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THE INTERNATIONAL TRIAL OF SLOBODAN MILOSEVIC: REAL JUSTICE OR REALPOLITIK?

Michael P. Scharf

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I. INTRODUCTION: SCAPEGOAT OR WAR CRIMINAL?

There were disquieting echoes of Nuremberg at the arraignment of Slobodan Milosevic in The Hague on July 3, 2001. Standing before the three-judge panel, Milosevic challenged the Security Council-created War Crimes Tribunal's validity. "You are not a judicial institution; you are a political tool," Milosevic told the panel. Drawing on the commonly-accepted notion that the post-World War II Nuremberg Trials were tainted by "victor's justice," Milosevic's initial trial strategy was to attempt to discredit the Yugoslavia Tribunal's legitimacy and impartiality.

Will history remember Milosevic as a victim of victor's justice, a scapegoat tried in a show trial before a one-sided court? Or will the Milosevic trial be seen as fair and free of political influence? More than

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anything else, the answer to these questions may dictate the ultimate success or failure of the proceedings.

If viewed as legitimate, the trial of Milosevic could potentially serve several important functions in the Balkan peace process. By pinning prime responsibility on Milosevic and disclosing the way the Yugoslav people were manipulated by their leaders into committing acts of savagery on a mass scale, the trial would help break the cycle of violence that has long plagued the Balkans. While this would not completely absolve the underlings for their acts, it would make it easier for victims to eventually forgive, or at least, reconcile with former neighbors who had been caught up in the institutionalized violence. This would also promote a political catharsis in Serbia, enabling the new leadership to distance themselves from the discredited nationalistic policies of the past. The historic record generated from the trial would educate the Serb people, long subject to Milosevic's propaganda, about what really happened in Kosovo and Bosnia, and help ensure that such horrific acts are not repeated in the future.

On the other hand, a trial that is seen as "victor's justice" would undermine the goal of fostering reconciliation between the ethnic groups living in the former Yugoslavia. The historic record developed by the trial would forever be questioned. The trial would add to the Serb martyrdom complex, amounting to another grievance requiring vengeance. In addition, the judicial precedent would be tainted. For any real advance to be made in the long march toward the establishment of a permanent international criminal court, Milosevic's trial must be seen to be more about real justice than realpolitik.

II. THE MISTAKES OF THE PAST

History's first international criminal court was the Nuremberg Tribunal, created by the victorious Allies after World War II to prosecute the major German war criminals. Although Adolf Hitler escaped prosecution by committing suicide, many of the most notorious German leaders were tried before the Nuremberg Tribunal. After a trial that lasted 284 days, nineteen of the twenty-two German officials tried at Nuremberg were found guilty, and twelve were sentenced to death by hanging. As the former Serb president, himself, is keenly aware, Nuremberg provides a compelling benchmark for assessing the legitimacy of the trial of Slobodan Milosevic.

The United States Chief Prosecutor at Nuremberg, Supreme Court Justice Robert Jackson, noted in his opening statement at the Nuremberg trial that "we must never forget that the record on which we judge these

defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well." Given Jackson's admonition, it is ironic that history has not been altogether kind to the Nuremberg Tribunal.

In the years following its judgment, there have been three main criticisms levied on the Nuremberg Tribunal: first, that it was a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law committed during the war; second, that the defendants were prosecuted and punished for crimes expressly defined for the first time in an instrument adopted by the victors at the conclusion of the war; and third, that the Nuremberg Tribunal functioned on the basis of limited procedural rules that inadequately protected the rights of the accused.

While the Nuremberg Tribunal deserves praise as a novel endeavor that paved the way for future war crimes tribunals and the development of international criminal law, these criticisms are not without foundation. It was true, for example, that only the leading victorious nations—the United States, United Kingdom, France, and the Soviet Union—were represented on the Nuremberg Tribunal's bench. There were no judges from neutral states, and the defendants were confined to German political and military leaders. None of the Allied commanders had to answer for similar crimes.

