

JE KINDLE-NOTITIES VOOR:

Travesty: The Trial of Slobodan Milosevic and the Corruption of International Justice

door John Laughland

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> NATO alleged that Yugoslav forces were making massive attacks against ethnic Albanian civilians in Kosovo in pursuit of a programme of racial persecution known as 'ethnic cleansing'. This claim lay at the very heart of the NATO case for war and of the indictment of Milošević and the other Yugoslav leaders. 'It is no exaggeration,' wrote the British Prime Minister, Tony Blair, 'to say what is happening in Kosovo is racial genocide. Milošević is determined to wipe a people from the face of his country.' 3 Blair went into overdrive: 'Children seeing their fathers dragged away to be shot. Thousands executed. Tens of thousands beaten. 100,000 men missing. 1.5 million people driven from their homes.' 4 The world's media joined in the frenzy. Lurid atrocity 'reporting' spread like a collective madness. Saturation coverage was provided of weeping Albanian refugees and the wildest stories about mass killings abounded. At one point, for instance, it was claimed that the Serbs, like the Nazis at Auschwitz, were burning the bodies of 1,500 murdered Albanians in the incinerators at the Trepča Mining Complex.5 Some of those who set themselves up as leading authorities on the Balkans fell for this blatant piece of war propaganda,6 even though it turned out to be completely false.7

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> The US State Department produced a report in May 1999, during the bombing, entitled 'Erasing History', which alleged that 'The regime of Slobodan Milošević is conducting a campaign of forced migration on a scale not seen in Europe since the Second World War.' The report contained numerous falsehoods, from the overall allegation of genocide (which was so unsustainable that it was never included in the Kosovo indictment, not even when this was revised in June 2001, two years after the end of hostilities), to specific claims such as one that the Kosovar capital, Priština, had become 'a ghost town' when in fact, there were still hundreds of thousands of people living there.9

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> Leading statesman fed the media with huge casualty figures, secure in the knowledge that their claims would be reported as fact before anything could be checked. In April, the US Ambassador for War Crimes, David Scheffer, said he thought 100,000 Albanians had been killed,10 a figure repeated by US Defense Secretary William Cohen the following month.11 Cohen's claims were widely reported the following day as fact.12 The British government was a little more circumspect, preferring the figure of '10,000 killed', a figure it initially mooted in June 1999 but which it stuck to until well into the following year.13

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> The centrepiece of NATO's claim in this regard was 'Operation Horseshoe'. This was allegedly a Serbian plan to drive out the Albanian population from Kosovo in order to establish ethnic Serb hegemony in that province. The NATO spokesman, Jamie Shea, referred frequently to Operation Horseshoe in his press conferences while the bombing was in progress,14 and the media reported it as fact.15 Eventually, it turned out to be an invention of the secret services of Western states.16 The game was given away when the document allegedly outlining it had 'horseshoe' written in the Croatian not Serbian form of the word (potkova instead of potkovica). Of course there were ugly incidents and war crimes in Kosovo, just as Albanian guerrillas indubitably committed atrocities against Serb civilians and other Albanians. But Operation Horseshoe had as much relationship to reality as did the fictional character, 'Gruban', hero of Miodrag Bulatović' s novel Hero on a Donkey, whose name was included in an indictment issued by the ICTY Prosecutor on 13 February 1995, the result of a practical joke played by a Serbian journalist on an American colleague. Having a drink one night in a bar, the Serb told the American that a brutal guard at the Omarska camp in Bosnia was called 'Gruban', and the journalist, who evidently had a second job as an informer but who did not understand the literary reference, passed the name on to The Hague. The indictment against 'Gruban' and others was eventually withdrawn three years later, on 8 May 1998, presumably when the ICTY Prosecutors realised they did not have much chance of ever seeing him in court.17

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> The news of the 'disappointing' body count started to emerge in September 1999, when a team of Spanish forensic doctors, who had been told to expect to have to carry out thousands of autopsies, packed their bags and returned home after being given only 187 cadavers to examine.20 At numerous sites where the US State Department claimed there had been hundreds of killings, the ICTY investigators found no bodies whatsoever. In the places where bodies were discovered, the numbers of bodies exhumed was about one-tenth of those claimed by the US government during the bombing. Articles appeared on the matter in the autumn of 1999,21 and by the following year it was widely accepted that NATO had exaggerated the scale of the atrocities, even by media who had reported the original allegations as fact.22 One of the most poignant examples of the lies told by Albanians and their allies to justify the war were those recounted to Canadian Broadcasting Corporation (CBC) correspondent Nancy Durham by Rajmonda Rreci, a Kosovo Albanian girl who told the reporter she had taken up arms to avenge her sister's murder by Serbs. Durham had broadcast emotional reports about Rajmonda in 1998, as the Kosovo conflict was beginning, but when she visited Rajmonda in Kosovo again in September 1999 she found that the girl's sister was alive and well. She had lied.23 (The fact that the BBC had been able to glorify a girl fighter did not stop it expressing outrage whenever there were reports of Yugoslav forces killing women.) In 2004, moreover, a Pulitzer Prize finalist journalist for USA Today resigned after it was revealed that he had faked proof about a meeting in 1999 at which he claimed he had been shown direct evidence of an order to ethnically cleanse a Kosovo village, about which he had published an article on the front page of his newspaper at the height of the war.24 Moreover, NATO had itself committed terrible massacres, such as when it bombed a convoy of 87 Albanians who were returning to their homes near Korisa in May 1999, or when it massacred scores of civilians doing their shopping in the marketplace at Niš. NATO had dropped cluster bombs on Niš, which issue a shower of bomblets and cause maximum damage over a wide area. In Kosovo,25 NATO used depleted uranium, which continued to cause cancer seven years later.26 There were dozens of such attacks, and NATO spokesman regularly denied reports of civilian deaths ('collateral damage') before admitting the

truth.27 In the event, NATO killed roughly the same number of civilians as the Yugoslav forces allegedly did, while NATO's murderous allies, the Albanian insurgents, carried out a spree of ethnic cleansing of Serbs, Bosniaks and gypsies, tens of thousands of whom fled north in the days between the withdrawal of Yugoslav troops from Kosovo and the arrival of NATO's. NATO also tried to kill President Milošević personally in an air strike on his house on 22 April 1999.

