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Biased Justice: Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia

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BIASED “JUSTICE:” HUMANRIGHTSISM AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA¹

ROBERT M. HAYDEN²

*Justice is the right to do whatever we think must be done, and therefore
justice can be anything.*

Meša Selimović, *Death and the Dervish*

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Human Rights Watch (“HRW”) has hailed the new millenium as “the beginning
of a new era for the human rights movement,” based on “an evolution in public
morality.”³ Its *World Report 2000* trumpets the trumping of state sovereignty by

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Center, Dec. 8, 1999.

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³Human Rights Watch, *World Report 2000: Introduction* <<http://www.hrw.org/wr2k/Front.htm>>

human rights⁴ because courts are willing to indict leaders and organizations, such as NATO, are willing to intervene militarily against regimes that commit crimes against humanity. HRW cites the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the incipient International Criminal Court, prosecutions of assorted Yugoslavs and Rwandans by Austrian, Belgian, French, German and Swiss courts, and a Spanish judge's indictment of former Chilean dictator Augusto Pinochet. It then mentions the NATO military actions against Yugoslavia and the international intervention in East Timor. It concludes that all of this "foretells an era in which the defense of human rights can move from a paradigm of pressure based on international human rights law to one of law enforcement."⁵

The interlinking rhetorics of law, justice and morality, along with their opposites of crime and injustice, underpin calls for "humanitarian [military] intervention," and the image of justice via international tribunals is dominant. HRW put "significant progress towards an international system of justice" to prosecute crimes against humanity at the head of its discussion of 1999 achievements,⁶ and is a strong proponent of the International Criminal Court. The link between tribunals and military intervention is explicit: "like the use of military intervention, the emergence of an international system of justice signals that sovereignty is no longer the barrier it once was to actions against crimes against humanity."⁷

The millennial shift includes a remarkable transformation of the capabilities of "human rights organizations," from persuasion to prosecution:

Until now . . . human rights organizations could shame abusive governments. They could galvanize diplomatic and economic pressure. They could invoke international human rights standards. But rarely could they trigger prosecution of tyrants or count on governments to use their police powers to enforce human rights law. Slowly, this appears to be changing.⁸

HRW is not the only human rights organization that calls for governments to use their "police powers" to intervene in other states in the name of morality. Bernard Kouchner, U.N. Governor of Kosovo after NATO's occupation of the place but otherwise one of the founders of Doctors Without Borders, the organization that won the Nobel Peace prize in 1999, is another: "a new morality can be codified in the 'right to intervention' against abuses of national sovereignty. . . . In a world aflame after the Cold War, we need to establish a forward-looking right of the world community to actively interfere in the affairs of sovereign nations to prevent an explosion of human rights violations."⁹ To Kouchner, this "right to intervene" is not "human rights imperialism" because

⁴Human Rights Watch, *Human Rights Trump Sovereignty in 1999*, Press release, Dec. 9, 1999.

⁵Human Rights Watch, *World Report 2000*.

⁶*Id.*

⁷*Id.* at 6.

⁸*Id.* at 1.

⁹Bernard Kouchner, *Establish a Right to Intervene Against War*, L.A. TIMES, Oct. 18 1999, at 7.

everywhere, human rights are human rights. Freedom is freedom. Suffering is suffering. Oppression is oppression. If a Muslim woman in the Sudan opposes painful clitoral excision, or if a Chinese woman opposes the binding of her feet, her rights are being violated. She needs protection. . . . When a patient is suffering and desires care, he or she has the right to receive it. This principle also holds for human rights.¹⁰

Chinese footbinding was last reported in the 1930s, and both the knowledge and the seriousness of a 1999 writer who calls for protection against it might thus seem doubtful. Yet Kouchner's elevation to administrative office indicate that the NATO powers, at least, take him seriously.¹¹ Certainly his sentiments echo those of Vaclav Havel, that "human beings are more important than the state . . . the idol of state sovereignty must inevitably dissolve" and that NATO's war against Yugoslavia "places human rights above the rights of the state," thus demonstrating that "human rights are indivisible and that if injustice is done to one, it is done to all."¹²

Assertions of devotion to justice, however, are common in the world—probably every political actor makes public claims to be on the side of justice and to uphold morality. HRW and other human rights organizations that call for military intervention are thus acting as classic political figures, demanding the application of massive violence to those whom they define as immoral. As such, their own actions and the actions of those whom they support should be exposed to the same scrutiny that they claim to apply to others.

This article thus takes a close look at one of the most important of the elements of the new international legal order which human rights activists promote, the International Criminal Tribunal for the Former Yugoslavia (ICTY, or "the Tribunal"). It finds that the ICTY delivers a "justice" that is biased, with prosecutorial decisions based on the national characteristics of the accused rather than on what available evidence indicates that he¹³ has done. Evidence of this bias is found in the failure to prosecute NATO personnel for acts that are comparable to those of Yugoslavs already indicted, and of failure to prosecute NATO personnel for *prima facie* war crimes. This pattern of politically driven prosecution is accompanied by the use of the Tribunal as a political tool for those western countries that support it, and especially the United States: put bluntly, the Tribunal prosecutes only those whom the Americans want prosecuted, and the United States government

¹⁰*Id.*

¹¹Kouchner's former organization, Doctors Without Borders, though, may not take him so seriously. In August 2000, the organization withdrew from Kosovo, blaming Kouchner's administration of the province as ineffective and failing to protect minorities there. *U.N. has Failed Kosovo Minorities*, THE INDEPENDENT (London), Aug. 17, 2000, at 1.

¹²Vaclav Havel, *Kosovo and the End of the Nation-State*, N.Y. REV. OF BOOKS, June 10, 1999 at 4, 6. The idea that "people" have rights superior to those of states is extended by John Rawls to mean that "liberal and decent peoples," not states, should be the true actors in international society. JOHN RAWLS, THE LAW OF PEOPLES (1999). Since each such "people" has a government (at 23) and a territory which it has the right to protect (at 29), it is very difficult to see how his distinction is meaningful—what, after all, is a State but a government united with a territory?

¹³The gendered pronoun is intentional—no women have yet been charged by the ICTY.

threatens prosecution by the supposedly independent ICTY in order to obtain compliance from political actors in the Balkans. Further, judicial decisions by the ICTY render it extremely difficult if not impossible for an accused to obtain a fair trial, while the Tribunal has also shown a lack of interest in the investigation of potential prosecutorial misconduct.

An expose of the ICTY has its own intrinsic merits, but there is a wider point. The materials that are cited in this paper are almost all from readily accessible sources, and the *facts* discussed should be well known. Yet the arguments made here are not those commonly taken in regard to the ICTY by those who claim to be human rights advocates, which raises the question of why NATO actions that so clearly violate human rights, and Tribunal actions that so clearly violate fundamental fairness towards defendants, are not the subject of much concern by those who profess to support human rights. The answer is found in the transformation of human rights concepts, from protesting the application of state violence on non-violent dissidents to demanding the application of massive violence on states deemed to be inferior. This transformation turns human rights into humanrightsism, with the new ism, like most isms, a repudiation in practice of the principles that it supposedly embodies. The ICTY is a particularly striking manifestation of humanrightsism because of the high principles that are routinely invoked to justify it, which are betrayed in practice.

I. SELECTIVE PROSECUTION 1: CLUSTER BOMBS AND WAR CRIMES

In July 1995, Milan Martić, President of the Republika Srpska Krajina (the self-proclaimed Serb "Republic" in Croatia), was indicted before the ICTY for violations of the laws and customs of war, in that he had ordered a missile attack on the city of Zagreb in retaliation for the successful Croatian offensive of May, 1995, which had driven Serbs from Slavonija.¹⁴ What is interesting about this indictment is that what made the bombardment a war crime was that it was carried out by missiles that had been fitted with cluster bombs warheads: "warheads containing 288 bomblets, all of which in turn have 400 small steel balls, which are scattered, along with bomblet fragments, on a lethal radius of ten meters. . . . It is used for soft targets, that is troops on the ground and vehicles, not for buildings or military installations."¹⁵ Seven civilians were killed and many more wounded, and it was noted in the Rule 61 hearing that one rocket damaged a home for the aged and a children's hospital.¹⁶

The use of cluster bombs is key to the Martić indictment, and the nature of these bombs was described in detail in the Rule 61 hearing. As the indictment put it, the rocket in question could "be fitted with different warheads to accomplish different tasks: either to destroy military targets or to kill people. When the [missile] is fitted with 'cluster bomb' . . . it is an anti-personnel weapon designed only to kill

¹⁴*Prosecutor of the Tribunal against Milan Martić*, Indictment, ICTY Case No. IT-95-11, July 25, 1995 (hereinafter, Martić Indictment). Note: unless otherwise specified, references to ICTY documents are to versions on the Tribunal's web page: <<http://www.un.org/icty/>>.

