"LESSONS LEARNED FROM THE BALKAN CONFLICTS" INTERNATIONAL JUSTICE

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October 16, 2004
Boston, Massachusetts

I would like to begin with an example from the Milosevic trial which is suggestive of what I consider the major lesson to be learned from it for other war crimes trials of state leaders. The following exchange between the late Judge Sir Richard May, then presiding, and the Accused, Slobodan Milosevic, occurred during the Accused's typically irrelevant cross-examination of a witness who testified about a massacre of nearly 90 Bosnian Muslim men. He was one of three survivors. His father and three brothers were not so lucky.

Rather than question him about the massacre, Mr. Milosevic asked who started the war and whether he knew about President Izetbegovic's plans for an Islamic Republic. After some time in this vein, Judge May interrupted to remind the Accused the Court is not helped by general political questions. Tellingly, Mr. Milosevic answered defiantly: "I will ask the questions I feel I need to. It doesn't matter if it assists you. I need to get to the truth." Attempting to reassert the Court's authority, Judge May responded, "If it doesn't assist us, you can't ask it." The Accused never backed down from his position.

To the extent that any of his cross-examination was relevant to a witness's testimony or the charges against him, it was accidental. As Mr. Milosevic announced from the beginning, he had no intention of defending himself against charges brought by a court he did not recognize. However, he would use the opportunity presented by the trial to bring his own charges against those he contended had committed crimes against Serbia and the Serbs. He would do this by availing himself of the right of self-representation.

This was never a legitimate position. A criminal trial is designed to determine whether an accused is guilty of the crimes charged, in Milosevic's case 66 counts of crimes against humanity, war crimes and genocide. What is called a *tu quoque* defense is not recognized by the Tribunal -- meaning 'maybe I'm guilty but others have done the same or worse.' Nor is it proper to invoke the recognized right of self-representation as a cover to secure a forum for advancing a political agenda. The moment Mr. Milosevic informed the Court he intended to use the trial for his purposes, it should have acted to stop him. At a minimum, appointment of standby counsel, who could take over when the Accused proved unable or unwilling to mount a proper defense, would have gone a long way to prevent the excessive delays of a trial that is in its third year and to avoid the problems that have recently occurred as a result of the Court firmly, though belatedly, asserting its control.

This is not to blame the Trial Chamber for choosing the approach it did when faced with Mr. Milosevic's defiance. We have the advantage of hindsight, as well as the

luxury of observers who do not bear the responsibility and consequences of our strongly held positions. Faced with an unprecedented situation in arguably the most important war crimes trial in an international tribunal since Nuremberg and Tokyo, ICTY Trial Chamber III stepped off a precipice not knowing where it would land – whether on firm ground or in a swamp. The Chamber's motives were good. It thought that by allowing Mr. Milosevic to speak within the trial format, he would gradually become involved in presenting a real defense. The Court's fault, if fault there be, was in its belief that a man fairly treated will respond in kind. Sadly, that is not always so -- and rarely, if ever, with a former authoritarian head of state used to getting his way.

The results of allowing the Accused to participate on his terms are a trial well into its third year with the defense case barely begun, a trial that often appeared to be controlled by the Accused rather than the judges, and survivor witnesses who were re-traumatized by the Accused's aggressive and sometimes abusive cross examination. As the Court bent over backwards to accommodate the Accused, they allowed him substantially more time for cross examination than the prosecution took for direct examination. Though repeatedly admonishing him about repetitive and irrelevant questioning and speech-making, the Chamber's lack of follow-through encouraged the Accused to continue his tactics. His occasionally proper cross examination lured the Court into believing he would change.

The stress of conducting his own case took its toll on Mr. Milosevic's health. During the prosecution's case the trial was adjourned 12 times for a total of 66 days and the trial schedule reduced to three days a week due to the Accused's illness. When Mr. Milosevic demanded two years' adjournment to prepare his defense case and was refused, he still managed to double the three-month adjournment time through illness and manipulating his medications. Five times the Trial Chamber attempted to begin the defense case and five times it had to adjourn because of Mr. Milosevic's illness. In the meantime, Presiding Judge Richard May was diagnosed with cancer and died within a few months.

