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The unfinished trial of Slobodan Milošević: Justice lost, history told

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Introduction

The Court

There is no universal prescription for how societies should deal with legacies of mass atrocities and political violence; and transition periods, during which societies extricate themselves from authoritarian or criminal regimes, are characterised by mass violations of human rights.¹¹ Studies in the field of transitional justice provide some guidance about the ways a state may address a legacy of mass atrocities or long-standing human rights abuses, and a UN report has defined them as “processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation.”¹² These mechanisms vary, from vetting or lustration processes, to truth commissions, to criminal trials.

Legal scholars, such as Gerry Simpson, have noted that while war crimes are committed around the world every day, national and international laws designed to punish these acts are invoked only under favourable political circumstances. In international law this has resulted in some well-known initiatives aimed at addressing the individual criminal responsibility of high-level political and military officials.¹³ In 1945, ad hoc military tribunals in Nuremberg and Tokyo were established to try high-level German and Japanese perpetrators, for example. But it was not until nearly the end of the 20th century that international political circumstances again allowed for the establishment of another international tribunal, to address individual criminal responsibility for crimes committed in the former Yugoslav republics.

The UN Security Council (UNSC) laid the groundwork for creation of the ICTY in two Resolutions. In February 1993, UNSC Resolution 808 announced the establishment of an

¹¹ Helga Welsh, “Political Transition Processes in Central and Eastern Europe,” *Comparative Politics* 26, no. 4 (July 1994): 378.

¹² United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, No. S/2004/616, 23 August 2004, 4. A universally accepted definition of the term ‘transitional justice’ does not exist, and it is still developing given the complexities of postconflict societies and the development of new mechanisms to deal with mass atrocities. For discussion, see: Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 2, *Country Studies* (Washington, DC: United States Institute of Peace Press, 1995); Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge, UK: Cambridge University Press, 2004); Teitel, *Transitional Justice*; and Melissa S. Williams, Rosemary Nagy, and Jon Elster, eds., *Transitional Justice* (New York: New York University Press, 2012).

¹³ Gerry J. Simpson, “Didactic and Dissident Histories in War Crimes Trials,” *Albany Law Review* 60, no. 3 (1997): 837.

international tribunal to prosecute those “responsible for serious violations of international humanitarian law” in the former Yugoslavia.¹⁴ The initial mandate of the ICTY was to put an end to such crimes and take effective measures to bring the persons guilty of them to justice. UNSC Resolution 827 of May 1993 confirmed this mandate and asserted that the Tribunal would “contribute to ensuring that such violations of international humanitarian law are halted and effectively redressed,” and further, that one of the objectives of the ICTY was “to contribute to the restoration and maintenance of peace.”¹⁵ Once brought to life, the ICTY was afforded considerable power; it had been established under Chapter VII of the UN Charter – “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression” – which compelled all UN states to cooperate.¹⁶ Soon, other ad hoc tribunals, for Rwanda, Cambodia, Sierra Leone, and Lebanon followed; and in 2002, the International Criminal Court (ICC) was finally established. It is the first permanent court with jurisdiction to address crimes committed in armed conflicts.

The founding of the ICTY took place as the violent conflict in BiH raged. In February 1993, parties to the conflict were presented with a plan known as the Vance-Owen Peace Plan (VOPP) which, if accepted, would have left BiH as a single state divided into ten ethnically-defined cantons. But negotiations definitively failed on 5 May 1993 when Bosnian Serb leaders rejected the VOPP.¹⁷ Less than three weeks later, the UNSC announced the establishment of the ICTY at a public hearing.¹⁸ The ICTY’s creation was labelled by some as a ‘fig leaf’ – alluding to the inability, up to that point, of the international community to stop the commission of crimes in BiH through peace negotiations or military intervention.¹⁹ Indeed, the creation of the Tribunal

¹⁴ United Nations Security Council, Resolution 808, S/RES/808 (22 February 1993).

¹⁵ United Nations Security Council, Resolution 827, S/RES/827 (25 May 1993). For more on the role of the ICTY and international criminal law in international relations and in ongoing conflicts, see: Beth A. Simmons and Richard H. Steinberg, eds., *International Law and International Relations* (Cambridge, UK: Cambridge University Press, 2007). The ICTY Statute was also adopted in UNSCR 827, and was last amended in July 2009 by Resolution 1877. See: United Nations, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (September 2009). Available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

¹⁶ United Nations, Charter of the United Nations and Statute of the International Court of Justice (October 1945), Chapter VII.

