by political and diplomatic obstruction at best, and enmity at worse becomes one of defence. Like Israel, we are a nation-state forged in war. Like Israel we are a manifestation of the combined desires of the homeland and diaspora alike. Like Israel international recognition has not stopped our enemies from attempting to challenge our sovereignty. But unlike Israel we have failed to formulate a core national identity that would override all superficial ideological, party political and societal divisions. We believe that the reason we have failed to create this core national identity is that we have failed to forge a national identity built on our victory, as those who are apathetic or hostile to the idea of Croatian national identity being the main foundation for our national political continuum have systematically disassembled the national ideology of the one institution that was the moral facilitating factor of our nation-state, the Croatian Army. And this was done in the name of breaking the so-called international isolation through de-Tuđmanisation.

This article will be divided henceforth into two parts. Firstly we will examine the legal aspects of the Croatian Defence Force (CDF) *vis-à-vis* its responsibilities toward international law, the Hague war crimes tribunal, her allies in NATO and her role as potential guarantor of national security in the post-Tuđman era. The second part will deal with the Israeli scenario, ie, IDF, and how it can provide a contemporary example for the CDF through examining how itself dealt with similar crises throughout its history.

I

This section of the paper will provide a rudimentary look at the phenomenon of 'lawfare' to stress the importance of legal strategy (in addition to military, intelligence and cyber operations) as part of an integrated national security program. The legal aspects are particularly relevant in the context of asymmetric warfare and in light of developments in international law that have taken place at the 'International Criminal Tribunal for the former Yugoslavia' (hereafter ICTY) and her sister tribunals, the 'International Criminal Tribunal for Rwanda' and the 'Special Court for Sierra Leone'. For states that border a country with a history of irredentism or contesting territory (the *Tadić* case provides a good examination of the 'Greater Serbia' political and military project),[1] these dimensions assume greater significance as conflict increasingly becomes transposed from the military to the legal, cyber and intelligence space. In recognition of this trend, President Obama has signed executive orders outlining how the US military should respond in cases of cyber-attack.[2] The importance of the legal sphere is also demonstrated by the first instance decision in the *Gotovina* case.[3]

Joint Security Structures: a Brief Comment

The Croatian state should resist the trend among European nations to downsize military budgets and related legal and cyber capabilities in a mistaken reliance on joint security architectures such as NATO. Outgoing US Secretary of Defence Robert Gate's warned of NATO's potential irrelevance and criticised the failure of many European allies to pull their weight in terms of materiel, troop contributions and military spending.[4] Given the experience of the US in Afghanistan, Iraq and Libya, it would be foolhardy for the Croatian state to expect assistance from the same European allies, especially given many are antipathetic to Croat national identity in deference to a regional "Western Balkan" architecture (Bildt, 1999). Further, the intelligence / military agents of some of these nominal allies made up the UNCRO force that according to the Gotovina's defence counsel colluded with rebel Serb forces during the Homeland War and gave unreliable

[1] *Prosecutor v Tadic (Transcript)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1 31 May 1996) 1618.
[2] 'Pentagon Gets Cyberwar Guidelines', *Fox News* (online), 22 June 2011 <http://www.foxnews.com/politics/2011/06/22/pentagon-gets-cyberwar-guidelines/>.
[3] *Prosecutor v Gotovina et al (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-06-90-T 15 April 2011).
[4] Voice of America, 'Gates Says NATO Could Face "Irrelevance" in the Future', *In The News* <http://www.voanews.com/learningenglish/home/world/Gates-Says-NATO-Could-Face-Irrelevance-in-the-Future-123664044.html>.

witness testimony in Gotovina's trial.[5] Likewise the US cannot be expected to engage seriously with the Croatian state as a reliable national security partner if the focus is on outsourcing.

Lawfare

Just as Carl von Clausewitz proposed the maxim that 'war is the continuation of policy by other means' (Hew & Herberg-Rothe, 2007, p.107), lawfare can be similarly constituted as the continuation of war by legal means. Academic prevalence of the term can be attributed to Major General Charles Dunlap who defined lawfare as 'a strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective' (Dunlap, 2008, p.146). His definition was intended to be 'ideologically neutral' in that it covered both positive and negative connotations of the term.

An example of positive use of lawfare includes sanctions on Iraq that prevented importing of new aircraft and parts and was as effective as an air strike in facilitating air dominance for the US led coalition in the second Gulf war.[6] A regional example includes Croatian diplomacy lobbying for sanctions to be imposed on Milosevic's Yugoslavia which had a debilitating impact on the economy.[7]

A more negative view of lawfare is espoused by neo-conservatives that see international legal institutions as prone to politicisation and misused by asymmetric forces to hinder states such as Israel and the US in confronting terrorism. Such a pejorative framing of the term resonates with American and like populations' suspicion of foreign bodies passing judgement over their troops. However such an analysis is not without merit as the statutes of international tribunals have had considerable input from non-state donors such as activist NGO's.[8] Brooke Goldstein of 'The Lawfare Project', cites examples such as libel/hate speech lawsuits to silence authors and politicians and inculcate a culture of fear. Analogous to this, there is the ICTY prosecution of journalists Josip Jovic and Domagoj Margetic that invoked a protest from Reporters without Borders.[9] This is an example of the misapplication of human rights terminology as well as the orchestrated law-of-war violations that is more about procuring civilian casualties to be used for propaganda purposes and also to threaten military personnel with war crimes trials.[10] Dunlap believes such risks are low but even he recognises that such litigiousness exists,

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[5] *Prosecutor v Gotovina et al (Gotovina Defence Final Trial Brief)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-06-90-T 15 April 2011) [396], [410].
[6] Daniel L. Haulman, 'Whatever Happened to the Iraqi Air Force' [2009] Air Force Historical Research Agency 1, 6.
[7] *Central and South-Eastern Europe 2004* (Europa Publications, 4th ed, 2003) 535.
[8] Hans Köchler, 'Universal Jurisdiction and International Power Politics: Ideal versus Real' [2006] *Yeditepe'de Felsefe* 1, 5.
[9] See criticism of prosecutions from 'Reporters Without Borders', <http://www.rsf.org/IMG/pdf/rapport_gb.pdf>; Merdijana Sadovic, 'Margetic Conviction Sparks Media Ethics Debate' on Institute for War and Peace Reporting, *International Justice – ICTY* (13 February 2007) <http://iwpr.net/report-news/margetic-conviction-sparks-media-ethics-debate>.
[10] Brooke Goldstein, 'The Disproportionate Use of Lawfare' on Hudson New York (5 April 2010) <http://www.hudson-ny.org/1132/the-disproportionate-use-of-lawfare>.

at least within international tribunals. More importantly, despite the disparate views on the nature of the risk, Dunlap understands the policy implications for force recruitment for an all volunteer army which has an influence on how the CDF is viewed from its conception.[11] Dunlap also points to the self-imposed lawfare where self-imposed restrictions as quantified by rules of engagement may be self-defeating and perversely lead to greater collateral damage as he argues was the case in NATO operations in Afghanistan.[12]

Universal Jurisdiction and Interpol Warrants

An negative manifestation of lawfare includes the misuse of 'universal jurisdiction' by activist groups to invoke criminal suits against ex- politicians from the US and Israel - a poignant example being the UK warrant for former Israeli foreign minister Tzipi Livni over the Gaza assault towards the end of 2008.[13] 'Universal jurisdiction' allows domestic courts around the world to try 'universal crimes' (piracy, slavery, genocide, crimes against humanity, war crimes, torture) in the absence of the conventional 'territorial or national nexus'.[14] Its practice becomes problematic when courts navigate beyond the customary definition of 'universal crimes' such as the Spanish inclusion of political groups among the classes of victims for genocide in order to enable a prosecution of former Chilean dictator Pinochet.[15] There is also the issue of disparate standards of due process because even though the authority to adjudicate the matter derives from international law, 'the state would be using domestic laws and procedures *to* adjudicate the substance of international law'.[16] The other problem is that in most cases this involves one country seeking to extradite from a second country a national that belongs to a third country. Given the gravity of universal crimes, bail is rarely given and the extradition process may takes months of years. Even if the accused succeeds in demonstrating an abuse of process, they will have had significant dislocation to their lives which does not serve the cause of justice nor strengthen faith in international law as in the case of the Gotovina and Markač trials. However states whose citizens are subject to a universal jurisdictional court process are not powerless and have the ability to object at the world court if the substance of the universal crime deviates from the benchmark set by international treaties and related tribunal jurisprudence, such as Congo did forcing Belgium to release Congo's minister for foreign affairs.[17]

Another avenue open to misuse is the Interpol system of international warrants. This was demonstrated by the arrest of Tihomir Purda in Bosnia Herzegovina on an international arrest warrant issue by Serbian war crimes prosecutors based on a confession extracted in