¹⁵*Prosecutor of the Tribunal against Milan Martić*, ICTY case no. IT-96-11-R61; Rule 61 Evidentiary Review (Feb. 27, 1996) at 5 <<http://www.un.org/icty/transe11/960227IT.txt>> (hereinafter Martić Rule 61 hearing).

¹⁶*Id.* at 19.

people."¹⁷ With this in mind, it is interesting to see the lack of response by the ICTY Prosecutor to NATO's May 7 attack on the city of Niš, when cluster bombs fell on the market, killing fifteen people, and the city's main hospital was also hit.¹⁸ Over the course of the NATO bombings, nine hospitals were damaged or destroyed and over 300 secondary and elementary schools and other educational institutions were damaged.¹⁹ According to the *Philadelphia Inquirer*, the U.S. Defense Department says that "American planes dropped 1,100 cluster bomb canisters, with 220,000 bomblets, over Kosovo," while "British planes dropped about 500 bombs, each with 147 bomblets."²⁰ British authorities have acknowledged dropping large numbers of cluster bombs, and in August 2000 had to admit that about 60% of those cluster bombs either missed their targets or remained unaccounted for, leaving perhaps 60,000 bomblets unexploded in Yugoslavia and Kosovo.²¹

In light of these statistics, the conclusion of the committee established by the Prosecutor to review the NATO bombing campaign, that there should be no investigation into NATO's use of cluster bombs, is remarkable.²² The committee's report attempted to distinguish NATO's use of cluster bombs from the culpability asserted in the *Martić* indictment by saying that condemnation of the use of cluster bombs should be limited only to the facts of that case. However, the Tribunal's holding in the Rule 61 proceeding in *Martić* was apparently wider:²³ "weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury" are prohibited.²⁴ NATO dropped cluster bombs from 30,000 feet "despite evidence from the Gulf War that if this was done they were likely to miss their targets."²⁵

Neither will it do to say that NATO was only aiming at military targets and missed; Martić also said that he was aiming at military targets in Zagreb,²⁶ and it cannot be argued that the US and British commanders did not know that they were risking civilian casualties. Martić's comment to a Western reporter that "I am very

¹⁷Martić Indictment, ¶ 7.

¹⁸*World: Europe. NATO bombs hit hospital.* (May 7, 1999) <<http://news2.thls.bbc.co.uk/hi/english/world/europe/newsid%5F337000/337979.stm>>.

¹⁹*Milosevic at Bay in Shell of his 'Victory,'* SUN. TIMES, June 13, 1999, at 4.

²⁰Jeffrey Fleishman, *In Peacetime Kosovo, bomb casualties mount*, PHIL. INQUIRER, Nov. 21, 1999, at 1.

²¹Richard Norton-Taylor, *MoD Leak Reveals Kosovo Failure*, THE GUARDIAN, Aug. 15, 2000, at 2.

²²*Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, ¶ 27 <<http://www.un.org/icty/pressreal/nato061300.htm>> (hereinafter, Committee Report).

²³I say "apparently" because the ICTY has not published the Decision in the Rule 61 hearing in *Martić* in its entirety, even though it did publish the transcript of the 1996 Rule 61 hearing itself. The only available quotes from the Decision are in the *Bulletin* of the Tribunal.

²⁴ICTY *Bulletin* #2 (1996).

²⁵Norton-Taylor, *supra* note 21, at 2.

²⁶Martić Rule 61 hearing, at 20.

sorry if civilian targets were hit because our aim was to hit military targets”²⁷ may be compared to any of a large number of NATO statements about “collateral damage,” including NATO’s decision on about May 1 to stop even issuing such apologies.²⁸ While the Rule 61 hearing on Martić introduced evidence from interviews that showed that Martić targeted cities intentionally, this is also true of NATO generals, including, specifically, American ones, who have openly complained that French politicians did not permit them to attack even more sites in Yugoslav cities.²⁹

The reason for the Tribunal’s disinterest in NATO’s actions is perhaps found in the views expressed by the official NATO spokesman, Dr. Jamie Shea, on May 16 and 17, 1999, when he was questioned during the daily NATO press conferences about the possibility of NATO liability for war crimes before the ICTY. Dr. Shea said on May 16 that “NATO is the friend of the Tribunal . . . NATO countries are those that have provided the finances to set up the Tribunal, we are among the majority financiers.” He repeated the same message on May 17: NATO Countries “have established these tribunals . . . fund these tribunals and . . . support on a daily basis their activities.” Therefore, he was “certain” that the Prosecutor would only indict “people of Yugoslav nationality.”³⁰

Any remaining doubts on this last point have been put to rest. In the last week of 1999, several major newspapers reported that the ICTY Prosecutor was investigating the conduct of NATO pilots and their commanders during the Kosovo war,³¹ including commissioning a preliminary study of NATO’s use of cluster bombs by looking at the history of such weapons and at how they have been used in previous wars.³² While Milan Martić might well wonder why the Prosecutor had not found it necessary to make such a study before indicting him for using cluster warheads, NATO officials clearly had little to fear. Within days of the first reports of prosecutorial interest in NATO, tribunal officials were reported as saying that the study was a preliminary, internal document that was highly unlikely to lead to indictments or even to be published.³³ While the Prosecutor had told the *London Observer* on December 26 that if the confidential report indicated that NATO broke the Geneva conventions she would indict those responsible, on December 30 she issued a press release saying that “NATO is not under investigation by the Office of

²⁷*Id.* at 21.

²⁸At *NATO, a crash course in spin* (May 1, 1999) <<http://www.MSNBC.com/news/default2sp?cp1=1>>.

²⁹Annie Gardner, *US General Condemns French ‘Red Card’* (Oct. 22, 1999) <<http://www.bbc.co.uk/>>.

³⁰*Nato’s Role in Kosovo* (last updated May 16, 1999) <<http://www.nato.int/kosovo/press/p990516b.htm>>; *Nato’s Role in Kosovo* (last updated May 17, 1999) <<http://www.nato.int/kosovo/press/p990517b.htm>>.

³¹Emma Daly, *Dossier of NATO ‘Crimes’ Lands in Prosecutor’s Lap*, *THE OBSERVER*, Dec. 26, 1999, at 15; *U.N. to Review NATO in Kosovo*, *N.Y. TIMES*, Dec. 29, 1999, at A5.

³²Stephen Erlanger, *U.N. Tribunal Plays Down Its Scrutiny of NATO*, *NY TIMES*, Dec. 30, 1999, at 2.

³³*Id.*

the Prosecutor. . . . There is no formal inquiry into the actions of NATO during the conflict."³⁴

This last announcement by the Prosecutor was plainly untrue, as the Committee Report itself indicates that the Committee was working through at least May 2000.³⁵ It is, of course, possible that this quick retreat and face-saving falsehood by Mrs. Del Ponte was unrelated to U.S. government denunciations of the reported inquiry into NATO's actions.³⁶

II. SELECTIVE PROSECUTION 2: WANTON DESTRUCTION OF PROPERTY

In July 1995, the Prosecutor of the ICTY indicted Radovan Karadžić and Ratko Mladić. One of the sets of acts said to constitute a crime against humanity was "the systematic destruction of Bosnian Muslim and Bosnian Croat homes and businesses. These homes and businesses were singled out and systematically destroyed in areas where hostilities had ceased or had not taken place."³⁷ They were also indicted for a "grave breach" of the Geneva Conventions because of "extensive destruction of property:" that they had

individually and in concert with others planned instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the extensive, wanton and unlawful destruction of Bosnian Muslim and Bosnian Croat property, not justified by military necessity, or knew or had reason to know that subordinates were about to destroy or permit others to destroy the property of Bosnian Muslim or Bosnian Croat civilians or had done so and failed to take necessary and reasonable measures to prevent this destruction or to punish the perpetrators thereof.³⁸

With these indictments in mind, the enormous economic destruction of Serbia by NATO is relevant. According to the Group 17 economists (who form the core of the Savez za Promenu, the Serbian opposition coalition most favored by the US, and thus who may be presumed to be fairly reliable observers), the economic damage caused by the NATO bombings to infrastructure, economic facilities and non-economic civil facilities was slightly over four billion dollars.³⁹ According to the BBC, "at least 30% of the adult population [of Serbia] is unemployed. The economic collapse was caused as NATO switched to infrastructure targets as the war continued"⁴⁰—switched from military targets. In the first month of bombing alone,

³⁴ICTY Press Release PR/ P.I.S./ 459-e, Dec. 30, 1999.

³⁵Committee Report, ¶ 12 <<http://www.un.org/icty/pressred1/nato061300.htm>>.

³⁶Rowan Scarborough, *U.N. Denounces U.N. Probe of NATO Bombing*, WASH. TIMES, Dec. 30, 1999, at A1; Steven Lee Myers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, N.Y. TIMES, Jan. 3, 2000, at A7.

