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Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learned From It

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Michael Mandel

Abstract

This article outlines the case against NATO as having committed war crimes that the author believes should have been tried before the ICTY. The author argues that by not subjecting countries like the United States and other NATO members to international criminal trials and consequences, it undermines international criminal law. The author concludes by discussing the ICC and the United States qualified signing of, and suggested withdrawal from, the treaty and the ramifications that it has for the legitimacy of international criminal law.

NATO'S BOMBING OF KOSOVO UNDER INTERNATIONAL LAW

POLITICS AND HUMAN RIGHTS IN INTERNATIONAL CRIMINAL LAW: OUR CASE AGAINST NATO AND THE LESSONS TO BE LEARNED FROM IT

*Michael Mandel**

I got involved with the International Criminal Tribunal for the Former Yugoslavia¹ ("ICTY") in May 1999. That is when I and a group of lawyers from North and South America filed a war crimes complaint against sixty-eight individual leaders of the North Atlantic Treaty Organization ("NATO") at The Hague. The leaders included all the prime ministers, presidents, foreign and defense ministers of the NATO countries, and various officials of NATO itself, that is to say Clinton, Albright, Cohen, Blair, Chrétien etc., down through Javier Solana, Wesley Clark, and Jamie Shea. With a legal team from Canada, France, Great Britain, Greece, and Norway, we went to The Hague to make our case to Chief Prosecutor Louise Arbour (and then her replacement Carla Del Ponte) and filed volumes of briefs and evidence. Like literally thousands around the world, we demanded that Arbour and Del Ponte enforce the law against NATO. In March 2000, it became clear to us what we and others had long suspected, namely that the tribunal was a hoax, and we gave up on it. In June, Del Ponte announced that she had determined that NATO was not guilty of any crimes and that (rather illogically) she was not opening an investigation into whether they had committed any.² She released a report that was an amateur white-

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1. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

2. Press Release, Prosecutor for International Tribunals Briefs Security Council (June 2, 2000).

wash. Fortunately Amnesty International issued its own very careful and competent report at the same time³—in fact, Del Ponte rushed to announce her results a week early to steal the thunder from Amnesty. Amnesty concluded NATO was guilty of war crimes.⁴

I defy anyone to read the two reports and not conclude that the ICTY report is a fraud.

Reflection on this experience with international criminal law has led me to the conclusion that the whole thing is in the tradition of the Trojan horse, a gift of which we must beware from the new Greeks of America who want to use it to hide their aggressive and violent imperial politics.

Another way of putting this is that I think Slobodan Milosevic had a very good point (English grammar apart) when he told The Hague judges on his first appearance before them that the Tribunal “is false tribunal, and indictments false indictments.”⁵ And when he said that the “trial’s aim is to produce false justification for the war crimes of NATO committed in Yugoslavia,”⁶ he was merely echoing the American State Department official who wrote the Statute for Madeleine Albright in the first place. Michael Scharf meant no criticism of the ICTY, only the governments, when he wrote in October 1999 that:

[T]he tribunal was widely perceived within the government as little more than a public relations device and as a potentially useful policy tool. . . . Indictments also would serve to isolate offending leaders diplomatically, strengthen the hand of their domestic rivals and fortify the international political will to employ economic sanctions or use force.⁷

Treating the tribunal as one that perceived itself as merely a propaganda arm of NATO, is the only way to make sense of its violation of the most basic principles of judicial impartiality. This is apparent above all in its failure to charge NATO leaders

3. AMNESTY INT’L, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA: “COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE (June 7, 2000), available at <http://www.web.amnesty.org/ai/nsf/index/EUR700182000>.

4. *Id.*

5. Prosecutor v. Milosevic, Case no. IT-98-37, Transcript, at 2 (1998), available at <http://www.un.org/icty/transe37/010703IA.htm>.

6. *Id.* at 4.

7. Michael Scharf, *Indicted for War Crimes, Then What?*, WASH. POST, Oct. 3, 1999, at B1.

for the crimes they committed in the bombing campaign, something it was legally required to do by its Statute, not to mention morally required to do by the facts of the case. But it is also unmistakable in the way it pursued the Serb authorities, clearly far more concerned with legitimating NATO's war on Yugoslavia than with doing justice. Following are some examples.

Racak, January 15, 1999: the event that the Americans used as a cause of war. It is still not clear whether this was a genuine massacre of forty-five defenseless Albanians by Serb soldiers or a monstrous hoax perpetrated by the Kosovo Liberation Army ("KLA"). But it did not matter to the Americans. Up until then, the Security Council and independent observers judged the violence as provocation by KLA "terrorists" and retaliation by Serbs.⁸ But the day this occurred, the head of the observer mission for the Commission on Security and Cooperation in Europe ("OSCE"), American State Department official, William Walker, decided to hold a press conference calling it a "massacre" and a "crime against humanity."⁹ This was clearly an American political decision and not a moral one on Walker's part. Walker was an old hand at massacres. He was named in the indictment in the Iran-Contra affair and was a major player in other bloody, illegal Latin American adventures of the Reagan-Bush period. He was well known for turning the other way when U.S.-backed paramilitaries killed priests in El Salvador in 1989. He must have been well known to Louise Arbour. Yet, within one day and with no further investigation, she was at the border of Kosovo with television cameras declaring that she was "opening an investigation." Within four days, having consulted only with NATO officials, she declared it a war crime for which the perpetrators would be punished.¹⁰

Remember that despite a year's worth of powerful and cor-

8. See, e.g., S.C. Res. 1160, U.N. SCOR, 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. SCOR, 3939th mtg., S/RES/1199 (1998); *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998), and 1203 (1998) of the Security Council*, U.N. SCOR, U.N. Doc. S/1998/1221 (1998); William E. Ratcliff, "Madeleine's War" and the Costs of Intervention, 22 HARV. INT'L REV. 70, 71 (2001).

9. MICHAEL IGNATIEFF, VIRTUAL WAR: KOSOVO AND BEYOND 60 (2000); Ambassador William Walker, On the Record Briefing on the Kosovo Verification Mission (Jan. 8, 1999), available at <http://www.state.gov/www/policyremarks/1999/990108walkerkosovo.html>.

10. Press Release, Statement from the Prosecutor Regarding Kosovo Investigation (Jan. 20, 1999), available at <http://www.un.org/icty/pressreal/p379-e.htm>.

roborated evidence accumulated and submitted by thousands to Arbour and Del Ponte on NATO crimes, they declared that they were not even “opening an investigation.” One day and one suspicious word was enough in Racak, when the Americans decided to change policy and go to war with Yugoslavia. Racak was the pretext for the war and the ICTY legitimated the pretext. Racak led directly to Rambouillet. The failure of the Serbs to agree to the United States’ demands at Rambouillet was the justification of the bombing.

Then, only days after the bombing had commenced, Arbour announced an indictment of the noted Serb paramilitary leader “Arkan” for alleged war crimes in Bosnia, an indictment that she had kept secret since 1997.¹¹ Why announce it then? She said it was to warn everyone from associating with him in further crimes in Kosovo.¹² As if all the players did not know Arbour was after Arkan. As if that could dissuade him from anything—evidently he had other more serious things to worry about, since he would be gunned down by assassins before the year was out. The only thing the announcement could do, and therefore what it must have been meant to do, was to demonize the Serbs and give credibility to the United States’ justification for the bombing.

In early May, Arbour made successive television appearances with British Foreign Secretary Robin Cook and American Secretary of State Madeleine Albright. Cook made a great show of handing over war crimes dossiers that NATO had prepared against Yugoslav authorities, and Albright swore undying allegiance to the ICTY and promised it more money. But by the time Arbour was being all friendly on TV with them, what Jamie Shea called “collateral damage”¹³ (the death and maiming of civilian men, women, and children) was mounting, and well-founded and documented war crimes complaints against Cook and Albright had reached Arbour from thousands of citizens around the world—read Amnesty’s report that was later released to see how well-founded they were. But did she care? She was not even embarrassed by a helpful hyperlink to the NATO website on the ICTY homepage throughout the “investigation” of

11. Press Release, Statement by the Prosecutor (March 31, 1999), *available at* <http://www.un.org/icty/pressreal/p391e.htm>.