[11] Dunlap, above n14, 141.
[12] Ibid, 135.
[13] BBC News, 'Israel fury at UK attempt to arrest Tzipi Livni', *BBC News* (online) (15 December 2009) <http://news.bbc.co.uk/2/hi/middle_east/8413234.stm>.
[14] Anthony J.Colangelo, 'The Legal Limits of Universal Jurisdiction' 47 (2006-2007) *Virginia Journal of International Law* 149, 150.
[15] Ibid 156.
[16] Ibid 162.
[17] Ibid 182 citing Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v Belg.), 2002 I.C.J. 121 (Feb.14).

a Serbian POW camp during a war characterised on the Serbian side by massive war crimes. Purda was later released after Serbian war crimes investigators found that the investigation had not met legal standards. The negative side-effects of such incidents include veterans fearing to travel overseas with the flow on effect on recruitment and defence force morale in future years to come as if this may occur to people who fought for their country whilst it was being attacked then who is to say what may happen to a professional soldier in a similar circumstance down the track. Indeed Purda is just one of a number of people who appear to have been targeted by Serbia through the interpol system which NGOs argue appears to be a strategy to redefine the regional narrative concerning responsibility for the wars in Bosnia and Croatia.[18] A narrative which has detuđiminisation at its heart as the goal is to place equal blame on Croatia for the occupation of her country by Serbia in attempt to create international parity in the interpretation of events. Incidentally, Purda was one of the group of former inmates of concentration camps in Serbia that form a class action group that is able to litigate against the Serbian state, again reinforcing the importance of lawfare.[19] This information should be taken into account as it is in the interest of the Serbian security community to defame litigants before their case gets to court.

Other examples include the cases of Ilija Jurić, Jovan Divljak and Ejup Ganić.[20] Kosovo political leaders likewise have faced episodic detention on the basis of an international arrest warrant issued by Serbia only to be subsequently to be released.[21] The *Ganić* case is instructive as Judge Workman detailed abuse of process by the Serbian war crimes office - a case of lawfare backfiring:

> On the first day of this extended hearing I was satisfied that there was prima facie evidence of an abuse of process and as a result of that ruling evidence has now been adduced in relation to that issue. No evidence having been adduced to show a striking or substantial change in the evidence available to the ICTY or to Mr Alcock I have concluded that there is no valid justification for commencing proceedings against Dr Ganic . I am satisfied from the evidence of Mr Arnaut that *during the course of these extradition proceedings attempts were made to use the proceedings as a lever to try to secure the Bosnian Governments approval to the Srebrenica Declaration. If indeed the Government was prepared not to pursue these extradition proceedings in return from Bosnian co-operation that in itself must be capable of amounting to an abuse of this process of this court.* Some corroboration for Mr Arnaut's evidence could be found in the unusual circumstances in which an application to vary conditions of bail was made to this court to enable Dr Ganic to return to Bosnia. It would appear that that application was founded upon attempts at

[18] Rory Gallivan, 'Ganic Case Highlights Dispute Over Bosnia War's Causes' on Institute for War and Peace Reporting, *International Justice – ICTY* (20 September 2010) <http://iwpr.net/report-news/ganic-case-highlights-dispute-over-bosnia-wars-causes>.
[19] Professor Danijel Rehak, *Putevima Pakla: kroz srpske koncentracijske logore 1991 ... u 21. stoljece* (Hrvatsko drustvo logorasa srpskih koncentracijskih logora, 2000), 495.
[20] Nenad Pejic, 'In Serbia, It's Time To Issue A Warrant For The Truth' on Radio Free Europe / Radio Liberty, *Commentary* (4 March 2011) <http://www.rferl.org/content/pejic_bosnia_commentary/2328106.html>.
[21] Matthew Brunwasser, 'Bulgarian Court Frees Former Kosovo Leader', *New York Times* (online) (26 June 2009) <http://www.nytimes.com/2009/06/27/world/europe/27kosovo.html>.

> diplomatic agreements. I am also satisfied that the descriptions in the request are as Dr Malcolm described significant misrepresentations. The combination of the two leads me to believe that these proceedings are brought and are being used for political purposes and as such amount to an abuse of the process of this court. (emphasis added) [22]

The case highlighted legal processes can be buffeted by the mechanics of international diplomacy, but also the importance of a robust domestic legal system in being prepared for rebuffing such foreign pressures. Dunlap notes that a robust legal system can significantly enhance national security and cites that 'totalitarian societies which suppress liberty, along with the proper function of the rule of law, seldom achieve lasting battlefield success.'[23] If lawfare encourages opponents to use the courtroom instead of the military space, then it is a positive development in minimising human suffering and should be encouraged.[24] Indeed, Dunlap ruminates the hope 'that military personnel would consider the law not just as a formal limitation and moral imperative, but also as an affirmatively useful- and very pragmatic- arrow in their quiver'.[25]

Lawfare, Propaganda and Evidence

Jus ad belllum governs when states may resort to force with this right codified in Article 51 of the Charter of the United Nations.[26] *Jus in bellom* qualifies how force may be applied in conflicts and its parameters include the legal requirements of necessity, proportionality and immediacy.[27]

The principle of distinction is defined in the Geneva Conventions *Additional Protocol I* in article 48 that requires parties to distinguish civilian and military population and objects and 52 which states that 'Attacks shall be limited strictly to military objectives'.[28] Proportionality or 'military necessity' are captured by article 51 and 57 of *Additional*

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[22] *Republic of Serbia v Ganic* [2010] EW Misc 11 (EWMC) (27 July 2010) [39] (Judge Workman).

[23] Charles J. Dunlap, Jr., 'Does Lawfare Need an Apologia?' (2010) 43(1-2) *Case Western Reserve Journal of International Law* 121, 139.

[24] Michael Scharf and Elizabeth Andersen, assisted by Cox Center Fellows Effy Folberg, Michael Jacobson, & Katlyn Kraus, 'Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting' (2010) 43(1-2) *Case Western Reserve Journal of International Law* 11, 24.

[25] Dunlap, above n14, 137.

[26] <http://www.un.org/en/documents/charter/chapter7.shtml>: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'

[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 103 ('*Nicaragua*'); *Nuclear Weapons* [1996] ICJ Rep 226, 245; *Oil Platforms (Iran v US) (Merits)* [2003] ICJ Rep 161, 187. See also International Military Tribunal (Nuremberg), Judgment and Sentences, reprinted in Lawrence Egbert, 'Judicial Decisions' (1947) 41 *American Journal of International Law* 172, 219–23; *Restatement (Third) of the Foreign Relations Law of the United States* § 905 (1987) cited in Michael N. Schmitt, '21st Century Conflict: Can the Law Survive?' 8(2) (2007) 443, 449.

[28] Additional Protocol I, art 48, 52(2).

Protocol I which cover prohibition of incidental injury, loss of life of property to civilians that would be excessive in relation to military advantage, and taking all precautions in planning.[29] Whilst *Additional Protocol I* governs international conflicts, *Additional Protocol II* governs internal conflicts and in the *Tadić* appeal judgement, whilst it was held that the Bosnian conflict had both international and internal dimensions, Judge Li gave a separate opinion that stresses that not all the provisions governing international conflict applied to *Additional Protocol II*.[30] Ironically considering the nature of his decision, Judge Orie held that Operation Storm occurred as part of an international conflict.[31] Whilst knowledge of the statute and jurisprudence is important, it is the evidence and laws of evidence that is equally critical. With this in mind, the propaganda dimension cannot be underestimated as there is an asymmetry in the media that affects availability of evidence. Schmitt note this difficulty when he states that:

> The media is a poor vehicle for conveying the balance between military necessity and humanitarian values that underpins the *jus in bello*. Consider the principle of proportionality. Destruction of civilian property and the deaths of civilians are easily depicted, and often quite spectacularly, on television. On the other hand, how do visual images capture the military advantage that rendered the collateral damage and incidental injury lawfully justified? Inevitably, the war the public watches is portrayed out of context.[32]

Compare this to the exaggerated claims as to life lost and property damage during *Operation Storm*, conceded by UN intelligence officer Phil Berikoff under cross-examination.[33] The international media and diplomatic space is an echo chamber where once allegations are made, it is very hard to redress the impression made. Ensuring a negative domino effect to occur when taking into account the image of an army, in this case the CDF. A negative image that can eventually easily be utilised by enemies of Croatia in future propaganda campaigns through various diplomatic channels.They influence perceptions and reports that become the standard narrative and consequently affect witness testimony and opinion evidence. Consider the reports of certain UNCRO officers of massive property destruction during *Operation Storm*- yet part of the evidence submitted included accounts of property damage that exceeded manyfold the number of properties in the village according to the 1991 census.[34]

There is also the risk of utopian jurisprudence where an exacting standard is applied that effectively outlaws war. An example is the Goldstone report on Israel's incursion into Gaza found insufficient the most extensive warnings to a civilian population to date -

