

**A Brief Review of the Indictment against Milosevic and Others of 27 May 1999** 33 (10) United Nations Law Reports 133-136 (June 1999) (code A-99-6)

A BRIEF REVIEW OF THE INDICTMENT  
AGAINST MILOSEVIC AND OTHERS  
OF 27 MAY 1999

by Anthony D'Amato\*

The Indictment issued by the Prosecutor at the International Criminal Tribunal for Yugoslavia (ICTY), and approved by the reviewing judge at the Tribunal, names five accused persons:

**Slobodan Milosevic**, President of the Federal Republic of Yugoslavia;  
**Milan Milutinovic**, President of the Republic of Serbia;  
**Nikola Sainovic**, Deputy Prime Minister of the Federal Republic of Yugoslavia;  
**Dragoljub Ojdanic**, Chief of the General Staff of the Armed Forces of the Federal Republic of Yugoslavia; and  
**Vlajko Stojiljkovic**, Minister of Internal Affairs of the Republic of Serbia.

### **1. Command Responsibility: The Foundation of the Indictment**

The extensive crimes against the people of Kosovo, outlined in chilling legal objectivity in the Indictment, are attributed to the five accused persons via the customary international law vehicle of "command responsibility." In the Indictment, the phrase used is "Superior Authority," a somewhat inelegant term (what, for instance, would "inferior authority" mean?) that encompasses the international customary law principle of "command responsibility." Under both the customary law usage and under Article 7 of the Statute of the ICTY, people who do not themselves commit the actual crimes but who planned, instigated, or ordered the commission of those crimes are individually responsible for those crimes. This includes, again under both the customary law usage and Article 7, nonfeasance—that is, a commander knew or had reason to know of the commission of the crimes and failed to take necessary and reasonable measures to prevent them.

The fact that five leader-commanders were indicted (and not, as many had expected, Milosevic alone) means that other leader-commanders can expect to be indicted in the future. This is a very hardline position that Prosecutor Louise Arbour has taken, and I think it is absolutely right under the circumstances. For example, it has been widely reported that Milosevic never signs his name to any orders in order to avoid generating documents that could someday be used as evidence against him. But somebody has to take those orders and send them out and perhaps sign them or stamp them in some way. People who do that are now on notice that they too can be criminally indicted.

Each of the five leader-commanders is described as having both de jure and de facto authority. This again is very sound prosecutorial pleading. In a joint trial, a defendant would be inclined to say, "that wasn't in my department, that was in his department." The prosecutor could reply that, de jure authority aside,

there was de facto command or coordination.

Somewhat significantly, no individual accused person is linked to any particular underlying crime in Kosovo. In other words, they are indicted jointly and severally, the linkage to be adduced at the trial under the international customary law of command responsibility reflected in Article 7 of the ICTY statute.

## **2. Genocide is Not Charged**

"Genocide," a separate crime under Article 4 of the Statute, is not charged. Journalists might be disappointed. But there are several good reasons why it was not included in the Indictment. First, although there is evidence of brutality, rape, and murder of women and children in Kosovo, the fact that vast numbers of women and children of both sexes were led out of their homes and out of the country—and not simply executed on the spot—is a counter-indication of genocide. Second, because genocide requires proof of specific intent, the "nonfeasance" aspect of the present Indictment, mentioned above, would be much harder to prove at trial. From a litigating standpoint, a prosecutor faced with the task of trying to infer genocidal intent to prove nonfeasance would run the risk that if the proof failed, the failure could carry over, or contaminate, the case against the accused on the more provable crimes. Third, the grave crime of genocide should not be cheapened by extending the concept to questionable cases. Finally, the accused persons face life imprisonment—the maximum sentence under the ICTY Statute—for the other crimes they have been charged with. There is no individual-punishment need to include genocide.