12. *Id.*

13. NATO Spokesperson Jamie Shea & Air Commodore David Wilby, Press Conference (Mar. 30, 1999), *available at* <http://www.nato.int/Kosovo/press/p990330a.htm>.

NATO.¹⁴

The most egregious example of the Tribunal's role as NATO's propaganda arm occurred on May 22 when, midway through the war (as civilian casualties of NATO's bombing were sickening the world), Arbour announced the indictment of Yugoslav President Slobodan Milosevic for various crimes, including murder.¹⁵ Apart from Racak, all of the charges concerned deaths that had occurred after the bombing had commenced.¹⁶ In other words, this indictment, based on undisclosed evidence supplied by NATO alone, came in the midst of a blistering bombing attack, for events which had occurred in some cases only *six weeks earlier* in the middle of the war zone. Though NATO tried to claim the indictment "embarrassed" them,¹⁷ the evidence all came from the Americans. Any impartial prosecutor would have regarded this evidence as very suspicious, perhaps the basis for an investigation once the bombing had stopped, but for an indictment during a war? Of course, this has to be compared with the inability of the Tribunal to even "open an investigation" after one year of being provided with overwhelming evidence in the public domain of NATO leaders' crimes, which, on the most conservative estimates, resulted in the deaths of far more civilians than those for which the Serb leadership was indicted.¹⁸

The purely propaganda nature of the Milosevic indictment became even clearer when Del Ponte took over from Arbour and said her first priority would be gathering evidence against him,¹⁹ in other words admitting that the indictment was preferred even

14. Do not bother trying to find it anymore. It was removed sometime after the report was released and the presence of the link was ridiculed by at least one ICTY critic. I have a printout of the page from April 22, 2000 for anyone interested in seeing it.

15. Press Release, Prosecutor for International Tribunals Briefs Security Council, *supra* note 2.

16. *Id.*

17. NOAM CHOMSKY, *THE NEW MILITARY HUMANISM* 98 (1999).

18. See Human Rights Watch, *Civilian Deaths in the NATO Air Campaign* (Feb. 2000); Federal Republic of Yugoslavia, Federal Ministry for Foreign Affairs, *Economic Survey* (Nov. 10, 1999) ("[M]ore than 1800 [were] killed and 5,000 wounded some 2,000 wounded persons will remain disabled for life.").

19. Press Release, Statement by Carla Del Ponte Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the Investigation and Prosecution of Crimes Committed in Kosovo (Sept. 29, 1999), available at <http://www.un.org/icty/pressreal/p437-e.htm>.

with most of the evidence still missing. When Milosevic first appeared in Court, Del Ponte added hundreds of victims to the counts against him, but apparently disappointed by the numbers, she announced (once again, for effect, that is well in anticipation of the fact) that she would be bringing “genocide” charges against him for his part in the Bosnian civil war.²⁰ This in turn was aided by the Trial Division’s judgment in *Krstic*,²¹ that genocide could consist of the murder of seven or eight thousand military-aged men (itself a very rough *maximum* estimate by the court) from one village in the middle of a military struggle over territory. A horrible crime, no doubt about it, but would it not have been enough to call it murder? Not if you wanted to Nazify the Serbs.

At the conclusion of the bombing, Arbour handed over the investigation of war crimes in Kosovo to the NATO countries’ own police forces, notwithstanding their obvious motivation to falsify the evidence. When people started to question the paucity of the victims, compared to NATO claims (mass graves either did not exist or turned out to be individual graves), Carla Del Ponte made a well-publicized and improvised visit to the Security Council—I know it was improvised because she had to cancel a long-scheduled meeting with me to attend—to reassure the world that the victims could yet well amount to what NATO had, at least in its more modest moments, alleged. We have heard nothing from her since on this subject.²²

So, whatever the guilt of the Serbs, the Tribunal acted more like a NATO press office than a court; this may not cast doubt on the guilt of the Serbs, but it certainly casts doubt on the legitimacy of the ICTY.

The real proof was in the failure to charge NATO, which is where I came in.

According to reputable polls taken during the bombing,

20. *Id.*

21. Prosecutor v. Radislav Krstic, Case No. IT-98-33, Judgement (1998), available at <http://www.un.org/icty/krstic/TrialCI/judgement/index.htm>.

22. After the arrest of Milosevic, Serb authorities announced they had found another 800 Albanian bodies that had been buried in Serbia to cover up crimes in Kosovo during the war. Without minimizing the terrible tragedy of each one of these deaths, it has to be said that even adding these would bring the “genocide” up to about 3,000 victims.

most of the world opposed this war.²³ Though supporters had some big names on their side such as Wiesel, Sontag, and Rushdie, we opponents did too: Miko Theodorakis, Claude Lantzmann—who called the war a “new Dreyfus Affair,”—Alexander Solzhenytsin, Roy Medvedev, Harold Pinter, Noam Chomsky, and Ramsey Clark.

Above all, we opponents did not believe the NATO countries, and particularly the United States, when they said they were acting out of necessity and for humanitarian reasons. There were a number of reasons for this. In the first place, the United States had never, in my experience, acted out of humanitarian motives in its military interventions before. It had a history of purely self-interested aggression in the world and zero respect for the lives of civilians: from the atomic bombs on Hiroshima and Nagasaki, through the napalming of Vietnam and the carpet-bombing of Cambodia, to the destruction of Iraq. This is a country that for no legal or legitimate reason keeps up a lethal sanctions regime, as well as a casual bombardment campaign (including the use of anti-human cluster bombs), that is reputedly said to have killed thousands of Iraqi children every month for ten years.²⁴ The hypocrisy of the justification is, once again, almost beyond belief: “weapons of mass destruction” and the re-

23. An opinion poll taken in mid-April 1999 and published by *The Economist* showed enormous opposition to the war both outside and inside the NATO countries. The poll showed more than a third of the population opposed in my own country, Canada, and in Finland, France, Germany, and Poland; almost an even split in Hungary; an even split in Italy; and a majority opposed in the Czech Republic, Russia, and Taiwan. *Oh What a Lovely War!*, *ECONOMIST*, Apr. 24, 1999. Historian Roy Medvedev wrote during the war that Russians were 95% opposed. Roy Medvedev, *La Rabbia Dei Russi (The Anger of the Russians)*, *LA REPUBBLICA*, Apr. 20, 1999, at 1. Opposition in the world's two most populous states, China and India, was official and assumed to be widespread in the population. CHOMSKY, *supra* note 17, at 142; Press Release, U.N. Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, SC/6659 (Mar. 26, 1999), available at <http://www0.un.org/news/press/docs/1999/19990326.sc6659.html>. A poll taken in Greece, a NATO country, between April 29 and May 5, 1999 showed 99.5% against the war with 85% believing NATO's motives to be strategic and not humanitarian. Interestingly enough, 69% of those polled were in favor of charging Bill Clinton with war crimes, 35.2% for charging Tony Blair, and only 14% for charging Slobodan Milosevic, not far from the 13% in favor of charging NATO General Wesley Clark and the 9.6% for charging NATO Secretary General Javier Solana. *Majority in Greece Wants Clinton Tried for War Crimes*, *IRISH TIMES*, May 27, 1999, at 13. In the United States itself, despite the relentless pro-bombing reporting of CNN, public opinion was evenly divided, and towards the end of the campaign had fallen below 50%. IGNATIEFF, *supra* note 9, at 193.

24. See Tariq Ali, *Our Herods*, 5 *NEW LEFT REVIEW* 5, 13 (2000).

fusal to cooperate with international institutions. The first, when the United States is the master of nuclear weaponry and is the only country to have actually used it against humans, not to mention an admitted chemical warfare “research” program that caused it to refuse in 2001 to sign an international ban. The second, when it is now widely accepted that the United States used arms inspection for spying on Iraqi defenses, the way they used the OSCE for bringing war to Yugoslavia.

This is the country that prevented the Security Council from intervening in Rwanda because it was not prepared to help and did not want to look bad.