³⁷Prosecutor v. Karadzic and Mladic, Indictment, ¶ 29, July 25, 1999 (hereinafter, Karadzic/Mladic indictment).

³⁸*Id.* at ¶ 41.

³⁹Grupa 17, *Završni Račun: Ekonomske Posledice NATO Bombardovanja* (Beograd: Stubovi Kulture, 1999), at 9.

⁴⁰*Kosovo War Cost £30bn* (Oct. 15, 1999) <<http://news6.thdo.bbc.uk/hi/english/world/europe/newsid%5F476000/476134.stm>>.

according to the European movement in Serbia, NATO targets included drug and pharmaceutical plants, tobacco plants and warehouses, printers, and shoe factories,⁴¹ while the G17 economists listed as well wood, textile and food industries, among others. There was clearly no “military necessity” for hitting these targets, unless “military necessity” is defined as meaning “anything the destruction of which might have a political impact.” Neither can it be said that these were “collateral damage.” NATO’s generals and politicians made a very purposeful decision to attack non-military infrastructure early in the war.⁴² They planned the attacks very carefully and only one proposed target was ever rejected because of concerns about its relation to the military.⁴³ But the Yugoslav military was not the target. NATO generals told the *Philadelphia Inquirer* on May 21 that “Just focusing on fielded forces is not enough. . . . The people have to get to the point that their lights are turned off, their bridges are blocked so they can’t get to work.” Note that the purpose of destroying these bridges was *not* military; but this was clear when NATO destroyed the bridges in Novi Sad, 500 kilometers from Kosovo, installations that clearly did not make the “effective contribution to military action” in Kosovo that would have rendered them legitimate targets under Art. 52 of Protocol I additional to the 1949 Geneva Conventions.

Aryeh Neier has noted that the U.N. commission that investigated war crimes in Bosnia concluded that “attacking the civilian population is a war crime.”⁴⁴ There is no question but that, in attacking “infrastructure,” NATO attacked civilians. Judging from the wording of the indictments of Karadžić and Mladić, we should expect indictments against those in NATO who planned and carried out these attacks, and against Bill Clinton and Tony Blair for having failed to take necessary and reasonable measures to prevent this destruction or to punish the perpetrators thereof. However, I would suspect that Jamie Shea’s view, as quoted in the last section, is accurate, and that we should not expect to see the FOT (Friends of the Tribunal) indicted.

III. SELECTIVE PROSECUTION 3: MURDER

On May 27, 1999, Slobodan Milošević, three other Yugoslav politicians and a Yugoslav Army general were indicted by the Prosecutor of the ICTY for, among other charges, “murder, a violation of the laws and customs of war,”⁴⁵ for the deaths of Albanians who were killed by Serb/ Yugoslav forces in Kosovo. It would seem, however, that NATO political and military leaders should also be liable for the charge of murder for, at the least, the bombing of the studios of Radio Television Serbia (RTS) on April 22, 1999. There is no question but that the RTS studios were civilian targets: NATO spokesman Jamie Shea had stated as much in an April 12

⁴¹*Yugoslavia’s Infrastructure Damage* <<http://www.msnbc.com/news>> (visited on Apr. 26, 1999).

⁴²See, e.g., WALL ST. J., Apr. 27, 1999, p. 1; *Kosovo War Cost £30bn* (Oct. 15, 1999) <<http://news6.thdo.bbc.uk/hi/english/world/europe/newsid%5F476000/476134.stm>>.

⁴³WASH. POST, Sept. 20, 1999, at 1.

⁴⁴ARYEH NEIER, WAR CRIMES 192 (1998).

⁴⁵*The Prosecutor of the Tribunal against Slobodan Milosevic et al.* (May 27, 1999) <<http://jurist.law.pitt.edu/indict.htm>>.

1999 letter to the general secretary of the International Federation of Journalists, noting that "television and radio towers are only struck if they are integrated into military facilities."⁴⁶ No one has suggested that RTS studios played any military role. Indeed, NATO spokesman David Wilby had stated at NATO's news briefing on April 8 1999 that RTS would not be bombed if it broadcast Western news broadcasts for six hours per day, which indicates clearly that there was no concern that the studios were integrated into the military. Bombing RTS was an intentional effort to widen the war to civilian targets,⁴⁷ which resulted in the deaths of at least sixteen civilians.

These statements by NATO's own spokesmen make ridiculous the Committee Report's conclusion that "NATO's targetting of the RTS building for propaganda purposes was an incidental (if complementary) aim of its primary goal of disabling the Serbian military command and control system."⁴⁸ Amnesty International, in its report on NATO's operations, calls the attack on RTS a war crime,⁴⁹ and after the Committee report was issued, challenged that report's findings on this incident.⁵⁰ Human Rights Watch agrees that the RTS studios did not constitute a legitimate military target, and further states that "NATO failed to provide clear warning of the attacks," as required by the Geneva conventions.⁵¹ Why the deaths of the sixteen journalists would not then be murders is not addressed by HRW.

At least, however, HRW recognizes the RTS dead to be journalists, more than can be said for the Committee to Protect Journalists (CPJ), which publishes a list annually of journalists killed on the job worldwide.⁵² CPJ's 1999 list intentionally excluded the RTS journalists on the grounds that what RTS broadcast was not journalism but propaganda.⁵³ Rather ironically, at the moment that the NATO bombs killed sixteen RTS people, the station was broadcasting an interview of Yugoslav

⁴⁶Jaime Shea, *Letter to the General Secretary of the International Federation of Journalists*, <<http://www.ifj.org/hrights/natoreply.html>>.

⁴⁷*Gloves Off: How NATO Decided It Was Time to End Its 'Gentlemanly' War*, WALL ST. J., Apr. 27, 1999.

⁴⁸Committee Report, ¶ 76.

⁴⁹Amnesty International, *Collateral Damage or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force*, <<http://www.amnesty.org/ailib/aipub/2000/SUM/47001800.htm>>.

⁵⁰Amnesty International's *Initial Comments on the Review by the International Criminal Tribunal for the Former Yugoslavia of NATO's Operation Allied Force* (June 13, 2000) <<http://www.amnesty.org/news/2000/47002900.htm>>.

⁵¹Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, at 14-15.

⁵²That the dead were simply employees of RTS—editors, technicians, mixers, make-up artists, see Steven Erlanger, *An Ordinary Serb, Lost in Air Attack, is Buried*, N.Y. TIMES, May 2, 1999, at 13. I confess a personal connection: an old friend who worked at RTS as a night-shift translator had, fortunately, just left the building when it was hit. Had he not left he, too, would have been among the CPJ's propagandists even though, ironically enough, his past twenty years had been spent in the employ of the U.S. government, first in the Fulbright office, later in the embassy until it closed at the start of the war. Note that the RTS victims were not even "collateral damage," as NATO meant to hit them. *Id.*

⁵³C. Glass, *When It's OK to Kill a Hack*, THE SPECTATOR, Feb. 5, 2000.

President Slobodan Milosevic by an American scholar, who did the interview on behalf of a CBS affiliate in Texas. That interview had already been broadcast in the United States, so the CPJ presumably would regard CBS headquarters in New York as having been a legitimate NATO target.

In regard to charges of “propaganda,” CBS would actually seem as vulnerable as RTS, but from the other side, if only it had had cruise missiles. In a speech to the National Press Club in Washington DC, CBS anchorman Dan Rather referred to American attacks on Yugoslav water and power systems as “our” attacks, something that “we” did; and when questioned by a member of the audience on the propriety of a supposedly independent journalist associating himself with one side, Rather responded that:

I’m an American reporter. Yes I’m a reporter and I want to be accurate. I want to be fair. But I’m an American. I consider the U.S. government my government. So yes I do—when U.S. pilots in U.S. aircrafts turn off the lights, for me, it’s “we.” And about that I have no apology. . . . I’m an American, and I’m an American reporter. And yes, when there’s combat involving Americans, [you] can criticize me if you must. Damn me if you must, but I’m always pulling for us to win. [applause from the audience]⁵⁴

Presumably, the CPJ would have protested had Rather been injured by Serbs in Belgrade (which he was not), and not only because of his status as a CPJ “Benefactor” who had given more than \$25,000 to the organization (as did CBS News).⁵⁵ But can we say that he was not engaged in “propaganda” when he was “pulling for us to win”?

CPJ was founded in 1981 to “monitor abuses against the press and to promote press freedom around the world,” and “accepts no government funding” in order to ensure its independence.⁵⁶ Yet this supposedly independent organization “pulled for us to win,” adopting NATO’s definition of legitimacy: NATO spokesman Wilby had justified attacking RTS by saying that it “is an instrument of propaganda. . . . It is therefore a legitimate target in this campaign,”⁵⁷ and the CPJ agreed. Thus the CPJ abandoned the principles it was founded to embody, in a striking manifestation of humanrightsism.