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Given that there had been Serb and Albanian victims in the conflict, and that NATO itself had killed additional hundreds of people, mainly civilians, the humanitarian justification for the war was clearly non-existent. The International Committee for the Red Cross at this stage was listing just over 3,000 people missing, that is, including all nationalities and including both missing and missing presumed dead. There had been huge emigration from Kosovo and Yugoslavia at this time, especially of Albanians, as reports from the refugee camp at Sangatte near Calais attested at the time, and many of the people on the 'missing' list may simply have left to start a new life abroad.29 Meanwhile,

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Many people in the West, indeed, quickly forgot that there had been no refugees before the bombing had started.

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Worse still than the non-existence of genocide in Kosovo was the fact that the NATO bombing had in fact started for an entirely different reason. The countdown to war began with the events in Račak on 15 January 1999. Kosovo Albanian sources and Western governments alleged that a massacre had occurred in that southern Kosovo village; the Serbs countered that there had been a fire-fight during which KLA terrorists had been killed. The Organization for Security and Co-operation in Europe (OSCE) took an active role in the investigation, with an especially important role being played by the head of its mission in Kosovo, the US ex-ambassador, William Walker. Walker had been US ambassador to El Salvador at a time when atrocities had been committed by US-backed insurgents there. He had also played a role in the campaign to overthrow General Noriega of Panama in 1988 – 89.31 The Kosovo Verification Mission, which he headed, was largely staffed with intelligence officers from Western states, especially Britain and the US, and it pursued a political agenda of making matters in Kosovo worse in order to destabilise Milošević.32 As Roland Keith, a former member of the KVM remarked, Walker was essentially working for the US government: 'It appeared to me ⋯ that powers higher than mine had no real interest in rebuilding stability in Kosovo but probably had other political agendas of which this [that is, peace] would not play a role whatsoever.' 33 The extent of cooperation at that stage between the theoretically independent KVM and NATO was underlined when Walker personally called both Richard Holbrooke, the US envoy for the Balkans, and Wesley Clark, the US general who was Supreme Commander of NATO, from Račak on his cell phone, even though he subsequently denied having done this.34

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The terms were simply excessive. No state could agree to the occupation of the whole of its territory, under draconian conditions, by a hostile army. Serbs with long historical memories compared the Rambouillet

ultimatum to the ultimatum that Austria issued to Serbia following the assassination of the Archduke Franz Ferdinand in Sarajevo in July 1914. Then Austria had, rather like NATO, demanded free access to the whole of Serbia's territory for its police and security forces. Serbia's refusal of that ultimatum triggered the First World War.

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There are good reasons for thinking that the demands made in the Rambouillet document were made deliberately in order to provide a pretext for war. Britain's second most senior defence minister, Lord Gilbert, Minister of State for Defence, said later, 'I think certain people were spoiling for a fight in NATO at that time. I think the terms put to Milošević at Rambouillet were absolutely intolerable: how could he possibly accept them? It was quite deliberate.' 36 The former US State Department official George Kenney has written that an unimpeachable source told him that the US 'deliberately set the bar higher than the Serbs could accept'. Kenney comments, 'The Serbs needed, according to the official, a little bombing to see reason.' 37

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The KLA were none the less presented in the Western media and by Western politicians as brave and respectable allies. The alliance between them and the Americans was glamourised even more than the similar alliance between the Americans and the Contras in Nicaragua in the 1980s. Madeleine Albright was photographed kissing the KLA leader, Hashim Thaci (whose gangster nickname is 'The Snake'); Tony Blair met him; while Jamie Rubin, the US State Department spokesman, who had already struck up a rapport with Thaci because of their mutual love of Armani suits, was happy to swagger around the streets of Priština with him, the two men both wearing the same Mafioso-style uniform of black leather jackets, white T-shirts and sunglasses. In fact, it was not only US government officials who showed a predilection for imitating the manners of the Mafiosi. On 10 July 1997, the British SAS shot dead an ICTY indictee, a Bosnian Serb named Simo Drljaća, and bundled his body into a helicopter together with his 14-year-old son who had watched his father die. But the Chief Prosecutor, Louise Arbour, seemed unembarrassed by the fact that the arrest had gone so horribly wrong. Instead, she was 'pleased': 'In the region, everyone felt a little chill,' she said. 'The next time we arrived in town ⋯ we were perceived as pretty serious and pretty scary people. Which is what we are supposed to be.' 54 Like the Contras, the KLA were funded and trained by the Americans, as was admitted by the Prosecution during the Milošević trial. Geoffrey Nice told the court that the CIA's favourite 'deniable' private security company, Military Professional Resources Incorporated or MPRI, had trained the KLA guerrillas and infiltrated the Kosovo Verification Mission, which reported on alleged atrocities committed by the Serbs: 'It is accepted that there were present in the Kosovo Verification Mission at least some people who had been trained by or had experience with the American organisation MPRI, and I do not challenge that members of the KLA may have been trained by such people.'

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The NATO-KLA alliance of course influenced the issuing of the indictment against Milošević. The same intelligence services who were funding and training the KLA were also 'informing' the ICTY Prosecutor about alleged atrocities committed by Serbs. David Scheffer, the former US Ambassador for War Crimes, the intellectual author of the concept of 'international judicial intervention' 56 and one of the driving

forces behind the creation of the ICTY, has spoken at length and in public about the decisive collaboration between the Office of the Prosecutor (OTP) and the CIA.57 Indeed, the role of the secret services in drawing up the indictment against Milošević was admitted by Prosecution staff during the trial itself.58 During the Kosovo war, in any case, Western governments had been happy to boast that their intelligence agencies were cooperating with the ICTY. Paris, London and Washington appointed special representatives for cooperation with the ICTY whose job was prepare the 'regular transfer of intelligence and other information to the Office of the Prosecutor'.59 The US State Department spokesman, Jamie Rubin (whose wife, CNN's star correspondent Christiane Amanpour, provided much of the coverage of Kosovo for CNN) spoke of the OTP and the US government in the same breath when, describing how the US government was providing information to the investigators, said, 'We have what we need and we think we can provide a compelling case.'60 During the Milošević trial, moreover, the ICTY judges allowed the US government to censor the transcript of the evidence given by General Wesley Clark, the former Supreme Commander of NATO, before it was released to the public, on the grounds that the ICTY was itself dependent on information received from governments and therefore there had to be a quid pro quo.61