¹⁷ Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Durham, NC: University of North Carolina Academic Press, 1997), 32, 44.

¹⁸ Chris Stephen, *Judgement Day: The Trial of Slobodan Milošević* (New York: Atlantic Books, 2004), 91-92.

¹⁹ John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (University of Chicago Press: 2003), 60, 62. The term ‘international community’ (abbreviated IC) is used somewhat arbitrarily in different contexts, typically to connote international bodies such as the EU and the UN acting in concert with individual states such as the US, UK, and Russia in espousing joint views and undertaking multilateral action.

did not bring peace nor did it deter the warring sides from committing further crimes. In fact, the gravest crimes of the war in BiH were committed by Serb forces in the summer of 1995 in the areas of Srebrenica and Žepa, two years after the Tribunal was established; and the Kosovo conflict came five years after the ICTY was created.

The question arises whether the creation of the ICTY – or any international criminal court for that matter – can compensate for political, diplomatic, and military failures to end an ongoing military conflict, to secure a long-lasting political solution, or to contribute to reconciliation after the end of a conflict. In other words, should legal remedies be expected to resolve political and military problems during ongoing armed conflict or in the postconflict period? No matter the answer, the creation of the ICTY raised high expectations, locally and internationally. These expectations have gone far beyond the original mandate or capacities of the Tribunal and have been difficult if not impossible to meet. And, this has been compounded by an underappreciation among those working in the ICTY that it serves a region with a specific and unique legal culture. Indeed, this seemed barely recognised within the ICTY for years, until the results of several 1999 studies revealed that members of the public as well as legal professionals in the former Yugoslavia did not understand the scope of the Court's work or its processes and procedures.²⁰

Initially, the ICTY was based on Anglo-Saxon or Common Law, which uses an *adversarial* system.²¹ Regional domestic legal systems are based on Continental European or Civil Law, which uses an *inquisitorial* system. While the adversarial system is primarily concerned with proving and ultimately winning a case, the inquisitorial system is primarily focused on determining the truth and was considered by some scholars and practitioners as more suitable for mass atrocities trials. Proponents of an inquisitorial model for the Tribunal asserted, *inter alia*,

²⁰ The first of these studies was an ICTY report indicating that its work was seriously misunderstood and misinterpreted by the very people it was trying to serve. Another similar study, published in the same year, was based on interviews with 32 Bosnian judges and prosecutors involved in prosecuting and trying war crimes, among whom there was clear consensus that those who commit war crimes should be held accountable; however, almost all of the interviewees of Bosnian Serb and Croat origin saw the ICTY as a political organisation that was biased and incapable of providing fair trials. Most survey participants also said that they could not understand the procedures of the Tribunal or its legal basis. See: Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005), 37–38.

²¹ Scharf, *Balkan Justice*, 88-89.

that it would allow judges to be more active in the evidentiary part of trials and this could shorten their duration.²²

Support and acceptance of the Tribunal by its ‘real constituency’ – understood here as people from the region where the crimes have been committed – has generally been seen as one of the important criteria by which to measure the success of the ICTY. The international criminal system is a normative system with strict rules and procedures, specific legal theories, lengthy court sessions, and terminology that make many aspects of the courts inaccessible to local communities. The fact that the proceedings are held abroad and often must be interpreted and translated is an additional barrier to constituents’ comprehension of ICTY trials. As Prosecutor Geoffrey Nice asked, “Would you go in for a surgery in which you had a Brazilian doctor, a Ugandan nurse, a Canadian anaesthesiologist, and the operation took place in a Japanese hospital?”²³ Maybe not; and this is a fitting analogy for the challenging international character of the Tribunal.

The establishment of the ICTY – along with that of other of ad hoc tribunals – has also opened doors to a new field of research in which the interaction between law and politics became a topic of analysis.²⁴ Human rights activists and victims cheered the Tribunal’s foundation, but the ICTY has also faced questions regarding alleged political undertones and partiality, and doubts about its legitimacy and legality.²⁵ In discussion about its foundation, so-called liberals,

²² For discussion, see: Carrie Menkel-Meadow, “The Trouble with the Adversary System in a Postmodern, Multicultural World,” *William & Mary Law Review* 38, no. 5 (1996): 5-44; Geoffrey Nice, “Trials of Imperfection,” *Leiden Journal of International Law* 14, no. 2 (June 2001): 383-397; and Osiel, *Making Sense of Mass Atrocities*, 7, 63, 73, 75, 84, 92-93, 123, 134, 167, 194.

