

INTERNATIONAL HUMANITARIAN LAW

AND

THE MILOSEVIC WAR CRIMES TRIAL

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29 October 2008

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For nearly three years, I observed what was billed as “the trial of the century” in an international courtroom in The Hague. Slobodan Milosevic, former President of Serbia, was accused by the prosecutor of an international criminal court of 66 counts of war crimes, crimes against humanity and genocide for his role in the decade-long conflict that tore Yugoslavia apart, leaving over 100,000 people dead, millions displaced and a multi-ethnic way of life destroyed.

His path to the courtroom was one of power, destruction and arrogance brought low. Mine evolved over a five-year journey that began in Belgrade in 1997, when Milosevic was still president of Serbia. I went to Serbia to assist a group of dissident judges to form an independent judges association. The wars in Croatia and Bosnia had ended two years before.

During my second year in Serbia, war broke out in Kosovo over Milosevic’s attempt to drive the majority Albanian population out of the province. The Serbian strongman believed he needed to cleanse Kosovo of its non-Serb population in order for him to hold onto power.

When NATO began bombing Serbia and Montenegro and hundreds of thousands of refugees poured over the borders in March of 1999, I left for Macedonia to document what was happening to the refugees. The stories we gathered – stories of rape, murder, beatings, property destruction, looting and deportation by Serbian forces – formed part of the data used by the International Criminal Tribunal for the former Yugoslavia to prosecute Slobodan Milosevic for war crimes and crimes against humanity. Within a matter of weeks after he was charged, Milosevic sought an end to the war and turned Kosovo over to United Nations’ administration. It did not save him from prosecution, however.

About a year later, the Serbian people ousted Milosevic from power and their new prime minister transferred him to the Yugoslav Tribunal. The Balkan strongman would stand trial for the most serious crimes associated with his ten-year reign of destruction, not only in Kosovo, but also in Bosnia and Croatia.

I went to The Hague as legal liaison for the Coalition for International Justice to monitor and write about the trial. For three years, I saw Slobodan Milosevic more often than I saw my friends and family. I watched as famous individuals and common people took the stand to accuse him of destroying Yugoslavia and its tolerant, multi-ethnic way of life. The survivors confronted him with their very personal losses – of family, friends, communities, of wholeness and peace of mind, of trust in their neighbors and in humanity. Milosevic watched it all with no apparent remorse, sympathy or compassion. He brought his loyalists to court to play the parts he had written for them. They described a fantasy world where Serbs were always and only victims, and never harmed anyone. Milosevic attempted to manipulate and undermine the trial, at the same time he used it to create the “Myth of Milosevic, the martyr and defender of the oppressed Serbs.” And then, after four years of trial with only weeks remaining in his defense case, he died, robbing many of a resolution. With an incomplete trial and a deceased accused, there could be no judgment. It would have to be enough that he spent his last years confined to a jail cell and a courtroom, compelled to listen as those he victimized recounted the suffering and loss his obsession with power had caused them. That is more than the vast majority of tyrants ever face. And it is an important marker on the road to end the **impunity** of powerful men who destroy hundreds of thousands of lives as if they were brushing off a fly.

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Slobodan Milosevic was the first sitting head of state indicted for war crimes by an international tribunal, the International Criminal Tribunal for the Former Yugoslavia, established in 1993 by the United Nations. As Chief Prosecutor Carla Del Ponte proclaimed in her opening statement at the trial: *“This prosecution is arguably the most significant trial ever to be held of a political leader and Head of State. By the indictment he faces, the accused is alleged to be considered as perhaps the principal cause of much of the charges.”*

To understand the trial, we must consider the historical context in which the crimes were committed. With Glasnost and liberalization in the Soviet Union at the end of the 1980’s, old communist regimes of Eastern Europe began to fall. Yugoslavia, a fairly open society and not a Soviet satellite, should have made an easy transition. It did not. For complex reasons, the country began to fall apart, aided by men like Slobodan Milosevic, who sought power by adopting a nationalist ideology, and Franjo Tudjman, a true nationalist and later president of Croatia, who sought an independent Croatia.

A multi-ethnic country, like Yugoslavia was, does not neatly divide into individual states each dominated by a single ethnic group. Milosevic took advantage of and promoted growing nationalism under the slogan that all Serbs belonged in one state.