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Much ICTY funding comes from the US government or its agencies such as the Orwellian-sounding United States Institute for Peace. There has also been funding from George Soros' Open Society Institute, the head of whose office in Kosovo was a strong supporter of the Albanian cause, and there have been other private donations. In an astonishing speech entitled 'The Dividends of International Justice,' given to an audience at the London offices of the investment bank Goldman Sachs on 6 October 2005, Carla del Ponte rattled the begging-bowl and said that the work of the ICTY was intended to deliver profits to private companies: It

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The Muslim states of Pakistan and Malaysia had alone provided 93.4 per cent of the ICTY's funding by 15 July 1994 ($3 million out of a total budget of $3,208,900); this was a reflection of the strong support given by Muslims around the world to the Bosnian Muslims' war against the Christian Serbs and Croats. However, the balance was eventually tipped strongly in favour of the US. In 2005, the US gave $17 million, four times the amount of the next largest contribution of $4 million from the European Commission. This pattern has been repeated every year since 2000. (The annual budget of the ICTY has been over $200,000,000 since 2002 and was over $276,000,000 for 2006–07. This compares to the budget of the International Court of Justice, which was $34,832,300 in 2005, one-eighth of that of the ICTY.)70

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This harmony of interests between NATO and the ICTY, and the financial dependency of the latter on the former, came to fruition in 2000 when the ICTY Prosecutor refused to open an investigation into whether NATO had committed any war crimes during its attack on Yugoslavia.71 She produced a report on the matter,72 having created 'a committee' within her office to look into various complaints received from a variety of sources, and the report concluded that NATO had no case to answer.

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> The Office of the Prosecutor's refusal to open an investigation terminated conclusively any claim it may have had to independence. The NATO attack on Yugoslavia was indisputably illegal under existing international law. 77 Very few supporters of the Kosovo war, indeed, even tried to argue that it was legal. They said instead that it was legitimate even if illegal,78 a very strange way indeed to defend the rule of law.

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> Shortly after President George Bush Sr's speech in 1990, there were further developments towards supranationalism. In response to the collapse of the Berlin Wall and of Soviet influence over eastern Europe, the powers of the Conference on Security and Co-operation in Europe were greatly strengthened in November 1990. This organisation had been created at Helsinki in 1975, as the United States and the Soviet Union had struggled to achieve some measure of détente: its charter contained a 'basket' of commitments on human rights, and these were used by dissidents in the Communist bloc and by those Western organisations and governments which supported them. In November 1990, in the euphoria of the collapse of Communism, the CSCE renamed itself 'the Organisation on Security and Co-operation in Europe' at a solemn conference in Versailles. The OSCE acquired a host of new human rights prerogatives, and a right to oversee the 'transition to democracy' in eastern Europe. The industry of 'transition-ology' was thereby born, and the curtain was raised on a decade of interference in the internal affairs of the newly liberated states, much of which was politically manipulated by Western governments operating via what purported to be non-governmental organisations.

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> The underlying philosophy was the same as that which was to lead to UN Security Council Resolution 688 in 1991. Human rights violations and other internal political tensions could, it was reasoned, be a cause of instability and thus insecurity. The implication was that international organisations needed to be strengthened in order to micro-manage the internal affairs of all European states. Pretty much anything became a cause for common concern: the treatment of minorities, women's rights, human rights, ethnic relations, even labour law and social protection. Security, it seemed, could be ensured only when the whole world was subject to the same standards and policies. As one constitutional expert wrote, the OSCE was 'the source of an overarching European constitutional order to which all national and political institutions in Europe must conform'.4

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> As the 1990s advanced, the idea became ever more firmly embedded in the foreign policy thinking of the Western powers that nationalism and instability were the new dangers, and that proactive foreign and military policy was required to counteract them. President Bush Sr had said at Aspen, Colorado on 2 August 1990 – the day Iraq invaded Kuwait – that, with the end of the Cold War, new threats could now emerge from anywhere and that US military policy would therefore need to have a global reach. Similarly, in 1992 a leaked Pentagon document, the Defense Planning Guidance, authored by Paul Wolfowitz and Defense Secretary Dick Cheney, also argued that the United States would need to adopt a more proactive stance in foreign and defence policy, specifically by intervening in many parts of the world to prevent or pre-empt the various threats which might arise. It was in this document that the doctrine of pre-emptive war was first articulated, later to be used to justify

the attack on Iraq in 2003. The approach proposed by the Pentagon officials would differ, they said, from the more reactive approach of the Cold War period, which had been based on national sovereignty and the doctrine of deterrence.7 More generally, many commentators (especially the neo-conservatives) started to argue that only US hegemony could prevent the world from descending into chaos.

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In the same vein, David Scheffer, one of the intellectual heavyweights behind the International Criminal Tribunal for the former Yugoslavia (ICTY), who was to serve as Bill Clinton's Ambassador for War Crimes and who coined the term 'international judicial intervention' in 1996,9 also revealed himself to be a supporter of international military intervention. In a seminal article in 1992, he expressed ideas about Iraq which would be used seven years later to justify a war of aggression against Yugoslavia: There is a critical need to re-examine humanitarian intervention in the context of contemporary events.

