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#### NGO FOCUS: THE TRIAL OF SLOBODAN MILOSEVIC

Human Rights Nongovernmental Organizations (NGOs), at a local, national and international level, are creations of the felt disenfranchisement of people, their inaccessibility and alienation from the realms of political power. Most significantly, they have grown from humanity's conscience and its stubborn insistence that people be held to a basic moral standard in their treatment of one another. NGOs reflect a belief in community and interconnectedness that does not abide borders. In their activism, they defy cynicism.

NGO activism deserves considerable credit for the burgeoning worldwide human rights movement. When the fall of the Berlin Wall made it possible for progressive-thinking people to press forward with an agenda, stalled for 50 years, for an enforceable international standard of justice, NGOs provided a major vehicle for doing so. Wars of genocidal proportions--in Yugoslavia and Rwanda--provided the catalyst.

As media reported large scale massacres and showed emaciated men behind barbed wire, an increasingly sophisticated public demanded that something be done to stop this inhumanity, reminiscent of the horrors of WWII. States and international and regional bodies found themselves unable or unwilling to take effective action. To save face and respond to public sentiment, the UN and its member states acceded to the establishment of two ad hoc war crimes tribunals. To some observers, it was a cynical effort to defuse public pressure by appearing to do something, while not risking the lives of their own in a military intervention. To the infant human rights community, it was an opportunity to revive the Nuremberg Legacy, which lay dormant for half a century.

The idea for an international tribunal to try war crimes in the former Yugoslavia came from a journalist in Serbia, Mirko Klarin, in 1991 before most of the wars there had been waged. His hope was that establishment of a war crimes court would prevent a quarter million deaths and the violent destruction of his country. It did not, but the idea found fruitful ground and may yet provide a basis for reconciliation in the region -- however distant it appears.

Recognizing that some saw the ICTY as nothing more than another tool of diplomacy or realpolitik, where accountability could be bargained away for short term gain and an illusory end to the conflict, a group of human rights and justice advocates got together and formed the Coalition for International Justice. Its goal was to help make the promise of justice a reality. Since 1995, its efforts have taken a variety of forms, from providing technical legal assistance to the Tribunal in the early days to connecting the

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Court and the people of the former Yugoslavia with one another to promote mutual understanding. CIJ has provided support to the Rwanda Tribunal and has assisted efforts to try war crimes in Cambodia, Sierra Leone and East Timor. Because my experience is with the Yugoslav Tribunal, I will confine my remarks to it.

In February 2002, when the trial of Slobodan Milosevic began at the ICTY in The Hague, CIJ initiated the project I have been working on for two years. Realizing that the first trial of a head of state for war crimes would focus attention on the ICTY and the infant process of international justice, we undertook to monitor the Milosevic trial, and provide regular legal analysis and commentary to the press and public, posted on our website: [www.cij.org](http://www.cij.org). NGOs have and will continue to play a vital educative role with the public. International justice is such a new concept that the overwhelming majority of people know little if anything about it. War crimes trials are long and complex. Legal procedures are incomprehensible to most non-lawyers. The media has a limited attention span, dictated by editors, publishers and corporate sponsors. Few people are able to watch even one trial from beginning to end. It falls to the NGO community, at least in part, to move the concept of international justice into the homes and living spaces of the world's people.

CIJ continues to work closely with the media, most of whom are unable to follow the trial on a regular basis. Our articles are translated into what in Tribunal parlance is "BCS" for Bosnian, Croatian and Serbian, and, if we obtain the resources, we will also provide an Albanian translation. In addition, our website is linked to that of the award-winning independent media outlet in Serbia, B-92.

CIJ is not the only NGO which has strongly advocated for the ICTY and ICTR and for international justice in general. We re privileged to work with and among such international and local NGOs as the Crimes of War Project, Human Rights Watch and the Belgrade Humanitarian Law Center. In fact, so much assistance came from the NGO community to the ICTY in its early days compared to that from official intergovernmental or state sources that Louise Arbour, second chief prosecutor, is reported to have exclaimed that the ICTY was operating as if it were an NGO. Thanks to her and others, it is now a functioning institution of international justice.