Yet significant numbers of them lived outside Serbia, particularly in Croatia and Bosnia. To create a state that encompassed all Serbs, Milosevic and his allies needed to annex substantial parts of Croatia and Bosnia, enlarging the state of Serbia. And they needed to free the territory to be annexed of non-Serbs. Milosevic and his allies undertook a four year campaign of terror, rape, destruction, and mass murder to force millions of non-Serbs to leave their homes and the coveted territory.

But this happened in the age of mass communications. The television media broadcast images around the world -- of emaciated men behind barbed wire, women and children fleeing burning homes, and cities and villages besieged by armies, provoking public outrage. The United Nations imposed an arms embargo that favored the Serb forces, inheritors of the Yugoslav People's Army arsenal. Europe--and later the US--sent diplomats to negotiate an end to the conflict. Their goal was peace, not a just peace. They were negotiating with bullies and making little progress. Under public pressure to do something, with UN member states unwilling to sanction military intervention, the United Nations established a tribunal to try those responsible for war crimes and crimes against humanity. Most did not expect the tribunal to accomplish anything. These cynical states only created it to relieve the pressure on them to intervene. Yet some advocates of the tribunal hoped its existence would deter more atrocities.

While the Yugoslav Tribunal failed to satisfy either expectation, it came to serve an important purpose. As it tried those accused of crimes related to the conflict, the Tribunal institutionalized the principle of leadership accountability for crimes against humanity, war crimes and genocide. International conventions and treaties defining acts so criminal they were intolerable even in war became more than mere declarations of intent. With the advent of the Yugoslav Tribunal (and soon after, a tribunal for Rwanda), these documents came to life. Establishment of these tribunals eventually lent impetus to the founding of a permanent international criminal court, which became functional in 2002. From now on, people hoped, crimes offending our deepest sense of humanity would be punished. The **impunity** of leaders had been dealt a blow.

Initially, only lower level actors were turned over to the Yugoslav Tribunal, but that changed through tireless efforts of human rights activists, and as politicians began to recognize the Tribunal's usefulness. Nevertheless, among diplomats, there remained the sense that certain influential people, like Serbian President Milosevic and Croatian President Tudjman, were more useful as negotiators on the diplomatic stage than behind bars. By working with these men, the diplomats hoped to negotiate an end to the conflict. Prosecutors, however, continued their investigations which led inexorably to the palace doors.

After Milosevic mounted his fourth (and last) war in Kosovo, the prosecutor had enough evidence to bring charges against him. On 24 May 1999, Louise Arbour, chief prosecutor at the time, issued an unprecedented indictment against him and four of his top military and political associates for war crimes and crimes against humanity in relation to the armed conflict in Kosovo. This indictment was followed on 8 October and 22 November 2001 by two additional indictments for crimes committed during the wars in Croatia and Bosnia. Who now would the diplomats negotiate with? Milosevic, an indicted war criminal? In fact, they did.

Milosevic was a sitting head of state when he was indicted for crimes associated with the war in Kosovo. At the time, he seemed safe from arrest. Two of his alleged co-conspirators, Radovan Karadzic (former president of the Bosnian Serbs) and Ratko Mladic (head of the Bosnian Serb army) had been indicted four years earlier but remained at large. It looked unlikely that Milosevic would face charges anytime soon.

His fortunes changed on 5 October 2000, when a popular movement ousted him from power. The new Serbian Prime Minister had him arrested and, on 28 June 2001, he was transferred to The Hague for prosecution by the Yugoslav Tribunal. In less than a year, on 12 February 2002, his trial began.

As in any criminal case, the prosecution had the burden of presenting evidence to support its charges with proof beyond a reasonable doubt. The task was formidable. It encompassed crimes committed during three wars fought throughout a broad geographic area over a decade, conflicts which were alleged to be part of a joint criminal enterprise involving dozens of named and unnamed perpetrators. The prosecution's challenge was to make the case **expeditious**, comprehensive and comprehensible, goals that were often contradictory.