IV. FAILURE TO PROSECUTE *PRIMA FACIE* WAR CRIMES: DEPRIVING A CIVILIAN POPULATION OF WATER

Art. 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949 is about as unequivocal as humanitarian prohibitions of military targeting get. Entitled “Protection of objects indispensable to the survival of the civilian population,” it states (Para. 2) that “it is prohibited to attack, destroy, remove or render useless objects indispensable for the survival of the civilian population, such as . . . drinking water installations and supplies . . . for the specific purpose of

⁵⁴Sam Hussein, *Accuracy in Media*, <<http://www.sam@accuracy.org>>.

⁵⁵Benefactors and other major donors listed on <<http://www.cpj.org>>.

⁵⁶*Id.*

⁵⁷NATO news Briefing (April 8, 1999) <<http://www.nato.int/kosovo/press>>.

denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive."

On April 25, a NATO official, who did not wish to be identified, told the *Washington Times* that a new phase of the NATO campaign would aim to destroy electrical systems and water systems in Belgrade and in other major Serbian cities in order to take the war directly to civilians.⁵⁸ On May 23, "fifteen NATO bombs hit water pumps . . . in the northwestern town of Sremska Mitrovica for the second night in a row."⁵⁹ Attacks on May 24 "slashed water reserves by damaging pumps and cutting electricity to the few pumps that were still operative."⁶⁰ Only 30 percent of Belgrade's two million people had running water, and the city was down to 10 percent of its water reserves.⁶¹ The fact that these attacks were not aimed at military operations in Kosovo is clear from the remarks attributed by the *Washington Post* to a Pentagon official, who stated that the attacks had been limited to Serbia proper but that "NATO commanders are understood to be planning to extend the attacks to Kosovo."⁶² A clearer example of NATO's targeting civilians in Serbia rather than soldiers in Kosovo would be hard to find.

To be sure, NATO responded to criticisms of these attacks by saying that it had not targeted water supplies but only the power system.⁶³ This was clearly not true in regard to Sremska Mitrovica; but in any event is irrelevant because what is prohibited is also "rendering useless" a water system, and NATO acknowledged that it was aware that its bombing of electrical stations would do this: "We are aware this will have an impact on civilians," a NATO official told the *New York Times* on 24 May. U.S. Senator Joseph Lieberman was even more direct: "We're not only hitting military targets, otherwise why would we be cutting off the water supply and knocking out the power stations—turning the lights out."⁶⁴ Lieberman, it should be noted, spoke of this *prima facie* war crime with approval as a way "to bring the war in Kosovo home to the people, the civilians in Belgrade."⁶⁵

Clearly, NATO committed a *prima facie* war crime and the evidence that it did so knowingly is at least as strong as anything used in the speedy indictment of Milan Martić. However, as a spokesman for the International Relations Committee of the U.S. House of Representatives told the *Ottawa National Post*, "You're more likely to

⁵⁸Rowan Scarborough, *NATO to Bomb Power Stations, Water Systems in Cities*, WASH. TIMES, Apr. 25, 1999, at C9.

⁵⁹Katerina Kratovac, *NATO Targets Yugoslav Electricity*, WASH. POST, May 24, 1999 (World Wide Web Edition).

⁶⁰Philip Bennett & Steve Coll, *NATO Warplanes Jolt Yugoslav Power Grid*, WASH. POST, May 25, 1999, at A1.

⁶¹Steven Erlanger, *Reduced to a 'Caveman Life,' Serbs Don't Blame Milosevic*, N.Y. TIMES, May 25, 1999, at A1.

⁶²Philip Bennett & Steve Coll, *NATO Warplanes Jolt Yugoslav Power Grid*, WASH. POST, May 25, 1999, at A1.

⁶³BBC News Online, May 24 1999. NATO Denies Targeting Water Supplies (May 24, 1999) <http://news6.thdo.bbc.co.uk/hi/english/world/europe/newsid%5F351000/352780.stm>.

⁶⁴*Fox News Sunday* (Fox News Television Broadcast, May 23, 1999).

⁶⁵*Id.*

see the UN building dismantled brick-by-brick and thrown into the Atlantic than to see NATO pilots go before a UN tribunal.”⁶⁶

V. U.S. GOVERNMENT DIRECTION OF PROSECUTION 1: MILOŠEVIĆ BUT NOT
TUDJMAN

The putative independence and impartiality of the ICTY was utterly compromised by the indictment on May 27 of Yugoslav President Milošević and four of his political associates. While there may be little question that Milošević is guilty of war crimes, “justice” that is not impartial cannot be seen as just. The failure of the Prosecutor to indict NATO or its clients would seem to confirm Jamie Shea’s message that he who pays the prosecutor determines who is charged. It is particularly noteworthy that while the Prosecutor has been reported unable to indict Croatian generals for the 1995 ethnic cleansing of the Krajina because the U.S. government has refused to provide requested information,⁶⁷ she made well publicized visits to American and British officials to gather information with which to indict Milošević. When a Prosecutor who is a citizen of one NATO country seeks assistance from the governments of other NATO countries in order to indict the President of the country that NATO is attacking, not even the pretence of prosecutorial independence remains. The matter was well described by Nina Bang-Jensen of the Coalition for International Justice in testimony during the Kosovo war before the U.S. Congress’s Commission on Security and Cooperation in Europe: the ICTY prosecutors “have to recognize . . . that even though they should make prosecutorial decisions independent of political considerations, and make their decisions in an unbiased legal and just way, they are wholly dependent on the cooperation of states in order to execute their orders. So they can be a little too pristine about their not wanting to acknowledge that they ultimately have to rely on political institutions.”⁶⁸ In light of these comments, the independence of the ICTY seems compromised by the fact that the President of the Tribunal, Judge Gabrielle Kirk McDonald, had been the guest of honor of Ms. Bang-Jensen’s organization a month before the testimony quoted, and referred on that occasion to U.S. Secretary of State Albright as “the mother of the Tribunal.”⁶⁹

VI. U.S. GOVERNMENT DIRECTION OF PROSECUTION 2: THREATS AGAINST VUK
DRAŠKOVIĆ

In July 1999, I was surprised when a close advisor to Vuk Drašković told me that the United States was threatening Drašković with indictment by the ICTY. If the Prosecutor’s office were truly independent, such a threat could not be plausible. However, the *New York Times* has also reported that “Washington has threatened

⁶⁶NATIONAL POST, May 22, 1999.

⁶⁷Raymond Bonner, *War Crimes Panel Finds Croat Troops ‘Cleansed’ the Serbs*, N.Y. TIMES, March 21, 1999.

⁶⁸*Accountability for War Crimes: Progress and Prospects: Hearing Before the Commission on Security and Cooperation in Europe*, 106th Cong. 25 (1999).

⁶⁹*Remarks at the U.S. Supreme Court by Gabrielle Kirk McDonald on the Occasion of Receiving the ABA CEELE Award* <<http://www.un.org/icty/pressreal/SPUSSC.htm>> (visited on Apr. 5, 1999).

Mr. Draskovic with indictment by the international war crimes tribunal in the Hague for the activities of his short-lived Serbian Guard, a paramilitary group, in Croatia in 1991.”⁷⁰ Since contacts in Washington inform me that a major task of the U. S. government’s interdepartmental Balkans Task Force is now to support the Prosecutor’s office, that Washington feels free to threaten indictments seems highly plausible.

VII. DENIAL OF A FAIR TRIAL 1: JUDICIAL DEFERENCE TO PROSECUTOR

Politicization of the ICTY Prosecutor’s Office is especially troubling in light of the extraordinary deference that the *judges* of the Tribunal afford the prosecutor. This deference was first shown in regard to a truly outstanding scandal in the first case tried before the ICTY, that of Bosnian Serb Duško Tadić.⁷¹ In that case, no witness had testified to having seen Tadić personally commit an atrocity, such as murder or rape. However, the Prosecutor’s final witness testified that not only had he seen Tadić rape and murder, but he had also been forced by Tadić to rape and murder as well. The witness was a Bosnian Serb who had been captured by the Muslims, convicted by them of genocide and then presented to the ICTY Prosecutor as a witness against Tadić.

The witness testified under complete anonymity, his identity having been kept a secret even from the defense under a “protection order” meant to allay the fears of witnesses that they or members of their families would suffer retribution if they testified before the Tribunal. In permitting such protection orders the ICTY adopted one of the less admired procedures of the Spanish Inquisition, which also concealed the identities of witnesses from the accused,⁷² and so it is interesting that such American human rights advocates as the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, the Center for Constitutional Rights, the Women’s Human Rights Law Clinic of the City University of New York and the Women Refugees Project of the Harvard Immigration and Refugee Law Program supported prosecution witness anonymity in a joint *Amicus* brief filed with the Tribunal.⁷³

⁷⁰Steven Erlanger, *Fractured Serbian Opposition Unites in Demanding Early Vote*, N.Y. TIMES, Oct. 15, 1999.