Given these circumstances, the Trial Chamber, which had repeatedly considered and rejected prosecution motions to appoint counsel to represent the Accused, undertook a radical review of the trial. Based on expert medical reports that concluded Mr. Milosevic was no longer fit enough to continue representing himself, and recognizing its duty to assure a fair and expeditious trial, the Trial Chamber finally took the step it had resisted for so long. It ruled that the Accused must be represented by counsel for the continuation of the trial.

Mr. Milosevic is presently defying the court order on the manner in which his defense case will be carried out. He is as scornful of his health as he is of the Court's order. He refuses the Court's standing invitation to appoint defense counsel of his choice. He refuses to communicate or cooperate in any way with defense counsel who were appointed by the Court and has also forbidden his associates to communicate with them. He steadfastly refuses the Court's repeated invitation to question witnesses himself on

relevant matters not covered by counsel. Mr. Milosevic asserts he will not participate in the trial unless the Court once again allows him to represent himself.

According to his Legal Associates, about 265 of his planned witnesses have also indicated their refusal to testify unless the Accused is allowed to resume representing himself. This amounts to a rather widespread defiance of the Tribunal -- which obstructs the trial and risks bringing it to an impasse. Meeting such widespread resistance among witnesses, Defense Counsel find it difficult, to say the least, to put forward a defense.

For those who accept the rule of law, including the legitimacy of the UN-established International Criminal Tribunal for the former Yugoslavia, the proper response to a decision with which one disagrees is to file an appeal. Indeed, court appointed counsel have filed an appeal on Mr. Milosevic's behalf. Rather than wait for the Appeals Chamber to render its decision, however, Mr. Milosevic and his allies have taken extra-legal measures to stop the trial -- the Accused by refusing to communicate with the defense lawyers and prohibiting his legal associates from doing so as well; his witnesses by refusing to testify. Clearly, their message is 'this trial will not go forward except under Mr. Milosevic's terms.'

It is wholly likely that if the Appeals Chamber upholds the Trial Court order, the Accused and his supporters will continue to defy the Tribunal. Mr. Milosevic has never wanted a trial. He has been clear he wants a forum.

The Accused and his supporters have focused public attention on what they consider his absolute right to represent himself. The Trial Chamber ruled that the right is not absolute, and is subject to the more fundamental right to a fair and expeditious trial, which, in this instance, it found could not be achieved by allowing Mr. Milosevic to continue representing himself in light of his chronic illness and deteriorating health. In all circumstances, the Court is obliged to act in the interests of justice. Whether one disagrees with the Trial Chamber's ruling or not, it is the Appeals Chamber who will decide if, in ICTY jurisprudence, the right to represent oneself should be absolute or limited.

Mr. Milosevic cynically uses his right to represent himself to charge the Court with violating his basic rights and to garner popular support. By claiming his rights are being violated, Mr. Milosevic distorts reality and attempts to manipulate the Court and the public.

Some believe Mr. Milosevic should be allowed to use the trial to advance his political views. After a recent lecture I gave on this topic, some in the audience argued it is no worse than having him sit silently as court-appointed counsel present a defense he does not want.

Why, then, have a trial at all? If he is allowed to create and control the process in which he has been called to answer very serious charges of criminal wrongdoing, it, in

fact, becomes something other than a trial. We are no longer operating under rule of law, but under the rule of men -- and a man who is accused of very grave crimes, at that.

Certainly, Mr. Milosevic has the right to choose a defense he considers appropriate -- but within the parameters of the law. Charging that there is a world conspiracy against the Serbs is not a legitimate defense to charges that he is individually guilty of committing genocide and crimes against humanity by taking part in a plan to ethnically cleanse large parts of Bosnia, Croatia and Kosovo of their non-Serb populations.

While the Trial Chamber did not base its decision to impose counsel on the Accused's refusal to mount a legitimate defense, Judge Robinson, now presiding, stated his health was not the only reason for the decision. It also became necessary to preserve the prestige, reputation and integrity of the Court, for if the Court were to continue allowing Mr. Milosevic to represent himself, knowing the trial would last at least two more years and be interrupted 12 times as it has thus far, the Court would be acting irresponsibly and would bring the Tribunal into disrepute.