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[29] Additional Protocol I, art 51(5)(b), 57(2).
[30] Kristen Dorman, 'Proportionality and Distinction in the International Criminal Tribunal for the former Yugoslavia' (2005) 12 *Australian International Law Journal* 83, 87.
[31] *Prosecutor v Gotovina et al (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-06-90-T 15 April 2011) 1693.
[32] Schmitt, above n30, 469,
[33] Goran Jungvirth, 'UN Officer Witnessed Arson and Looting' on Institute for War and Peace Reporting, *International Justice – ICTY* (5 September 2008) <http://iwpr.net/report-news/un-officer-witnessed-arson-and-looting>.
[34] *Prosecutor v Gotovina et al (Gotovina Defence Final Trial Brief)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-06-90-T 15 April 2011) [456].

approximately 165,000 telephone calls, the dropping of 2,500,000 leaflets, radio broadcasts.[35] A standard no army could realistically reach including *ipso factum* judgment of the Tuđman Govt and CDF in their efforts to forewarn ethnic Serbian civilians of the impending action of *Operation Storm.* There is the report by U.N. Special Rapporteur Phillip Alston with the suggestion that operators of remote predators must reveal to international scrutineers site specific information in order to determine the benchmarks of distinction and military necessity, yet this would allow insurgents to learn from such information and gradually blunt the effectiveness of such weapons systems.[36] Which in itself would halt the aimed military objectives of liberating one's territory.

Whilst the term lawfare is relative new, the concept is not as demonstrated by the Soviet Union's tradition of lawfare to bind other states in non-aggression pacts and thus supplement their military strategy by giving them predictability over the contested space. There is the use of lawfare as propaganda tools such as show trials of 'enemies of the regime' for which the various communist states were reknown.[37] Russia has pre-empted international criminal court by enacting the international law of aggression into its criminal code allowing it to try such cases both domestically.[38] Something Croatia's political elite has not seen as necessary, with obvious consequences.

ICTY – Lawfare, Secrecy and Hearsay Rules

There is a number of factors that make the ICTY more suspect than many domestic court systems. These include the absence of a police arm- the ICTY is forced to rely on reports from intelligence services of various countries who by omission of intelligence can create a misleading picture that accords with their state's foreign policy objectives. Former ICTY spokesperson, Florence Hartmann, noted that most of Military Analyst Teams would shift through the evidence and influence who would be charged and for what were mostly staffed by UK and US military analysts.[39] It also becomes a political actor by virtue of the virtual trials of cooperation with a non-complying state.[40] Add to this that the tribunal is also under pressure to justify its budget, especially in the earlier years and consequently targeted states become more likely to comply to fill its cells.[41] The financial and time constraints as well as performance pressure (especially after the death of

[35] Dunlap, above n16, 136 citing Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 795, 828.
[36] Ibid, 133.
[37] See the show trial of Aloysius Stepinac; <http://www.glas-koncila.hr/index.php?option=com_content&view=article&id=119&Itemid=122>.
[38] Christi Scott Bartman, 'Lawfare And The Definition Of Aggression: What The Soviet Union And Russian Federation Can Teach Us' (2010) 43(1-2) *Case Western Reserve Journal of International Law* 423, 445.
[39] Florence Hartmann, *Peace and Punishment: The Secret Wars of Politics and International Justice* (Flammarion, 2007) 103.
[40] Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press, 2009) 9.
[41] Ibid 81.

Milošević), can also impact the exit strategy- the most notable example is the decision not to charge Ratko Mladić with offences committed in Croatia.[42]

The adoption of the civil law approach to hearsay evidence also contributes to the potential for lawfare in the ICTY. While Stephen Rapp, former Chief Prosecutor in the *Prosecutor v. Charles Taylor* trial notes that hearsay is essential to establishing accountability for high level civil and military leaders in cases where the crimes are committed in a widespread and systemic manner,[43] but this plays easily into perceptions that the Hague Tribunal is a political court, especially if too low a threshold is set for hearsay evidence. Indeed, a former ICTY judge has herself expressed concerns about the ICTY's rules of evidence, particularly a move away from live testimony to greater use of depositions and audio-visual presentations. She also expresses doubt that judges do not need the same restrictions and juries, with concern over the reputational effect on the tribunal's legacy:

> Donning a robe does not enshroud its occupant with a seventh sense of whether something written on paper is true or false. In that sense, the judge is on a par with the juror, who must rely on his or her human instincts in evaluating the person doing the testifying. To permit critical material to be admitted without the ability to directly view and question the witness goes to the heart of the process and threatens to squander the ICTY's most precious asset--its reputation for fairness and truth seeking.[44]

In this sense her Honour reflects a common law approach, where the hearsay rule operates to exclude hearsay except in a number of exceptions, because a key aspect of a trial is cross-examination in which you can question the witness and observe their demeanour to assess their understanding, truthfulness and memory. The absence of the ability to cross-examine may undermine a defendant's right to a fair trial. By contrast, the civil law allows all evidence because it considers that the truth cannot be established otherwise.

The trial chamber ruled in the *Tadić* case, judges found that while balancing probative and prejudicial effect of hearsay evidence before ruling on its admissibility may be relevant in a jury trial, in a bench trial, the judges' training and experience meant they could be trusted to determine the evidence's relevance and probative value and accord it the appropriate weight in their deliberations.[45] Evidence probative if at a minimum is

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[42] Daily tportal.hr 'Brammertz: War crimes in Croatia excluded from Mladic indictment' *tportal.hr* (online) <http://daily.tportal.hr/131110/Brammertz-War-crimes-in-Croatia-excluded-from-Mladic-indictment.html>.

[43] Angela Stavrianou, 'Admissibility of Hearsay Evidence in the Special Court for Sierra Leone' on Centre for Accountability and Rule of Law, *Articles* (9 March 2010) <http://www.carl-sl.org/home/articles/383-admissibility-of-hearsay-evidence-in-the-special-court-for-sierra-leone>.

[44] Patricia M. Wald, 'ICTY Judicial Proceedings ---- An Appraisal From Within' (2004) 2(2) *Journal Of International Criminal Justice* 466, 471.

[45] *Prosecutor v Tadic (Decision on Defence Motion on Hearsay Dated)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1 5 August 1996) [17].

reliable.[46] In making this ruling, the trial chamber relied on rule 89 that states the tribunal may admit any evidence it deems to have probative value and noted sub rule 89(D) allows admitted evidence on basis of relevance to be later excluded.

In *Prosecutor v Aleksovski,* Judge Robinson in dissenting opinion took a purposive approach in interpreting the statute. He counselled against too low a threshold for admissibility holding that the rules do not say that any evidence that is relevant and probative is admissible and cited rule 95 as an instance where evidence obtained by methods that throw doubt to its credibility or damage integrity of proceedings would be excluded despite its relevance and probative value.[47] He also pointed to rule 90 as evincing an intention of the primacy of direct witness testimony in chamber with only two exceptions being deposition pursuant by order of the Chamber or a video-conference authorised the chamber.[48] His Honour also noted that the primacy of oral evidence was reflected in the safeguards of rule 94bis,[49] if expert evidence is to be admitted without further cross-examination.[50] His Honour reaffirms the primacy of the right to cross-examine as a keystone of legal systems around the world and its breach may breach International Covenant on Civil and Political Rights.[51]

The Tribunal is also at risk of veering towards a utopian jurisprudence that displaces the elements of proportion and distinction with a criteria that equates the incidence of collateral damage with war crimes. This is precisely what we see in the Gotovina trial and judgement. One of Gotovina's attorneys Payam Akhavan has expressed reservation about a ruling which effectively breaks the nexus between crimes against humanity and the laws of armed conflict.[52] This allows a commander, who despite obeying humanitarian laws, 'can still be held criminally liable by re-categorisation of his conduct.'[53] In Gotovina's case, the issue contested is the charge of 'forcible displacement' and the ruling effectively makes no distinction between occupation forces forcing out a population, and a population fleeing an oncoming army during combat. Conventionally, occupation forces would be held to higher standard than forces in combat who would instead be assessed against the criteria of proportionality and distinction. Akhavan argues that the tribunal has misread the silence on occupation element in the *Stakić* definition of deportation as dispensing with the requirement of occupation.[54] The Gotovina appeal is

[46] *Prosecutor v Tadic (Decision on Defence Motion on Hearsay Dated)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1 5 August 1996) [15].
[47] *Prosecutor v Aleksovski (Decision on Prosecutor's Appeal on Admissibility of Evidence)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-AR73 16 February1999) [6] (Judge Robinson).
[48] Ibid [10].
[49] Ibid [17].
[50] Rule 94bis sets out special procedures if expert evidence is to admitted without calling the expert to testify in person and includes time limits for disclosure of expert evidence to opposing party as well as for opposing party to indicate acceptance or request cross-examination of the expert.
[51] Ibid [28(iv)(e)].
[52] Payam Akhavan, 'Reconciling Crimes Against Humanity with the Laws of War' (2008) 6 *Journal of International Criminal Justice* 21, 31.
[53] Ibid 35.
[54] Ibid citing *Prosecutor v Stakic¤ (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, Appeals Chamber, 22 March 2006), 278: the forced displacement

also instructive of the danger of utopian jurisprudence and its negative implication for bona fide military actions. His appeal states that 1st instance judgement 'imposes [a] standard so exacting that it renders lawful warfare impossible'. Regarding the unlawful shelling charge, the defence noted that the trial judges concluded that any shell that fell outside 200m from a military target was therefore targeting a civilian area and hence unlawful. They suggested that the judges erred in law as they imported this 200m standard after the completion of litigation without an opportunity for either litigant to respond and in doing so denied procedural fairness. Gotovina's defence team also noted that the judgement found 95% of the shells fell on military targets, of which the remaining 5% fell into empty fields - yet the trial judges held that 20,000 civilians fled due to the 5% of shells that missed the military target, most falling into empty fields, and not due to the local Serb leadership 'evacuation orders or the propaganda-induced fear of a Croatian army victory'.