This is a country that has underwritten repressive regimes from Somoza, to Pinochet, to Suharto, to the Kuwaitis, and to the Saudis. Within the heart of NATO, Turkey has carried out a violent repression of the Kurds that has claimed 30,000 lives, not 2,000 like the one in Kosovo had before the intervention.²⁵

Furthermore, the United States is a notorious violator of the human rights of its own citizens: a country of racial segregation, poverty amidst prodigious wealth, police brutality, bursting prisons, and the death penalty. The United States has the biggest prison population outside Russia;²⁶ and, unlike Russia and Yugoslavia—which have banned the death penalty—during 1999, the United States executed two of its own citizens by lethal injection every week.²⁷

Not only that, and this is extremely important, in the Balkans itself, the United States, along with the rich countries of Europe, made a crucial contribution to the disintegration and descent into violence of the former Yugoslavia through aggressive economic policies motivated by pure greed as well as a desire to destroy Eastern European socialism.

The imposition of economic shock therapy on the Eastern European economies immediately plunged them into a deep depression. That is why they call it “shock” therapy. Yugoslavia lost

25. CHOMSKY, *supra* note 17, at chapt. III.

26. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS fig. 6.1 (Ann L. Pastore & Kathleen Maguire eds., 2000), *available at*, <http://www.albany.edu/sourcebook/1995/pdf/t6001.pdf>.

27. *Capital Punishment 1999*, BUREAU OF JUSTICE STATISTICS BULLETIN, (U.S. Department of Justice), Dec. 2000, at 12, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp99.pdf>.

two-thirds of its income in the early nineties.²⁸ The split-up of the country was also a function of shock therapy: Yugoslavia could not afford the transfer payments necessary to keep the country together. But this was not the operation of immutable economic laws. It was imposed by the rich countries through their pseudo-independent financial institutions (the International Monetary Fund and the World Bank) so that they could buy off East European productive resources at bargain basement prices and subject their economies to Western dominance in a “hub-and-spoke” arrangement that divided and conquered. The European Union (“EU”) then recognized the Balkan republics on the basis of borders that were a recipe for civil war. What followed was the Bosnian bloodbath, whose persistence was ensured by successive American administrations’ relentless torpedoing of peace plans with a real chance of success, including the Lisbon plan of 1992 and the Vance-Owen plan of 1993. Remember that the “genocide” at Srebrenica did not happen until 1995.

The NATO countries did precious little to stop the fighting. They cultivated the KLA, who were encouraged to engage in deadly provocations with the Serbs, inviting retaliation precisely to bring down NATO’s bombs. NATO made noisy preparations for war for a year prior to the attack of March 24, 1999. Then there was the Racak affair (also a signal), and then the fake negotiations at Rambouillet. At Rambouillet, the NATO countries said they had ten non-negotiable demands.²⁹ None of them in-

28. *Trends in Europe and North America*, UN/ECE STATISTICAL YEARBOOK Jan. 17, 1999, available at <http://www.unecce.org/stats/trend/yug.htm>; see also BOB ALLEN, *WHY KOSOVO? THE ANATOMY OF A NEEDLESS WAR* 12 (1999); PETER GOWAN, *THE GLOBAL GAMBLE: WASHINGTON’S FAUSTIAN BID FOR WORLD DOMINANCE* 203-36 (1999).

29. The Rambouillet process is based upon a group of non-negotiable principles and on a detailed general agreement concerning the provisional status of Kosovo for a three-year period. These principles call for an immediate end to hostilities, broad autonomy for Kosovo, an executive legislative assembly headed by a president, a Kosovar judicial system, a democratic system, elections under the auspices of the OSCE within nine months of the signing of the agreement, respect of the rights of all persons and ethnic groups, and the territorial integrity of the Federal Republic of Yugoslavia, with Kosovo remaining within the country.

Paul Heinbecker, Assistant Deputy Minister, Global and Sec. Policy, Dep’t of Foreign Affairs and Int’l Trade, Testimony Before the Standing Committee on National Defense And Veterans Affairs of the Canadian House of Commons (Feb. 9, 1999); see also NATO Spokesperson Jamie Shea, Morning Briefing (May 17, 1999), available at <http://www.nato.int/kosovo/press/b990517a.htm>.

cluded NATO presence or independence for Kosovo. The Serbs accepted every one of the ten, but the Albanians balked. Then, suddenly, the terms changed and the Serbs were presented with new terms that were impossible to accept and were meant to be so: a referendum on Kosovo's final status and total occupation of Kosovo by NATO, with a free hand in Yugoslavia itself.

The Americans withdrew the OSCE observers and commenced a bombing campaign ostensibly to enforce Rambouillet but really manifestly aimed at encouraging a refugee crisis which did not exist before the bombing, but which was an entirely foreseeable result of it. (General Wesley Clark claimed only to be surprised at the size of it). This was then used to justify an intensification of the bombing, aimed mainly at breaking civilian morale, because NATO did not want to risk their soldiers' lives. And they did not lose one. Now *that* is "impunity."

And who could look honestly at the results of this war, unblinkered by the "official story" of the Western mass media, and conclude that this was a "humanitarian intervention?" A bombing campaign that, in dropping 25,000 bombs on Yugoslavia, directly killed between 500 and 1,800 civilian men, women, and children of all ethnicities and permanently injured as many others;³⁰ a bombing campaign that caused 60 to 100 billion U.S. dollars worth of damage to an already impoverished country;³¹ a bombing campaign that directly and indirectly caused one million refugees to flee Kosovo in all directions;³² a bombing campaign that indirectly caused the death of maybe thousands more by provoking the violent retaliatory and defensive measures that were entirely predictable when you massively bomb one people on behalf of another and give a free hand to extremists on both sides to vent their hatred. It was a bombing campaign that led to the entirely predictable "ethnic cleansing" that has occurred in Kosovo since the entry of the triumphant KLA, fully backed by NATO's might, which has seen hundreds of thousands of Serbs and Roma (and the few Jews remaining) driven out of Kosovo. It left hundreds murdered, a murder rate about twice the Ameri-

30. Human Rights Watch, *supra* note 18.

31. James McLean, *Yugoslavia "Will be the Poorest Man in Europe"*, *EVENING STANDARD* (LONDON), Aug. 24, 1999, at 37.

32. The OSCE Kosovo Verification Mission (OSCE-KVM) Human Rights Division, *Kosovo/Kosova As Seen, As Told* (1999), available at <http://www.osce.org/kosovo/documents/reports/hr/part1/ch14.htm#1>.

can one, already one of the highest in the world.³³

These results were to be expected, and NATO's military and political advisers must have contemplated them in their very careful planning of the war, which went back more than a year before the bombing commenced.

So, in our view and the view of most of the world, it was a case of the American government and business class, aided and abetted by their European counterparts, creating violent social conditions, destroying every chance to peacefully resolve them, and then imposing violent solutions. This was classic Americanism. Like poverty in the midst of fabulous wealth, with the resulting violence resolved by massive imprisonment and a regular dose of the death penalty.

In other words there were plenty of reasons to oppose this war.

Another reason I opposed it was the grotesque Holocaust analogy. Milosevic was a new Hitler. "Europe" had not seen this kind of thing since the Holocaust (of course Africa had, and it continues to, South America had, and Vietnam had). Maybe Benigni's film *La Vita è Bella*, so lavished with Hollywood awards on the eve of the bombing, had made everyone think that trains and refugees were enough to make a Holocaust.

Trains and refugees do not make a Holocaust. The worst scenarios of Serb ethnic cleansing did not even come close to the extermination program of the Nazis. You do not have to minimize the suffering of people killed in the thousands, terrorized and expelled from their homes, to distinguish between that and being hunted down one by one wherever we lived or wherever we ran in a methodical plan (that succeeded by about half) to wipe an entire people off the face of the earth. The Nazis, as Julie Birchill wrote, did not put Jews on trains to Israel.³⁴ And what about the context? Did European Jewry have a separatist army like the KLA that was trying to take a piece of Germany away from the Nazis? If Srebrenica was "genocide," indeed "extermination" in the absurdly hyperbolic opinion of the ICTY

33. *Id.*

34. Julie Birchill, *Forty Reasons Why the Serbs Are Not the New Nazis and the Kosovars Are Not the New Jews*, THE GUARDIAN, Apr. 10, 1999, quoted in M. Hume, *Nazifying the Serbs, from Bosnia to Kosovo*, in *DEGRADED CAPABILITY: THE MEDIA AND THE KOSOVO CRISIS* (Phillip Hammond & Edward Herman eds., 2000).

judges in *Krstic*,³⁵ what was the Holocaust? And if only the West had merely “stood by!” Instead they locked their doors to Jewish immigration and sent people back to their deaths. “Outmoded notions of national sovereignty?” Had the world stood up for national sovereignty and international law when Hitler invaded Czechoslovakia, there would have been no Holocaust. And when the Allies were engaged in a fully legal war with Germany in Poland, and they were begged by Jews to go five kilometers out of their way and bomb Auschwitz, which could have saved hundreds of thousands of Jewish lives, they could not be bothered because it did not fit into their strategic plans.