Moreover, the Nuremberg judges oversaw the collection of evidence and judged the defendants in a necessarily political arena, thereby raising questions about their ability to objectively preside over the trials. Most astonishing of all, however, was the fact that two of the Judges of the Nuremberg Tribunal, General Nikitchenko (Soviet Union) and Robert Falko (Alternate, France), served earlier as members of the committee that had drafted the Nuremberg Charter and the indictments. Having written the law to be applied and selected the defendants to be tried, it is hard to believe they could be sufficiently impartial and unbiased. And yet, they were insulated from challenge since the Nuremberg Charter stipulated that neither the Court, nor its members, could be challenged by the prosecution or the defendants.

In addition, the States which tried the Nuremberg defendants were arguably guilty of many of the same sorts of crimes for which they sat in judgment over their former adversaries. Had Germany and Japan won the war, American leaders could just as easily have been prosecuted for crimes against humanity in relation to the dropping of the atomic bombs, firebombing civilian centers, and conducting unrestricted submarine warfare. Soviet leaders could have been prosecuted for waging aggressive war and mistreatment of prisoners with respect to the forcible Soviet annexation of the Baltic States and appalling record of the Soviets

regarding the treatment of prisoners of war. Most reprehensible of all, however, was the Soviet Union's insistence that the German defendants be charged with responsibility for the Katyn Forest Massacre, in which 14,700 Polish prisoners of war were murdered in 1941—when the true perpetrators of this atrocity, we now know, were the Soviets and not the Germans.

Perhaps the most often-heard criticism of Nuremberg was its application of *ex post facto* laws, by holding individuals responsible for the first time in history for waging a war of aggression and by applying the concept of conspiracy which had never before been recognized in continental Europe. One of the first to voice this criticism was Senator Robert Taft of Ohio in 1946, but it was not until John F. Kennedy reproduced Taft's speech in Kennedy's Pulitzer Prize-winning 1956 book, *Profiles of Courage*, that this criticism became part of the public legacy of Nuremberg. To this day, articles appear in the popular press deriding Nuremberg as "a retroactive jurisprudence that would surely be unconstitutional in an American court."

The other major criticism was that the Nuremberg Charter failed to provide sufficient due process guarantees to the defense, and that those it did provide were circumscribed by several pro-prosecution judicial rulings. The most notable of such rulings was the Tribunal's decision to allow the prosecutors to introduce *ex parte* affidavits (depositions taken out of the presence of the accused or his lawyer) of persons who were in fact available to testify at trial. In addition, the Nuremberg Tribunal prevented the defendants from having access to the Tribunal's evidentiary archives assembled by the Allies, and it allowed only the Prosecution the right to object to witnesses before questioning. Such rulings were particularly troubling because the Nuremberg Tribunal did not provide for a right of appeal.

Even Justice Jackson acknowledged at the conclusion of the Nuremberg Trials that "many mistakes have been made and many inadequacies must be confessed." But he went on to say that he was "consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future."

III. IMPROVEMENTS OVER NUREMBERG

In keeping with Justice Jackson's aspiration, the drafters of the Yugoslavia Tribunal's Statute were determined to prevent this modern-day Nuremberg Tribunal from being subjected to the kinds of criticisms that have tarnished the legacy of its predecessor. And the judges of the Yugoslavia Tribunal have recognized that they must do better than their

brethren did fifty-years earlier at Nuremberg; they must ensure that the Yugoslavia Tribunal is perceived as scrupulously fair.

In some respects, the Yugoslavia Tribunal is a vast improvement over its predecessor. Its detailed Rules of Procedure and Evidence, for example, represent a tremendous advancement over the scant set of rules fashioned for the Nuremberg Tribunal. Further, in contrast to the Nuremberg Tribunal, the Yugoslavia Tribunal prohibits trials *in absentia*, which are inherently unfair and are likely to be seen as an empty gesture. And where the defense attorneys at Nuremberg were prevented from full access to the Nuremberg Tribunal's evidentiary archives, defendants before the Yugoslavia Tribunal are entitled to any exculpatory evidence in the possession of the Prosecutor, and both the prosecution and the defense are reciprocally bound to disclose all documents and witnesses prior to trial.