⁷¹Candor requires me to state that I was actually the very first *defense* witness to appear before the ICTY, in the *Tadic* case, on the question of the character of the conflict (national or international), a question discussed in the next section. My testimony was limited to constitutional and political issues in Yugoslavia and in Bosnia through 1992 (a précis of the testimony is found in my article in 22 (#1). Robert M. Hayden, *Bosnia’s Internal War and the International Criminal Tribunal*, THE FLETCHER FORUM OF WORLD AFFAIRS 45-64 (1998). Apart from one very brief meeting with Tadić in May 1996, at the request of his defense counsel, I had and have no personal acquaintance with Tadić or knowledge of the crimes for which he was accused.

⁷²H. KAMEN, THE SPANISH INQUISITION 182, 194-95 (1997).

⁷³Prosecutor v. Dusko Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Aug. 10, 1995, at 10, 11.

As it happened, the Defense was able to show that the witness, "Witness L," had lied.⁷⁴ The man had said that his father was dead and that he had no brothers, but a member of the defense team was able to discover that, in fact, he had a brother and that his father was not dead, and arranged to confront the witness with his father and brother by bringing them to the Hague. At that point the witness not only confessed to lying about his family, but also claimed to have been forced by the Muslims, while he was in their custody, to agree to lie against Tadić and then trained by them in the testimony he was to give in the ICTY. Confronted with these lies, the Prosecutor in Tadić informed the court that it did not regard his testimony as reliable and invited the court to disregard it, and the identity of the witness, one Dragan Opačić, was revealed.

At this point, the obvious questions would seem to have been why the witness lied, and whether in fact he was trained to do so by the Bosnian government, which had made him available to the Tribunal. Indeed, the Trial Chamber did order the Prosecutor's office to investigate the matter in order to determine whether charges of perjury should be brought against the witness. However, at this point, the Trial Chamber gave both the Prosecutor and the Bosnian government extraordinary deference.

On December 2, 1996, the Prosecutor sent a letter to Alija Izetbegović, President of the Presidency of Bosnia and Herzegovina, thanking him for his cooperation in investigating the Witness L matter and exonerating his government of wrongdoing.⁷⁵ Tadić's defense lawyers, who had gone to Sarajevo to investigate the matter themselves but who had been given the "cold shoulder" by the Izetbegović government,⁷⁶ first heard of this letter several weeks later when I asked them for a copy of it.⁷⁷ The Trial Chamber accepted this action by the Prosecutor without questioning why the Prosecutor had never shown greater zeal in determining the truth of the witness's story before the defense challenged basic facts about it, an especially interesting question since the Prosecutor knew the identity of the witness and the defense, by virtue of the protection order, did not.⁷⁸ Since some parts of the witness's story seemed to indicate that the Prosecutor's office might also have been involved in training him to give false testimony, the Tribunal in effect asked the

⁷⁴The basic story of "Witness L" can be found in news accounts: e.g. *Internet Naša Borba* Oct., 28, 1996, Reuters, Oct. 25, 1996, Associated Press, Oct. 25, 1996. Copies of an interrogation of "Witness L" by Tadić's defense attorney, Michail Wladimiroff, and of an Oct. 25, 1995 statement by ICTY Prosecutor's investigator Robert Reid concerning Witness L's lies and accusations against the Bosnian government are in author's files. The most detailed account of the "Witness L" matter was broadcast on Dutch VPRO Radio's *Argos* program on Sept. 10, 1999, a transcript of which (in English) is available at <<http://www.domovina.net/opacice.html>> (hereinafter, *Argos*).

⁷⁵Institute for War and Peace Reporting, *Tribunal Update no. 6* (Dec. 2-6, 1996).

⁷⁶Letter from Michail Wladimiroff to author (Nov. 11, 1996).

⁷⁷Fax letter from author to Michail Wladimiroff (Dec. 30, 1997); fax letter to author from Michail Wladimiroff (Jan. 7, 1997).

⁷⁸It is in fact likely that the Defense was in violation of the protection order when it questioned people who, the defense thought, might have been related to the anonymous witness. Had they followed the rules, however, the defendant could not have had a fair trial.

Prosecutor to investigate possible wrongdoing by her own office, while offering no support to the defense in its own efforts to investigate the matter.

To make matters even more odd, neither the judges nor the Prosecutor showed any interest in determining whether the witness had, in fact, been threatened by the Bosnian government or whether he would be mistreated were he to be sent back to that government. Opačić, who said that he had been tortured into making a confession to genocide in Sarajevo, asked not to be returned to the Bosnian government, requesting asylum in Holland.⁷⁹ However, even though Opačić had an attorney to represent him on these issues, he was returned to the Muslims without prior notice being given to his attorney.⁸⁰ Opačić's fears seemed not unreasonable -- in at least one case similar to his, two supposed victims of a Serb who confessed to murdering them and was thereupon convicted of genocide were found alive, but the Bosnian government's courts refused a new trial.⁸¹ Yet immediately after this false case received world-wide publicity, Opačić was returned to the control of the Bosnian government, where he now is serving a ten-year sentence for "genocide" following a conviction based solely on his own confession, which he says was extracted from him by torture.⁸²

When the Dutch *Argos* journalists asked the Tribunal for an explanation of this failure to investigate the Opačić matter more thoroughly, or to consider his request for asylum, a Tribunal spokesperson said that

Defense Counsel Vladimirof [sic] did not prove that all of Dragan Opacic's story was untrue. The only point that was established is that Opacic lied about his family members. His father wasn't at all dead, as he had claimed. And that is the basis upon which the prosecutor decided that Opacic was not a reliable witness. . . . Why Opačić lied and whether the rest of his story was correct was not relevant to the Tadic case. He was no longer any use as a witness, and that is why we sent him back to Bosnia.⁸³

Of course, Wladimiroff had not proven more about Opačić because his cross examination of him was stopped as being in violation of the protection order,⁸⁴ and the Prosecutor had also objected even to the evidence about Opačić's identity but was overruled.⁸⁵

The questions of why Opačić lied and especially of whether the Bosnian government and even the Prosecutor's office trained him to do so were basic to determining whether other witnesses might also have been trained to commit perjury. The *Tadic* defense did try to raise this question on appeal, in regard to the testimony of another witness who had been presented by the Bosnian government, but the

⁷⁹ICTY: *Tadic Case: Update*, June 2, 1997.

⁸⁰*Argos*.

⁸¹N.Y. TIMES, Mar. 1, 1997, at 3; WASH. POST, Mar. 15, 1997, at A17; N.Y. TIMES, June 15, 1997, at 10.

⁸²*Argos*.

⁸³*Id.*

⁸⁴Fax letter from Michail Wladimiroff to author (Oct. 30, 1997).

⁸⁵*Id.*

Appeals Chamber did not accept this claim because the “circumstances” of the two witnesses were “different. Mr. Opacic was made known to the Prosecution while he was still in the custody of the Bosnian authorities, while [the other witness’s] introduction was made through the Bosnian embassy in Brussels.”⁸⁶ Why this particular difference might matter was not explained by the Appeals Chamber, which also failed to notice that while Opačić was in the custody of the Bosnian government because he was captured as a soldier in the Bosnian Serb Army, the second witness’s name (Nihad Seferović) indicated that he was a Muslim and thus perhaps not as in need of persuasion to lie at the behest of the Muslim government as—Opačić had been.

In the Witness L matter, then, the judges of the ICTY afforded very great deference to the Prosecutor and an equally great indifference to the causes of the perjury of a prosecution witness who had been found by the Bosnian government, or of the implications of the possible causes of the perjury for defendant Tadić and for the witness himself (who claimed, apparently with justification, to have been the victim of mistreatment by the Bosnian government), or for future defendants who might be victimized by what may have been collusion by the Prosecutor and the Bosnian government.

VIII. DENIAL OF A FAIR TRIAL 2: CHANGING THE TRIAL RULES AFTER THE TRIAL IS OVER

In its decision on a preliminary question before the start of the Tadić trial, the ICTY Appeals Chamber stated that charges under Art. 2 of the Statute of the Tribunal (covering “grave breaches” of the Geneva Conventions) apply only to persons or objects “to the extent that they are caught up in an international armed conflict.”⁸⁷ The same interlocutory decision concluded “that the conflicts in the former Yugoslavia have both internal and international elements.”⁸⁸ It argued that, had the Security Council considered the conflict international and bound the Tribunal to that position, an “absurd” conclusion would result:

Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serb civilians in their power would not be regarded as “grave breaches”, because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as “protected persons” under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as “grave breaches”, because such

⁸⁶Prosecutor v Dusko Tadic, Judgment, July 15, 1999, ¶ 65 (hereinafter Tadic appeal judgment).