It seemed to me that if there were any analogy, it was that the West did not give a damn about the Albanians any more than they did about the Jews.

A big part of the Holocaust analogy of course was the ICTY, the Nuremberg precedent, and all that. This was something played up by the Court itself, most notably in the ignorantly bloated rhetoric of Judge Gabrielle Kirk McDonald in speeches before the war, but also in small details such as the tasteless display of Prosecutor Louise Arbour’s photo in the Anne Frank House in Amsterdam (which could be seen even as NATO’s cluster bombs started to fall on Yugoslavia) with a quote arguing that she was continuing the work of punishing Anne Frank’s murderers.

What were the real motives for the war if they were clearly not the humanitarian ones that NATO claimed? This was what made people of good will suspend their disbelief. It was hard to find the classic imperialist motives in this godforsaken part of the world. But there were, in fact, many war-making interests that converged here: the need to invent a new role for NATO after the Cold War, arms manufacturers’ profits, a good place to test weapons, lucrative reconstruction contracts, a war *pour encourager les autres*, like the war against Saddam, (that is to say a

35. *Prosecutor v. Radislav Krstic*, Case no. IT-98-33, Judgment (1998). In this case, the ICTY decided that the 1995 Srebrenica massacre of a maximum 8,000 Bosnian Muslim men of military age was enough for the intent to destroy a national etc. group “in part,” namely the part that lived in the small town of Srebrenica. But even there the killings were found to be part of a plan to displace the population permanently, which was arguable in the context of the jockeying for territory of the Bosnian civil war. Applying this to Kosovo would take the creative decision-making of the ICTY to an entirely new level.

demonstration war for those who think they can oppose American will), a war against a weak enemy that could be fought without losing one American life in combat, security for the much-coveted Caspian Sea oil pipeline, and even Monica Lewinsky—all these are far more plausible explanations than a sudden, isolated instance of humanitarianism on the part of the Americans.

One very important strategic interest seems to have been the United States' desperate desire, especially in the Clinton years, to free itself of the discipline of the United Nations ("U.N.") system, including the Security Council's monopoly of the use of force, which from Washington's point of view, puts far too much institutional power in the hands of its rivals Russia and China. This is the powerful thesis of the Englishman Peter Gowan, that the Balkans was an excuse for the United States to redesign the world order in its own image.³⁶ Through the beggaring of the U.N. (including the firing of an independent Secretary-General Boutros Boutros-Ghali and his replacement with long time NATO friend Kofi Annan), and the expansion of NATO eastward, the United States has sought to establish NATO as the world's only legitimate active military interventionist force. Because, while the United States only has one vote at the U.N. and in the Security Council, by virtue of its military power it *owns* NATO. Ninety percent of the military hardware used in the Kosovo war was American.³⁷ The other countries merely provided political cover.

There are always lots and lots of military and political reasons for going to war for a superpower, but the circumstances have to be right. The Balkans was about as good an excuse that could be hoped for, since humanitarianism could be a plausible justification, (given the world's most powerful propagandist machine, namely the American news media) and the enemy was too weak to cause any losses.

But the problem (or the *point* in Gowan's view) was that it was illegal, and over this there was no controversy.³⁸

This war was a conscious violation of international law and the U.N. Charter. The Charter authorizes the use of force in

36. Peter Gowan, *The Real Meaning of The War Over Kosovo*, in *THE SOCIALIST REGISTER 2000: NECESSARY AND UNNECESSARY UTOPIAS* (Leo Panitch & Colin Leys eds., 1999).

37. IGNATIEFF, *supra* note 9, at 206.

38. See Gowan, *supra* note 36.

only two situations: self-defense, or when the Security Council authorizes it.³⁹ The jurisprudence of the International Court of Justice is also very clear. For instance, it stated in its ruling against the United States' intervention in Nicaragua (another bloody imperialistic war fought in the name of human rights—though not international justice):

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras.⁴⁰

It should also be noted that the preliminary decision of the World Court in Yugoslavia's case against ten NATO countries does not contradict this in the slightest. The decision to reject Yugoslavia's claim for preliminary measures against the attack was taken on purely jurisdictional grounds. First, the United States' refusal to recognize the World Court's jurisdiction in general; and second, objections (by Canada and others) to jurisdiction in this specific case.⁴¹

So in the case of NATO's war on Yugoslavia, neither of the two exclusive bases for the use of force (Security Council authorization or self-defense) was even claimed by NATO. It should be pointed out that this is a very rare case of scholarly consensus: the war's illegality is not disputed by any legal scholar of repute, even those who had some sympathy for the war, for instance Professor Antonio Cassese, former President and Judge of the ICTY itself.⁴²

Incidentally, as a violation of the U.N. Charter, the attack on Yugoslavia was also a violation of the NATO Treaty. The NATO Treaty, so far as is relevant, reads as follows:

[Preamble]: The Parties to this Treaty reaffirm their faith in

39. See U.N. CHARTER chs. I, V-VII.

40. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 70, 134-35 (June 27).

41. *Legality of Use of Force (Yugo. v. Can.)*, 1999 I.C.J. 106 (June 2).

42. Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 24 (1999).

the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments.

Article 1: The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

Article 7: This treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.⁴³

Another very important and uncontroversial legal element of all this was that the claimed humanitarian motives for the war, even if they were true, could not change its illegal character. In fact, the reason why there is such unanimity among scholars on the illegality of this war is that there is no "humanitarian exception" under international law or the U.N. Charter. Such an exception would have sounded distinctly Hitlerian to the drafters of the Charter, because that is how Hitler justified his aggression in World War II. This does not mean that there are no means for the international community to intervene to prevent or stop humanitarian disasters, even to use force where necessary. It just means that the use of force for humanitarian purposes has been totally absorbed in the U.N. Charter. A State must use only peaceful means or be able to demonstrate the humanity of its proposed intervention to the Security Council, including, of course, the five permanent members possessing a veto.

The apparent contradiction (that humanitarianism is a ground of intervention but only when authorized by the Security Council) is not so difficult to understand. It is as if the police arrested and imprisoned someone without trial, arguing that, since they had plenty of proof, why bother with the formalities of a trial?

43. North Atlantic Treaty, Apr. 4, 1949, pmbi., arts. 1, 7, 63 Stat. 2241, 34 U.N.T.S. 243.

It is well known that one of the justifications for the war was the supposed untrustworthiness of the Security Council. But imagine the police in the example just given claiming that the courts were so biased or inefficient that they could not be relied upon to convict the guilty. Now imagine the police making the same claim when they themselves were the ones sabotaging the courts. Almost all the vetoing in the Security Council since the 1960's has been the NATO countries: eighty-six percent of all vetoes between 1966 and 1997.⁴⁴ In the last ten years, the United States alone has accounted for sixty-three percent of the vetoes.⁴⁵ In March 2001, it vetoed an international observer force for Israel.⁴⁶

In fact the Security Council was far from "paralyzed" as the NATO defenders like to put it. The Security Council had issued numerous Resolutions authorizing action in this very conflict (Resolutions 1160, 1199, and 1203 of 1998, and Resolutions 1239 and 1244 of 1999, the last of which brought an end to the bombing). None of them authorized the use of force, of course, but not because the Security Council was incapable of doing so. The United States' war to expel Iraq from Kuwait in 1991 was explicitly authorized by Resolution 678 of November 29, 1990.⁴⁷ Indeed, the NATO bombings during the Bosnian civil war were expressly authorized by Security Council Resolutions 816 and 836 of 1993, "subject to close cooperation with the Secretary-General and UNPROFOR."⁴⁸

This, of course, is not to defend either of these cases of the use of force, merely to show that the Security Council was far from incapable of authorizing it.

So the Gowan thesis is amply demonstrated by the fact that the United States had systematically undermined the U.N. sys-

44. SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE U.N. SECURITY COUNCIL* 239 (3d ed. 1998).

45. *Id.*

46. Press Release, U.N. Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, SC/6659 (Mar. 26, 1999); Press Release, U.N. Security Council, Draft Resolution on Middle East Situation Rejected by Security Council, SC/7040 (Mar. 27, 2001), available at <http://www0.un.org/News/Press/docs/2001/sc7040.doc.htm>.