With respect to Nuremberg's application of *ex post facto* laws, the creators of the Yugoslavia Tribunal went to great lengths to ensure that the Yugoslavia Tribunal could not be subject to similar condemnation. Beginning in 1992, the Security Council adopted a series of resolutions that put the leaders of the former Yugoslavia on notice that they were bound by existing international humanitarian law, in particular the Geneva Conventions and Genocide Convention. The resolutions enumerated the various types of reported acts that would amount to breaches of this law, and warned that persons who commit or order the commission of such breaches would be held individually responsible. Moreover, the jurisdiction of the International Tribunal is defined on the basis of the highest standard of applicable law, namely rules of law which are beyond any doubt part of customary law, to avoid any question of full respect for the *ex post facto* principle—known internationally by the Latin phrase *nullem crimen sine lege*. It is particularly noteworthy that the crime of waging a war of aggression, which engendered so much criticism after Nuremberg, is not within the Yugoslavia Tribunal's Jurisdiction. Ironically, it is the one crime that might have been easiest to prove against Milosevic.

IV. THE LEGITIMACY OF THE YUGOSLAVIA TRIBUNAL

While the Nuremberg Charter precluded challenges to the legitimacy of the Nuremberg Tribunal itself, the Yugoslavia Tribunal considered the question in its first case in 1996. The Tribunal ruled that, although its creation by the Security Council was without precedent, it was a valid product of the Security Council under the Council's broad powers to take action to maintain international peace and security. But, as Milosevic may be quick to point out, the judges that made that decision could not be

seriously expected to decide the issue impartially, given that their incredibly prestigious, \$200,000-per-year jobs would have been instantly extinguished if they had decided otherwise.

Having rendered that decision, the Yugoslavia Tribunal is unlikely to revisit the question in the Milosevic trial. In response to Milosevic's challenges to the Tribunal's legitimacy at a pre-trial hearing in August 2001, Presiding Judge Richard May responded, "Mr. Milosevic, we are not going to listen to these political arguments." While this might seem unduly harsh, it is a bit late in the day for Milosevic to be challenging the Tribunal on this ground, given that he recognized the legitimacy of the Tribunal when he signed the Dayton Accords in 1995, which require the parties to cooperate with the Tribunal. Any doubt should have been erased when Milosevic authorized the transfer of Drazen Erdemovic for prosecution before the Tribunal for the part the young Serb soldier played in the massacres at Srebrenica.

Having failed to convince the Yugoslavia Tribunal to reconsider this issue, Milosevic attempted to attack the legitimacy of the Tribunal in the Hague District Court. But the Dutch Court declared itself incompetent to consider the question.

V. VICTOR'S JUSTICE

If Milosevic's goal is not to obtain a dismissal but to publicly discredit the Tribunal, he may have a greater chance of success with his argument that the Yugoslavia Tribunal, like Nuremberg, represents "victor's justice."

In contrast to Nuremberg, however, the Yugoslavia Tribunal was created neither by the victors nor by the parties involved in the conflict, but rather by the United Nations, representing the international community of States. The judges of the Yugoslavia Tribunal come from all parts of the world, and are elected by the General Assembly, in which each of the world's 188 countries gets an equal vote. Moreover, the message of the International Tribunal's indictments, prosecutions, and convictions to date of Muslims and Croats, as well as Serbs, has been that a war crime is a war crime, whoever it is committed by. The Tribunal has taken no sides.

On the other hand, the decision to establish the Yugoslavia Tribunal was made by the United Nations Security Council, which cannot truly be characterized as a neutral third party; rather, it has itself become deeply involved and taken sides in the Balkan conflict. The Security Council has, for example, imposed sanctions on Milosevic's Serbia, which it felt was most responsible for the conflict and atrocities. Throughout the conflict, the Security Council had been quite vocal in its condemnation of Serb

atrocities, but its criticisms of those committed by Muslims and Croats were comparatively muted. And, most problematic of all, three of the Permanent Members of the Council—the United States, France, and the United Kingdom—led the 78-day bombing campaign against Milosevic and Serbia in 1999.

