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International Criminal Tribunal for the Former Yugoslavia and Milosevic's Trial

*"Serbs expelled my parents and me, killed my cousins and my friends, raped my neighbors, plundered my property, looted and burnt my parents' house, killed my fiancée, [and] made us homeless in our town and state."*¹

BACKGROUND OF THE ICTY

On February 27, 1993, the Security Council of the United Nations formally established the International Tribunal for the Former Yugoslavia (ICTY)², through S.C. Resolution 827, which listed the Security Council's attempts up to that time to achieve a peaceful solution to the conflict in former Yugoslavia.³ The ICTY is headquartered at The Hague, in the Netherlands.

The legal basis underlying the establishment of the ICTY by the Security Council is two-fold under the United Nations Charter. First, under Chapter VII, Articles 39 to 41, the Security Council is authorized to take measures to restore international peace. Second, under Chapter V, Article 29, the Security Council is authorized to establish "such subsidiary organs as it deems necessary for the performance of its functions."⁴ Since the United Nations Charter lays an affirmative obligation on the Security Council to work to maintain international peace, the formation of the ICTY may be seen as an exercise of the Security Council's power to form subsidiary organs in accordance with Article 29.⁵ The ICTY was established to govern criminal prosecutions of individual persons in the protection

¹ Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J INT'L L. 255, 300 (2001).

² See United Nations: Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International and Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 84th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

³ Antonia Sherman, *Sympathy for the Devil*, 10 EMORY INT'L L. REV. 833, 837 (1996).

⁴ *Id.* at 839.

⁵ *Id.*

of humanitarian law and to ensure accountability for atrocities against civilian populations during the Yugoslavian conflict.⁶

The establishment of the ICTY does not divest national courts throughout the international community of power to prosecute persons accused of violations of international humanitarian law. The ICTY and national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law in the former Yugoslavia since 1991. While concurrent jurisdiction exists, the ICTY has primacy over national courts as provided in Article 9(2) of the ICTY's Statute.⁷

MILOSEVIC'S INDICTMENT

Slobodan Milosevic was formally indicted by the ICTY on May 24, 1999, at the height of the Kosovo crisis, while he was still President of Yugoslavia, on allegations of murder and ethnic cleansing of ethnic Albanians in Kosovo.⁸ Although Milosevic was widely believed to have been responsible for war crimes committed in Bosnia and Croatia in the early and mid-1990s, at that time he had only been indicted for crimes committed in Kosovo from January to May 1999. It had been difficult for ICTY investigators to directly link Milosevic to the expulsion and mass murder of Muslims and Croats in Bosnia and Croatia, since they had not been able to unearth a "paper trail" of written commands or to obtain the testimony of high-level collaborators. However, the fresh atrocities committed in Kosovo in 1999, as well as eyewitnesses who survived the massacres, provided war crimes investigators with ample evidence to build a case against him.⁹ On May 27, 1999, ICTY Chief Prosecutor, Louise Arbour, presented the indictments of Milosevic and four other Serbian leaders to the ICTY Trial Chamber. Judge Davis Hunt promptly confirmed the indictments. In the indictments, Arbour had laid out a *prima facie* case against Milosevic and the four others

⁶ Ruth Wedgwood, *ASIL Insights: Former Yugoslav President Slobodan Milosevic To Be Tried in The Hague for Crimes Against Humanity and War Crimes Allegedly Committed in Kosovo*, AMERICAN SOCIETY OF INT'L LAW (2001), at <http://www.ail.org/insights/insigh76.htm>.

⁷ ICTY statute, *supra* note 2.

⁸ Dorothy Beane, *ASIL Insights: The Yugoslav Tribunal and Deferral of National Prosecutions of War Criminals*, AMERICAN SOCIETY OF INT'L LAW (1996), at <http://www.ail.org/insights/insigh4.htm>.