## **3. War Crimes: A Questionable Call**

If genocide was rightly omitted from the Indictment, it is arguable that the war-crimes charge perhaps should have been omitted. The five accused persons are charged with:

Murder, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

In order for war crimes to be charged, there must be a war. The only relevant war in Kosovo was the civil war between the Kosovo Liberation Army (KLA) and Serbia. But that's something which, if I were the prosecutor, I would be inclined to omit from the Indictment. The civil war seems to be a defendant's issue, not a prosecutor's. There was nothing illegal in Serbia's resisting the guerrilla tactics of the KLA and treating the KLA and its supporters as enemies in a war. (What, after all, was Serbia to do about it? Let the KLA go on murdering the minority Serbian population in Kosovo?) I am sure that the attorney for the accused persons (if this case gets to trial at The Hague) will want to talk about the civil war as much as possible. The prosecution has opened the door by introducing the war-crimes count in the Indictment.

Why did the Prosecutor introduce the war-crimes count? Paragraphs 23, 31, and 57 of the Indictment suggest one reason: that the existence of a civil war makes it easier to prove that some of the accused persons were in a position of *military* command. Secondly, the civil war antedated the NATO bombing, so any war crimes committed during the course of the civil war become relevant. However, on balance, both of these reasons do not seem to give the Prosecutor enough in return for handing Defense Counsel a broad invitation to focus on the civil war in defending the accused persons.

So, on sheer speculation, including the war-crimes count may have been for public-relations reasons. The public knows what a "war crime" is. If genocide isn't going to be alleged, maybe the media needed the phrase "war criminal." (The phrase "WAR CRIMES" is in the headline of today's New York Times.) The public is far less accustomed to the phrase "crimes against humanity."

#### 4. Crimes Against Humanity

All five accused persons are charged with three specific crimes falling under the rubric "Crimes Against Humanity": Deportation, Murder, and Persecution.

(a) **Deportation.** The ICTY Statute, Article 5, simply says "deportation." Yet customary international law certainly does not regard *mere* deportation as a crime. For example, civilians might be deported from a town that is under attack to a safe area several miles away. They might even be forcibly deported (some people tend to stay in their homes or basements no matter what happens.) If the motive for deportation is to protect the people, it can hardly be a crime. So, what the Indictment says *about* the deportation is a critical part of the charge against the accused persons. Their alleged motive certainly does not appear to be to protect the people. The alleged means they used were brutal and violent—crimes in themselves. In my view, the Indictment sufficiently makes out a case which, if uncontradicted, would result in the conviction of the accused persons for "deportation."

(b) **Murder.** This is the key charge. The Indictment lists the names of many people who were allegedly murdered in Kosovo by forces acting under the command of the five defendants. The refugees talk of the rape-murder of many women, of the murder of children. They talk about mass executions of men of military age. How can the defendants answer this charge? One analogy that I use in my classes is the killing of Vietnamese farmers by American forces during the Vietnam War. From the American military point of view, these farmers were only farmers by day; at night they were Viet Cong fighters whose job it was to kill American soldiers. In short, in a civil war, how do you identify your opponents? The defendants would have to prove that all the male Kosovars that were killed were probably KLA fighters in civilian clothes. But even that would not answer the question: why not intern them instead of killing them? Also it does not answer the question of rape, brutality, and murder of women.

(c) **Persecution on political, racial and religious grounds.** This so-called international crime should not have been included in the Statute of the ICTY and is, in my view, unjustifiable under customary international law. The reason is simple: any **acts** involved in any "Persecution," such as deportation, brutality, rape, and murder, are themselves crimes against humanity. What is left? Simply non-acts, i.e., speech. By the *ipse dixit* of the UN Security Council in drafting the ICTY Statute, what the communists used to call *agitprop* is now regarded as an international crime. The Prosecutor may have had no choice but to include Persecution in the indictment, since it is after a listed crime under the Statute that governs the Prosecutor as well as the Tribunal. But under the Nuremberg precedent, the tribunal must be satisfied that the crimes listed in its Statute are in fact crimes under customary international law. Counsel for the accused persons should argue vigorously that there is no sound customary international law basis for the so-called crime of persecution.

#### 5. Conclusion

The international indictment of government leaders during a war is a bold and impressive step. In the final year of this century, we are seeing a former head of state (Pinochet) extradited for criminal prosecution

for previous acts and omissions, and now we are seeing some of the highest political and military authorities in Yugoslavia being indicted for real-time acts and omissions. The twentieth century was the bloodiest in human history. Hopefully the Pinochet and Milosevic cases will cause political and military leaders in the next century to think twice before embarking upon copycat wide-scale atrocities.