While both the Prosecutor and the Judicial Chambers of the Yugoslavia Tribunal were conceived to be independent from the Security Council, one cannot ignore the fact that the Statute provides that the Tribunal's Prosecutor is selected by the Security Council. The Judges are selected by the General Assembly from a short list proposed by the Security Council, and they have to stand for re-election after a four-year term. Moreover, the operation of the Tribunal has been dependent on hundreds of millions of dollars in contributions from the United States and its Western allies. And most of the staff of the office of the International Prosecutor are on loan from NATO countries.

Although a creature of the United Nations, the Tribunal has, according to its former president, Antonio Cassese, tended to "take into account the exigencies and tempo of the international community." There are those who would argue that this means that the Tribunal has yielded to the objectives of the United States and other NATO powers, without whose financial and military support the Tribunal could not function.

VI. THE TIMING OF THE INDICTMENT

For evidence of the political influence of the United States on the Yugoslavia Tribunal, Milosevic can turn to the suspicious timing of his indictment. It was issued on May 22, 1999, sixty days into the 78-day NATO bombing campaign against Serbia. The indictment came down at a crucial time when popular support for the intervention was waning in several NATO countries in the face of intense press criticism of NATO's use of cluster bombs and depleted uranium munitions, attacks on civilian trains, truck convoys, and media centers, and the accidental bombings of the Chinese Embassy in Belgrade and the territory of neighboring Bulgaria. If this forced a premature end to the bombing campaign, American officials feared that it might irrevocably damage the credibility of NATO, potentially leading to its demise.

After years of pressuring the International Prosecutor not to indict the Serb leader whose cooperation was seen as essential for the Balkan peace process, suddenly the United States was pressing for the immediate issuance of charges against Milosevic, knowing that such action would bolster the political will of the NATO countries to continue the bombing campaign, and ultimately force Milosevic to accept NATO's terms for

Kosovo. And after years of refusing to turn over sensitive intelligence data to the Tribunal in order to protect "sources and methods," the United States and Britain were hurriedly handing over reams of satellite imagery, telephone intercepts, and other top-secret information to help the Prosecutor make the case against Milosevic.

To make matters even more questionable, a few weeks after issuing the Milosevic indictment, the International Prosecutor, Louise Arbour, was given her dream job: the only seat on the Supreme Court of Canada open to an Ontario resident that was likely to be available during her professional lifetime. One doesn't need to use much imagination to guess what would have happened to Arbour's judicial prospects if, instead of indicting Milosevic, she had issued an indictment charging NATO leaders with war crimes in the midst of the intervention.

VII. THE MANNER OF MILOSEVIC'S SURRENDER

The newly elected President of the Federal Republic of Yugoslavia, Vojislav Kostunica, backed up by a federal court ruling, refused to permit the extradition of Milosevic to The Hague. But in a late-night move that caught everyone off guard, Kostunica's political rival, Prime Minister Zoran Djindjic, instructed the Serb police under his command to secretly take Milosevic to an American air base in Tuzla, Bosnia, from which Milosevic was transferred by military jet to The Hague on July 28, 2001. In announcing the action, Djindjic said that he had been forced to take a "difficult but morally correct" decision to protect the interests of Serbia (that is, the United States and its European allies were promising \$1.28 billion in aid in return for the surrender of Milosevic). Immediately thereafter, a furious Kostunica protested that the extradition of Milosevic was "illegal and unconstitutional."

Meanwhile, on board the flight to The Hague, Milosevic reportedly told the tribunal officials who read him his rights, "You are kidnapping me, and you will answer for your crimes." In analogous cases (*Stoeck v. Germany* (1991) and *Bozano v. France* (1986)), the European Court of Human Rights has held that luring or abduction in violation of established extradition procedures is a human rights violation for which dismissal is the appropriate remedy. But the Yugoslavia Tribunal rejected the argument in the *Dokmanovic Case* (1997) on the ground that there does not exist a formal extradition treaty between the Tribunal and the Federal Republic of Yugoslavia.

Whatever the technical legal merits of his argument, politically, the timing of Milosevic's surrender could not be worse for the Tribunal. He arrived at the Yugoslavia Tribunal on St. Vitus's day, the solemn holiday

commemorating the historic Serb defeat to the Ottoman Turks at the battle of Kosovo Polje in 1389, which figures so prominently into the Serb mythology of victimization.