The ICTY passed its 10<sup>th</sup> anniversary in 2003. It will be many years before its successes and failures can be properly assessed. However, preliminary comments are useful as new forums for international justice are developed -- including new ad hoc tribunals, the permanent International Criminal Court, and national level courts that apply international humanitarian law.

The recent capture of Saddam Hussein, a dictator with a long and grisly record of violence, demonstrated something quite remarkable on the international stage. Nearly everyone called for him to face justice in a court of law, though they differed on what that should look like, whether it should be domestic or international or some combination. While there were some among those who had felt his violence firsthand who were intent on his execution as soon as possible, they at least claimed it should be the end result of a

trial, however foregone its conclusion. The overwhelming response, however, was a world away from what existed at the end of World War II when Winston Churchill called for summary execution of top Nazi leaders, avoiding the time and expense of a trial. This sea change for international justice resulted to a significant degree from the work of the ICTY and ICTR.

The ICTY has been criticized both fairly and unfairly. There are those who unfairly expect perfection and dismiss the Tribunal out of hand for each mistake, each uncertain or wrong step. They fail to recognize that international justice is a process. It must be grown from experience and experimentation. Only Aphrodite sprang full grown from the head of her father. Every other human being faces the difficult and sometimes painful process of development, step by step, sometimes benefiting from advice, often learning from trial and error. And so it is with the ICTY and the institutions of international justice that follow after.

Some of the criticisms of the ICTY have been highlighted in the Milosevic trial. Yet it is a unique trial in many ways, one that cannot provide a standard by which to judge the ICTY or future trials of heads of state, though it can provide useful lessons.

Slobodan Milosevic, the former President of Serbia and the rump Yugoslavia, does not recognize the legitimacy of the ICTY. He considers it part of an international conspiracy against him and the Serbian nation. Nevertheless, he has chosen to participate -- on his terms. He has informed the Court that he will use whatever fora available to present his view of history to the public. He will not accept defense counsel, but insists on representing himself. As a result of this and his ill health, the trial is destined to be the longest in history. To date, the Court has been sitting for 280 days over a two year period and, with its abbreviated trial schedule (3 partial days a week) due to Milosevic's poor health, is not expected to conclude before the end of 2005.

In my view, the first and fundamental mistake the Court made in the Milosevic trial was to sanction his decision to represent himself. According to Tribunal rules, there is no absolute right to do so. Numerous problems have flowed from that mistake. In its obligation to justice and fairness, the Court must grant Milosevic additional time for cross examination because he lacks professional legal skills. As well, his lack of legal skills gives him more leeway in cross examination to ask irrelevant, repetitive questions. While Presiding Judge Richard May attempts to keep this to a minimum, it has a substantial effect.

Of more concern, Milosevic's self-representation allows him to directly cross examine survivor witnesses. For the witness, this significantly exacerbates the trauma of testifying. Not only must they travel thousands of miles to appear in an international courtroom in a foreign country. They must answer questions from the man many of them consider responsible for the deaths of family members and the destruction of the world as they knew it. While Milosevic occasionally is respectful of their suffering, far more often he uses bullying tactics designed to confuse -- and, from his viewpoint -- expose them as liars.

I recall one young woman who came from Kosovo to testify about the murder of her father, uncle and brother. Three policemen came to her house early one morning. One of them fired a shot through the window, narrowly missing her younger brother. With automatic weapons drawn, they ordered her older brother, father and uncle out of the house. From the window she could see one of the soldiers kneel and begin shooting in their direction. When she and her mother went outside, they found all three were dead. Milosevic dismissed her testimony because she hadn't seen the bullets enter the bodies of her relatives.

Despite Milosevic's power to humiliate witnesses against him, a number of witnesses appear to obtain satisfaction in confronting him. One Kosovar Albanian man I remember in particular. He was frail, quite elderly, but his voice was sure and strong. He testified about the murder of his son's wife and children. At the end of his testimony, he asked the Court if he could address the Accused, something the Court does not allow. In this case, his presence was so powerful that the judges granted his request. He turned to look Milosevic directly in the eye and asked, in what sounded like the voice of god at the last judgment, "Women and children were killed. I want to ask you, Mr. Milosevic, don't you have any feelings?" The courtroom was utterly silent. Milosevic did not react.