⁸⁷Prosecutor v Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995 ¶ 81 (hereinafter “Tadic Interlocutory”).

⁸⁸*Id.* at ¶ 77.

civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-a-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor.⁸⁹

In accordance with these decisions, the Prosecutor was required in the *Tadic* trial to prove that the conflict was, in fact, international. The Trial Chamber viewed the matter as controlled by the International Court of Justice's decision in the *Nicaragua* case,⁹⁰ that external support to a party in an internal conflict would only internationalize that conflict if the external party had "effective control" over the forces in question. The Trial Chamber, over the dissent of the presiding judge, found that the evidence showed only a coordination between the Bosnian Serb Army and the Yugoslav Army, not control of the latter by the former; and thus held that "on the evidence presented to it, after 19 May 1992, the armed forces of the *Republika Srpska* could not be considered as *de facto* organs or agents of the Government of the Federal republic of Yugoslavia (Serbia and Montenegro)."⁹¹ Accordingly, the Trial Chamber found *Tadic* not guilty of charges under Article 2 of the Statute.⁹²

The Prosecutor appealed that decision and won: the Appeals Chamber held that the Bosnian Serb forces were acting as "*de facto* organs" of the Federal Republic of Yugoslavia.⁹³ In doing so, the Appeals Chamber reached precisely the conclusion in the *Tadic* appeal that it had itself pronounced "absurd" in the interlocutory appeal in the same case. The fairness of a Tribunal that sets explicit rules before a trial and then changes them after it is over is certainly dubious, but that is what the ICTY has done.

Also dubious is the reasoning of the *Tadic* appeal. At trial, of course, the burden of proof rested with the Prosecutor to prove that the events in question took place in the context of an international conflict, and the Trial Chamber concluded that this had not been proved. The Appeals Chamber, however, noted that the Trial Chamber had not said what the nature of the conflict was after May 19, 1992. Since the

⁸⁹*Id.* at ¶ 76.

⁹⁰*Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. Reports 14. Ironically, the defendant in *Nicaragua* was the United States, so that the U.S. prosecutors in *Tadic* were urging the abandonment of the position that had protected the U.S. in *Nicaragua*.

⁹¹*Prosecutor v Dusko Tadic*, Opinion and Judgment, ¶ 607, May 7, 1997 (hereinafter, *Tadic* trial judgment). The May 19, 1992 date was important because the Bosnian Serb Army was formally separated from the Yugoslav Peoples Army on or before that date, and the only evidence presented on the chain of command between the two armies after that date was that of a witness who said that "there was no real chain of command" between them, and evidence that the Bosnian Serb Army used secure communications links that ran through Yugoslav Peoples Army headquarters in Belgrade for its own internal communications. *Id.* at ¶ 598.

⁹²*Id.* at ¶ 608.

⁹³*Tadic* appeal judgment, at ¶ 167.

burden was on the prosecutor to show that it *was* international, there was no burden on the defense to show that it was *not* international. Yet the Appeals Chamber phrases the question as whether the conflict “became . . . *exclusively* internal” after that date.⁹⁴ Since the *Tadic* interlocutory judgment had concluded that the conflict had *both* internal and international elements, this could not have been the question that the defense had been required to counter, or, for that matter, that the Trial Chamber was required to determine.

Indeed, the Appeals Chamber itself recognized that the conflict was “*prima facie* internal,” because it set up the legal question involved as determining “the legal criteria for establishing when, in an armed conflict which is *prima facie* internal, armed forces may be regarding as acting on behalf of a foreign power, thereby rendering the conflict international.”⁹⁵ The Trial Chamber had undertaken a serious review of the facts in Bosnia in 1992 and had concluded that while the Bosnian Serb forces were allied to those of the Federal Republic of Yugoslavia, “there is no evidence on which this Trial Chamber can conclude that the Federal Republic of Yugoslavia . . . and the [Yugoslav Army] ever directed . . . the actual military operations of the [Bosnian Serb Army], or to influence those operations beyond that which would have flowed naturally from the coordination of military objectives and activities” by the two armies.⁹⁶ The Trial Chamber based this conclusion in part on the fact that the Republika Srpska political leaders were popularly elected by the Bosnian Serb people and that these elected political leaders played a role in the activities of the Bosnian Serb Army.⁹⁷

The Appeals Chamber, on the other hand, paid no attention to the activities of Bosnian Serbs as political or military actors in their own right. Instead, it concluded that since the Bosnian Serb Army had received some financing and equipment from the Yugoslav Army, “participation in the planning and supervision of military activities” would constitute “overall control” by the Yugoslav Army, thus rendering the conflict “international.” This reasoning, of course, negates the meaning of the term *control* by conflating it with *participation*. At this point, the Appeals Chamber’s earlier acknowledgment that the conflict had both internal and international elements vanishes, and the *Tadic* appeal judgment reaches precisely the conclusion that the *Tadic* interlocutory judgment had rendered “absurd”; that even though both the Bosnian Serbs and their victims were nationals of Bosnia and Herzegovina, the victims were “protected persons” because “they found themselves in the hands of armed forces of a State of which they were not nationals.”⁹⁸

The Appeals Chamber, perhaps aware that it was rejecting its own earlier conclusion even if unwilling to admit it, justified its new holding on the “object and purpose” of Article 4 of Geneva Convention IV, as “the protection of civilians to the maximum extent possible.”⁹⁹ If this justification is valid, the distinction between

⁹⁴*Id.* at ¶ 86.

⁹⁵*Id.* at § IV.B.3 (heading).

⁹⁶*Tadic* trial judgment, at ¶ 605.

⁹⁷*Id.* at ¶ 599.

⁹⁸*Tadic* appeals judgment, at ¶ 167.

⁹⁹*Id.* at ¶ 168.

“internal” and “international” conflicts that the Appeals Chamber affirmed in the *Tadic* interlocutory judgment is invalid—but for *Tadic*, it is the interlocutory standard that must apply. In any event, the *Tadic* appeals judgment then makes an extraordinary statement, that the applicability of the Geneva Conventions is not “dependent on formal bonds and purely legal relations.”¹⁰⁰ The same judgment had already said, approvingly, that international law concerning State responsibility “is based on a realistic concept of accountability, which disregards legal formalities.”¹⁰¹ But legal formalities protect an *accused*—prosecutors, after all, need no protection, but the rest of us may benefit by the bounds put on prosecutorial zeal. The ICTY Appeals Chamber has thus clearly indicated that fairness of the proceedings for defendants is not high in its concerns.

In yet another striking lapse from both fundamental fairness and the principles of fair trials, the Appeals Chamber, apparently on its own initiative, introduced and discussed what it saw as evidence of FRY control over the Bosnian Serbs in 1995 as evidence that the FRY controlled the Bosnian Serb Army in 1992.¹⁰² Since the same Appeals Chamber judges had refused to permit the *Tadic* defense to introduce additional evidence after the conclusion of the trial,¹⁰³ this is grossly unfair. However, “legal formalities” in regard to evidence do not seem to have been among the stronger points of this Appeals chamber, which refers in the *Tadic* appeal to findings of the international character of the conflict in “three Rule 61 Decisions” in other ICTY cases.¹⁰⁴ Rule 61 proceedings are reviews of evidence in cases in which the defendant is not in custody, which “permit the charges in the indictment and the supporting material to be publicly and solemnly exposed.”¹⁰⁵ Rule 61 proceedings are uncontested; in one, the Trial Chamber noted that powers of attorney had been lodged successfully by one defendant but refused the attorney access to the courtroom or any role in the proceedings.¹⁰⁶ Judicial presentation of the Prosecutor’s uncontested allegations in cases other than the one at trial as being evidence on key issues in the latter seems grossly unfair.

For the Appeals Chamber, however, it would seem that justice is indeed the right to do whatever they think must be done, and therefore justice can be anything.

¹⁰⁰*Id.*

¹⁰¹*Id.* at ¶ 121.

¹⁰²*Id.* at ¶¶ 157-60.

¹⁰³*Tadic* appeals judgment, ¶ 16.

¹⁰⁴*Id.* at n.107.

¹⁰⁵*Prosecutor v Radovan Karadžić and Ratko Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 3 (July 11, 1996) (hereinafter *Karadžić and Mladić*, Rule 61 proceeding).