VIII. UNCLEAR HANDS

To further illustrate the Tribunal's politicization, Milosevic will attempt to force the Tribunal to face the *tu quoque* argument (literally meaning "you too"). First, Milosevic may point out that Franjo Tudjman, the former leader of Croatia, was never indicted by the Tribunal for the mass atrocities that Croatian troops committed against the Serbs in re-taking Serb-controlled areas of eastern Croatia. In fact, Tudjman was welcomed to the United States for cancer treatment at Walter Reed Hospital in Washington, D.C., a few months before his death in 1999.

Next, Milosevic will raise the issue of NATO war crimes. When several respected human rights organizations urged the Tribunal to investigate the possibility that NATO had committed war crimes during the 1999 intervention, the then Prosecutor, Louise Arbour (from Canada, a NATO country), assigned the task to her Legal Adviser, William Fenrick. Fenrick is an ex-NATO lawyer, who went to the tribunal directly from his post as director of law for operations and training in the Canadian Department of Defense. Not surprisingly, Fenrick's report, which was released in June 2000, concluded that NATO had committed no indictable offenses. But critics have been quick to seize upon the clause of the report that notes that the review of NATO's actions relied primarily on public documents produced by NATO, and that the authors of the report "tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given."

Finally, Milosevic may argue that the United States opposition to a permanent international criminal court has undermined its moral right to participate in any way in the trial of Milosevic. According to United States officials, such international tribunals are prone to politicization—the very argument that Milosevic has made about the Yugoslavia Tribunal.

There are several answers to Milosevic's *tu quoque* arguments. First, whatever Franjo Tudjman and NATO have done, their actions do not excuse what Milosevic did. Second, the Tribunal's Prosecutor at the time of the Milosevic indictment, Louise Arbour, has stated that she was about to issue an indictment for Franjo Tudjman just before the Croatian President passed away, demonstrating that the Tribunal was striving to be evenhanded. Third, whether or not one believes NATO violated the laws of war during the 1999 bombing campaign, NATO did not systematically set out to kill and torture civilians on a mass scale—the crimes of which

Milosevic has been accused. The alleged NATO offenses are just not in a league with those of which Milosevic is charged. Fourth, established democracies have mechanisms (a free press, political opposition, and an independent judiciary) to examine publicly their own past: for example, America's actions in Vietnam or France's use of torture in Algeria. While Serbia was willing to try Milosevic for corruption, the Yugoslavia Tribunal is the only venue in which his war crimes and crimes against humanity could be exposed.

Finally, these arguments might suggest that the Tribunal's Prosecutors might have been out to get Milosevic. But selective prosecution is never a valid defense, even in domestic trials. Milosevic's ultimate fate is in the hands of the Tribunal's judges, not its prosecutor. As long as the bench is impartial, and the procedures are equitable, the trial of Milosevic will be considered credible.

IX. COMPOSITION OF THE BENCH

Given that the pool of the Tribunal's judges that were available for the Milosevic trial included citizens from several countries that had no stake in the Balkan conflict, the three judges assigned by Chief Judge Jorda to preside over the case represented a most unfortunate selection. The judge selected to head the panel, Richard May, hails from one of the NATO countries (the United Kingdom) that led the 1999 intervention against Serbia. May is said to have close continuing contacts with the British Foreign Ministry. The second judge, Patrick Robinson, is from Jamaica, a Caribbean country with very close political and economic ties to the United States and United Kingdom. Having served with Judge May on other trials, Robinson is said to be somewhat too deferential to his British associate on the bench. Only the third judge, O-Gon Kwan of South Korea, who replaced the judge originally assigned to the trial, Mohamed El Habib Fassi Fihri of Morocco, hails from an unquestionably neutral country.

These distinguished jurists could not be expected to recuse themselves from participating on the Milosevic bench because, that would be an admission of their bias and would subvert the credibility of the Tribunal as a whole. And yet, however fair and impartial these judges actually turn out to be, one can certainly understand why some might perceive that the "fix is in." In this regard, Osgoode Hall Law Professor Michael Mandel maintains that "Milosevic has about as much chance of getting a fair trial from this court as he had of defeating NATO in an air war."