⁹ Stacy Sullivan, *Milosevic on Trial: Crimes of War Project*, at <http://www.crimesofwar.org/monitor/milosevic.html> (last visited Nov. 21, 2001).

charging them with crimes against humanity and violations of the laws and customs of war. Specifically, Milosevic was charged with several crimes against humanity, including the killing of unarmed civilians and deportation of 800,000 Kosovo Albanians.¹⁰ The indictment further alleges that:

These operations targeting Kosovo Albanians were undertaken with the objective of removing substantial portion of the Kosovo Albanian population from Kosovo in an effort to ensure continued Serbian control over the province. If these pleaded facts are accepted, they establish that the forces from the Federal Republic of Yugoslavia and Serbia persecuted the Kosovo Albanian civilian population on political, racial, or religious grounds, and that there was both deportation and murder, constituting crimes against humanity and violations of the laws or customs of war.¹¹

The prosecution's major obstacle in obtaining Milosevic's indictment was connecting him to the alleged war crimes. Arbour established this connection by showing that Milosevic was the "President of the Federal Republic of Yugoslavia and the Supreme Commander of the Armed Forces . . . with the power to implement the National Defense Plan. . . ." ¹² The Armed Forces came under Milosevic's control in March 1999 when he first declared an imminent state of war, and then declared war on March 20, 1999.

In order to prove that Milosevic is guilty of these crimes, the ICTY's prosecutors will have to establish that Milosevic either ordered or knew that the cities named were being attacked and the people listed were being killed, and that he failed to take all "necessary and reasonable" measures to stop it from happening.¹³ The indictment argues that Milosevic exercised de facto control over the Yugoslav Armed Forces and the Serb Police who took part in the

¹⁰ William Miller, *Slobodan Milosevic's Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice*, 22 *LOY. L.A. INT'L & COMP L. REV.* 553, 562 (2000).

¹¹ See Prosecutor v. Milosevic, No. IT-99-37, Decision on Review of Indictment and Application for Consequential Orders, (Int'l Criminal Trib. Former Yugoslavia, Trial Chamber, May 24, 1999), at <http://www.un.org/icty/ind-e.htm> (last visited Jan. 24, 2002).

¹² Miller, *supra* note 8, at 563.

¹³ Sullivan, *supra* note 7, at 5.

campaign. One of the issues at trial will be the nature of the responsibility of a political official for the systematic commission of alleged crimes by the forces of his command. Under the law of war, a military commander is criminally responsible for directly ordering crimes to be committed by his troops, or in the alternative, for failing to take any steps to monitor and control his troops when they abused civilians. The widespread nature of the attacks against civilians is traditionally noted as one method of showing that a commander either knew or should have known about the commission of crimes.

MILOSEVIC'S ARREST

On June 28, 2001, former Yugoslav president, Slobodan Milosevic was handed over to the ICTY. Milosevic, as former head of state of the Federal Republic of Yugoslavia, is the highest-ranking state official to be indicted by a war crimes tribunal since Nuremberg.¹⁴ This decision to end impunity and instill accountability on political leaders could affect the way the world will be run for decades to come.¹⁵ Milosevic's prosecution will be the litmus test for the ICTY, and his forthcoming trial is far from an easy win for the prosecution. For one, it is generally easier to convict middle-level personnel for war crimes than a commander or a former head of state like Milosevic. Middle-level officers such as captains, camp guards, and squadron leaders, have either participated in the actual crimes themselves, given the orders to others to commit the crimes, or "looked the other way" when the crimes were committed.¹⁶ However, as one goes higher in the chain of command to the level of generals, prime ministers or heads of states, they increasingly distance themselves from specific events in the field by vague delegation to their field commanders.

The surrender of Milosevic complied with an international arrest warrant issued by a United Nations judicial body, the ICTY, with the United Nations General Assembly emphasizing the importance of State cooperation in the arrest of the accused. The General Assembly also noted that it was a "decisive advance", marking the resolve of the authorities of the Federal Republic of Yugoslavia, to

¹⁴ Miller, *supra* note 8, at 554.

¹⁵ Roy Gutman, *Why Milosevic Matters*, NEWSWEEK, July 3, 2001, at 35.