Another negative result of Milosevic's self-representation is the way it is perceived in the former Yugoslavia, which has a different legal system than that which the Tribunal operates under. If Milosevic were tried in Yugoslavia, he would not be allowed to cross examine witnesses against him. The judge asks the questions. While an accused can submit questions for the judge to ask, he or she has no right to question the witnesses directly. This has led people in the former Yugoslavia watching the Milosevic trial to conclude that Milosevic is running the show -- indeed, that it is a show. While the panel of three judges who will ultimately decide on Milosevic's guilt or innocence are not influenced by his histrionics and will ultimately reach their verdict based on relevant and probative evidence, the interested public in the Balkans may reach a different conclusion.

In a sense, it is easy to criticize court decisions from the sidelines and after the fact. The judges in the Milosevic trial were faced with an unprecedented situation. They based their decisions on their best judgment. Indeed, it is a fundamental principle of law that a person accused of crime must be given whatever is reasonably necessary to defend himself and that the state, the accuser, must be required to prove guilt beyond a reasonable doubt. How a fair trial is achieved in these particular circumstances is first and primarily a decision of the trial court. Despite criticisms, the Court made a reasoned judgment supported by law to allow Milosevic to represent himself.

It is equally important to remember that international justice is a process -- it is a concept coming into being. When one approach doesn't work well, the helpful response is to try something different. That was Judge Wolfgang Schomburg's reaction when confronted with another accused, more flamboyant and oppositional than Milosevic, who insisted on representing himself. Vojislav Seselj is known in the Balkans for his racist brand of nationalism and his outrageous conduct in promoting it, from bringing a pistol

into Parliament to ordering his bodyguard to beat up a lawyer debating him on television. Seselj is charged with 15 counts of war crimes and crimes against humanity for his actions as leader of a paramilitary group and the Serbian Radical Party. Not long after Seselj arrived at the Tribunal, charged with crimes against humanity, but after filing numerous documents with outrageous accusations and demands, Judge Schomburg ruled that "standby counsel" would be appointed in the case. The counsel would be in the courtroom from the beginning, ready to take over should the Accused persist in disrupting the Court. That, one assumes, is a lesson learned from the Milosevic trial.

The ICTY has been tasked with contributing to the restoration and maintenance of peace in the region, including the reconciliation of its people. That is a tall order. Some critics have already decided the ICTY is a failure on this account. Many people in the region share this conclusion, often for quite different and opposing reasons. In Serbia and Republika Srpska, the complaint is that the Tribunal is anti-Serb, since more Serbs than Croats and Bosnian Muslims have been indicted and, while Serbia's president is standing trial, the presidents of the other two states died before any indictments were issued. Some Bosnian Muslims, who, as a group, have the most favorable view of the Tribunal, are disenchanted with what they consider too light sentences for horrible crimes against them. Many are also unhappy with lighter sentences secured as a result of plea agreements with the Prosecution, feeling that it is rewarding the guilty for telling the truth. For the Prosecution, plea agreements are a valuable source of securing information and establishing truth which can break down denial among Bosnian Serbs, particularly about crimes like those at Srebrenica.

Though there is good reason to criticize the Tribunal's sentencing practices which lack a reasoned coherence, it is also true that no sentence, however harsh, can provide true justice. That would require the restoration of life and livelihoods. As a victim witness told the Court in another case, "There is no penalty, no punishment bad enough to make up for the death of a single child, for the rape of a single girl, let alone all the things that actually happened."

Whether the Tribunal ultimately contributes to reconciliation in the region is not a matter that can be easily or quickly judged, just as reconciliation is not easy, quick or even certain. What the Tribunal can contribute is a record of facts dispassionately judged. Not all facts, to be sure, but a core that will be available for future generations. The records of the ICTY provide a counter to denial and revisionism. They are a legacy for the future.