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Jacques Poos, the foreign minister of Luxembourg and president of the European Council in 1992 said that the notion of national self-determination was 'dangerous as the basis for the international order'.13 Since the European Union was removing the main sovereign rights from its own member states, there seemed little reason to suppose that former Communist states had any right to sovereignty or self-determination either. The most explicit statement of this

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None of these prophets of supranationalism would ever admit that the collapse of Yugoslavia had itself been micro-managed by the international community, precisely acting in the name of supranationalism. International involvement in the Yugoslav crisis began as soon as the League of Communists collapsed in 1990, when multi-party elections were held in each of the Yugoslav republics. The European Union immediately decided that the build-up of tensions inside Yugoslavia was its business. On the verge of signing the Maastricht Treaty on European Monetary Union, the EU was determined to throw its weight around in foreign affairs too. Neither the EU nor the US ever took the view that the best way to defuse the crisis was to let the protagonists themselves sort things out. Instead, the EU and its officials immediately started to try to broke agreements, while at the same time intervening in Yugoslavia's affairs by encouraging the secessions of Slovenia, Croatia and finally Bosnia & Herzegovina. Germany famously forced the hand of the other EU states, by announcing its intention to recognise Slovenia and Croatia in late 1991, whence the existence of numerous 'Genscher cafés' in Croatia today and whence the broadcast of a cheesy pop song on Croatian TV following the war, in which a tartily dressed young woman schmoozed the words, 'Danke, Deutschland

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International intervention had an absolutely crucial influence on the decisions of the local actors. The Bosnian Muslim president, Alija Izetbegović, withdrew his signature from the Lisbon Agreement in February 1992, following encouragement to do so by the US ambassador, Warren Zimmerman, who successfully lobbied his government to undertake 'an active American push for recognition' [of Bosnia & Herzegovina as a

sovereign state] even though the Serbs, who made up a large proportion of the population, wanted the republic to remain in Yugoslavia.15 Recognition ensued, even though few if any of the 'conditions' previously set down by the Badinter Commission had been met. The indication that Bosnia-Herzegovina would indeed be recognised led directly to the declaration of independence, which in turn led directly to the start of the Bosnian civil war.16 International recognition, indeed, was required to provide a legal basis for sending UN troops to Bosnia, which occurred in 1992, that is, unilaterally to dismantle the sovereignty of the existing state of Yugoslavia.

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Having helped start the Bosnian civil war, the international community seemed to do everything to prolong it. Western policy was based on a determination to break up Yugoslavia, which had been multi-ethnic, and on a determination to maintain Bosnia-Herzegovina, on the basis that it was multi-ethnic. This crucial schizophrenia prolonged the conflict for three years.

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Logically, the collapse of Yugoslavia should have led directly to the collapse of Bosnia-Herzegovina, in which case the fighting may well have been over as quickly as it was between Yugoslavia and Croatia. Instead, the EU and the US insisted that Bosnia-Herzegovina be preserved. That fighting ended in 1995 only with even more surreal international interventionism than before: an international protectorate under a 'High Representative' was established, which, to this day, is the only thing which holds together an entirely bogus state.17 The internally divided state of Bosnia & Herzegovina exists only on paper, and only to the extent that the constituent peoples are in fact not governed by it at all.18

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Nuremberg is thus often mentioned in formal legal documents to legitimise the workings of the Hague Tribunal, which is often presented as Nuremberg's successor.1 References to the trials abounded from the very moment the Tribunal was even conceived. When US Secretary of State Lawrence Eagleburger first suggested putting leading Serb officials on trial, he said that he had been moved to do so during a meeting with Elie Wiesel, the famous Holocaust survivor and author.2 The UN Resolution of 6 October 1992, which proposed the creation of a committee of experts to examine war crimes in Yugoslavia, deliberately chose the word 'commission' in order to recall the United Nations War Crimes Commission, which had preceded the Nuremberg trials.3 When the UN Security Council adopted Resolution 808 on 22 February 1993, creating the Yugoslav Tribunal, the US Ambassador to the UN, Madeleine Albright, declared that 'the Nuremberg principles have been reaffirmed.'

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However, these references to Nuremberg are false and misleading. First, it is not true that the Nuremberg trials forced state leaders to account for their acts for the first time. Heads of state and political leaders have been put on trial at various times in history – Charles I and Louis XVI are cases in point. In the twentieth century, the Vichy government in France put the leaders of the Third Republic on trial for having allegedly led France into war unprepared, while Marshal Pétain was then tried after the Liberation. In 1989, the Romanian dictator,

> Nicolae Ceauşescu, was put on trial for genocide by the revolutionary authorities who had overthrown him and, a guilty verdict having been pronounced, was taken out of the room and shot. Second, it is not true that Nuremberg established for the first time the principle that the law is higher than the orders issued by a head of state or a military commander. On the contrary, it is one of the oldest principles of political philosophy that the state is itself subject to natural law, while most military codes in the world (including that of Nazi Germany) forbid soldiers from executing illegal orders. Nor did Nuremberg invent the laws of war: these very ancient and most civilised states have for centuries had laws on their statute books governing what their soldiers may do in battle and making commanders responsible for their subordinates' acts. These,

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> It is quite probable that there were ulterior motives in the Allies' approach. Most legal scholars accept that the Nuremberg trials were far from perfect. The most obvious shortcoming was the fact that the Nazis were charged with planning and executing a war of aggression, whereas one of the Allied powers, the Soviet Union, which had been Nazi Germany's ally from 1939 to 1941, had collaborated with the Germans in the plans to wage aggressive war. The USSR helped itself to chunks of eastern Poland, the Baltic states and Bessarabia under the terms of the secret protocol of the Molotov-Ribbentrop Pact signed on 23 August 1939. The Nazis even provided their Bolshevik allies with huge quantities of fuel, food and war materiel for the purposes of conquering and occupying eastern Poland.