¹⁶ Anthony D'Amato, *Observations of the Forthcoming Milosevic Trial*, at <http://jurist.law.pitt.edu/forum/forumnew27.htm> (last visited Jan. 24, 2002).

comply with its international obligations arising out of Security Council Resolution 827 and Article 29 of the Statute.¹⁷

Coincidentally, the decision to send Milosevic to the ICTY was made one day before an international donors' conference in Brussels was called to raise over \$1.25 billion in aid to rebuild the Federal Republic of Yugoslavia. Prior to attending the conference, the United States stated that they would attend the conference on the condition that Belgrade cooperates with the ICTY.¹⁸ In the end, Western money sealed Slobodan Milosevic's fate. In limbo between a Yugoslav Federal government leery of handing its former president over to a war crimes tribunal and a Serb national government wanting to receive aid contingent on a handover, the Serbs short-circuited the federal government's legal process and unceremoniously packed their former leader off to stand trial in The Hague.¹⁹ Milosevic has joined 38 others in cells inside a high-walled compound in Schevingen, where he resides during his trial for crimes against humanity, genocide, and violations of the rules of war and grave breaches of the Geneva Convention.²⁰

Milosevic, in his pre-trial court appearances, continuously refused to enter a plea and even more attempted to denounce the legitimacy of the ICTY. The court responded just as did it did with the earlier charges relating to Kosovo and Croatia by recording a not guilty plea on his behalf.²¹ Milosevic has refused to appoint a defense counsel, therefore, the court appointed three lawyers, known as amici curiae, or friends of the court, to secure a fair trial. They are Ramsey Clark, Christopher Black and Jacques Verges.²² They have the powers to cross-examine witnesses and draw attention to any evidence that may indicate Milosevic's innocence.²³

¹⁷ U.N.GAOR, 56th Sess., Item 61 of the Prov. Agenda, at 5, U.N. Doc. A/56/352-S/2001/865 (2001).

¹⁸ Bruce Zagaris, *Milosevic Turned Over to the ICC*, INT'L ENF. LAW REP. (2001) SECTION: WAR CRIMES AND EXTRADITION; VOL. 17, No. 8.

¹⁹ Tony Karon, *Milosevic Trial Challenges Serbs and the West*, TIME, June 28, 2001, at <http://www.time.commerce/time/world/printout/0,8816,165800,00.html> (last visited Jan. 30, 2002).

²⁰ *Id.*

²¹ Author Unknown, *Q & A: Milosevic Trial*, BBC NEWS, Dec. 27, 2001, at http://news.bbc.co.uk/hi/english/world/europe/newsid_1403000/1403054.stm (last visited Jan. 24, 2002).

²² *Id.*

²³ *Id.*

MILOSEVIC'S TRIAL

Milosevic's trial commenced February 12, 2002. He is conducting his own defense and he faces 66 counts of crimes within the three indictments, one relating to atrocities carried out in Kosovo in 1999, another for crimes in Croatia between 1991 and 1992, and the third, and most serious, alleging genocide in Bosnia between 1992 and 1995.²⁴ He could be jailed for life if convicted of any of the 66 charges.

Chief Prosecutor of the ICTY Carla del Ponte requested that all three indictments be merged into one so that Milosevic could face one comprehensive trial covering all the wars of Yugoslav succession. Prosecution argued that Milosevic should face a single trial because his role in the three conflicts, including what became known as "ethnic cleansing," was part of a "criminal enterprise" to create a "Greater Serbia."²⁵ But Judge Richard May ruled that combining all three cases would cause delays and told her to proceed with the Kosovo trial first, because "it is ready- the other two indictments are not."²⁶

Milosevic was "delighted," by the judge's decision to not merge the indictments and when the court asked for his views on the proposed merger of trials his response was that if he were in the judge's place, he would personally "reject such ideas."²⁷ He also stressed that his advice did not mean he had modified his view that the tribunal is illegal. Explaining why he "personally" would reject the idea, Milosevic described the prosecutor's request for a single trial as a "consequence of September 11."²⁸

Milosevic contends that the prosecution's real motive to use a joint trial is to push the accusations over Kosovo into the background, since those accusations open up the question of the Clinton Administration's cooperation with terrorists in Kosovo, including

²⁴ Author Unknown, *The Charges Against Milosevic*, BBC NEWS, Dec. 11, 2001, at http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1402000/1402790.stm (last visited Jan. 24, 2002).

