Milosevic in the dock: a challenge for the international tribunal

by Douglas Cassel in the August 15, 2001 issue

At last the biggest fish in the Balkan pond—former Yugoslav President Slobodan Milosevic—has been snagged by the International Criminal Tribunal for the Former Yugoslavia (ICTY). The catch presents the first international criminal court since Nuremberg with its greatest opportunity and greatest challenge: Will the man most responsible for the carnage in what was once Yugoslavia now be fairly tried, credibly convicted and duly punished? Or will his trial confirm the claims of critics who dismiss the tribunal as a judicial facade for NATO power?

From the moment it was created by the United Nations Security Council in 1993 the ICTY has been dogged by doubters. Could it work? With no international police or sheriffs, could an international court secure the necessary evidence and persuade governments to arrest its suspects? Could it overcome legal hurdles? Could it find clear enough law and fair enough procedures, acceptable to differing legal traditions, to meet standards of criminal due process? And could it escape geopolitics? Or would it be blocked, captured or hopelessly tainted by power politics, national interests or larger issues of war and peace?

Two factors magnify the importance of these questions. First, the ICTY was set up to deal with the most serious crimes of global concern: genocide, crimes against humanity and serious war crimes.

Second, the ICTY was never only about Yugoslavia. During the 1990s the United Nations negotiated and ultimately adopted what became the 1998 Rome Treaty for a permanent International Criminal Court (ICC). The ad hoc court for Yugoslavia, and its younger sibling the ad hoc International Criminal Tribunal for Rwanda (ICTR), created by the Security Council in 1994, were and are testing grounds for a more ambitious project—a court whose prosecutorial reach will be global and permanent. The ICC will not be a court merely for lawsuits between nations, like the World Court (International Court of Justice), but a *criminal* court. And it may prosecute not only

tyrants from small countries like Yugoslavia or Rwanda; potentially it can prosecute leaders of powerful countries like the United States, although it is not likely to do so.

In its early years the ICTY came close to failing. After creating it in 1993, the Security Council misfired on its first pick for chief prosecutor, and took over a year to bring on board his replacement, Judge Richard Goldstone of South Africa.

Goldstone promptly fell into a budgetary and bureaucratic swamp. The UN gave him too little funding, and that only for short periods; he had to induce prosecutors to move to The Hague on short-term contracts. Even so, his team swiftly produced results. By mid-1995 it had indicted nearly 50 defendants, including Bosnian Serb political and military leaders Radovan Karadzic and General Ratko Mladic. Most of the suspects were Serbs—the UN investigating commission attributed a majority of the atrocities to the Serbs—but some Croats and Bosnian Muslims were indicted as well.

But while Goldstone could indict suspects—subject to judicial confirmation—he could not bring them to trial. ICTY rules rightly forbid trials in absentia, and the tribunal could not get hold of the suspects. And though the Security Council, acting under the UN Charter, directed all governments to cooperate with the tribunal, few did so.

Open defiance, of course, came from the regimes of Milosevic in Yugoslavia and Karadzic in Bosnia. Worse, UN and later NATO troops in Bosnia did nothing to nab Karadzic, Mladic or anyone else. Few UN member states even adopted laws necessary to send suspects to the tribunal.

Goldstone was forced to seize a target of opportunity. A low-level Bosnian Serb thug named Dusko Tadic had been arrested in Germany. Germany agreed to amend its constitution to allow his transfer to the ICTY. In 1996—three years after its birth—the ICTY opened its first trial.

Found guilty of war crimes and crimes against humanity, Tadic was eventually sentenced to 20 years. But what next? In March 1997, having turned over his post to Canada’s Louise Arbour, Goldstone wrote an op-ed in the *New York Times*, “No Justice in Bosnia.” Only seven of 75 indicted suspects, he complained, had been arrested. Justice was being denied and the tribunal was losing credibility. But it was not too late. What was required was political will.

Political will arrived in the person of newly elected British Prime Minister Tony Blair. That June UN forces tricked a former Serb mayor, accused of a massacre of hospital patients, into returning to Croatia, where they arrested and sent him to The Hague. In July British commandos, in an operation approved by Blair and President Clinton, moved in on two Serbs secretly indicted by the tribunal. One was killed resisting arrest, and the other was sent to The Hague. Enlivened by Blair, Washington also turned the financial and diplomatic screws on Croatia, threatening to block credits and calling for Croatia's suspension from the Council of Europe. In October ten indicted Croats surrendered to The Hague.