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> This last sentence is totally incompatible with the modern theory of international judicial intervention, which insists precisely that states with functioning governments can and should be constrained. The ruling is therefore quite incompatible with the existence of ad hoc tribunals like the ICTY. Consequently, we can say that the creation of the ICTY represented a radical departure from the existing law, as confirmed by Nuremberg: it did not represent a continuation of it. Far from being the successor to Nuremberg, The Hague has introduced a new interventionist doctrine in international law, which the Nuremberg judges had explicitly and deliberately rejected. The contrast between Nuremberg and the ICTY is therefore clear. Whereas the Nuremberg judges said that their legitimacy derived from the fact that they were acting on the instructions of the sovereign power in Germany, the ICTY judges say that morality alone, or other vague and emotional notions, justifies their jurisdiction. In their first ruling on jurisdiction, the judges of the ICTY Trial Chamber said that national sovereignty had to give way automatically when the crimes alleged were grievous: 'The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they [the crimes alleged] affect the whole of mankind and shock the conscience of all nations of the world.'19

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> The UN Secretary-General's report of 3 May 1993, which laid out the structure and philosophy of the ICTY and formed the basis on which the Security Council voted to bring it into being, said specifically that the ICTY 'would have the task of applying existing international humanitarian law',20 of which the Nuremberg Principles unquestionably form an integral part. In fact, Nuremberg is explicitly listed as having 'beyond doubt become part of international customary law' by paragraph 35 of that report.

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> was precisely because Nuremberg did outlaw aggressive war that a lone voice from the time of the Nuremberg trials itself was raised when NATO attacked Yugoslavia over Kosovo. Walter Rockler, the last surviving lawyer to have worked on the Nuremberg trials (he was a prosecutor), spoke energetically against the Kosovo war. In an article published during the bombing, Rockler made it clear that the attack on Yugoslavia was precisely the kind of thing for which the Nazis themselves had been indicted and convicted:

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> It is a poignant irony that the men who said they were honouring the Nuremberg Principles by attacking Yugoslavia and indicting its president were in fact undertaking actions that merited their own indictment under them.

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> It had taken more than two years after the end of the Kosovo war for this trial to begin. A 'huge CIA operation' had been mounted in Kosovo to overthrow Milošević in 1999 but it had failed.2 Milošević remained in power until October 2000 when, thanks to another $100 million poured into the coffers of opposition politicians by the Americans on the occasion of the presidential elections, and thanks to the fact that the pro-US Serb politicians concluded alliances with some of the country' s most notorious gangsters, a putsch overthrew Milošević on 5 October 2000.3

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> The correct procedure for creating an international criminal tribunal would have been to submit a treaty for signature and ratification by the states of the former Yugoslavia. States are the subjects of international law and international law grows out of the agreements between them. This is the method which was adopted for the creation of the International Criminal Court when its treaty was signed in July 1998. In his report of 3 May 1993, the Secretary-General specifically admitted that this would be the normal procedure. But he decided to reject it: 'The treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.'8

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> In fact, the Yugoslav states were not the only states affected by the creation of the ICTY. The right and duty to prosecute criminals, including war criminals, is not only inherent in the concept of national sovereignty, it is also an integral part of international law itself. The 1948 Genocide Convention, which has been duly signed and ratified by a very large number of states, requires national authorities to prosecute people suspected of genocide, yet this provision was summarily deleted by an executive fiat when the ICTY was set up, at least for acts of genocide committed in the former Yugoslavia. The creation of the ICTY therefore unilaterally rewrote an important treaty of international law, one moreover which had been drawn up in the immediate aftermath of Nuremberg and the Second World War.

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> The fact that the ICTY was not created by law infringes a core principle of the rule of law. Article 14 of the 1966 United

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> It was these two last elements – extraterritoriality and supranationalism – which attracted human rights activists to the laws of war. People committed to universal human rights, to the end of state sovereignty, or to the creation of a single legal-political system for the whole planet, used the laws of war as a basis on which to build the foundations of their broader project. Such universalists used the fact that acts committed in wartime can be particularly shocking to deploy the emotive argument that there must be universal jurisdiction to deal with them. 23 Conflict is increasingly seen 'not (as formerly) in terms of a collision between rival national interests, but rather as human tragedy … This humanitarian approach marked the abandonment of the ethos of the duellist in favour of the more tender outlook of the physician.'24 In its first ruling, indeed, the ICTY emphasised that 'a state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.'25

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> The note was struck at the very beginning by the main architects of the ICTY and its procedures. Michael Scharf, who has become a leading authority on the Yugoslav tribunal and war crimes (even though he has never visited Yugoslavia1), was the official at the US State Department who drafted the terms of United Nations Security Council Resolution 771 (13 August 1992), which initiated the process that was to lead to the creation of the ICTY the following year. Scharf admitted that he drafted the Resolution 'in the language of news reports rather than strictly following the legal terminology of the Geneva Convention'.2 He also admits (indeed even boasts of the fact) that he then helped draft the rules of evidence of the ICTY so as 'to minimise the possibility of a charge being dismissed for lack of evidence'.3

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> The entirety of the ICTY jurisprudence is shot through with this cavalier attitude to law and its principles. Perhaps the most shocking violation of legal principles occurred when the ICTY decided to rule on its own legality in its first trial, that of Duško Tadić, in 1995. The defence contested three fundamental points about the ICTY: first, the legality of its establishment; second, its primacy over national courts, and, third, its subject matter jurisdiction (that is, over different types of conflict). The Defence counsel, Michail Wladimiroff, argued that the ICTY was not legal since it was a fundamental right of all defendants to be tried by a tribunal established by law, which the ICTY had not been. The Appeals Chamber considered the question and, not surprisingly, found that the ICTY had been legally created and that it did have the jurisdiction it claimed.4 Had it found otherwise, the ICTY would have been obliged to close down its operations immediately and the judges themselves would have been out of a job. It is difficult to imagine a worse infraction of the fundamental legal principle that no man should be judge in his own cause.

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> The Security Council, of which the ICTY is a subsidiary organ, has no real control over the ICTY, which is required only to submit an annual report to the Secretary-General, and there is no oversight by the United Nations General Assembly either.5 In over ten years, the Security Council has not reviewed or amended any of the substantial decisions on law and liability taken by the ICTY. In other words, the ICTY judges are a law unto themselves.