One of the more under-analysed aspects of Croatia's War of Independence, as well as the corresponding Bosnian war and to a lesser extent the Kosovo war, is the impact guerrilla forces have in not just military terms but legal consequences, especially with respect to the calculus of distinction and military necessity. Indeed, parallel with the conventional war, the aforementioned conflicts, particularly in Croatia and Bosnia, involved large numbers of militia that interspersed easily with civilian populations. These guerrilla militias are integral to the 'Chetnik' tradition that dates back to the First and Second World Wars where the guerrillas intermingled with civilian populations. This brings to mind the Article 37(1) of *Additional Protocol I* that prohibits perfidy, including feigning surrender.[55] The incident that comes to mind is the controversy surrounding Sijekovci. The potential issue is one of distinction with regards to an irregular force employing perfidy that backfired and may account for the disputed accounts. But it also points to the inherent evidential and propaganda issues that a military combating asymmetric forces has to face.

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of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a de jure border or, in certain circumstances, a de facto border, without grounds permitted under international law'

[55] Art 37. Prohibition of Perfidy

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
(b) the feigning of an incapacitation by wounds or sickness;
(c) the feigning of civilian, non-combatant status; and
(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Conclusion Part I

Lawfare can have both positive and negative consequences. If misused, it can backfire as it did for Serbia in the *Ganić* case. However, it can be a valuable tool for ensuring accountability and providing deterrence for future military actions- Croatia's success in the ICJ to date, Croatia's success in the European court of Human Rights in the *Blečić* case,[56] as well as the legal actions taken by Serbian POW camp and like victims demonstrate the positive role of the law. The negative is demonstrated by *Gotovina* case where Croatia has failed to assist Gotovina's attorneys nor plead their national security cause in deference to EU ambitions- contrast the success of Serbia in getting secret SDC minutes redacted.

To assist Croatia's legal capabilities, it would be recommended that Croatia adopt some elements from the common law system, particularly with regard to rules of evidence because as some of the most robust legal systems in the world, US, UK and Australia, are common law systems. In becoming a hybrid system it will allow more Croatian attorneys to adjust seamlessly to the international legal arena. Also a system of military justice modelled along the lines of JAG would help inculcate a robustness and independence to military justice which would allow international confidence in the bona fides of local prosecutions, but also remove any scope for confusion or misinterpretation as to the lines of command as arguably happened in the *Gotovina* case with respect to military police. Finally, also of assistance would be a lustration bill that would help weed out inefficient justices who are likely prone to political interference, with re-admittance in certain exceptions on a case by case basis and involving a truth and reconciliation commission. Relaxing admission requirements to the Croatian bar to lawyers in the diaspora would also help the judiciary not only in terms of expertise (especially those from common law jurisdictions), but also in terms corporate culture and cultivating a culture of independence from the other branches of government.

II

The IDF as an Example for Croatia

The very fact that the Croatian state is placed on trial as a defendant in warcrimes tribunals or itself is a litigent in many cases as has been shown in the previous section of this essay suggests that we have reached Jerusalem. So now lets look at how the Israelis did things to ensure that they at least remained sovereign as a people within their nation-state. For us the answer lies in the tying of military doctrine to that of their national identity forging a coherent national *raison d'etre* out of their different political and ideological stances; whereby, despite the conflicts within Israeli society the very fact that within the first 25 years of her existence Israel had fought five wars for existence a

[56] *Blecic v Croatia* no. *59532/00* 29 July 2004; case dealt with property acquisition by the state and redistribution.

consensus for the need of sovereignty has become innate thanks in the main to the IDF placing itself as the moral authority of the state's *raison d'etre*.

It would be wrong to believe that from the foundation of the IDF that it had an innate sense of self belief and knowledge of its inherent role in the survival of the Israeli state. The same doubts of who we are and what is our identity plagued the IDF as it did many people born and bred in Croatia. Both peoples were either raised with the belief that an independent homeland was a dream or that the identities of the states in which they were raised were of greater importance. Hence it is no surprise that in the mayhem in the foundling years of the Israeli state the single most important person responsible for the formation of IDF identity as a military doctrine based on the premise that it must protect at all costs the Zionist state and Zionism was in fact a Scottish protestant, Orde Wingate[57]. At the core of this new identity would be the need to recognise that nothing could be achieved or maintained without the firm belief in the special mission of the Jewish people.

This in many ways is relevant when looking at Croatia and the role of both the first President of Croatia Franjo Tuđman and the war time Minister of Defence Gojko Šušak. There is little doubt the role of the first President is the more significant. But looking at his role simply in terms of being an ostracised intellectual and political dissident that saw his nation through the period of transition from communism to democracy is a minimalist viewpoint open to subjective criticism from those seeking to downplay the nature in which Croatia attained her independence. Tuđman was Croatia's Ataturk. First and foremost he was a military leader who led his people through a war that was imposed upon them, and against all odds attained victory. But deeper than this is the fact that he personified the union of two ideological viewpoints in what Croatia was as a political entity, ie, he through his role as the national military leader brought together those who actively worked for the development of Croatia as a sub-unit of the Yugoslav identity with those who fought for her outright independence. Hence the attacks upon him and Minister Šušak are a concerted attack upon the very symbols of homeland and diasporic union. And there is no better way in diminishing this than by relativising the role of the Armed Forces in the modern state, as well as morally belittling them by accusing them of being co-signutures to a doctrine of interethnic conflict. It is because of this we find ourselves in a situation whereby we have the *de jure* prosecution of our generals in the Hague, and in the sentencing the *de facto* criminilisation of the personality of the father of the modern Croatian nation-state, President Tuđman.

The question we ask is would other nations allow this to occur? Of course not. And it is here we would like to look at several examples involving Israel whereby the IDF would lead the way in creating Govt national ideology through sending messages to the

[57] Orde Wingate was a British Army Intelligence Officer assigned to the British Mandate of Palestine who honed his military skills in the Sudan, Ethiopia and Burma and who eventually was recognised by Ze'ev Schiff "as the single most important influence on the military thinking of the Haganah", whilst Samuel M. Katz would claim "Wingate had a profound impact on the molding of the Israeli military doctrine. Defense, when fighting a numerically superior enemy, meant offense, and offense meant fighting deep inside enemy territory where the opposition was most vulnerable" (Meyer, 2009, p. 1).

international community that only the Israeli people in the form of the IDF and state have the right to question and condemn the actions of their national polity.

Israel has always been aware of the IDF's responsibility toward international law. It understands that within the security zone that is called the Occupied Territory Israel is constantly monitored by the UN through two branches of law: the International Human Law and the International Humanitarian Law. Nonetheless the reality is that due to her precarious position Israel has had two periods of counter-terrorism law, that *de facto* have merged into one period, that has governed through *Defence Emergency Regulations* of 1945 that was adopted from the formation of the state in 1948 in the *Prevention of Terrorism Ordinance* through to the end of military rule in 1966 to the Knesset and IDF's freezing of the amendments to the law in the wake of the 1967 war. This aggressive interpretation of national security would manifest as a form of not just domestic, but the basis for Israel's international policy, according to Lori Wigbers (2009, pp36-39).

The Political-Military Partnership

What had developed here is what Yoram Peri (2002, pp. 12-13) calls the "political-military partnership" between the state and military. Though all decisions are made at the govt level, and ratified through acts of parliament, under the surface there is a secreted level whereby a professional military officer class is an equal partner to policy decision making processes. Even in a party political organisational sense the policy spectrum is made up of groups of politicians and officers working to keep continuity of development within the defence structures of the state.

This is plausible as up to 10% of the population at any time is in the army whilst no one can hold a position within the Knesset, diplomacy or governemental institutions if they have not completed national service. Yet the army itself is constantly changing as officers move into early retirement and are absorbed into civil structures. Reservists allow civilians to be counter linked to the army creating the notion amongst the populace of the IDF being ideologically and doctrinally a civilian army. What emerges is a symbiotic relationship between population/society and army. A fluid movement between segments of society that allowed for quick decisive action when Israeli citizens are threatened as in the case of the Munich Olympics' tragedy of 1972.