From then on, a slow but steady parade of suspects were arrested or surrendered. About 50 have now been brought before the tribunal. The ICTY has been so busy that it cannot keep up; last year the Security Council increased its judges, originally 11, to the current 25. Yet by early this year, 25 suspects remained at large, including seven major figures—Milosevic and four top cronies from Yugoslavia, plus Karadzic and Mladic.

This summer, however, looks like another turning point. Since late June, Serbia handed over Milosevic, Croatia surrendered a general, and the Bosnian Muslims turned in two generals and a colonel. Even Republica Srpska is working on a law on cooperation. This month Bosnian Serb General Radislav Krstic—second in command at Srebrenica, where thousands of Muslims were massacred—was convicted of genocide and sentenced to 46 years in prison. Rumors abound that Karadzic and Mladic may be next. The tribunal now looks real.

But is it fair? Critics accuse it of kidnapping suspects, holding them in prolonged pretrial detention, and convicting them under vague laws through hearsay and anonymous witnesses.

Yet the procedural and substantive fairness of the ICTY compares favorably to criminal courts in the most law-abiding countries. For example, the hearsay rule is designed to shield credulous jurors from secondhand testimony. Since there are no juries in The Hague (or in most of the world, including Yugoslavia, or in U.S. courts-martial), the hearsay rule simply has no place in the ICTY.

Relying on anonymous witnesses would be a serious matter. But after sharp criticism of one early case in which a single anonymous witness testified but was not relied on by the court, the prosecutor's office dropped that ill-advised practice.

Lengthy pretrial detention is a concern. Suspects are typically held for periods ranging from nine to 22 months before trials begin; three were released pending trial, after being held for over two years. Albeit regrettable, these periods (due largely to resource constraints) are well within international human rights norms for difficult cases.

The most serious rap is that the ICTY is—or appears to be—a front for NATO. Most fuel for this fire is not of the tribunal's own making. The grumbling began the moment the Security Council, pressed by its NATO members, bypassed the General Assembly to establish the ICTY. Concerns mounted in the 1990s as it became clear that the U.S., for all its professed prosecutorial zeal in Yugoslavia and Rwanda, would accept an ICC only under Security Council control, enabling Uncle Sam to veto any prosecutions not to his liking.

Then came NATO's bombing of Yugoslavia in 1999. The same NATO powers that backed the ICTY in order to enforce international law now violated international law by bombing Yugoslavia without Security Council approval. And Amnesty International accused NATO of committing war crimes by bombing civilian targets such as a Belgrade television station.

During the NATO bombing the ICTY, on the basis of charges reportedly drafted by an American lawyer in the prosecutor's office, indicted Milosevic for war crimes and crimes against humanity in Kosovo. Much later, after a prolonged inquiry, new ICTY prosecutor Carla del Ponte—relying on a recommendation written by a former military lawyer from NATO member Canada—declined even to open a formal investigation of any crimes allegedly committed by NATO.

In my judgment the decisions of the ICTY prosecutor were justified in both cases: Milosevic allegedly ordered mass murders in Kosovo, while NATO's bombings—even if violations of the UN Charter and in some cases the laws of war—did not clearly amount to war crimes.

Nonetheless, the appearances are unfortunate. Some Western lawyers and commentators now denounce the ICTY as NATO's puppet. And if Milosevic carries out his threat to defend himself by putting NATO on trial, ICTY judges may find themselves in a catch-22: If they shut off his defense, they will be further accused of shielding NATO, but if they allow him running room, he will use it to bash NATO's supposed puppet.

Two lessons emerge. In the short run the tribunal must not only give but be seen to give Milosevic a fair trial—a tall order against this background. In the long run the Milosevic case illustrates why a global, permanent ICC is better than ad hoc tribunals controlled by Security Council members. Future international prosecutions must not only be, but appear to be, free of plausible charges of selectivity and partiality. Victims of atrocities deserve no less.