In the final analysis, the Trial Chamber should have appointed at least standby counsel from the first moment Mr. Milosevic declared he did not recognize the Tribunal and intended to use the trial to present his political agenda. The Court's initial decision was a mistake, as anyone familiar with Milosevic the negotiator during the 1990's would have known. This is an important lesson for international criminal tribunals faced with similar defiance by defendants in the future -- defiance which can be expected from those formerly at the apex of power when they are called to account for crimes.

Indeed, in three other cases before the Yugoslav and Rwanda Tribunals and the Special Court for Sierra Leone the courts have acted quickly to assert their authority in the face of similar challenges from the accused. In two of them, accused boycotted their trials to protest court decisions regulating the manner in which they could conduct their defense. Both the Rwanda and Sierra Leone Courts ruled it did not violate the accuseds' rights to continue the trial in their absence, since the accused had **chosen** not to be present.

Vojislav Seselj, leader of the Serbian Radical Party and sponsor of paramilitary units during the recent wars, now awaiting trial in The Hague on 15 counts of war crimes and crimes against humanity, also denies the legitimacy of the proceedings that have been brought against him before the ICTY and insists on representing himself. Having seen the result of allowing Mr. Milosevic to have his way, Trial Chamber II appointed standby counsel for Mr. Seselj shortly after his initial appearance. Should the Accused attempt to obstruct the trial process, standby counsel will take over.

These cases, as well as the Milosevic trial, illustrate the very serious problem that international criminal tribunals, whether ad hoc or permanent, can expect to face, that is, a refusal by those they charge, particularly those in leadership positions, to submit to legal authority. The international tribunals must be prepared to respond in ways that advance the rule of law. If they do not, and the legal process established to end impunity

is allowed to be hijacked to the purposes of those it seeks to bring to account, then international humanitarian law itself will be brought into disrepute.

While we focus on the accused and his rights at trial, other interests are involved, not least of which are those of the public in seeing justice done and those of people who have been victimized by the crimes Mr. Milosevic is alleged to have perpetrated.

Defense counsel have argued to the Court that the only rights which matter in a criminal trial are those of the Accused. If that is so, where do victims look for justice? If the trial is handed over to the Accused as his political platform, what becomes of the victims' need for justice? This is not to prejudge Mr. Milosevic as guilty, but to argue that the victims have a right to a fair determination of his guilt for the horrible crimes committed against them.

While victims' rights and interests have not been explicitly provided for in the ICTY Statute as they have in the statute of the permanent International Criminal Court, the ICTY cannot fulfill its mission without giving them serious consideration at all stages of the process. How can there ever be security and reconciliation in the former Yugoslavia where those who have suffered so grievously feel disregarded? How can there be reconciliation where a person accused for the harm done to them is allowed to hijack the trial to serve his purposes, thereby denying them a fair determination of his guilt?

Finally, people frequently ask me whether I think the trial of Slobodan Milosevic has had a negative effect in the former Yugoslavia. Has it rallied Serbs to the defense of the leader they so recently threw out of office? Has it disillusioned Bosniaks, Croats, Kosovar Albanians and Serbs who consider Milosevic responsible for so much of their suffering? Will this trial contribute to reconciliation or will it fuel more divisiveness?

Quite simply, I don't know. It would be arrogant and presumptuous of me to even attempt to answer these questions. I would like to make two points, however. One, the answer may not be available for many years, it may not be simple and it may not be the same for everyone. Two, opinion makers -- journalists, commentators, politicians and academics -- have a responsibility to the general public to de-mystify the rather arcane legal proceedings, as well as to expose efforts to manipulate them by those who would profit from the Tribunal falling into disrepute.

The ICTY and other international war crimes tribunals are not perfect. They cannot be a goddess born whole and complete from the head of a god. That's myth. They are born of great effort with errors in their conception. They crawl into the world on all fours, not yet able to stand alone. They reflect our inadequacies, our differences and compromises. When they err and disappoint, however, we should not respond by destroying these new creations, but by giving them the constructive criticism and support they need to become what we want them to be -- institutions that implement our desire for the rule of law to replace the rule of impunity. What this conference has set out to do is a positive step in that direction.

Thank you for your attention.