¹⁰⁶*Id.* at ¶ 4. Interestingly, the Trial Chamber described its actions in this uncontested Rule 61 proceeding as being in pursuit of the “mission” of “international criminal justice” of “revealing the truth about the acts perpetrated.” *Id.* at ¶ 3. Truth, apparently, can be found reliably in the uncontested allegations of the Prosecutor. *Id.*

IX. PROBLEMS FOR AMERICA? STATE RESPONSIBILITY

The dissenting Trial Chamber judge in *Tadic* was an American, by far the greatest number of staff working in the Prosecutor's office were American, and it is likely that the U.S. government supported the Appeals Chamber's reversal of its own interlocutory decision in regard to the nature of the conflict. Yet if such a thing as international law ever does come into existence, in the sense of a legal order binding all international actors, the U.S. might regret elements of the appellate decision in *Tadic*. The view that the imposition on States of responsibility of "*de facto* agents" should disregard "legal formalities" would not only hold the U.S. responsible for the actions of the *Contras* in Nicaragua, but also for those of the Croatian Army in its 1995 offensives against Serbs in Croatia and Bosnia. It is no secret that the U.S. government arranged for the "private" firm Military Professional Resources, Inc. (MPRI) to train the Croatian Army, beginning in September 1994,¹⁰⁷ activity that is attributable to the U.S. government under the *Tadic* appeal judgment. That the American-trained and American equipped Croatian forces were committing war crimes was known to the United States government; witness Richard Holbrooke's reference to the "harsh behavior of Federation troops during the [Sept. 1995] offensive," which would have produced "forced evictions and random murders" of Serbs had Banja Luka been taken—yet Holbrooke told the Croatian Defense Minister that "Nothing that we said today should be construed to mean that we want you to stop the rest of the offensive, other than Banja Luka We can't say so publicly, but please take Sanski Most, Prijedor and Bosanski Novi."¹⁰⁸ Indeed, Holbrooke himself admits telling Croatian President Tudjman that the actions of Croatian forces could be viewed "as a milder form of ethnic cleansing."¹⁰⁹ Yet he urged that the offensive continue. Of course, as one of Holbrooke's colleagues had put it when the offensive started, "We 'hired' these guys [the Croatian Army] to be our junkyard dogs because we were desperate. We need to try to 'control' them. But this is no time to get squeamish about things."¹¹⁰ In addition to Holbrooke, then-U.S. Ambassador to Croatia Peter Galbraith has been reported to have "attended meetings when Croats planned war."¹¹¹

In the unlikely event that the ICTY ever takes its mandate as a charge to render impartial justice and follows the principles announced by its Appellate Chamber in the *Tadic* appeal, American political actors who trained, armed and helped in the planning of Croatian offensives in which war crimes were committed should expect to be indicted and the United States as a State should be charged with responsibility for the actions of its junkyard dogs and *de facto* agents, the Croatian Army. I do not expect this to happen, however. As Jamie Shea said, after all, the U.S. is the friend of the Tribunal and the U.S. is the major financier of the Tribunal.

What, then, does this politicization of the ICTY say about the chances of ever creating a regime of international law? We might ponder the view of a leading

¹⁰⁷*Globus*, Oct. 20, 1995.

¹⁰⁸RICHARD HOLBROOKE, *TO END A WAR* 166 (1998).

¹⁰⁹*Id.* at 160.

¹¹⁰*Id.* at 73.

¹¹¹N.Y. TIMES, May 30, 1996, at A7.

human rights advocate, that the ICTY "was a significant advance over the tribunals at Nuremberg and Tokyo, because it had a mandate to prosecute and punish malefactors from all sides . . . and has carried out its charge. Accordingly, unlike its predecessors, it is not susceptible to accusations of victor's justice."¹¹² It is clear, however, that the ICTY is no more impartial than were earlier these earlier tribunals. Instead of being victor's justice after the conflict, it is a tool meant to ensure victory during it.

X. "HUMAN RIGHTS PECCADILLOES" AND HUMANITARIAN WAR CRIMES

To its credit, HRW has recognized that NATO's actions in its war against Yugoslavia signaled "a disturbing disregard for the principles of humanitarianism that should guide any such action"¹¹³ and criticized in particular NATO's use of cluster bombs. In its report on "Civilian Deaths in the NATO Air Campaign," did say that civilian deaths resulted from nine "attacks on non-military targets that Human Rights Watch believes were illegitimate,"¹¹⁴ and noted that "the use of cluster bombs was a decisive factor in civilian deaths in at least three incidents."¹¹⁵ HRW also concluded that "NATO violated international humanitarian law," although it prefaced this conclusion with the interesting distinction that it had "found no evidence of war crimes."¹¹⁶ However, HRW has not called for investigation of NATO actions with the goal of prosecuting those in NATO who have violated human rights. One must wonder why this is so. At the least, we should expect to see HRW issue a demand for an independent investigation that could facilitate prosecution of those in NATO who have committed the crimes that HRW says that NATO committed in Yugoslavia, comparable to HRW's December 1999 request that the U.N. Security Council appoint an independent commission of inquiry to investigate war crimes by Russian forces in Chechnya.¹¹⁷ Instead, HRW demanded, in its report on civilian deaths, only that "*NATO and its individual member states*" "establish an independent and impartial commission . . . that would investigate violations of international humanitarian law and the extent of these violations, and would consider the need to alter targetting and bombing doctrine" and otherwise engage in "investigations."¹¹⁸

The HRW distinction between "war crimes" and (mere?) "violations of international humanitarian law" is specious in this context (genocide, after all, is not a war crime), because the ICTY has jurisdiction over both kinds of delict.¹¹⁹ Indeed,

¹¹²ARYEH NEIER, WAR CRIMES 259 (1998).

¹¹³Human Rights Watch, *World Report 2000*, at 5.

¹¹⁴Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, "Summary" Feb., 2000 <<http://www.hrw.org/reports/2000/nato>>.

¹¹⁵*Id.*

¹¹⁶*Id.*, "International Humanitarian Law and Accountability."

¹¹⁷*See* <<http://www.hrw.org/campaigns/russia/chechnya>>.

¹¹⁸Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, "Summary," at 7-8.

¹¹⁹The Statute of the ICTY grants it jurisdiction over Grave Breaches of the Geneva Conventions of 1949 (Art. 2), Violations of the Laws and Customs of War (Art. 3), Genocide (Art. 4) and Crimes Against Humanity (Art. 5).

in convicting Croatian general Tihomir Blaskic, the presiding judge specified that the “extremely serious crimes” he committed included “acts of war carried out with disregards for international humanitarian law.”¹²⁰ One might wonder whether the HRW call for an “independent and impartial commission” might be an acknowledgement of the truth of the Jamie Shea position that he who finances the Tribunal determines the prosecutions, and thus imply that a really independent and impartial body should replace the ICTY, were HRW not explicitly calling for NATO to investigate, independently and impartially, itself.

The difference in standards applied to NATO and to Russia might be explained by a distinction in a 1998 *Washington Post* op-ed piece by HRW executive director Kenneth Roth.¹²¹ Trying to assuage U.S. government concerns that new international judicial institutions could be used to accuse Americans of war crimes, Roth states that “clearly it is not U.S. policy” to commit genocide, war crimes or crimes against humanity, and that “there is no prospect” of harassment of “democratic leaders who have at worst a few human rights peccadilloes to their record.” Of course, Roth made this distinction before NATO committed what HRW identifies as violations of the Geneva conventions, but the distinction, perhaps, still holds: NATO, after all, is by definition democratic, so presumably its war crimes are peccadilloes, not worthy of prosecution. The consequences of indictments of NATO personnel for war crimes for the new international judicial institutions that HRW wishes to promote were made clear by Senator Jesse Helms in his January 2000 speech to the UN Security Council:

any attempt to indict NATO commanders would be the death knell for the International Criminal Court. But the very fact that [the ICTY Prosecutor] explored this possibility at all brings to light all that is wrong with this brave new world of global justice. which proposes a system in which independent prosecutors and judges, answerable to no state or institution, have unfettered power to sit in judgment of the foreign policy decisions of Western democracies.¹²²

Since HRW’s executive director says that Western democracies commit human rights peccadilloes rather than war crimes, and the US clearly controls the ICTY, Senator Helms’s concerns are, clearly, baseless.

Another explanation might be said to lie in the extremity of the situation to which NATO responded in Kosovo: that “it took NATO’s controversial bombing campaign before Belgrade would acquiesce in the deployment of international troops to stop widespread ethnic slaughter and forced displacement,” and that the inspiration for “NATO’s action was fundamentally humanitarian . . . the desire to stop crimes against humanity was a major goal.”¹²³ HRW’s recounting of the events leading up to NATO’s attacks closely tracks that of Bill Clinton, who asserted that NATO “had to act” when Yugoslav forces “began an offensive” against the Albanians of

¹²⁰ICTY Press Release JL/P.I.S./474-E, Mar. 3, 2000 <<http://www.un.org/icty/pressreal/p474-e.htm>>.

¹²¹Kenneth Roth, *Justice for Tyrants*, WASH. POST, Nov. 26, 1998, at A31.