²³ Geoffrey Nice, presentation, Columbia University, New York, 17 April 2006, as quoted in: Lara J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge, UK: Cambridge University Press, 2010). Also see: Geoffrey Nice, “Trials of Imperfection,” *Leiden Journal of International Law* 14, no. 2 (June 2001): 383-397, 383.

²⁴ For scholarly discussion on the background of the ICTY and appraisals of its early years, see: Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press: 2000); Hagan, *Justice in the Balkans*; Pierre Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, Eugenia & Hugh M. Stewart '26 Series on Eastern Europe (Texas A&M University Press, 2004); Osiel, *Making Sense of Mass Atrocities*; William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press: 2012); Scharf, *Balkan Justice*; Stephen, *Judgement Day*; Stover, *The Witnesses*; Nena Tromp, “War Crimes Tribunals and The International Criminal Tribunal for Former Yugoslavia,” in *15 Years of Peace Building in the Western Balkans: Lessons Learnt and Current Challenges*, eds. Ernst M. Felberbauer and Predrag Jureković (Vienna, December 2010), 151-165.

²⁵ For discussion on points of criticism, see: Jovan Ćirić, ed., *Haški tribunal između prava i politike*, Institut za uporedno pravo (Beograd: Goragraf, 2013), available in B/C/S at: <http://www.comparativelaw.info/haski-s.pdf>; Jill

concerned with violations of human rights and the nature of crimes committed in BiH, saw the Tribunal as a victory of liberal ideals; in this case, of what was referred to in the literature as ‘liberal legalism.’²⁶ On the other hand, realists attributed the Court’s foundation to *Realpolitik*, concerned more with concrete political interests such as ensuring international stability than with addressing the humanitarian catastrophe.²⁷ More generally concerns exist about the UN running the ICTY given that it was involved in peacekeeping and peace-making processes and was present on the ground when some of the most severe crimes occurred and were witnessed – but not prevented – by the UN’s own personnel. Is it right for the UN to be in charge of an ostensibly independent court where criminal culpability for these very crimes is determined?

Responding to critical external assessments of the Tribunal, Gabrielle Kirk McDonald, the ICTY President at the time, launched the Tribunal’s battle for ‘hearts and minds’ of the people. The ICTY established its Outreach Programme in 1999, aiming to encourage communication between the Court and citizens of the former Yugoslavia.²⁸ After a slow but promising start, the Outreach Programme remains meagrely staffed so that the mandate it is expected to fulfil is unreachable. And the limited influence of ICTY outreach activities is not just a matter of finances. It also results from the UN’s general, and the ICTY’s particular, propensity to control public debate on ICTY-related issues. Cautious to protect the professional and public image of the institution, UN and court officials often achieve this by minimising contact with the outside world, even with – or perhaps specifically with – victim constituents.²⁹ Still, one of the first empirical studies assessing the impact of ICTY outreach in BiH between 2000 and 2005 concluded that the ICTY had a relatively positive impact in Bosnian society during that period.

A. Irvine and Patrice C. McMahon, “From International Courts to Grassroots Organizing: The Obstacles to Transitional Justice in the Balkans,” in *Transitional Justice and Civil Society in the Balkans*, eds., Olivera Simić and Zala Volčič (New York: Springer, 2013); Olivia Q. Swaak-Goldman, “The ICTY and the Right to a Fair Trial: A Critique of the Critics,” *Leiden Journal of International Law* 10, no. 2 (June 1997): 215-221; Leila Nadya Sadat and Michael P. Scharf, eds., *The Theory And Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden: Martinus Nijhoff, 2008); Bert Swart, Alexander Zahar, and Göran Sluiter, eds., *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press: 2011); Oliver Tomić, ed., *Od Nirnberga do Haga: pouke istorije* (Beograd: 2013).

²⁶ Hagan, *Justice in the Balkans*, 3, 22, 29, 31, 105, 118, 204, and 240.

²⁷ For more on the views of liberals and realists, see: Bass, *Stay the Hand of Vengeance*, 265, 302-305.

²⁸ Stover, *The Witnesses*, 36-38; “Outreach Programme,” ICTY: Outreach, <http://www.icty.org/sections/Outreach/OutreachProgramme> (accessed 18 April 2014).