Deciding which crimes to charge out of so many possible was not easy. Given sufficient evidence, the prosecution had to weigh a number of sometimes competing considerations. The many victims from hundreds of crime sites wanted their suffering acknowledged. The public had an interest in knowing the truth about Milosevic's involvement in the wars, but required that it be delivered in a relatively quick and understandable manner. The Court needed as full a picture as possible, but no more than that, to reach a fair decision, presented in a way the judges could track, recall and evaluate the evidence. Similarly, the trial had to be understandable to the accused for him to answer the serious charges against him, charges that, if proved, would put him behind bars for the rest of his life.

Trying a head of state for war crimes, crimes against humanity and genocide is distinctly different from domestic murder trials, as well as from war crimes trials of those who directly carry out the crimes, such as shooting guns and torching houses. To

establish that Milosevic was responsible for ethnic cleansing in Bosnia, for example, the prosecution had to show there was a plan with a criminal purpose and that Milosevic was involved in originating and implementing the plan or supporting it in concrete ways, such as providing the means necessary to conduct a war. The breadth of the criminal plan and the crimes needed to execute it required substantial evidence.

For trial, the prosecutor secured Court approval to join the three separate indictments for Croatia, Bosnia and Kosovo into one. Milosevic was charged with criminal liability for his participation in what the prosecution called a joint criminal enterprise to force non-Serbs out of large sections of territory in Bosnia and Croatia that would then become predominantly Serb and could eventually be attached to Serbia proper, thus diluting opposition to Milosevic's rule. He was also charged with responsibility based on his *de jure* (legal) and *de facto* (actual) position of command over forces alleged to have committed crimes. Finally, he was charged with responsibility as a principle actor or accomplice in the crime of genocide against the Bosnian Muslims.

The trial was expected to last a year, possibly a year and a half. Instead, it dragged on for four years, then abruptly ended when Milosevic unexpectedly died of a heart attack. The trial remained unfinished. There could be no judgment.

Because of the trial's length and lack of judgment, the prosecution's decision to combine the three indictments into one large trial was criticized. The advantage of joining the three cases was practical in that it saved some witnesses from having to repeat their testimony. It also made for a more coherent telling of how the conflicts evolved under Milosevic's guiding hand. In one sense, they were all part of one overall plan, designed to preserve and enhance Milosevic's stature and power. Critics argue if the cases had been separated, at least one of them would have been completed within a reasonable time. In that way, the public would have maintained interest and a judgment would have been secured before Milosevic's death ended the proceedings altogether. Yet justice takes time. While justice should be speedy for all concerned, summary justice, as in executions and show trials, is no justice at all. The four year plus length of the trial was neither foreseen by the prosecution nor the fault of its case organization. Milosevic, his serious illness and his insistence on representing himself, caused the excessively long trial.

Before the trial even began, Milosevic denounced the Tribunal as a fraud, and refused to acknowledge its validity to try him. Claiming the role of persecuted hero, he rejected representation by a professional attorney, declaring instead his intention to "represent himself." Yet, he had no intention of defending himself, as he clearly announced to the Court. His sole intention was to accuse his accusers. Since he was

ousted from power and locked up, he would take advantage of his one opportunity to make his political case to the public and to history.

The Court failed to recognize the inherent contradiction of Milosevic assuming a major role in a proceeding he considered illegitimate. It granted his "request" for self-representation, thus giving him a soapbox for his political agenda.

Before Milosevic arrived in The Hague, he had been diagnosed by Serbian doctors with a serious heart condition. His poor health alone was a sufficient reason for the Court to insist he be represented by an attorney. His self-representation was extremely stressful, requiring the court to adjourn for weeks at a time when he was too ill to conduct his defense. Midway through the trial, before the defense case was to begin, Milosevic's health had deteriorated to the point that the Court finally appointed counsel to represent him. Milosevic, however, refused to accept representation, insisting on his "right" to represent himself. When appointed counsel attempted to call witnesses from Milosevic's witness list, they refused to attend trial unless his right of self-representation was restored. Unfortunately, the Appeals Court overruled the Trial Court, and Milosevic was once again allowed to represent himself.