Operation Spring of Youth and *Operation Wrath of God* were more than just instinctive responses to the Black September Orgaanisation (BSO) and Palestinian Liberation Organisation's (PLO) attack on Israeli athletes at the Munich Olympic Games in 1972. It was a message that after centuries of displacement and persecution a new policy emerged that would "allow" the Israeli Govt to act extraterritorially, even outside the legal definitions of war, in order to ensure the continuation of the Jewish homeland. This establishment of "Committee X" would see the IDF and Mossad placed in major foreign policy formation strategic advisory positions in the name of national security (David, 2002, pp. 3-4). As stated by Golda Meir , "Wherever a plot is being woven, wherever people are planning to murder Jews and Israelis- that is where we need to strike" (Mapes, 2009, p. 151).

What the world saw as dubious attacks upon the sovereignty of foreign states, ie, *Spring of Youth's* bombing of PLO camps in southern Lebanon, western Syria and Jordan or *Wrath of God's* precision assassination program between 1972 and 1979[58] from Norway to Paris, the Israelis saw as a position of aggressive defence. Significantly, many of those involved in the planning and implementation/ground leadership of these teams, including the April 10, 1973 Israeli commando raid and assassination on three PLO leaders in their Beirut homes would become the new wave of political elite schooled in the concept of the need for a militarized national identity such as future Prime Minister and long time Labour leader Ehud Barak (Jonas, 2005, pp. 182-197).

But the IDF itself was able through experience to learn more from potential defeat than victory, an example that would grant Mossad and Israel the luxury of no longer taking certain things for granted. As Rober S. Bolia (2004, pp. 48-53) argues a major shift in consolidating IDF national identity, and hence the need to look at Israeli national identity as a continuum that needs to be continually defended, occurred during the failures of the first 24 hours of the Yom Kippur War in 1973. It was a period whereby Egyptian Forces crossed the Suez Canal into the Sinai losing only 208 soldiers (though estimates were to be 10,000) and Syrians advanced 12.8 kms into Israel via the Golan Heights. In the main this hubris was caused by the four from four victories achieved against a variety of Arab military combinations over a 25 year period that led to an arrogance of superiority amongst certain IDF and Govt leaders that presumed that military superiority was inherent thus making Israel forever safe from foreign incursion. A delusion of invincibility that could lead to a moral laziness, which in turn may undermine the reasons behind the need to protect the nation-state. Bolia points to the fact even if you take von Clausewitz's defensive strategy being the strongest it was the very same von Clausewitz who mentioned that without moral virtue/belief a victory cannot be achieved. For von Clausewitz in the main it is a question of "Volksgeist" or "national spirit"[59].

Though the IDF had modernised its weaponry it had not its doctrine. Since the Six Day War in 1967 they had attained US Skyhawk and Phantom jets, Hawk surface-to-air missiles, M60 tanks, M113 personnel carriers and M109 self-propelled artillery pieces. Yet they were mistaken in believing that battles were one by armour alone. As Bolia (2004, p. 51) would state it is motivation that is the key to victory and the continuum of military survival. But this survival could not only be built on defense alone. Here the IDF failed in its interpretations of the outcomes of the Six Day War. Building the system of fortified defensive lines named after the then IDF Chief of Staff General Bar Lev was the same mistake the French made between the two world wars and look at that outcome. It was only with a policy of aggressive defense that the IDF has been able to adapt its doctrine in a bid to ensure the continuum of Israeli identity within the defense of the Israeli state. As Bolia (p. 54) states of the 1973 generation:

> The Israelis possessed what Clausewitz called *Volksgeist*, a patriotic or national spirit. Because of the goals of the Arabs in most of their wars with Israel was the eradication

[58] Though the final assassination actually occurred in 1996.
[59] Von Clausewitz, Carl *Vom Kriege* (Berlin: Ullstein, 2002 p. 168)

> of Israel as a nation, the Israelis always felt that they were fighting not simply to win, but also to exist. This was a unifying factor, like the natural camaraderie associated with the common bond of military service. But in the Yom Kippur War, there was more to it than that. Israel was now 25 years old, and those who fought as young men in the War of Independence were still fighting. But this time their sons and daughters were fighting as well.

Doctrinal Military Autonomy as a Pillar of Statehood

The importance here is recognizing that the IDF, within its doctrine, was always able to act relatively autonomous of the democratic political structures. The success of 1973 came from the revitilisation of the IDF's doctrine post 1967 with an ever more reliance on the doctrine of aggressive defence. What the period from 1964[60]- with the clashes with Syria over water supplies- through to the Six Day War of 1967 had taught the IDF was the political dovish path to peace through diplomacy and the engagement of superpower allies without taking into account IDF intel was what nearly led to the collapse of the state in a time of unexpected war (Gluska, 2007).

The Govt of Unity, which included Likud, did not see the signs as the atmosphere created by well intentioned politicians placed too much emphasis on the strength of Israeli democracy whilst neglecting the fact that her neighbours were not so democratically oriented. Whilst the Govt of Prime Min Eshkol was singing praises of its diplomatic solutions President Sadat of Egypt by May 1967 had moved his forces into the Sinai. If it were not for the adopting in 1966 by the IDF, in a hawkish move by the IDF Chief of Staff General Yitzhak Rabin contrary to the political will of the Govt, of a preparation for preemptive strikes against Syria and Jordan one would question whether Israel would have survived the initial onslaught of the 1967 campaign. In fact Segev (2007, p. 155) notes that the difference between Eshkol and Rabin lay in what could be described as generational issues. The IDF was filled with younger cadres who had been raised with the IDF, and saw is not merely as a responsive military entity but one that was designed doctrinally to take the initiative prior to it being necessary to go on the defence.

This younger cadre was in many ways responsible for the major doctrinal shift of the IDF that was correspondent to a shift in international affairs with the decline of the Soviet Union by the late 1980s and the subsequent rise of the First Intifada in 1987. Peace through land return was becoming a possibility in attempting to gain peace with the Palestinians. None of this could be achieved without IDF involvement. Moreover, since the Govt was reliant upon the Intelligence and Planning Divisions of the IDF for intel by the 1990s the IDF was placed within all echelons of the Israeli state. Even when by 1996 Prime Min Netanyahu attempted to rectify this the reality of the nature of the conflict in the West Bank and Gaza would lead to such moves petering out.

The beginning of the Second Intifada, the al-Aqsa intifada, and the failure of the 2000 Camp David Talks would see the environment made available for the IDF to claim more

[60] In fact, according to Gabriel Sheffer (2008, p. 12) whilst citing Tom Segev the IDF already had a plan to occupy the West Bank along with East Jerusalem in 1963, though it was rejected by Prime Min Eshkol.

space in the policy-making process of state. One could suggest that the rise of hardliner Sharon to the Premiership over Barak was done with quiet and active support of the IDF. Sharon addressed the complaints of officers that politics hampered their ability to protect civilians. As Peri (2002) notes for the first time the Chief of General Staff of the IDF Lt.-Gen. Shaul Mofaz engaged politicians with heavy criticism in the mass media eventually leading him by 2002 to become Defence Min in the new Govt. Civil control over the Defence Ministry was no more, but Israel would now be steered in a direction where doctrinal change could occur without threat to the security of the state. A rare luxury considering her geopolitical position in the world.

Technological Evolution, Doctrinal Change & National Security

Yet one of the major problems facing any army is that of doctrinal evolution *vis-a-vis* technological revolution. With the emergence of what the American theorists have come to call the Revolution in Military Affairs, Networkcentric Warfare (NCW) has become a dominant model in strategy planning. Essentially, technology has taken its place at the centre of military doctrine. Carl Osgood noted (2008, p. 53-54) that this was a major factor in the IDF's failure to attain their main agenda during the Summer 2006 incursion into Southern Lebanon. With an aim to eradicate Hezbollah the strategy was built around: «a doctrine that emphasised generating «effects» on Hezbollah's «systems» in order to create a «consciousness of victory» on the Israeli side, and a «cognitive perceptiion of defeat» on the part of Hezbollah». The problem lay in the not only the diversive nature of the opponent, but also the fact the overuse of technological language within the command systems led to a misunderstanding at best, and misinterprating of orders at worst. Suddenly, a generation within the military emerged that was totally professional in its outlook but lacking an understanding of what their role was to be within a new evolving national polity.