²⁵ Reuters, *Milosevic Trial Wrangle Appeal Hearing Opens*, THE NEW YORK TIMES, Jan. 30, 2002, at <http://www.nytimes.com/2002/01/30/world/international-yugoslavia-warcrimes-milosevic.html> (last visited Jan. 30, 2002).

²⁶ *Id.*

²⁷ Mirko Klarin, *Analysis: Milosevic to Put NATO on Trial*, INSTITUTE FOR WAR AND PEACE REPORTING, at http://www.iwpr.net/index.plaintiff?archive/tri_tri_248_1_eng.txt (last visited Jan. 24, 2002).

²⁸ *Id.*

Osama Bin Laden. He reasons that most of the crimes listed in the Kosovo indictment occurred during the period of NATO intervention against Yugoslavia from March 24, 1999 to June 3, 1999, and the United States supplied close air support to the Kosovo Liberation Army and other Albanian "terrorists" and their foreign Islamic allies, including Bin Laden.²⁹ Milosevic's strategy is to convert his trial for the killing of several thousand Kosovo Albanians and the deportation of over 800,000 of them into a trial of NATO and the Clinton administration.

The prosecution appealed the decision of the court asserting that Trial Chamber III "abused its discretion" when it turned down its joinder motion.³⁰ The chamber justified its decision, arguing that a nexus between the Kosovo crimes and the Croat/Bosnia crimes was "too nebulous" to constitute "a common scheme, strategy or plan," which the ICTY rules set as a condition for joinder.³¹ The Appeals Court decided, two weeks before the trial, that the three indictments will be joined, that all three were part of "one strategy, one scheme," and for procedural reasons the evidence relating to the Kosovo charges will be presented at the outset of the current proceedings.³²

After this court hearing, Milosevic also announced through his Belgrade lawyers that he will request the appearance of former President of the United States Bill Clinton, former United States Secretary of State Madeleine Albright, United Kingdom Prime Minister Tony Blair and other Western politicians, generals, and peace mediators as witnesses.³³ The appearance of American officials at the Tribunal could set an important legal precedent, and would potentially subject American officials to cross-examination by Milosevic, an indicted war criminal.³⁴ United States officials are currently engaged in intensive negotiations to determine the circumstances in which American officials might appear in court. They will agree to permit officials to appear before the court only if they

²⁹ *Id.*

³⁰ Mirko Klarin, *Analysis: Wrangling Over Milosevic Trial Continues*, INSTITUTE FOR WAR AND PEACE REPORTING, at http://www.iwpr.net/index.plaintiff?archive/tri/tri_249_1_eng.txt (last visited Jan. 24, 2002).

³¹ *Id.*

³² Johanna McGeary et al., *Will Milosevic Get His?*, TIME, Feb. 18, 2002, at 48.

³³ *Id.*

³⁴ Colum Lynch, *U.S. Offers Help In Milosevic Trial*, WASH. POST, Mar. 21, 2002, at A20.

have “unique” information that the court needs to help convict Milosevic.³⁵ The United States is trying to avoid the setting of a precedent whereby defendants like Milosevic drag every former American official responsible for foreign policy into international courts.³⁶ Richard Holbrooke, former president Bill Clinton’s chief envoy to the Balkans, said he would testify if it would be seen as helpful by the prosecution. If he appears, Holbrooke would be the first American cabinet member to testify before an international war crimes tribunal.³⁷