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> As if this were not enough, various articles of the Statute allow the Prosecutor to appeal against the acquittal of a defendant. This happens frequently. This practice infringes one of the oldest principles of law, known as non bis in idem or 'double jeopardy', according to which a defendant may not be tried for the same crime twice. This fundamental principle has existed in English law since at least the fifteenth century; it is expressed in the double jeopardy clause of the Fifth Amendment of the United States' constitution, and it even exists in the ICTY Statute. Yet Article 25 of the ICTY Statute allows the Prosecutor a general right of appeal against an acquittal. Worse, Article 99 of the Rules of Procedure (entitled 'Status of the Acquitted Person') allows the continued detention of a person who has been acquitted in his trial, that is, of a person whose innocence has just been confirmed:

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> In other words, the ICTY can imprison a person whom it has just found innocent.

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> BY THE TIME of Slobodan Milošević' s second appearance in the courtroom of the ICTY, it was already obvious that the Prosecution was in difficulty. A second pre-trial hearing was held on 30 August 2001, at which Carla del Ponte admitted that she still could not say whether the indictment would be subject to further amendments. In the event, it was amended a second time, on 29 October 2001. She also said that the Prosecution was intending to publish two further indictments, on Croatia and Bosnia, which duly happened on 8 October 2001 and 22 November 2001. (The Croatia indictment was amended on 23 October 2002 and again on 28 July 2004, while the Bosnia indictment was amended on 21 April 2004 – after the Prosecution had completed its case!) When Judge May asked Milošević if he had anything to say, the former Yugoslav president replied sarcastically (speaking in English):

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> That was very interesting what I heard now, and that is proving what I said 3rd of July in this room, that that is false indictment. I was indicted 26th of May, 60th day of NATO aggression against Yugoslavia, when I was defending my country; and there are two and a half years from that date, and we just heard that they have no evidence, that they cannot complete indictment, in two and a half years. It is very long time for false indictments to be completed, and what we heard, that was proving that.1 It was a good point. August 2001 was indeed over two years after the end of the war over Kosovo. It was also six years since the conclusion of the Dayton

> Agreement which had ended the civil war in Bosnia, over six years since the main atrocities of that conflict, such as Srebrenica, and ten years since the main conflict in Croatia. Why had it taken so long to issue indictments for Bosnia and Croatia? In 1995, the Prosecutor had considered and rejected arguments that Milošević should be indicted for Bosnia.2 The surreal situation was that the Prosecution had waited for between seven and ten years before deciding to indict Milošević for the earlier Balkan wars, and yet, even after two years of investigation in a NATO-occupied Kosovo, was not ready to start prosecution on the original indictment. Were these two facts connected? The

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> This jurisprudence should have guided the ICTY, especially since the indictment of Slobodan Milošević turned precisely on whether he had de facto control over armed forces in Croatia and in Bosnia-Herzegovina over which he had no de jure control whatever. (Milošević was president of Serbia until 1997.) As shall be seen, the ICTY turned the Nicaragua jurisprudence on its head and adopted instead the most wideranging concept of criminal liability which exists anywhere in the world.

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> In other words, when asked to provide an example of Milošević' s alleged nationalism or incitement to hatred, Morillon could not find a single one. The same thing happened when Peter Galbraith, US ambassador to Croatia from 1993 to 1998, appeared, also as a witness for the Prosecution. Nice asked him, Can you in fact identify any particular statement, observation, or anything of the accused that justifies your conclusion or opinion that he was a proponent of ethnic cleansing?' Galbraith replied, 'No. It was a – this was really based on, at least as I recall, it was based on behaviour.' 14 In spite of this lack of evidence, Greater Serbia formed the central plank of the Prosecution' s case. The Greater Serbia theory was also the principal argument of the influential BBC television documentary, The Death of Yugoslavia, on which the ICTY Prosecution relied very heavily to make its case, showing the film or parts of it several times during the trial.15 This gave the impression that the Prosecution case was indeed little more than a rehash in court of opinions gleaned from the television. It was also the basis of the most influential biographies of Milošević, including those by Louis Sell and Adam LeBor, which repeat the usual unsubstantiated allegations that it was Milošević", through his nationalism, who destroyed Yugoslavia from within.

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> Serbia thus reformed its constitution, thereby provoking the claim made in the books and by the ICTY Prosecution that 'Slobodan Milošević revoked the autonomy of Kosovo' 16 and thereby started to ride the wave of nationalism. The claim is false. First, it was not Milošević who changed the constitution of Serbia but Serbia' s parliament. Second, the autonomy of Kosovo was not revoked: Kosovo & Metohija remained an autonomous province within Serbia, albeit with some reduced powers. In any case, changing the constitution of a state cannot conceivably be considered the rightful subject of a criminal prosecution for war crimes by an international tribunal. To say that the national autonomy of ethnic Albanian citizens of Yugoslavia is a matter for international criminal law to deal with is absurd: whether the cause is right or wrong, the constitutional arrangements of a state are political matters, best decided by the people themselves. Yet these matters did form a key part of the Prosecution case against Milošević, and they were

the subject of much evidence given by Prosecution witnesses.17 For instance, when he appeared as a witness for the Prosecution, the president of Croatia, Stjepan Mesić, said, 'I'm quite certain that Milošević didn't favour any kind of Yugoslavia that would be either federal or confederal. That was not what he wanted. What he was interested in was a Greater Serbia which would be created upon the ruins of the former Yugoslavia.' 18 These changes in the constitutional arrangements in 1990 coincided with political changes in the leadership of the provinces, which meant that those provinces were henceforth represented at the federal level by allies of the president of Serbia. This in turn encouraged secessionist desires in Slovenia and Croatia. They wanted a loosening of the federation, while Serbia wanted a tightening of it, including through democratic multi-party elections at federal level. Slobodan Milošević campaigned for these, while the secessionist states (especially Slovenia) campaigned against them: democracy at the federal level would have represented a centralising force. These differences of opinion were exacerbated by arguments over the state budget and the national debt, comparable to those which bedevil relations between northern and southern Italy. The situation was especially aggravated by the desire of the unpopular federal prime minister, the Croat Ante Marković, to launch 'the most radical reform in Eastern Europe',19 for which he enjoyed the backing of the United States and the World Bank but not the support of the Yugoslav electorate. Eventually these differences proved irreconcilable and they led to hysterical over-reaction on all sides and war.