For all the advantages of having a highly techonologically educated military elite what was not foreseen was that an overemphasis on technology also led to a neglect of the ideological reason for the existance of the IDF. NCW can blind many of its adherence, especially if they are of the mindset to be fascinated by technology *per se*. Hence, there is always a group who seek to place it at the centre of military doctrine, rather than simply accepting it as a tool to make the job of the soldier more easy. For Croatia this is of importance as we have now moved into a period of structural assimilation into the military planning systems of NATO. This runs the risk of the CDF becoming an auxillary wing of a great alliance with its own specialised roles predetermined by High Command rather than a defence force designed to secure the external borders of the state who come independently and with its own goals into the alliance command system. Yes the CDF needs to adapt but whether or not it should forgo conventional combat skills due to a foreign implemented dotrine is questionable. Even the USDF[61] was questioning by 2005

[61] As Osgood, 2008, p. 54 points out it was Lt Col. Gian Gentile who started questioning- whilst working at the U.S. Military Academy after two deployments to Iraq USDF- strategies by comparing their failures with those of the IDF in Southern Lebanon in 2006.: “The Israeli army wasn’t even able to handle basic tasks, such as command and control between battalions and brigades, or coordination between tanks and infantry. Gentile argued that the supposed success of the surge in Iraq compounds the problem for the U.S.

in Afghanistan whether it was worth reorganising army doctrine to placate the demands of technology when no one can guarantee that the next war will be the same as the last. Can we guarantee that the next war (which seems most likely to occur over Republika Srpska in Bosnia, or over the cantonisation of Bosnia *per se*) will be determined along the same strategical lines that the were determined by pre-planned Serb aggression at the commencement of the Croatian War of Independence? By Israel's next conflict in 2008 such questions became even more pertinent.

Israel's three week offensive into Gaza and Southern Israel from December 27, 2008, to January 18, 2009, called *Operation Cast Lead* was, according to a critic of warfare without morality Roni Bart (June 2009, p.19), a new era in direct conflict resolution when the IDF moved not to pressure population groups out before attacking. Much of this came due to the failures of the 2006 campaign in Southern Lebanon and a much needed review of how an army in a period of non combat should prepare for upcoming conflict as a means of deterrence in the wake of the *Winograd Commission*. It was now up to Lt. Gen. Gabi Ashkenazi to lead a cultural change that would redefine the doctrinal role of the IDF within Israeli society through the implementation of a new five-year plan called *Teffen 2012* (Matthews, 2009, p.42). More importantly, on the initiative of the Ministry of Defence, the Government of Israel sought to defend all IDF members against potential war crime accusations. A stance that if the Croatian Govt chose to similarly do so would place her own armed forces in a secure position of not being answerable to anybody but the defence of the state and nation thus allowing her to develop a doctrine based solely on the survival of the nation-state and citizenry without fears of retribution from defeated enemy centres of power. At once professionalizing the army within the definition of its constitutional role as an insurer of the pillars of state- along with Parliament and Judiciary- remain intact whilst ensuring its autonomy in the evolution of its doctrine as the protector of the nation-state's foreign borders and security spheres.

In the Israeli example, there developed a moral duality whereby many generations of Israeli soldiers were brought up in the belief that their army was the most moral in modernity. In the main this was built around the story of Major Hanan Samson's death at the hand of terrorists in the Jordan Valley in 1969 whilst protecting the life of a mother nursing her baby as a symbol of national defence in times of war being built solely around the concept of any war fought in the name of national security being a just and moral one. For Croatia a similar scenario would be the development of the cult of the Croatian War of Independence. This is not the creation of a legend through the feeding of myths rather it is a nod to those who sacrificed their lives in the name of Croatian independence that their lives were not wasted. In fact their sacrifices would now be used as a doctrinal unifying gel for upcoming generations to understand that their forebears created a tradition built upon the sanctity of homeland defence[62]. So when looking at the

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Army because that, and the high profile of the new counterinsurgency manual, are have a "Svengali-like effect on us, like we have some secret recipe for success.""

[62] This is more common in contemporary democracies than most people realise. In Australia for example ANZAC Day, which recognises the sacrifices made by Australian and New Zealand Forces when landing during WWI at Gallipoli on April 25 1915 in what is now modern day Turkey, is not viewed as the commemoration of defeat or the folly of war rather is it viewed as the day when the fledgling Australian federation for the first time entered as one onto the international military stage. Which itself is a potent tool

refusal of the IDF to persecute any Israeli citizen of war crimes before conflicts occur one realises that the IDF never made the mistake of not covering their bases. From sending tens of thousands of phone calls to citizens in the Gaza and the dropping of pamphlets from the air to repeated media warnings- even at the cost of eliminating the strategy of surprise- the IDF ensured that civilians knew what was coming and that the nature of the battle would be from house to house.

So why is international community not seeking to trial Israel, yet for *Operation Storm* where Serb communities were equally forewarned Gen. Gotovina and Gen. Markač have been sentenced to 24 and 18 years imprisonment respectively? One interesting answer may lie within the IDF and how it successfully humanises the *raison d'etre* behind their actions. At the core of IDF philosophy is to place the universal principle of the sanctity of life at the centre of all their actions. However, including the protection of the life of the average soldier within this definition of the sanctity of life changes the very perspective of who the soldier actually is. He/she is not just a dehumanised figure in military uniform but a human individual willing to make the ultimate sacrifice in order to ensure the continuity of the collective being that is the Israeli nation. At the heart is the need for the IDF to continually evolve their ability to justify to the rest of the world the reasons for their specific methodology as they deny access to international judicial institutions of trialing individuals.

For Bart (June 2009 pp. 25-27) several points have become essential in ensuring the protection of the IDF and her soldiers, they are:

- Mobilising international law- aimed at ensuring that the concept of "disproportionate response" that is outlawed by international law[63] is no longer an issue to be debated upon publicly by civil and military elites.
- A transition from response to proactiveness- such as ensuring that the opposing side and international media is aware that their a ceasefires declared in order to allow for the provision of humanitarian aid to occur.
- Increasing transparency- controlling the access of international observers to investigate military actions.
- Advance-preemptive public relations- which would allow a combination of political PR officials to be part of operational planning details, and for international PR to be primed well before the event is to occur. Even to the extent of local liaison facilities being established between the IDF and local groups in Palestine and Lebanon.

In fact *Operations Cast Lead* also points to another development of great importance to the CDF. As Elkus and Burke (2010, pp. 14-15) point out many non-Israeli, including American, military analysts felt the operation was a strategic failure. The IDF, in

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used today in creating a doctrinal role for the Australian Defence Force as a symbol of guarantor of Australia's democratic freedoms and security interests.

[63] Arend, Anthony & Beck, Robert *International Laa and the Use of Force- Beyond the UN Charter Paradigm* (London, 1993) pp. 165-166.

dictating their interpretation of the operation, does not put much weight on world opinion. For them this was only one battle within the context of an ongoing war[64]. An ongoing war that is defined as the means to ensuring the national survival of the Israeli state and Jewish identity. As such international opinion must not supplant the mission of the IDF at any time, nor the strategy of continued deterrence.

Continued deterrence as a strategy has never seen the IDF forgo its defensive geo-political ideological line of national preparedness or immediate reserve mobilization. A prime example is the current debate being waged within Israel's defence community over the return of the Golan Heights to Syria as seen in the works of Major-General (res) Giora Eiland (2009) which directly challenges the rights of civilian government to return land without discussing the military implications of such actions.

One reason why this is possible is that the major parliamentary committee that deals with foreign policy also deals with military policy, ie, the Foreign Affairs and Defence Committee. Hence, within the Israeli body polity there is no separation between defence and foreign policy. This allows the IDF to be both a civilian and political army at once. Through the annual report to Cabinet by the head of the Intelligence Division, CGS of the IDF and the head of the Research Unit the IDF is constitutionally obliged to advise the Govt on the geo-strategic stance of Israel within the region *vis-a-vis* war and peace. The document that is produced here for review is essentially the blueprint for foreign policy and state security. In fact due to the autonomous nature of all Israeli ministries whereby each minister runs his own policies through his ministries the CGS also has to be in contact, for security reasons, with all ministries which in itself gives him a political role as "advisor" to all arms of government.

For us this highlights how through its autonomous role within Israeli political society the IDF has developed a role that is both porous and structurally linked to the overall system of governance. Yoram Peri (2006) goes further to suggest that this was a planned development that was not just a reactive or proactive response to Israel's wars but a doctrine developed from *real politik* analysis of Israel's geopolitical placement in the world and the IDF's role within this overall national defence strategy. As Reserve's Major-General Eiland (2009, p.16), former Chair of Israel's National Security Council from 2004 to 2006[65], wrote:

> Geostrategic characteristics remain a key factor in determining a country's ability to defend itself. England was never conquered because its army is strong but because it is surrounded by the sea. Russia was not defeated by Napoleon not by Germany due to its size and strategic depth. The Soviet Union during the 1980s and the United States currently find it difficult to control Afghanistan both due to its size and its topographical features. Israel is threatened by Hizbullah from Lebanon and by Hamas

[64] As quoted in Elkus & Burke, Israeli Special Forces Ari Spiegelman stated "the war is ongoing, with periods of more violence and periods of less violence, during which the enemy regroups and plans his next attack. When we feel that the enemy is getting strong, we must be prepared to make pre-emptive strikes, hard and fast at key targets, with viciousness, as the enemy would do to us. Only then can we acquire, not peace, but sustained periods of calm".