¹²²<<http://www.usis.it/wireless/wfa00120/A0012011.htm>>.

¹²³Human Rights Watch, *World Report 2000*, at 1, 5.

Kosovo.¹²⁴ Assuming that he read the reports of his own State Department, the President must have known that his account was inaccurate: in a report issued two weeks before the President published his article in the *New York Times*, the State Department said that until the NATO attacks were under way, Serb forces were engaged in "the selective targeting of towns and regions suspected of [Kosovo Liberation Army] activities," not a general offensive against the Albanian population.¹²⁵ This pattern of Serbian actions before NATO's offensive is confirmed by the OSCE in its massive report on events in Kosovo, which shows that Serbian forces, until NATO attacked, were fighting the KLA and not engaged in systematic ethnic cleansing.¹²⁶ HRW might have tacitly recognized this uncomfortable fact when it stated that "before using military force to stop crimes against humanity, planners at a minimum should be confident that intervention will not make matters worse by provoking a wider war or setting in motion a string of new atrocities."¹²⁷ Yet applying this criterion to NATO's actions would delegitimize them, which HRW clearly does not want to do.

The more fundamental problem in any event is HRW's assertion that war can be seen as humanitarian. Attacks against civilians are probably inevitable in any supposedly humanitarian intervention. Every nation has the right to defend itself, and at the level of practical politics, a nation that is attacked will try to resist the attacker. Winning the war thus requires defeating not only the army, but the nation: the civilian population. Thus the decision to attack a sovereign state is, logically, a decision to attack the civilian population of that state, not just the military. NATO's targeting of the civilian infrastructure of Serbia (and earlier, of Iraq), is thus logical, and the constant repetition that "NATO never targets civilians" was hypocritical, presumably meant to obscure the uncomfortable fact that humanitarian intervention requires the committing of humanitarian war crimes. At this point, the greatest triumph of the human rights movement, "humanitarian intervention," is revealed as its greatest defeat, because it transforms what had been a moral critique against violence into a moral crusade for massive violence. Of course, HRW could escape this trap by demanding the indictment of NATO leaders, but it would then precede the UN in being dismantled brick by brick and thrown into the Atlantic. While speaking truth to power is admirable, telling power what it wants to hear tends to bring more tangible rewards.

XI. HUMANRIGHTSISM

A month after NATO began its attacks on Yugoslavia, Vaclav Havel gave what seems to be a principled justification for the war:

this is probably the first war that has not been waged in the name of "national interests," but rather in the name of principles and values. . . . This war places human rights above the rights of the state. The Federal

¹²⁴N.Y. TIMES, May 23, 1999, at § 4, p.17.

¹²⁵U.S. State Department, *Erasing History: Ethnic Cleansing in Kosovo*, May, 1999.

¹²⁶OSCE, *Kosovo/Kosova As Seen, As Told: The Human Rights Findings of the OSCE Verification Mission*, Part II, Chapter 3, <<http://www.osce.org/kosovo/reports/hr/part1>>. (Initially, this FN says Part I).

¹²⁷Human Rights Watch, *World Report 2000*, at 6.

Republic of Yugoslavia was attacked by the alliance without a direct mandate from the UN. This did not happen irresponsibly, as an act of aggression or out of disrespect for international law. It happened, on the contrary, out of respect for the law, for the law that ranks higher than the law which protects the sovereignty of states. The alliance has acted out of respect for human rights.¹²⁸

Havel then states that human rights “are as powerful as they are because, under certain circumstances, people accept them without compulsion and are willing to die for them.”¹²⁹

Havel sounds great but, in fact, even as he gave the speech quoted (April 29, 1999) he must have known that he lied. Few indeed were willing to die for human rights, particularly in the Czech Republic,¹³⁰ but rather NATO was engaged in killing for human rights. As Havel spoke, the alliance was targeting civilian “infrastructure” because attacking Yugoslav military targets would have exposed NATO pilots to danger. In the five days before his speech, NATO repeatedly bombed oil refineries in Novi Sad, causing massive pollution of the air and of the river Danube; bombed civilian targets in central Belgrade, and bombed a Serbian town on the Bulgarian border, destroying houses and killing civilians.¹³¹ All but the last were intentional targetting, so damage to the environment and civilian deaths were not “collateral damage.” Havel’s speech is thus either politically cunning, as befits the elected president of a sovereign nation-State; or else evasive, avoiding the truth that Havel could not, as a long-term supporter of human rights, admit.

But the difference between Havel the advocate of human rights and Havel the War President embodies the difference between human rights as a principle for criticism of the actions of governments and humanrightsism as a justification for government actions that violate human rights. By humanrightsism, I mean what the *New York Times* has described as the “elevation” of human rights to a “military priority,”¹³² since military priorities are by definition based on the threat and use of force. This “elevation” is actually a striking inversion of the principles that have guided the growth of human rights organizations. For example, Amnesty International long required that its “prisoners of conscience” not be advocates or practitioners of violence.¹³³ Humanrightsism, however, itself calls for violence.

¹²⁸Vaclav Havel, *Kosovo and the End of the Nation-State*, N.Y. REV. OF BOOKS, June 10, 1999, at 6.

¹²⁹*Id.*

¹³⁰See M. Znoj, *Czech Attitudes Toward the War*, 8(#3) E. EUE. CONST. REV. 47 (1999).

¹³¹U.N. Environment Programme and U.N. Centre for Human Settlements, *The Kosovo Conflict: Consequences for the Environment* (1999), at 17.

¹³²Michael Wines, Editorial, *The World: DoubleVision: Two Views of Inhumanity Split the World, Even in Victory*, N.Y. TIMES, June 13, 1999, at §4, p.1.

¹³³See, e.g., Amnesty International, *Yugoslavia: Prisoners of Conscience* (1985), at 9-10:

[T]he following violations of human rights in Yugoslavia are of concern to Amnesty International: the arrest and imprisonment of people for their non-violent exercise of internationally recognized human rights . . . the vague formulation of certain legal

I am aware, of course, of the revival of "just war" arguments, by political philosophers¹³⁴ and politicians.¹³⁵ In regard to the latter, however, surely even Vaclav Havel realizes that all politicians justify wars by reference to "principles and values," and justification for attacks that are not based on self-defense are often less than reliable assessments. After all, were governments that apply force always candid in their reasons for doing so, HRW and other human rights organizations would not have been in business in the first place.

The question then, remains: why have human rights advocates ignored the actions by NATO and by the ICTY that they would condemn were they performed by, say, China, or Russia, or India?

This question is addressed directly in a brilliant and brave article by Dimitrina Petrovna, Executive Director of the European Roma Rights Center in Budapest.¹³⁶ Petrovna acknowledges that she herself was in favor of NATO intervention in Kosovo until she saw, soon after the bombing began, that it was escalating the human rights catastrophe for everyone in the Federal Republic of Yugoslavia, inside Kosovo and in Serbia, and that "from a campaign to defend the lives and rights of Kosovo Albanians, [the war] metamorphosed into something else: the monster of an escalated war."¹³⁷ While Petrovna herself then called for an immediate end to the bombing and a negotiated peace, few others in the human rights community did so. She notes that for east European human rights workers, their very status and funding could have been jeopardized by criticism of NATO and especially of the US-NATO countries are, after all, the major financiers of more than just the ICTY. In the Western countries themselves, however, the reasons are more troubling. There, she notes, "human rights are becoming indistinguishable from official political ideology," producing "a gradual usurpation of the human-rights culture by the dominant powers, and the very argument for human rights is turning into an apologia for the global status quo, all in the interests of these very powers."¹³⁸

From the evidence of NATO's actions in Kosovo and the ICTY's treatment of defendants, this transformation of human rights inverts the concept, from one premised on the protection of people from the violence of states, to one justifying the application of violence by the world's most powerful states against weaker ones. With this transformation, human rights betrays its own premises and thus becomes its own travesty: humanrightsism.

provisions which enables them to be applied so as to penalize people for the non-violent exercise of their human rights.

Id.

¹³⁴*E.g.*, MICHAEL WALZER, *JUST AND UNJUST WARS* (2d ed., 1992), and JOHN RAWLS, *THE LAW OF PEOPLES* (1999). Rawls' assertion that "If the political conception of political liberalism is sound . . . then liberal and decent peoples have the right . . . not to tolerate outlaw states," seems, remarkably but as yet unremarked, a call for liberal *jihād*. *Id.* at 81.

¹³⁵*E.g.* William J. Clinton, *A Just and Necessary War*, N.Y. TIMES, May 23, 1999, at 4-17.

¹³⁶Dimitrina Petrovna, *The War and the Human Rights Community*, 8(#3) E. EUE. CONST. REV. 97 (1999).

¹³⁷*Id.* at 99.

¹³⁸*Id.* at 101.