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No doubt Milošević bears some political responsibility for what happened, although even his enemies concede that it was thanks to him that the fighting was stopped in Slovenia, the Yugoslav National Army having been ordered to fight by Ante Marković.20 But rearranging an internal constitution is absolutely not a war crime, nor any business of the international community, any more than it would be if the United Kingdom decided to impose a national curriculum on Scotland.

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The Prosecution none the less based the whole of its case on the political allegation that Milošević wanted to destroy Yugoslavia and carve a Greater Serbia out of it instead. Bizarrely, it did this

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even though Greater Serbia had not even been mentioned in the indictments. Greater Serbia was mentioned nowhere in the Kosovo indictment; in the Bosnia indictment, it was mentioned only glancingly ('Slobodan Milošević's calls for the union of all Serbs in one state coincided with those agitating for the creation of a "Greater Serbia."' 21); while in the Croatia indictment it was mentioned only in connection with Vojislav Šešelj and not at all in connection with Milošević himself. The fact that the Prosecution applied for the three indictments to be joined into one on the basis of a master plan which none of them had even mentioned caused considerable confusion, even among the ICTY judges.

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Ultimately this was the fundamental bone of contention between the Serbs, on the one hand, and the Croats and the Bosnians on the other during the break-up of Yugoslavia: the Serbs wanted to retain the status of 'constituent

people' even in a sovereign Croatia, while the Croats wanted them to be a national minority. A similar point was made during testimony by career diplomat Vladislav Jovanović, who explained that the official view was taken before the conflict that unilateral declarations of independence were unjustified: 'Only the peoples of Yugoslavia ···by way of referendum can decide whether their joint state can continue to exist.' 29 The confusion over whether aggressive war was really a hidden part of the indictment was only exacerbated by the fact that the Prosecution counsel, Geoffrey Nice, said in his opening speech at the Milošević trial that it was the Croats who started attacking the Serbs in the spring of 1990, that is, before Croatia's declaration of independence, and that they had therefore started the war.30 Perhaps the Prosecution used the 'Greater Serbia' accusation for jurisdictional reasons. The Prosecution needed to show that the expulsions known as 'ethnic cleansing' were in fact an example of systematic persecution, or else they would not have qualified as crimes against humanity. It was to trigger this specific charge that Nice used the language of international criminal law when he said that the offences had been 'committed as part of a widespread or systematic attack against the civilian population': if an attack against a civilian cannot be shown to be widespread or systematic, then it does not qualify as a crime against humanity.

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Milošević said that in fact the boot was on the other foot: he accused Croatia of specifically wanting a war in order to expel Serbs from Croatia.38 Milošević recalled that he had travelled to Pale, the Bosnian Serb capital, to visit the Bosnian Serbs together with Constantine Mitsotakis, the Greek prime minister, in 1993 to get them to accept the Vance-Owen plan, but that their Assembly had rejected it. Yugoslavia had then introduced a blockade on the Bosnian Serbs to force them to accept the plan. (Indeed, when Milošević died, the president of the Bosnian Serb Republic (Republika Srpska), Dragan Čavić, who refused to attend the funeral, said that he could 'never forgive Milošević for having imposed the embargo on the Bosnian Serbs during the Bosnian civil war. So much for an alliance between the Bosnian Serbs and Serbia or Yugoslavia.)39

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Andras Riedlmayer appeared as a witness on the destruction of cultural heritage: although there has been huge destruction of churches in Kosovo, and in spite of the fact that traditional Ottoman mosques in Bosnia have been destroyed and/or replaced by Wahhabi ones thanks to the huge influx of Saudi money in the years since the end of the war, Riedlmayer concentrated largely on the alleged destruction of Muslim cultural monuments by Serbs. He was asked by Slobodan Milošević during cross-examination whether he had received instructions from any institutions, including from the Tribunal, before preparing his report on Kosovo, and replied that he had not: 'We did not perform the study in order to support any particular indictment.' 3 Oddly enough, even though Riedlmayer was giving evidence under oath, he had in fact written precisely the opposite of this in 2000. At that time, he had said that one goal of his survey was 'to collect documentation to support the investigations of the Office of the Prosecutor of the U.N. war crimes tribunal (ICTY), which has included the destruction of cultural and religious heritage in Kosova among the charges in its war crimes indictment of Yugoslav President Slobodan Milošević and other officials.' 4

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> Much of the rest of the trial, as it happens, produced evidence that was exculpatory of Milošević, even though much of it came from Prosecution witnesses. The former federal prime minister of Yugoslavia, Ante Marković, who initially appeared as an anonymous witness, C-062, tried to claim in his testimony that he had not started the war by giving the order to activate the army in Slovenia to protect the borders after these had been seized by Slovene secessionist forces. But Milošević produced the transcripts from the federal government cabinet meetings on 21 August 1991, which stated that Marković clearly had given the order to the police and the army.51 Marković panicked and appealed to the judge, 'He [Milošević] wants to transform the indictment

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> against him into an indictment against me. I ask to be protected.'52 When Marković returned to give evidence a second time on 15 January 2004, he and Milošević again argued about who had ordered the army into operations in Slovenia. Milošević again produced stenographic notes from the relevant cabinet meetings indicating that Marković had given the order; Marković protested that, although he was the prime minister of Yugoslavia at the time, he had no control over the army.53 Marković bleated that he was in a weaker position than the imprisoned Milošević: 'I do not have all the documents that Mr. Milošević has, and I am completely in an inferior position because I was unable to get anything from my office, whereas he got everything.' 54 Ante Marković' s role in the break-up of Yugoslavia and the outbreak of war was also discussed at length on 20 November 2003, the last day of Borisav Jović' s fascinating testimony, where Jović made it clear that he thought Marković' s hated and damaging economic 'reforms' were the primary cause of the country' s collapse.55

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> Similar testimony was offered by Zoran Lilić, a senior-ranking Serb and Yugoslav politician who had been federal president before Milošević' s election to that post, and deputy federal prime minister under him. He was called as a Prosecution witness and his evidence was evidently expected to be damaging to Milošević: before Milošević started his cross-examination of Lilić, Judge May said to Milošević, 'I warn you not to waste time arguing with the witness.' 60 As it turned out, however, Lilić' s testimony was a disaster for the Prosecution and vastly corroborated Milošević' s version of events.