[65] Major-General Eiland designed and implemented the IDF's operational and strategic policies during this period.

> from Gaza not because of their strength but because geography allows them to strike deep into Israel with primitive weapons. If hizbullah, for example, with the very same arsenal, was located 200 km from the Israeli border, it would not be defined as a threat at all.

It is Gabriel Sheffer (2007, p. 2), in his analysis of Israeli security literature, who notes that even in the face of increasing Israeli public questioning of why the IDF has such a privileged place within Israeli society, but also in formulating policy, after the perceived failures of the 2006 Lebanon intervention one must recognise that there are nonetheless several clear facets of Israeli society that has led to this scenario. Which he (ibid., p.5) believes this is the development of a society that is based on the concept of a "Security network" that is a partnership between civil authorities and security forces that allows for the development of a robust militarised society that protects the nation-state's democratic legitimacy. They are:

1. The IDF has been there from the beginning of nation-state formation to this day,
2. Israel has always been surrounded by threats with the IDF often being the sole guarantor of Israel's survival,
3. The autonomy of the IDF in forging its own security policies,
4. Israeli society itself is in essence a "mobilised" society, and,
5. The often "blurred" public opinion that the IDF is inherent to the Israeli political system.

At the core of understanding this is that Israel is a "nation at arms" as it has to be so in order to survive. Thus the borders between civil and military society are porous, ambiguous, autonomous and interactive leading to a politicisation of the military as well as the militarisation of society. As Ron Tira (2010, p.39) points out the IDF simply follows the line of von Clausewitz whereby war is an extention of the political will of the nation. This is an extension of a trend that Tira (2010, p.52) has noted whereby in the USA, Israel and the West the military has attempted to place their doctrine and methodology into the political realm as war itself is merely policy of state, a last course of action when diplomatic compromise cannot be achieved.

The Question of "Ethnic Cleasnsing" and Military Doctrine

During his time at the Hebrew University of Jerusalem in the 1970s Baruch Kimmerling was working toward a PhD on Zionist ideology and its relationship toward land and its political consequences when he discovered that the World Zionist Organisation's (WZO) Jewish National Fund (JNF) between 1882 and 1948 had purchased only 7% of Arab owned land in Palestine meaning that in the wake of the war of independence the Israeli state saw 350 Arab villages evacuated, leaving, according to the then Minister for Agriculture Moshe Dayan, four million dunums of land being procured through nationalisation to the Israeli state or the JNF (Kimmerling, 2004, p. 3). All of which was legislated into law through the 1960 *Basic Law: Israel Lands*, the *Israel Lands Law*, the *Israel Lands Administration Laws*, and the 1954 and1961 Convenants between the Government of Israel and the WZO and JNF respectively.

Why is this significant?

Because these policies were the child of the 1948 Military Blueprint which would be called *Plan D (Tochnit Daleth)* designed and implemented in part by General Yigael Yadin on March 10, 1948. As Yadin stated:

> Actions against enemy settlements located in our, or near our, defense systems [i.e., Jewish settlements and localities] with the aim of preventing their use as bases for active armed forces. These actions should be divided into the following types: The destruction of villages (by fire, blowing up and mining)- especially of those villages over which we cannot gain [permanent] control. Gaining of control will be accomplished in accordance with the following instructions: The encircling of the village and the search of it. In the event of resistance- the destruction of resisting forces and the expulsion of the population beyond the boundaries of the state[66].

Yet, even some of the most foremost critics of IDF strategies of displacement of Palestinian populations such as Benny Morris do not see either the results of population resettlement/expulsion/flight in the wake of Plan D in 1948 or after the 1967 and 1973 wars as war crimes. Why? Because the role of the IDF is seen as the ideological instrument to protect Israel at all costs. Hence, it is exempt from blame at the core level from any form of war crime. There is awareness that one victory, even if it is the one that establishes the nation-state as a result of a war of independence, does not in anyway guarantee the continuum of a state's existence as history is endless. Yesterday's borders changed, today's are likewise impermanent, tomorrow's are defined today. Thus a state that seeks to survive must always at a military level be ideologically prepared to ensure the defence of the realm from within and without.

When talking of Israel's future in an interview for the *Middle East Quarterly* Benny Morris (p. 69) said: "That there was a victory in 1948, but this did not ensure the existence of the state of Israel ad infinitum. Our success in 1948 aroused in the Arab mind a reaction of rejection and a tremendous desire for revenge. The Arab world adamantly refuses to condone our existence. Even if peace treaties have been signed since then, the average Arab, the educated man in his home, and the soldier in his fox hole persistently refuse to recognize Israel". It would be naïve to believe that this scenario does not exist in Croatia's case post *Operation Storm* in 1995. Any serious defence force would also recognise this and solidify this knowledge within its *raison d'etre*.

Alan Dowty (1999) feels that this attitude comes from an innate understanding of the need for defensive organisation, be it at a cultural, social or religious level, when operating in a non-Jewish environ for 2000 years. This fortified the people into a political nation through an increased spirit of understanding that survival comes from a welding of

[66] The implementation of such policy saw 20,000 square km of territory (6000 more than granted to Israel by the *UN Partition Resolution*) and with 700,00 Arabs becoming refugees with no right of return, as Kimmerling would state "The military doctrine, the base of Plan D, clearly reflected the local Zionist ideological aspirations to acquire a maximal Jewish territorial continuum, cleansed from Arab presence, as a necessary condition for establishing exclusive Jewish nation-state", 2004, p. 4.

common and individual interests in a single goal polity, the state. For such communities the individual sees its nation-state as a communal entity with whom it identifies as a guarantor of his/her national identity. This is at odds with the modern western view of the civil state whereby the individual sees the state as a separate entity designed as a forum for the resolution of competing interest groups. When it comes to the IDF Israelis realise that if it was not for their intervention in 1967 and 1973 Israel as a nation would not exist today. As in both cases Israel alone fought its enemies as did Croatia from 1991 till 1995.

Hence, any form of marginalization of the IDF in favour of increased democratic social relations is scene by many Israelis as an anathema to peace. Peace is not up for negotiation. It is not a goal to be attained by bargaining national rights or land, it is to be sculptured from the very land itself. Something that many Croatian politicians are purposefully neglecting in the aim of achieving EU membership at all costs.

A prime example of this was how the IDF took over Oslo I post September 1993 and gained full control- by Oslo II in 1995- over the process of negotiation. Though Shimon Pires and Yossi Beilin, the Foreign Min and deputy Foreign Min respectively, were the architects of the long term peace strategies it was Prime Min Rabin who slowly moved IDF generals into negotiation positions post the September 1993 Washington signing of the agreement.

The July 2000 Camp David negotiations between the Palestinian Authority and the Israeli Govt is another example whereby, even when agreements are on the verge of being made, when the question of refugee return arises Israel seeks to react in a way that places the security of the nation before that of positive international public opinion. Even when on September 18, 2000, the PLO Central Committee reaffirmed that no agreement could be confirmed without a total return of refugees, including a return to their former residences in Jerusalem (Dowty and Gaweerc, 2001, p. 40)[67]. The response of the Israeli elite? The September 29 visit of Ariel Sharon to the Temple Mount went ahead, even in the face of last minutes warnings by Jibril Rajub (ibid. p. 41), Head of Preventative Security on the West Bank. The result would be the second Intifada. An opportunity taken by the Govt and IDF to further close the West Bank and Gaza from outside traffic.

The IDF here is the instrument of implementation of such policies. Many scholars of Israeli and Jewish society have rightly pointed out that the Holocaust has left its mark upon the national psyche. Especially, in the wake of non-intervention by many western powers and the rejection of mass acceptance of refugees fleeing Germany and Central-Eastern European territories during WWII. A hardening of values towards security and the role of the nation-state in implementing security policies has led to a more aggressive attitude of the Israeli nation *per se* on this question[68].