While the Tribunal statute and the UN Covenant on Civil and Political Rights provides that an individual has a right to represent himself, the right is not absolute. A court may appoint an attorney over the objection of an accused where self-representation would harm the integrity of the judicial process or result in an unfair trial. In Milosevic's case, though he had an undergraduate degree in law, he had no experience or qualifications to represent a criminal defendant in a trial, even if it was himself. His conduct in the courtroom proved his lack of competence to defend himself. Moreover, since he had no respect for the international tribunal, he felt no obligation to abide by its rules. He introduced false evidence in the form of fraudulent documents and witnesses who lied. It was obvious that he prepared his witnesses by telling them what to say. Because there was no judgment, we cannot know how the judges regarded this information, though their comments at trial indicated they were aware of his flagrant attempts to manipulate the process.

From his defendant's chair in a Hague courtroom, Milosevic styled himself hero, victim and martyr, not just for "his" people but for all those oppressed by US pursuit of dominance and Western corporate greed. That, in itself, is an injustice. While good reasons exist to criticize US exploitation of smaller nations and its pursuit of worldwide hegemony, Milosevic, who oppressed so many of his own citizens, was a false champion of the world's oppressed.

Milosevic's self-representation allowed him to dominate the trial, making it appear he was in charge, not the panel of three judges. Because the Court repeatedly intervened to stop Milosevic from intimidating witnesses, repeating questions, asking irrelevant questions, making speeches and generally wasting time, it placed the Court in an adversarial relationship to him, when it was trying to maintain its position as unbiased judge.

Acting as his own attorney, Milosevic was allowed to cross-examine witnesses. While he respectfully questioned diplomats and other high ranking officials, he was cruel to ordinary people who suffered the most from his policies. He made fun of a witness who had lost both his legs and taunted a man who was unable to save his pregnant wife after she had been shot. He was belligerent in questioning a young girl who had been sexually assaulted by paramilitaries and soldiers, insisting that she was lying, though there was nothing at all to suggest it. One can imagine how terrifying it was for those witnesses, many peasants from remote villages, to be flown to a major European capital, taken into a courtroom with the latest technological equipment, seated before three judges of international stature and then made to answer questions from the man they considered most responsible for their ruined lives. It would be terrifying enough if they were questioned by a professional attorney, but being brutally questioned by Milosevic, the former, all-powerful president of their country, who treated them all as disreputable liars, made their experience far worse.

Some victims who faced Milosevic were pleased to have the opportunity to confront him. An old man whose son's wife and children were all killed turned to Milosevic and said, "How could you kill women and children. Have you no feelings?" A former subordinate he betrayed stated, "You sought to cheat, to trick the [Serbs in Croatia] to achieve your plans." A young man who had been conscripted into the army took the opportunity to say, "You, as supreme commander, could have come and seen what it was like for us. You were issuing shameful orders." A survivor of a brutal concentration camp, who was beaten so badly on a daily basis that he was taken for dead four times, merely said: "Shame on you, Mr. Milosevic."

The Milosevic trial, like other trials at the Yugoslav Tribunal, provided a solemn, public forum for survivors to tell the world what happened to them. Such a forum is necessary to reweave the web of community broken by those who cause violence. A trial is a way for the larger community to acknowledge the harm done and stand in solidarity with the victims.

As I said earlier, the trial was never completed. On 12 March 2006, a Detention Unit guard found Milosevic dead in his cell. An investigation concluded he died of a massive heart attack. It was also discovered that he was manipulating his medications

and his illness, so he could delay the trial. In the end, his manipulations may have gone too far and contributed to his death.

Despite its unsatisfactory ending, the trial of Milosevic accomplished a great deal. It made substantial contributions to the developing jurisprudence of international humanitarian law on such topics as command responsibility, genocide and self-representation. The Court's struggle with the latter issue and how it played out in the courtroom may be its greatest legacy to future war crimes trials. The cliché that we learn more from our mistakes than our successes applies here. The Trial Court's eventual decision to appoint counsel for Milosevic, though late in the day, deserves praise. In taking this step, the Court demonstrated its independence from popular opinion, including that in the legal community. The Court concluded it was the right thing to do to assure a fair and expeditious trial and to uphold the integrity of the process.

The difficulty of the Court's struggle with a defiant and manipulative accused should not be underrated. It required vigilance through a long and complex process to notice and stop Milosevic's manipulation and, at times, outright deceit. It was not always possible. The Court's efforts to err on the side of providing leeway to the accused because he was representing himself, though appropriate, gave him opportunities to manipulate the system of which he took full advantage.