47. S.C. Res. 678, U.N. SCOR, 2963d mtg., S/RES/678 (1990).

48. S.C. Res. 816, U.N. SCOR, 3191st mtg., S/RES/816 (1993); S.C. Res. 836, U.N. SCOR, 3228th mtg., S/RES/836 (1993).

tem so that it could deliberately boycott it in this case and establish a new precedent.

But to do this they had to appeal to a higher legality, not their own naked power, and that is where the ICTY came in. This U.N. organ would give the war the needed appearance of international legality, as law enforcement against war crimes.

Now it was only to be expected that, with most of the world opposed to the war, there would be quite a few lawyers who would feel the same way and who would harbor well-founded suspicions about the ICTY. With NATO bombing away and acting like a bull in a china shop with human life, they would be moved to call the ICTY's bluff by bringing charges against the NATO leaders for violations of the same Geneva Conventions that Arbour and company were charging the Serbs with. In fact, within a month of the commencement of the bombing, several more or less detailed legal complaints had been delivered to the ICTY, including one from the Faculty of Law of Belgrade University, one from Greece on behalf of 6,000 Greek citizens, one from England from a group called the Committee for the Advancement of International Criminal Law, one from a Committee of the Russian Duma, and our own complaint from Canada on behalf of law professors from York University in Toronto jointly with the American Association of Jurists, a group with members throughout the Western hemisphere. To this must be added the thousands of individuals from every corner of the globe who wrote to the ICTY endorsing our complaints or making their own.

In our case, we filed a complaint against sixty-eight named NATO leaders. The charges were:

Grave breaches of the Geneva Conventions of 12 August 1949 (contrary to Article 2) namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) wilfully causing great suffering or serious injury to body or health; (c) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Violations of the laws or customs of war (Article 3): (a) employment of poisonous weapons or other weapons to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.

Crimes against humanity (Article 5): (a) murder; (i) other inhumane acts.

Article 7 of the Tribunal Statute provides for “individual criminal responsibility” in this way:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility or mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁴⁹

The legal case was based on two grounds. First, we focused on the illegality of the war. This was a classic war of aggression, which the Nuremberg Judgment had classified as the “supreme” crime: “To initiate a war of aggression . . . is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁵⁰

Now this crime was not included in the ICTY Statute as a specific crime. Evidently the United States did not want it there, the way it desperately did not want it in the International Criminal Court (“ICC”) Statute.⁵¹ Was it for “difficulty of definition”

49. ICTY Statute, *supra* note 1.

50. ROBERT H. JACKSON, *THE NUREMBERG CASE AS PRESENTED BY ROBERT H. JACKSON CHIEF OF COUNSEL FOR THE UNITED STATES TOGETHER WITH OTHER DOCUMENTS* (1971).

51. Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998).

as is often said? As if war crimes and crimes against humanity were easy to define. Once again Milosevic's explanation is the only one that makes sense: the ICTY was meant to legitimate aggression, so how could it criminalize it?

On the other hand the crime of aggression was not specifically excluded. And in the article on "crimes against humanity" there were the crimes of murder and other inhumane acts.⁵² Murder is universally defined as causing death intentionally—which, in classic criminal law doctrine, always includes knowingly—and without lawful excuse.

Our case was simply that the NATO leaders planned and executed a bombing campaign that was contrary to the most fundamental tenets of international law and that they knew would cause the death and permanent injury of thousands of civilian men, women, and children. They admitted this over and over again, said they were sorry but that is what happens in war, and went on bombing. On this ground alone, for example, the killing of hundreds or thousands of civilians knowingly and without lawful excuse, these leaders are guilty of *mass murder*. Milosevic and the other Serb leaders were indicted in The Hague for the murder of 385 victims.⁵³ The total victims of the ninety-eight people executed for murder in the United States in 1999 was 129.⁵⁴ The NATO leaders murdered at least 500 and perhaps as many as 1,800.⁵⁵

Here is what Chief Prosecutor Robert Jackson said on the subject at Nuremberg:

Any resort to war—any kind of war—is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. *But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal.* The very minimum legal consequence of the treaties making aggressive war illegal is to strip those who incite or wage them of

52. ICTY Statute, *supra* note 1, art. 5.

53. Milosevic et. al, *supra* note 5.

54. Death Penalty Information Center, at <http://www.essential.org/dpic/dpintl.html>.

55. Press Release, Prosecutor for International Tribunals Briefs Security Council, *supra* note 2.

every defense the law ever gave, and to leave the war-makers subject to judgment by the usually accepted principles of the law of crimes. (Emphasis added)⁵⁶

Then there were the Geneva Conventions, which basically make it a crime, even in a legal war, to kill and injure civilians intentionally or carelessly, while not taking care to hit only military targets.⁵⁷

According to admissions made in public throughout the war (for instance during daily NATO press briefings), eye-witness reports, and powerful circumstantial evidence displayed on the world's television screens throughout the bombing campaign—evidence good enough to convict in any criminal court in the world—these NATO leaders deliberately and illegally made targets of places and things with only tenuous or slight military value or no military value at all.⁵⁸ NATO leaders targeted places such as city bridges, factories, hospitals, marketplaces, downtown and residential neighborhoods, and television studios. The same evidence shows that, in doing this, the NATO leaders aimed to demoralize and break the will of the people, not to defeat its army. Michael Dobbs, Madeleine Albright's authorized biographer, wrote in *The Washington Post*, on July 11, 1999, “[I]t is obvious to anyone who visited Serbia during the war that undermining civilian morale formed an essential part of the alliance's war-winning strategy.”⁵⁹

One reason civilian targets are illegal is that civilians are very likely to be killed or injured when such targets are hit. And all of the NATO leaders knew that. They were carefully told that by their military planners. And they still went ahead and did it.

And they did it without any risk to themselves or to their soldiers and pilots. That is why this war was called a “cowards' war.” The cowardice lay in fighting the civilian population and not the military, in bombing from altitudes so high that the civilians, Serbs, Albanians, Roma, and anybody else on the ground bore all the risks of the “inevitable collateral damage.” Displac-

56. JACKSON, *supra* note 50, at 82-84.

57. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, T.I.A.S. No. 3365.

58. See e.g., Human Rights Watch, *supra* note 18; AMNESTY INT'L, *supra* note 3; MINISTRY OF FOREIGN AFFAIRS, FEDERAL REPUBLIC OF YUGOSLAVIA, NATO CRIMES IN YUGOSLAVIA: DOCUMENTARY EVIDENCE, VOLUMES I AND II (1999).

59. Michael Dobbs, *A War-Torn Reporter Reflects*, WASH. POST, July 11, 1999, at B1.

ing all the risks onto the civilian population is contrary to the recognized laws of war.

Indeed, there was persuasive evidence that, in some circumstances at least, NATO not only *knowingly* killed civilians, but that it *deliberately* set out to do so: for example, on the Grdelica and Varvarin bridges on April 12 and May 30, and in the Nis marketplace on May 7.⁶⁰

Starting in May 1999, along with many other lawyers and parliamentarians around the world, and thousands of individual citizens, we made our case to the Tribunal. We spent hours with Arbour, Del Ponte, and their advisers. We filed briefs of legal arguments and documentary evidence. In December of 1999, Del Ponte let it slip in an interview that she was studying our case.⁶¹ All hell broke loose. American military authorities said they would never cooperate.⁶² Did she call for sanctions? No, she unctuously apologized and backtracked.⁶³ By March of 2000, it was clear to us that she was a fraud and we publicly denounced her as such.

Del Ponte announced her decision to the Security Council on June 2, but the report was only released on June 13.⁶⁴ Why did she anticipate the results? Only one explanation: she knew that Amnesty International was releasing its report on June 7 with a very different conclusion from the Prosecutor's, and she wanted to beat them to the punch. You should read these two reports in order to see whether Del Ponte's bleating about Milosevic can be given any credibility at all.

Amnesty's executive summary reads as follows:

Amnesty International believes that in the course of Operation Allied Force, civilian deaths could have been significantly reduced if NATO forces had fully adhered to the laws of war.