[67] It is worth noting that Dowty and Gawerc point out that during the lead up to these Camp David negotiations the Israeli Ministry of Housing oversaw a 92% increase in the commencement of construction between the first half of 2000 and 1999 respectively in the settlements in the Occupied Territories even when the issue of return was known to be central to the Palestinians' negotiation's starting position, p. 40.
[68] As Dowty (1999, p. 7) points out through various opinion polls conducted by the Israeli authorities between 1967 and today in 1969 64% of sampled Israelis felt that "they preferred strong leadership over

Not even the question of democracy is immune to this. Democracy, freedom of the press and civil rights are important. Yet they are not to ever exceed the significance of national security at any level. First and foremost is the protection of the Israeli citizen before any promotion of a social movement or civic societal agendii. So much so that Israeli Chief of Staff Rafael Eytan once declared "nothing which might give satisfaction to an Arab, should be allowed to be published by the Israeli news media."[69]

In fact, though international opinion is important, it is not paramount. Something that the elites of Croatia have yet to realise. It was Matthews (2009, p.49) in his seminal study of IDF strategies in Gaza during *Operation Cast Lead* and their consequences upon IDF doctrinal development who noted:

> Although threatened with a crushing defeat, Hamas still believed it could strengthen its standing in the Arab world by continuing to resist and by conducting an effective IO [sic*- international opinion] campaign. However, while Hamas's propaganda machine tried to capture worldwide sympathy for its plight and paint Israel as the aggressor, the IDF pushed on relentlessly, seemingly unconcerned about any wide-reaching IO effort. One IDF officer said that the Israelis would never win global public opinion, but thought Israel's IO campaign had worked well in conveying the message that "we did as we pleased, when we pleased, and where we pleased- full battle space domination."

Interestingly, when considering the Croatian elites' fascination with the opinions of civil society and media's demand for transparency Matthew (ibid. p.49) noted that the opinion of one Israeli soldier he interviewed that "he also considered the IDF's ability to be "less transparent" in this conflict as a positive factor", because at the core of the new strategy is to always be able to create a "better security situation". For example, even to the extent that Israeli military elite ignored the concerted effort by critical theorists and post-modernists who called, through the British Association of University Teachers' in 2005, for the academic boycott of Haifa and Bar Ilan universities with the aim of removing "tenured radicals" from Israeli educational institutions (Seliktar, 2005). The IDF and Israel Govt did not appease these calls rather they came out on the attack using the medium of broadcast and print media to defend their positions.

Opposed to this we have the Croatian example whereby we have the wanton opening of the Presidential Archives to the world media by former President Stipe Mesić which was instrumental in providing the documentation that convicted generals Gotovina and Markač at the Hague. In Israel the Westminster concept of the "right to know", which has found its legal completion in the US constitutional law in the *Freedom of Information Act*, is not recognized. In fact after consultation with the IDF in order to recognise how best to protect the military Israeli lawmakers over the years have ensured that the protection of national security is of greater import. This is shown through the legislation of the *Israel Penal Revision Law (1957)* and the *Basic Law on the Executive Branch*

"all the laws and debate". By 1981 this numbered 72%. Whilst in 1990 some 34% of Israelis considered Israel too democratic.

[69] Ibid. p. 9.

(1968) which prohibits the publication of classified and cabinet meeting documents. The *Freedom of Information Law (1998)* has only made cosmetic changes to the law. This is an example of a parliament placing security of the state and its defence force ahead of civil rights issues for the benefit of national security as a whole.

Intervention as Policy and a Means of Ensuring the Security Paradigm

Debate in Israel is still occurring. Nevertheless the question of military intervention upon foreign territory is not seen as aggression but as a means of aggressive defence. Hence any potential foreign criticism is rejected out of hand as it is realised that no one will intervene to protect Israel but the IDF itself. At the core of national security must be a continued awareness of real perceived threat from without the state.

The real perceived threats may take the form of extended policy from without aimed at destabilising Israeli state security via supporting groups whose sole objective is the destruction of the Israeli state; or an ideological openly hostile state who has reached a level of military technology that can produce a weapon that may physically destroy Israel. The former is shown in Iranian and Syrian support for Hezbollah and Hamas in Southern Lebanon and Palestine respectively, and the latter in Iran's potentiality to create a nuclear weapon.

In such cases no international criticism concerning the lack of respect for the sovereignty of a foreign state, nor potential intrusion upon civil rights, is taken seriously as the sanctity of Israeli statehood is placed foremost above all other concerns.

As Ron Tira (2010b, pp.45-46) noted, as in the case of Iran's potential nuclear proliferation, what the concerns for the IDF are: recognition of the actors, threats and their interests; what does a nuclear Iran mean for Israel; how to engage this threat in the short and long term; can intervening militarily halt the production of warheads; how can Israel influence the geopolitical strategy of the region after such preventative actions; can the international community be utilised to negate action in the first place; will the attack ensure successful completion of state policy, and will the USA/allies give the green light. Thus establishing who and what are the 'actors', 'alternatives', 'time frames', 'achievable objectives', 'subsequent trends', 'necessity', 'measures of success' and 'standpoint of allies' (ibid.) is the duty of the IDF and Knesset. In no ways does the establishing of such aggressive defensive tactics run contrary to the main goal of the IDF, which is the protection of all costs of the Jewish nation, no matter what the pressures from the international community[70]. If the international community is displeased then it is the job of diplomacy not to appease and placate them rather it must bring them around to see the Israeli standpoint, and if this cannot be done then draw the diplomatic line, which clearly states to other nations accept it or not we will do this anyway.

[70] The fact that many intel channels attributed the 2007 attacks upon Syrian "nuclear" facilities to Israel is suggestive that such military implementation of national policy is of such importance that it is considered not for public consumption.

One of the most controversial forms of intervention has been the reintroduction of targeted killings since 2000. For the international community, Iran and the Arab League these are clear-cut assassinations. For the IDF and security community the terms "interceptions" or "targeted thwartings" are preferred as they are viewed as legitimate counter-terrorism measures. No matter terminology is used it is clear that the IDF feels such measures are justified if the end goal is decreasing terrorism and securing the Israeli state.

These targeted killings have been part of Hagan, Mossad and IDF duties since 1948. From the 1950s mail bomb killings of two Egyptian agents who ran Fadayeen and the families of German missile scientists working for Egypt through to General Sharon's anti-terror detachments that killed 104 and captured 742 Palestinian militants from 1971 "interceptions" have been legitimate tools of the IDF of eliminating enemies of Israel (David, 2002, p. 3). In more recent times the 1988 killing of Abu Jihad, Arafat's number two, 1996 assassination of Hamas' Yahya Ayyash, and the 2001 elmiination of Abu Ali Mustafa and Mustafa Zibri, the head and general secretary of the Palestinian Front for the Liberation of Palestine respectively, as well as the 2002 liquidating of Hamas leader Sheik Salah Shehada, suggests little has changed.

Steven David (2002, p.14) points out in such a situation Israel places Israeli and Jewish Biblical Law before that of the international community[71] and the UN[72]. Citing Exodus 22:1 which is known in Judaic scriptures as the Rodef Injunction the IDF is seen as the institution designed to stop those coming to kill you by killing them. Though Basic Law has no capital punishment of an Israeli or non-Israeli citizen the Judge Advocate General of the IDF, with the support of the Israeli High Court, is permitted to suspend such law if three conditions are met: firstly, the target must ignore appeals to be arrested; secondly, that the IDF could not arrest them; and thirdly, the killing must be done as an act of prevention not revenge. If they fulfill these requirements then any extra-state activity undertaken by the IDF has ultimate support from the Israeli state in the face of the international community. Where would our generals be today if our High Court acted in a similar way?

Another question which is pertinent to the Croatian situation is that when dealing with their main enemy Israel, in this case Palestine, does not live in a black and white world, rather in shades. The reality is that international law defines conflict in terms of peace and war, in the Palestinian situation there is a question whether by legal definition whether or not Israel can be at war with terrorist groups. Hence many Israeli IDF analysts may ask whether or not the rules of engagement apply when no official war has been declared. Consequently international criticism of Israel and the IDF on whether or not they apply the rules of warfare is superfluous.

[71] *The Convention for the Prevention and Repression of Terrorism 1937.*
[72] *The New York Convention for the Prevention and Repression of Terrorism 1973.*

Conclusion

To come full circle in our argument we feel that in more ways than one that the Israeli state *vis-à-vis* her relationship with the IDF provides the Croatian state the best example on how the army may support the state and *vice versa* when it comes to ensuring national security. As an autonomous yet societally porous entity the IDF has successfully created a political- military alliance within the state that has ensured its ability to react robustly toward any threat to the Israeli nation-state from without. In return for border security the conjunctions of will between the Parliament and High Court have provided the legal background to ensure that all IDF members are secure in the knowledge that their actions shall be lauded rather than prosecuted. Add to this the role of diplomacy as a tool of governance to persuade the international community that Israel will react in ways that places the security of the Israeli citizen first no matter what international opinion may say then one can see where the elites of Croatia have let the CDF down. But in the main this has occurred in Croatia due to the overt politicisation of what the CDF's role should be from politicians themselves who seek to aspouse political agendii at the expense of sensible national security policy. It would be naïve to believe that this scenario does not exist in Croatia's case post *Operation Storm* in 1995. Any serious defence force would also recognise this and solidify this knowledge within its *raison d'etre* or even established doctrine. Unfortunately, upon the Croatian political scene, the enemies of the late President Tuđman see this, and have moved to ensure that the army as an institution of national unity may never be able to sufficiently recover to play its rightful role as guarantor of Croatian sovereignty.

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