Milosevic sees himself as having the role of prosecutor in a trial of former President Clinton and other members of NATO member-states for a “joint criminal enterprise” against Yugoslavia and Serbia.³⁸ He is attempting to put NATO on trial as an “unlawful aggressor” by calling various world leaders as witnesses. Only the judges, however, could legally summon them via a subpoena.³⁹ It also remains to be seen how Milosevic will manage to accomplish this without his actions being interpreted as his “recognition” of the court.⁴⁰

Another factor fueling Milosevic’s defense strategy was the procedural decision to begin with the Kosovo charges. It has allowed Milosevic during his trial to focus on the NATO bombing campaign—spending many hours in his opening speech listing civilians and civilian institutions hit and stressing his argument that Albanians fled Western bombs, not Serbian forces.⁴¹ He has accused NATO of telling an “ocean of lies” about his implication in the Kosovo conflict.⁴² NATO Secretary General George Robertson dismissed the accusations made in court by Milosevic that the alliance violated international law and killed innocent civilians in its 1999 bombing campaign. He commented that the accusations would do

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Klarin, *supra* note 27, at 3.

³⁹ McGeary, *supra* note 32.

⁴⁰ Mirko Klarin, *Analysis: Milosevic ‘Friends’ Defeated*, INSTITUTE FOR WAR AND PEACE REPORTING, at http://www.iwpr.net/index.plaintiff?archive/tri/tri_243_eng.txt (last visited Jan. 24, 2002).

⁴¹ Anthony Borden, *Milosevic at the Bar*, THE NATION, April 1, 2002, at <http://www.thenation.commerce/docPrint.mhtml?I=20020401&s=borden> (last visited Mar. 23, 2002).

⁴² Daniela Armean, *NATO’s Robertson Brushes Aside Milosevic Defense as ‘Lies’*, WORLD MARKETS ANALYSIS, Feb. 15, 2002.

little to 'help his case' and reiterated that 'NATO always acted within international law, and it did so to save lives, not to lose lives.'⁴³

STRATEGIES OF PROSECUTION AND DEFENSE

The prosecution has certain advantages in the trial thus far. First, the Tribunal's acquittal rate so far is very low. Years of investigation have turned up hundreds of witnesses and since Milosevic's regime fell in October 2000, many close associates of Milosevic have agreed to testify.⁴⁴ The prosecution intends to use their testimony to prove Milosevic was the driving force behind the atrocities committed and that his real aim was a conspiracy to create a nation patched together from land occupied by Serbs in Croatia, Bosnia and Serbia.⁴⁵ The prosecutors will call about 90 witnesses for the Kosovo section of the trial, but have refused to release a list for fear they may be threatened or coerced into not testifying.⁴⁶ Already, several Balkan-based witnesses have been threatened and some have received death threats, some direct and others indirect. There has been a growing climate of intimidation and unfortunately the Serbian media contributes to the problem by repeating the threats.⁴⁷

The prosecution has also received some criticism that the case they are presenting is weak, and witnesses that have been called thus far have been insignificant. The Serbian Prime Minister has gone as far as to call the trial a "circus," and it has left him and his government facing an awkward dilemma. Many Serbs have begun to accept Milosevic's defense that NATO is the guilty party in this trial and that his only interest was to defend and protect Serbia.⁴⁸ The United States also provided Milosevic with ammunition when President Bush's Ambassador-at-large Pierre Richard Prosper told Congress that the Tribunal was "mismanaged, unprofessional and

⁴³ *Id.*

⁴⁴ McGeary, *supra* note 32.

⁴⁵ Ian Fisher, *Power Drove Milosevic to Crime, Prosecutors Say as Trial Opens*, N. Y. TIMES, at A1.

⁴⁶ Ian Fisher and Marlene Simons, *U.N. Details Vicious Acts Charged Against Milosevic*, N. Y. TIMES, Feb. 14, 2002, at A6.

⁴⁷ Marlene Simons, *Court Rejects Any Liberty For Milosevic, Citing Threats*, N. Y. TIMES, Mar. 7, 2002, at A9.