60. AMNESTY INT'L, *supra* note 3, at 35-36, 68-70.

61. Jerome Sokolovsky, *U.N. Prosecutor Investigating NATO's Conduct in Yugoslavia Bombing Campaign*, ASSOCIATED PRESS, Dec. 28, 1999.

62. Rowan Scarborough, *U.S. Denounces U.N. Probe of NATO Bombing*, WASH. TIMES, December 30, 1999, at A1.

63. Press Release, Statement by Madame Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (Dec. 30, 1999), *available at* <http://www.un.org/icty/pressreal/p459-e.htm>.

64. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, U.N. Doc. PR/P.I.S./510-E (2000), *available at* <http://www.un.org/icty/pressreal/nato061300.htm> [hereinafter OTP Report].

NATO did not always meet its legal obligations in selecting targets and in choosing means and methods of attack. In one instance, the attack on the headquarters of Serbian state radio and television (RTS), NATO launched a direct attack on a civilian object, killing 16 civilians. *Such attack breached article 52 (I) of Protocol I and therefore constitutes a war crime.* The International Criminal Tribunal for the former Yugoslavia should investigate all credible allegations of serious violations of international humanitarian law during Operation Allied Force with a view of bringing to trial anyone against whom there is sufficient admissible evidence. States should surrender to the Tribunal any suspect sought for prosecution by the Tribunal.⁶⁵

Amnesty's report identifies three basic types of war crimes committed by NATO. First, the attacks on civilian targets such as the Belgrade RTS radio and television building were contrary to Article 52(1) of Protocol I of the Geneva Convention (1977),⁶⁶ and made criminal by Article 2 of the Tribunal Statute.⁶⁷ Second, for example, in the killing of civilians on bridges (Grdelica, Luzane, and Varvarin), NATO failed to suspend attacks even after it became clear that it would cause loss of civilian life, which was excessive in relation to the concrete military advantage to be anticipated, and in contravention of Article 57(2)(b).⁶⁸ Third, for example in bombings that killed displaced civilians (Djakovica and Koriša), insufficient precautions were taken to minimize civilian casualties, contrary to 57(2)(a).⁶⁹ Specifically on the "cowards' war" question of bombing from 15,000 feet: "Also, aspects of the Rules of Engagement, specifically the requirement that NATO aircraft fly above 15,000 feet, made full adherence to international humanitarian law virtually impossible."⁷⁰ Amnesty also found a lack of discrimination contrary to the Geneva Conventions in the use of cluster bombs: "The use of certain weapons, particularly cluster bombs, may have contrib-

65. AMNESTY INT'L, *supra* note 3 (emphasis added).

66. *Id.*; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391, art. 52, ¶1.

67. ICTY Statute, *supra* note 1, art. 2.

68. AMNESTY INT'L, *supra* note 3.

69. *Id.*

70. *Id.*

uted to causing unlawful deaths.”⁷¹

The Amnesty Report ends with nine illuminating case studies. They include the five selected by the Office of the Prosecutor’s (“OTP”) Report and make for striking comparisons.

The OTP Report comes as something of a shock, not for its conclusion (which was expected, though admittedly not in the extreme form in which it came), but for the amateurishness and lack of shame with which it justifies that conclusion.

If it feels more like it was written by a lawyer for NATO than a judge, this should not be surprising, because there is little doubt that the brief was in fact written by a NATO lawyer, if only an ex-NATO lawyer, Canadian Armed Forces Frigate Captain William J. Fenrick (ret.). Fenrick has been involved in the project from the beginning, leaving his position as Director of Law for Operations and Training in the Canadian Department of Defense to help set up the Tribunal in 1992. It is worth remembering that the Tribunal was created at the insistence of the Americans, and that at the very moment of its creation U.S. Secretary of State, Lawrence Eagleburger, publicly identified Serb leaders Milosevic, Karadzic, Mladic, and Arkan as war criminals. Fenrick became senior legal advisor of the Tribunal when it was officially launched in 1995. The OTP Report is unsigned, attributed to an anonymous “committee” charged with the case by Arbour in May 1999 (one week after we served our complaint), but amateur sleuths will notice that it quotes great swaths of an article authored by Fenrick in 1997—word for word and without quotation marks.⁷²

On the other hand, the report often goes beyond even the lawyer’s brief and comes as close as possible to being an actual NATO press release that might have been issued by Jamie Shea

71. *Id.*

72. Paragraphs 35-42 and 48-50 of the report (OTP Report, *supra* note 64) are lifted verbatim from William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense* 7 DUKE J. COMP. & INT’L L. 539, 542-46 (1997), except for one bow to political correctness when the word “people” is substituted for “women.” The sentence in the journal reads: “For example, bombing a refugee camp is obviously prohibited if its only military significance is that *women* in the camp are knitting socks for soldiers.” *Id.* at 545. Whereas in the OTP Report it becomes: “For example, bombing a refugee camp is obviously prohibited if its only military significance is that *people* in the camp are knitting socks for soldiers.” OTP Report, *supra* note 64, ¶48. This fact would certainly not have been known to me if Fenrick himself had not proudly presented me with an offprint of his article when we argued our case in The Hague in November 1999.

or James Rubin. These hard-nosed experts at the ICTY, with all their experience in investigating war crimes, declared that their operating investigative technique would be to read NATO's press releases and take them at face value:

The committee has conducted its review relying essentially upon public documents, including statements made by NATO and NATO countries at press conferences and public documents produced by the FRY. It has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given.⁷³

Can you imagine what kind of law enforcement a country would have if the police took alleged crooks' explanations at face value? Can you imagine how many indictments would have been issued against the Serb leadership if the OTP had stopped at the Federal Republic of Yugoslavia ("FRY") press releases? It is not as if NATO had proved its veracity to the OTP by opening its books to them and making a full account. There was no investigation because NATO did not allow it: "The committee must note, however, that when the OTP requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the specific incidents."⁷⁴ In fact, as far as the record goes, the OTP sent one letter to NATO on February 8, 2000 and NATO replied ("in general terms" etc.) on May 10.⁷⁵

So, having determined that NATO did not want to be investigated, the OTP had to absolve them without an investigation, hence the "face value" principle. But even this would not do the trick entirely, because NATO made some pretty damning public admissions along the way. For instance, in bombing the Belgrade television station, some NATO leaders claimed (most implausibly), that they did it to knock out FRY military communications, but others (for example, Tony Blair) said they did it to strike a blow against Serb "propaganda" (meaning that they did not like what the television was saying), which is an unmistakable war crime. That left only one thing to do: take the NATO version most favorable to NATO!

73. OTP Report, *supra* note 64, ¶90.

74. *Id.*

75. *Id.* at ¶12.

The report is so weak in its reasoning, so untroubled by inconsistency and double standards, that one cannot help wondering whether the authors had spent too much time in The Hague's famous "coffee shops." For example, when they said that 500 deaths were too few to be considered crimes against humanity,⁷⁶ did they realize that Milosevic had been charged with 385? "If one accepts the figures in this compilation of approximately 495 civilians killed and 820 civilians wounded in documented instances, there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity."⁷⁷ And what about paragraph fifty-six? Did they do the math on a napkin?

The committee agrees there is nothing inherently unlawful about flying above the height which can be reached by enemy air defenses. However, NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians or civilian objectives. The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.⁷⁸

"*Vast majority*"! What can this mean in a bombing campaign of 38,000 sorties? Seventy-five percent would mean 9,500 sorties for which it did not comply with its legal obligation. Ninety percent? That would mean 3,800. Ninety-nine percent? That would leave 380 sorties—just enough to kill 500 people, if you are using the most powerful conventional weapons technology in the world.

Even with all this, the OTP had major problems defending the decision not even to open an investigation because the orthodox legal tests laid down by the Statute and deployed so handily to prosecute the Serbs became extremely inconvenient where absolving NATO was concerned. They had to undergo a major transformation.

The civilian principle of *l'obbligatorietà dell'azione penale* ("ob-

76. *Id.* at ¶54.

77. *Id.* at ¶53.

78. *Id.* at ¶56.

ligatory prosecution”) written into the Statute in the clearest terms became the “discretion” to open an investigation. This discretion then became exercisable only when there was proof beyond any doubt that the accused were guilty. On this basis, of course, Milosevic never could have been charged. The clearest and most chilling example of this is the Grdelica bridge incident.

