

## Justice denied at The Hague?

Milosevic's trial ends without a verdict, but history may not deem it a failure.

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LAST SUMMER in The Hague, I asked a number of prosecutors working on the war crimes trial of Slobodan Milosevic to imagine their nightmare scenario. None of them mentioned acquittal. They all turned to the fear that history would judge the trial a colossal failure if, after years of testimony and hundreds of millions of dollars spent, the former Yugoslav president died before a verdict could be reached and justice could be done.

Now that the prosecutors' worst fears have come to pass, will history really be so severe?

Certainly the trial, the first of a former head of state before an international court, had been going on for too long. What started in 2002 as groundbreaking and spectacular had long since vanished from the headlines. During the weeks that I observed the trial from an often empty gallery, university students occasionally would file in, exchange their iPods for court headsets, excitedly gesture in the direction of the defendant and then quickly grow listless.

Why was the trial such a bore? In part, because it was a trial. It's worth recalling that the Nuremberg trials, now enjoying hagiographic 60th anniversary celebrations, were once likewise attacked as staggeringly dull. Rebecca West, who covered Nuremberg for Britain's Daily Telegraph, famously described the trials as a "citadel of boredom." Yet if one of the purposes of a war crimes trial is to reintroduce the rule of law into a radically lawless realm, the very dryness of the proceeding can be construed as a triumph of legal sobriety over lawless chaos.

Still, the trial of the major war criminals at Nuremberg took a breezy 11 months, and the Milosevic trial had wended its way into its fourth year. What was taking so long? Milosevic's health problems slowed the proceeding — causing long interruptions and a shortened schedule each week — but crucial missteps by the court and the prosecution also were to blame.

Early on, the court, with little objection from the prosecution, acceded to Milosevic's

demand that he be allowed to present his own defense. Courts have long recognized such a right, yet it has never been considered absolute. In *Faretta vs. California* (1975), a case The Hague court relied on, the U.S. Supreme Court noted that a defendant's right to defend himself did not include a right to insult the dignity of the court.

Yet this is exactly what Milosevic got away with, time and time again. Almost from the start, the court found itself hostage to the defendant's tendentious, time-consuming and yet not unresourceful harangues. (One prosecutor acknowledged to me, "There's no doubt who's the smartest guy in the courtroom.") These displays permitted Milosevic to cast himself as a lone warrior standing up to the West, a picture that played well to a Serb audience. Having recognized the defendant's right to defend himself, the judges were reluctant to curtail it, lest they be seen as confirming Milosevic's claim that the entire proceeding was a political farce.

The prosecution also made an early, fateful misstep in tendering an overly broad and ambitious indictment. The decision was understandable: having finally seized the architect of the Balkan calamity, prosecutors were not about to charge Milosevic with the kind of relatively minor offenses for which Saddam Hussein is being tried. And yet the Hussein prosecutors' modest charge sheet clearly reflects their attempt to learn from the mistakes of the Milosevic prosecution. The unwieldy, 66-count indictment — which charged Milosevic with war crimes, crimes against humanity and genocide in Croatia, Bosnia and Kosovo — slowed the trial, made for an unfocused and confusing presentation of evidence and played into Milosevic's argument that the details were too complicated to be digested in court.

Still, it is too early to condemn the Milosevic trial as a failure. One of the great, if overlooked, achievements of the Nuremberg trials was the astonishing trove of documents and materials assembled by researchers and prosecutors and since mined by generations of historians. I suspect the Milosevic trial will provide similar rewards to future historians of the Balkan wars.

Finally, it's worth remembering that in the decades after the Nuremberg trials, the majority of Germans viewed the trials with contempt, as an exercise in victor's justice. Now Nuremberg is generally viewed in Germany with respect, both as an event that prodded Germans to a collective reckoning with their troubled past and as a vital contribution to the developing body of international law. So if Milosevic's prosecutors have struggled to do justice to a complex history, history also will take time to do justice to the trial.