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> Lilić said that Milošević' s desire for all Serbs to live in one state did not mean that he wanted Greater Serbia and the destruction of Yugoslavia, as the Prosecution claimed, but on the contrary the preservation of it.61 (In old Yugoslavia the Serbs did indeed live in one state.) He testified that Milošević had nothing to do with Srebrenica,62 and that he exercised control over neither the Bosnian Serbs nor the Croatian Serbs.

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> The corrupt legal culture of the ICTY is reflected, moreover, in the fact that the Appeals Chamber categorised the Trial Chamber decision to impose counsel as rightfully 'discretionary'. It said in paragraph 9 of its 1

> November 2004 ruling that the decision to impose counsel ‘fits squarely’ in the same category as other ‘discretionary’ decisions such as ‘imposing sentence’, ‘determining whether provisional release should be granted’, decisions ‘in relation to the admissibility of some types of evidence’, ‘evaluating evidence’, and ‘deciding points of practice or procedure’. But decisions about the admissibility of evidence and sentencing are hardly ‘discretionary’ at all, in the sense that they must be guided by the rules and the law. It is incredible to describe as rightly ‘discretionary’ a decision which overruled what the ICTY’s own Statute calls ‘a minimum guarantee’: if a Tribunal has the right to use its discretion to overrule its own rules, then it truly is a law unto itself and the rule of law has come to an end.45

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> Even though the media had almost completely ignored the trial for its duration, Milošević’ s death evinced a sadly predictable orgy of denunciation of him. All the tired old stories about the former president’ s responsibility for various terrible crimes were brought out of the cupboard and given one last airing. None of the actual evidence presented at the trial was discussed in the world’ s mainstream media, especially not since it conflicted with the usual view that the trial had comprehensively demonstrated Milošević’ s guilt.

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> By a curious coincidence, Milošević died on the day before the third anniversary of the assassination in Belgrade of Zoran Djindjić, the Serbian prime minister. In contravention of Yugoslav law, Djindjić had spirited Milošević out of prison in Belgrade and sent him to The Hague on Serbia’ s national day, St Vitus’ Day, 28 June 2001, choosing as the day for the handover the anniversary of the Battle of Kosovo Field in 1389 as well as the anniversary of a famous speech Milošević had made at the beginning of his political career in 1989. Djindjić had later been gunned down in the streets of Belgrade on 12 March 2003, an event which led to mass arrests in Yugoslavia as huge numbers of people were implicated in the assassination and rounded up. The chief suspect, Milorad Luković, known as ‘Legija’, was the same man who had helped Djindjić win power by unseating Milošević in the putsch of 5 October 2000.

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> Estimates of the number of ordinary Serbs who flooded into Plato square in front of the Yugoslav parliament to attend the funeral ceremonies varied between 50,000 and 500,000: there was a huge turnout. The crowd was addressed, among others, by Ramsey Clark, the former US attorney general who had taken up Milošević’ s cause, and by the Austrian playwright and novelist, Peter Handke, who had written on many occasions that the Serbs had been unfairly demonised. Handke’ s presence at the funeral so shocked the director of the Comédie française in Paris that he cancelled the production of a play by Handke in his theatre after reading about his funeral speech in the papers.

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> Emotions ran high throughout this time because, on the day Milošević died, Zdenko Tomanović, one of Milošević’ s three Serb legal assistants, released a handwritten letter from Slobodan Milošević to Sergei

Lavrov, the Russian foreign minister, dated 8 March 2006. In this letter, Milošević had alleged that someone at The Hague was taking 'active, wilful steps to destroy my health', and that it was in order to cover this up that the ICTY judges had refused to let him leave The Hague to visit a heart clinic in Moscow: Milošević said that the manipulation of his health would inevitably be discovered by Russian doctors. He adduced as proof of his claim the fact that a substance had been discovered in his blood on 12 January but that he had inexplicably not been told about its presence until 7 March. Milošević wrote, 'An extremely strong drug was found in my blood, which is used, as they themselves say, for the treatment of tuberculosis and leprosy.' He concluded, 'I am addressing you in the expectation that you will help me defend my health from the criminal activities in this institution.'

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The drug in question was rifampicin, which would have had the effect of neutralising the other medicines he was taking to keep his blood pressure and heart condition under control. As was discussed in Chapter 9, Milošević's weak health had been a matter of common knowledge ever since the trial started, and it was known that he had severe heart problems. In the early years of the trial, his supporters had repeatedly alleged that the trial would kill him and that he should therefore be released on compassionate grounds. The decision to impose counsel on him had been taken in spite of the fact that, as the amicus curiae Steven Kay said to the judges, 'Sick men do not stand trial.' The judges had turned a deaf ear to this argument – and declared the relevant medical reports to be confidential.

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This was not the first time that there had been complaints about Milošević being given the wrong medicine. On 23 November 2002, two Dutch journalists at the NRS Handelsblad reported that the wrong medicine had been administered, which had caused his blood pressure to rise very sharply.3 The trial was suspended as a result but the Tribunal refused to discuss the matter, claiming that it was private. The amici curiae on this occasion called for the trial to be suspended for a year but the Prosecutor reacted furiously, saying that Milošević had all the medical care he needed in prison. This was patently untrue. For months before his death, Milošević had been complaining of a ringing sound in his ears and of pain behind his eyes. In November 2005, doctors from the Bakulev heart clinic in Moscow had examined him and said that his condition could be cured but that he would have to go to Moscow for treatment. Milošević duly made a request to this effect on 12 December 2005. One of his stated reasons for wanting to go to Moscow was that he did not trust the Dutch doctors who were treating him in the UN Detention Unit. On 11 January the Trial Chamber demanded guarantees from the Russian government that Milošević would return, and these were duly given and formally submitted to the court on 18 January. However, in spite of receiving the guarantees it had demanded, the Trial Chamber ruled on 23 February 2006 that Milošević would not be allowed to go to Moscow after all. He died just over a fortnight later.