On April 12, a NATO plane launched two separate laser-guided bombs that hit a passenger train crossing a bridge, killing at least ten people and injuring at least fifteen. NATO’s explanation, offered by General Wesley Clark the next day at a news conference, was that the pilot was attacking the bridge and not the train, and that the pilot did not see the train until the last second because it was going too fast.⁷⁹ According to the OTP: “It does not appear that the train was targeted deliberately.”⁸⁰ Why? More work for the face value principle: U.S. Deputy Defense Secretary John Hamre and General Wesley Clark, NATO’s Supreme Allied Commander for Europe, said so! The OTP reproduced Clark’s explanation in full:

[T]his was a case where a pilot was assigned to strike a railroad bridge that is part of the integrated communications supply network in Serbia. He launched his missile from his aircraft that was many miles away, he was not able to put his eyes on the bridge, it was a remotely directed attack. And as he stared intently at the desired target point on the bridge, and I talked to the team at Aviano who was directly engaged in this operation, as the pilot stared intently at the desired aim point on the bridge and worked it, and worked it, and worked it, and all of a sudden at the very last instant with less than a second to go he caught a flash of movement that came into the screen and it was the train coming in. Unfortunately he couldn’t dump the bomb at that point, it was locked, it was going into the target and it was an unfortunate incident which he, and the crew, and all of us very much regret. We certainly don’t want to do collateral damage.

The mission was to take out the bridge. He realized when it had happened that he had not hit the bridge, but what he had hit was the train. He had another aim point on the

79. See NATO Spokesperson Jamie Shea & General Wesley Clark, Press Conference (Apr. 13, 1999), available at <http://www.nato.int/kosovo/press/p990413a.htm>.

80. OTP Report, *supra* note 64, ¶59.

bridge, it was a relatively long bridge and he believed he still had to accomplish his mission, the pilot circled back around. He put his aim point on the other end of the bridge from where the train had come, by the time the bomb got close to the bridge it was covered with smoke and clouds and at the last minute again in an uncanny accident, the train had slid forward from the original impact and parts of the train had moved across the bridge, and so that by striking the other end of the bridge he actually caused additional damage to the train.⁸¹

General Clark then showed the cockpit video of the plane that fired on the bridge:

The pilot in the aircraft is looking at about a 5-inch screen, he is seeing about this much and in here you can see this is the railroad bridge which is a much better view than he actually had, you can see the tracks running this way. Look very intently at the aim point, concentrate right there and you can see how, if you were focused right on your job as a pilot, suddenly that train appeared. It was really unfortunate. Here, he came back around to try to strike a different point on the bridge because he was trying to do a job to take the bridge down. Look at this aim point—you can see smoke and other obscuration there—he couldn't tell what this was exactly. Focus intently right at the centre of the cross. He is bringing these two crosses together and suddenly he recognizes at the very last instant that the train that was struck here has moved on across the bridge and so the engine apparently was struck by the second bomb.⁸²

The OTP's dismissal of this particular incident was rendered more complicated by the fact that a German computer whiz, Mr. Ekkehard Wenz, an opponent of the war acting entirely independently, analyzed the video and the technical information provided by NATO, and discovered that the video shown by Clark had been speeded up to about five times its speed and that the plane was the type in which there was both a pilot and a gunner. He concluded that the attack on the train must have been deliberate.⁸³ After a German newspaper report, NATO finally admitted in January 2000 that the video had been sped

81. *Id.*

82. *Id.*

83. See Ekkehard Wenz, The Gredelica Organization, Comment on ICTY's Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing

up.⁸⁴ The OTP report does not dispute Wenz's points—nor naturally does the incident shake its faith in the trustworthiness of NATO's press releases—but it argues that this still does not prove Wenz's case:

If the committee accepts Mr. Wenz's estimate of the reaction time available, the person controlling the bombs still had a very short period of time, less than 7 or 8 seconds in all probability to react. Although Mr. Wenz is of the view that the WSO [Weapons Systems Operator] intentionally targeted the train, the committee's review of the frames used in the report indicates another interpretation is equally available. The cross hairs remain fixed on the bridge throughout, and it is clear from this footage that the train can be seen moving toward the bridge only as the bomb is in flight: it is only in the course of the bomb's trajectory that the image of the train becomes visible. At a point where the bomb is within a few seconds of impact, a very slight change to the bomb aiming point can be observed, in that it drops a couple of feet. This sequence regarding the bombsights indicates that it is unlikely that the WSO was targeting the train, but instead suggests that the target was a point on the span of the bridge before the train appeared.⁸⁵

Notice the standard: "*another interpretation is equally available.*" Only "equally available." In other words, even though there was a fifty-fifty chance that a dozen civilians had been murdered by NATO—which would put a rather different complexion on the whole bombing campaign—there would be no further investigation.

That aside, the OTP's point is, that if the train had been deliberately targeted, the pilot would have followed it with his cross hairs. Unless, of course, he was trying to "fabricate an accident," which is Mr. Wenz's point, posted in a comment for his group, the Grdelica Organization, on July 12, 2000:

As visible most clearly in the decelerated video, the target point during the beginning of the scene was the abutment of the bridge on the center pier. Shortly after the train reached the bridge, the target point is completely changed from this

Campaign Against the Federal Republic of Yugoslavia (July 12, 2000), at <http://www.balkanpeace.org/lan/lan10.shtml>.

84. See *id.* ¶7.

85. See OTP Report, *supra* note 64, ¶61.

point, which is the only reasonable point to take out truss bridges, towards a truss part, that's loss might damage the bridge but would not destroy the bridge at all (as happened). Since NATO maintained that missions were planned exactly, it is not very likely that truss bridges were intended to be dismantled brace by brace with [U.S.\$800,000] missiles. The reason to give up a "perfect" aiming point in favour of another unreasonable aiming point, in combination with the presentation of speeded video material, can only be that the previous aiming point wasn't the intended aiming point. In other words: this is the way to fabricate an "accident."⁸⁶

Mr. Wenz also points out a number of other errors: that the bombs were not laser-guided but "TV-guided" (that is, from a television in the bomb, which makes for much greater control), that there was a third bomb that did not hit the bridge at all, suggesting that the bridge was not the target; and that seven or eight seconds from the appearance of the train was plenty of time for a Weapons Systems Operator, with only that duty, to change the path of the target (in the whole video the target is changed six times in twenty-three seconds). In an e-mail to me, Wenz put it this way: "Sit back, close your eyes and count slowly from twenty-one to twenty-eight. Enough time?" Thus, Wenz's view is that the Weapons Systems Officer had plenty of time after he saw the train to put the bomb wherever he wanted.

So, the OTP analysis of the first bomb is completely unconvincing. But its analysis of the *second* bomb is non-existent:

The train was on the bridge when the bridge was targeted a second time and the bridge length has been estimated at 50 meters. It is the opinion of the committee that the information in relation to the attack with the first bomb does not provide a sufficient basis to initiate an investigation. [*Yeah, but what about the second one?*] The committee has divided views concerning the attack with the second bomb in relation to whether there was an element of recklessness in the conduct of the pilot or WSO. Despite this, the committee is in agreement that, based on the criteria for initiating an investigation, this incident should not be investigated. In relation to whether there is information warranting consideration of command responsibility, the committee is of the view that there is no information from which to conclude that an inves-

86. Wenz, *supra* note 83, ¶12.

tigation is necessary into the criminal responsibility of persons higher in the chain of command. Based on the information available to it, it is the opinion of the committee that the attack on the train at Grdelica Gorge should not be investigated by the OTP.⁸⁷

This is nothing less than incoherent babbling. There is zero explanation of how firing a second bomb with knowledge that the train was on the bridge could not constitute recklessness (a consciousness that civilians might be endangered). Wenz has also pointed out that the bridge was subsequently repaired by Yugoslavia, not rebuilt, which means that NATO used some very expensive bombs to hit a bridge twice without destroying it.