⁴⁸ Ian Fisher, *Killings in Kosovo Are Described at War Trial*, The New York Times, Feb. 26, 2002, at A13.

full of abuse.” He stated that it should end by 2008.⁴⁹ Later, in an effort to control damage, Ambassador Prosper came to the Tribunal and stated that his comments were taken out of context and that the Tribunal will operate until the most wanted Bosnian Serbian suspects were brought to justice.⁵⁰

A rebuttal to these criticisms by Chief Prosecutor Carla del Ponte on her latest visit to United Nations Headquarters in New York was that the prosecution is at a major disadvantage because of the obstruction by Yugoslav authorities and their limited cooperation. Del Ponte stated the cooperation that was forthcoming was both “selective and limited.”⁵¹ Yet, Milosevic, who is in communication with six or seven attorneys in Belgrade, receives an unfettered line of communication and assistance from Belgrade. Milosevic has aggressively cross-examined prosecution witnesses and attacked their credibility consistently with astonishing detailed information.⁵² His cross-examination skills and ability to attack with explicit details regarding witness testimony has drawn praise from legal experts all around the world. It is especially impressive considering that Milosevic holds a law degree but has never practiced law, much less appeared as a defense attorney in a criminal trial. Some say too impressive, many suspect he is being coached, and a court official reported that he has been visited in jail by ten lawyers since his arrest in June.⁵³ The prosecutors are also having a difficult time because Milosevic is not following courtroom rules or protocol even though he is conducting his own defense. He refuses to read court papers, will not meet with prosecutors and does not accept standard documents as evidence. This has slowed down court proceedings and left the prosecution to bear the burden of

⁴⁹ Christine Amanpour, *Pattern Set in [at] Milosevic Trial*, CNN, Mar. 7, 2002, at <http://www.cnn.com/commerce/2002/WORLD/europe/03/07/milosevic.scene/index.html> (last visited Mar. 23, 2002).

⁵⁰ *Id.*

⁵¹ *Cooperation from Belgrade ‘Selective and Limited’*, UN War Crimes Prosecutor Says, UN News Center, Mar. 23, 2002, at <http://www.un.org/apps/news/story.asp?NewsID=3190&Cr=yugoslavia&Cr1=tribunal> (last visited March 23, 2002).

⁵² Author Unknown, *US Officials Will Testify at Milosevic Trial*, CNN, Mar. 21, 2002, at <http://www.cnn.com/commerce/2002/WORLD/europe/03/21/delponte.un/index.html> (last visited March 23, 2002)

⁵³ Ian Fisher, *Combative Milosevic Displays a Flair for Courtroom Tactics*, N. Y. TIMES, Feb. 20, 2002, at A4.

Judge May's insistence on "judicial economy," with repeated requests they cut their witness list.⁵⁴

The trial is expected to conclude in two years. The prosecution must prove the leader of a nation was the intellectual author of crimes even if he did not literally have blood on his hands. The testimony from some 50 crime-based witnesses (people who survived and witnessed the brutality first hand) will be very compelling but the most damning testimony will come from an estimated 20 high-level political and security bosses with firsthand knowledge of what Milosevic said and did.⁵⁵ A major test of the trial will be the prosecution's ability to present proof of actual direct involvement that can supercede any theories of command responsibility. To establish credibility, it is important that there be more specific evidence of Milosevic's direct involvement because the command responsibility theory is often just seen as criminal negligence, or failure to control.⁵⁶ In other words, the key question to be answered at this trial is, "Did Milosevic try to reduce the chaos, or did he thrive upon it?"⁵⁷

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⁵⁴ Lauren Comiteau, *Milosevic Confronts His Angry Accusers*, *Time*, Mar. 4, 2002, at 8.

⁵⁵ McGeary, *supra* note 32.

⁵⁶ Barbara Crossette, *At the Hague, It's a Leader on Trial, Not a People*, *The New York Times*, Feb. 17, 2002, at 3.

⁵⁷ D'Amato, *supra* note 13.