X. FAIRNESS OF THE PROCEDURES

In addition to an impartial bench, the validity of the trial depends on the court allowing Milosevic the equality of arms and fair procedures which the Nuremberg defendants did not receive.

Another criticism of Nuremberg that Milosevic will attempt to resurrect was that the Nuremberg Tribunal did not comport with due process because it permitted the prosecution to base much of its case on hearsay evidence and *ex parte* affidavits. In its previous cases, the Yugoslavia Tribunal has similarly permitted unfettered use of hearsay by prosecution witnesses, as well as anonymous witnesses, whose identities are not provided to the defendant or defense counsel. These rulings have undermined the right to examine or cross-examine witnesses supposedly guaranteed by the Yugoslavia Tribunal Statute. Simply put, the right of confrontation cannot be effective without the right to know the identity of adverse witnesses. With the stakes as high as they are in the Milosevic trial, it is unlikely that the Tribunal will permit anonymous witnesses, and it will probably be far more circumspect with regard to the use of hearsay evidence.

Another criticism of the Nuremberg procedures was that those acquitted by the Tribunal were retried and convicted in subsequent proceedings before national courts. The Statute of the Yugoslavia Tribunal, in contrast, expressly protects defendants against double jeopardy by prohibiting national courts from retrying persons who have been tried by the International Tribunal. However, by permitting the Tribunal's Prosecutor to appeal an acquittal, Milosevic may argue that the Tribunal itself infringes the accused's interest in finality which underlies the double jeopardy principle.

As the United States Supreme Court has said, "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that a verdict of acquittal ... could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." The proscription of the Double Jeopardy Clause applies no matter how erroneous or ill-advised the trial court's decision appears to the appeals court. The rationale for the American rule is that permitting a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that even though innocent, he may be found guilty. This rationale is just as applicable to prosecution before an international criminal court as to domestic prosecutions. The Yugoslavia Tribunal's Office of Prosecutor, together with State authorities assisting that office, will have the full

resources of the Tribunal and several interested States behind it, while Milosevic and his counsel have minimal resources at their disposal.

Yet, this expansive notion of double jeopardy is a uniquely American judicial concept. Other common law countries such as Australia, Canada, and the United Kingdom permit their prosecutors to appeal acquittals. And while it may offend American sensibilities, a prosecutorial appeal is perfectly consistent with international standards of due process, as well as with the practice of the courts in Serbia. In light of the unique function of the Yugoslavia Tribunal, prosecutorial appeals may be important to ensuring uniform precedent

XI. CONCLUSIONS

As described above, Slobodan Milosevic adopted a trial strategy of attacking the legitimacy of the International Tribunal at every opportunity rather than trying to prove his innocence of the charges against him. But his refusal to "play by the rules" was blunted somewhat by the Tribunal's clever decision on the eve of trial to appoint three distinguished defense counsel to act as "friends of the court" and thereby to ably build Milosevic's defense in court, regardless of his wishes.

In the end, Milosevic may still be able to convince many throughout the world that the Yugoslavia Tribunal is not quite the impartial international justice system, immune from big power influence, that its founders had promised. But only starry-eyed idealists could ever have imagined that power politics would play no part in the timing and targeting of the Tribunal's indictments. By way of comparison, despite its shortcomings, few today question the validity of the judgment of the Nuremberg Tribunal because the defendants were convicted on the strength of their own meticulously-kept documents. Similarly, if the International Prosecutor is able to prove the case against Milosevic with compelling evidence, Milosevic will have a much harder time convincing anyone that his trial represents a denial of justice.

But, one of the modern myths of Nuremberg is that the German people immediately accepted the legitimacy of the Tribunal. Opinion polls conducted by the United States Department of State from 1946 through 1958 indicated that a large majority of West Germans considered the Nuremberg proceedings to be nothing but a show trial, representing victor's justice rather than real justice. Yet two generations later, the German people largely speak of the Nuremberg Tribunal with respect, and Germany is the foremost advocate of the permanent international criminal court. Perhaps this suggests that regardless of the strength of the evidence, the Serb people will not immediately embrace the findings of the

Yugoslavia Tribunal in the Milosevic case, and that the question of its success will await the judgment of future generations.