We are talking here about *opening an investigation* in a case where the committee was divided in its views! Where there is no other plausible explanation. Milosevic had lots of explanations for Racak, that were quite credible in fact. Louise Arbour did not wait to hear them before she “launched her investigation” the next day. On the other hand, listen to what Amnesty said about the same incident:

NATO’s explanation of the bombing—particularly General Clark’s account of the pilot’s rationale for continuing the attack after he had hit the train—suggests that the pilot had understood the mission was to destroy the bridge regardless of the cost in terms of civilian casualties. This would violate the rules of distinction and proportionality. Yet, even if the pilot was, for some reason, unable to ascertain that no train was travelling towards the bridge at the time of the first attack, he was fully aware that the train was on the bridge when he dropped the second bomb, whether smoke obscured its exact whereabouts or not. This decision to proceed with the second attack appears to have violated Article 57 of Protocol I which requires an attack to “be cancelled or suspended if it becomes clear that the objective is not a military one . . . or that the attack may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated.” Unless NATO is justified in believing that destroying the bridge at that particular moment was of such military importance as to justify the number of civilian casualties likely to be caused by continuing the attack—an argument that NATO has not

87. OTP Report, *supra* note 64, ¶62 (citations omitted).

made—the attack should have been stopped.⁸⁸

The third incident discussed by the OTP was the deliberate attack by NATO on the RTS (Serbian Television and Radio Station) in Belgrade on April 23 in which sixteen people are believed to have been killed. The OTP concedes that this would have been a crime if the station were taken out for “propaganda” reasons alone (as Blair’s statement admits), but concludes on the basis of statements by *other NATO officials* that it *may* not have been and thus decides not to *open an investigation!*⁸⁹ The report also shifts the blame entirely to the FRY for allowing the civilians to stay at the station after they had been warned.⁹⁰ As if a robber were to come to your house and tell you to leave, and you did not and he killed you, and any self-respecting judge would say he was not guilty of murder.

Here is what Amnesty said:

Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of “effective contribution to military action” and “definite military advantage” beyond the acceptable bounds of interpretation. Under the requirements of Article 52(2) of Protocol I, the RTS headquarters cannot be considered a military objective. As such, the attack on the RTS headquarters violated the prohibition to attack civilian objects contained in Article 52(1) and therefore constitutes a war crime.

The attack on the RTS headquarters may well have violated international humanitarian law even if the building could have been properly considered a military objective. Specifically, that attack would have violated the rule of proportionality under Article 51(5)(b) of Protocol I and may have also violated the obligations to provide effective warning under Article 57(2)(c) of the same Protocol.

Article 51(5)(b) prohibits attacks “which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated.” NATO must have clearly anticipated that civil-

88. See AMNESTY INT’L, *supra* note 3, at 17.

89. See OTP Report, *supra* note 64, ¶¶74-79.

90. U.S. Dep’t of Defense, News Briefing (May 17, 1999), *available at* www.web.amnesty.org/ai/nsf/index/eur700182000.

ians in the RTS building would have been killed. In addition, it appears that NATO realized that attacking the RTS building would only interrupt broadcasting for a brief period. SACEUR General Wesley Clark has stated: "We knew when we struck that there would be alternate means of getting the Serb Television. There's no single switch to turn off everything but we thought it was a good move to strike it and the political leadership agreed with us." In other words, NATO deliberately attacked a civilian object, killing 16 civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality.⁹¹

One question that Amnesty did not deal with, and on which the OTP took a firm stand, concerned the effects of the illegality of the war. We had stressed the importance of this to both prosecutors. Our argument was that the illegality of the war and the lack of any real (as opposed to claimed), humanitarian justification, made the killing of civilians murder and therefore a "crime against humanity." However, the OTP resolutely rejected this proposition:

Allegations have been made that, as NATO's resort to force was not authorized by the Security Council or in self-defense, that the resort to force was illegal and, consequently, all forceful measures taken by NATO were unlawful. . . . In particular, the legitimacy of the presumed basis for the NATO bombing campaign, humanitarian intervention without prior Security Council authorization, is hotly debated. That being said, as noted in paragraph 4 above, the crime related to an unlawful decision to use force is the crime against peace or aggression. . . . [T]he ICTY does not have jurisdiction over crimes against peace. . . . The ICTY has jurisdiction over serious violations of international humanitarian law as specified in Articles 2-5 of the Statute. These are *jus in bellum* offences.⁹²

The result was that the Tribunal gave NATO immunity for civilian deaths and injuries that were merely part of the war, exactly as if this were a legal war. This is a preposterous reading of the Statute and compares very unfavorably with Robert Jackson's statement at Nuremberg cited earlier. (*"But inherently criminal*

91. See AMNESTY INT'L, *supra* note 3, at 23-24.

92. OTP Report, *supra* note 64, ¶30.

acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal.")⁹³ Even if it were a correct reading, it would certainly not save the ICTY's legitimacy that its Statute had been so crudely drawn to make American war crimes immune from punishment.

So my conclusion is that we are dealing in the ICTY with a corrupt tribunal. It cannot even be trusted to give Milosevic a fair trial. But this is not the main point. Even if Milosevic were guilty, the failure to prosecute NATO crime renders the Tribunal the opposite of what it claims to be. Not abstractly, but concretely. Imagine that one mafia boss makes war on another and then buys the police and the courts to prosecute only the other one. Who would feel safe? Naturally, only those who kiss the hand of the more powerful boss and pay him his *pizzo*. Then they would be as free as birds to commit any crimes they wanted (so long as they did not threaten Don Corleone's interests, of course). In other words, all you have to do is play ball with the Americans and you can do anything you want in Turkey, in Indonesia, in Colombia, in Saudi Arabia and, I am sad to say, in Israel.

What about the future? Maybe the ICTY was just a flawed prototype, like the Wright brothers' first airplane with its wobbly half-flight? But if we take a look at what has happened with the ICC, it appears that corruption is the destiny of international criminal law.

The ICC Statute signed in Rome in 1998⁹⁴ is as full of holes as a plate of *bucatini alla matriciana*. Thanks to a big Western lobbying effort, it effectively leaves out the "supreme crime" of aggression, and defines war crimes in a way congenial to the big powers (tending to exclude the kind they commit in their "humanitarian interventions"). It also allows agreements between States to override the duty to arrest war criminals; Pinochet could not even have been arrested in Britain under the ICC.

The ICC has one good thing going for it, though: the judges and prosecutors are not subject to an American veto (like the judges and prosecutors of the ICTY via the Security Council). But that means the Americans will never ratify it. They have already said so. They signed it on the last day possible for

93. JACKSON, *supra* note 50, at 82-84.

94. Rome Statute of the International Criminal Court, *supra* note 51.

reasons of pure public relations (the way Israel did), with Clinton expressly saying that he recommended that it not be ratified. Now, nobody seriously thinks you can have an international criminal justice system without the world's most powerful country to enforce it, as American critics of the ICC have not been shy in pointing out.⁹⁵

The result is that the ICC operates as pure propaganda: it makes it seem that the punishment of America's enemies is part of a universal movement against impunity. In this way it operates like the detention of Pinochet who was held during the war in Yugoslavia and then released, as "a great precedent" that will never be applied to him or anyone else the United States does not want tried.

So international criminal justice seems destined to remain a hypocritical expression of power, as typically American as the death penalty and judicial review: repression as a solution to social problems and judges acting as an antidote to democracy—as in the very election of President Bush II, where the U.S. Supreme Court, in a transparently biased decision, reversed its pro-federalist jurisprudence and ordered Florida not to count votes, evidently for fear that Bush might lose (Bush Sr. having appointed two of the judges who voted for Bush Jr.).⁹⁶

We should question the very vision of international criminal law.⁹⁷ Have we not learned the lessons of a century of criminology that violence has causes? International criminal law, like the "war on terrorism," seems designed to banish all talk of causes, beyond identifying this year's devil. But in a world of inequality and of power gone berserk, we have more than enough causes to explain ethnic violence, and terrorism as well. Is it not obvious that we should try to foster the conditions that allow peace and human rights to flourish, instead of allowing them to be destroyed for reasons of greed, merely to come in afterwards and punish the usual suspects?

95. Ruth Wedgewood, *The International Criminal Court: An American View*, 10 EURO. J. INT'L L. 93 (1999); David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

96. Michael Mandel, *A Brief History of the New Constitutionalism, or 'How We Changed Everything So That Everything Would Remain the Same,'* 32 ISR. L. REV. 250 (1998).

97. Carrie Gustafson, *International Criminal Courts: Some Dissident Views on the Continuation of War by Penal Means*, 21 HOUS. J. INT'L L. 51, 52-55 (1998).