As only a leadership trial can, the Milosevic trial provided a broad view of the decade of war in the former Yugoslavia and what caused it. Documents, intercepted telephone calls, transcripts of meetings, as well as testimony from those who once helped Milosevic in his criminal endeavor exposed a vast record that would never have come to light without the trial. As Aryeh Neier, President of the Open Society Institute and founder of Human Rights Watch, concluded, "The mountains of evidence in its records make the horrendous crimes committed in the wars in ex-Yugoslavia comparable in the extent of their documentation to those by the Nazis." The record has been and will continue to be used in other trials at the Yugoslav Tribunal, as well as in trials in the states of the former Yugoslavia. The trial record will be available to historians who have a critical role in revealing truth and helping establish a common historical understanding of events that tore a country and its people apart. It may take generations, but the record will remain available for the time Serbs, Kosovars, Croats, and Bosniaks are able to view it more openly, without the fog of war, hatred and suffering.

Despite its often high drama and the spectacle Milosevic sought to create, the trial was above all a legitimate legal proceeding in a legally established court by which a former head of state was made to answer for his role in crimes and atrocities that shocked the world's conscience. He spent the last five years of his life behind bars, rather than on the sunny shores of a Greek isle. Once the leader of Serbs, considered the most powerful

man in the Balkans by international leaders, he ended his life as an outcast. He was made to face those whose lives he shattered, as well as the international figures he courted. While there was great disappointment that he evaded a verdict, there was also satisfaction that he died in jail. Eric Stover conducted a study of victim witnesses who testified at the ICTY in other cases and found: “For many study respondents, merely being in the courtroom with the accused while he was under guard helped to restore their confidence in the order of things. Power, one witness said, ‘flowed back from the accused to me.’ If only for a brief while, this witness finally held sway over his personal tormentor, and his community’s wrongdoer. . . .” As Hajra Catic of the Association of Srebrenica Mothers stated, “It is a pity that we will not see him facing justice, that we will not hear the verdict. However, it seems that God punished him already.”

It would be surprising if this "first" among trials proceeded smoothly. That it did not does not justify foregoing such trials in the future. The alternatives to trying a head of state for widespread atrocities are unpalatable at best: summary execution or impunity. The latter necessarily condones crimes against humanity and insures their repetition, and both undermine respect for rule of law. *While truth and reconciliation commissions, whether on the South African model or another, have a useful role to play in societies grappling with the results of years of civil conflict, they cannot replace the need for justice. That is perhaps most true when dealing with the ultimate leaders and strategists behind war crimes and crimes against humanity. It is far easier to contemplate reconciliation between a young soldier who shows genuine remorse for his crimes committed under orders and the family of his victim, than between that family and the man who devised the strategy requiring the murder of innocents to serve his thirst for power.*

International criminal law is in its infancy. While it has supporters, it also faces great obstacles, not least of which are the powerful states who refuse to submit to its governance, while continuing to undermine it in their singular pursuit of self-interest. Under the best circumstances, justice is not perfect; more so when it lacks long traditions and well-established institutions to support it. For all their mistakes, failures and inadequacies, the new institutions of international criminal law require and deserve support. They are the institutions of a world we aspire to – one based on justice for everyone regardless of power, position or privilege. The alternative is a world where those who cause great harm to their fellow humans are “rewarded” with golden parachutes, like former Ugandan President Idi Amin’s exile to live out his days in a palace in Saudi Arabia after murdering 300,000 of his own citizens, looting the state treasury and leaving an economically and psychologically devastated country. Such diplomatic solutions may end fighting for a time, but they do not bring justice. They

leave the future open to continuing cycles of revenge and bloodshed, festering hatreds ripe for exploitation by the next tyrant seeking to grasp or hold onto power. Victims, left alone with their pain and loss, receive no golden parachutes. They are left with their countries, livelihoods and lives devastated. And worse, they are left with the belief that the rest of the world does not care. International justice should be the avenging angel outside the cell door who stands as a warning to all abusers of power. Only we, individuals joined together, not some superhuman entity, can make international justice a reality.

Thank you for your attention.