²⁹ See: Refik Hodžić, “Accepting a Difficult Truth: ICTY is Not Our Court,” *Balkan Insight*, 6 March 2013. One interesting example of this was the ICTY’s lack of outreach after the acquittals of General Momčilo Perišić, Jovica Stanišić and Franko Simatović.

The author stressed, however, that attitudes do and will change; and that any study on the subject of public attitudes is valuable only if research continues over time.³⁰

Reasonably, people of the former Yugoslavia, especially bereaved relatives of victims and surviving victims themselves, expected criminal accountability to be achieved more swiftly than it was. Lengthy trials tend to dilute interest, with new indictments and judgements left as the only events that renew the public's attention. Further, the approach applied at the ICTY, of 'equivalence of guilt'³¹ – according to which all the warring parties committed equally grave crimes and should be equally punished – has been criticised.³² Indeed, disappointment among victims, who are probably the ICTY's most interested and constant observers, has often been expressed after acquittals; predictably, reactions depend on which "side" victims see themselves.³³

The case of Ramush Haradinaj is a good illustration of this. The OTP was under great pressure to indict the former Kosovo Prime Minister and Kosovo Liberation Army (KLA) commander, despite a lack of evidence.³⁴ He was acquitted twice, in 2010 and again in 2012, and these results were cheered by many as an example of justice having prevailed. But in Serbia, Haradinaj's acquittal was used to bolster criticism of the work of the Tribunal and label it as an anti-Serb institution.³⁵

The acquittal in 2012 of Croatian General Ante Gotovina – a commander during Operation Storm in the summer of 1995, which liberated a large part of Croatian territory from Serb occupation – brought a similarly split reaction. It was received with anger among Serbs but was

³⁰ Lara J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge, UK: Cambridge University Press, 2010).

³¹ This concept is referred to by a number of similar terms, and no one term has been universalised; it may also be called 'equity of guilt,' 'equality of guilt,' and 'proportionality of guilt.' For more on the OTP's indictment policy, see (in Dutch): Frederiek de Vlaming, *De Aanklager* (Leiden: Boom, 2013). For similar arguments in English, see: Frederiek de Vlaming, "The Yugoslavia Tribunal and the Selection of Defendants," *Amsterdam Law Forum* 4, no. 2 (2012).

³² For example, see: Ines Sabalić and Roland Kemp, "Marko Hoare: Bivši istražitelj Haškog suda," *Globus*, no. 854 (2007). In this interview, Marko Attila Hoare, a former war crimes investigator at the ICTY, claimed the Tribunal had treated war criminals less stringently than their victims.

³³ For discussion, see: Marija Ristić, "Mixed International Reactions to Haradinaj's Acquittal," *Balkan Insight*, 30 November 2012; Edona Peci, "Hague Tribunal Acquits Kosovo's Haradinaj," *Balkan Insight*, 29 November 2012; and Edona Peci, "Kosovo and Albania Demand Inquiry Into Del Ponte," *Balkan Insight*, 3 December 2012.

³⁴ *Ibid.*

³⁵ On reactions in Serbia to the acquittal of Ramush Hardinaj, see: Meridijana Sadović and Aleksandar Roknić, "Serbian Anger at Haradinaj Acquittal," Institute for War and Peace Reporting, 4 April 2008.

celebrated in Croatia, where the verdict was seen as exoneration for the Croatian side in the war.³⁶ Yet this did not insulate the ICTY from hostility against the Tribunal in Croatia, which emerged in response to other verdicts. When three officers of the Yugoslav People's Army (*Jugoslovenska Narodna Armija*, or JNA) were indicted and tried for crimes committed in the Croatian town of Vukovar in 1991, their sentences were deemed inadequate by many in the Croatian public.³⁷ At the same time, the acquittals of indictees from Serbia – especially General Momčilo Perišić in March 2013, and Jovica Stanišić and Franko Simatović in April 2013 – have been cheered by Serbians as absolution for Serbia.³⁸ But these judgements have been severely criticised by Croats and Bosnian Muslims who interpret them as politically-motivated decisions imposed by the international community.³⁹

The ICTY's work was never going to be easy, given the unique internal and external circumstances that framed its creation. With no institutional equivalent since Nuremberg, the ICTY pushed its way forward in what was aptly described as “learning by doing.”⁴⁰ The Tribunal's indictment policy, long trials, and disappointing judgements have led to scepticism about whether the ICTY and its *retributive justice* mechanism, which concentrates on perpetrators and punishment, delivers the justice sought by victim communities. Now, after years of retributive justice via the ICTY and in local courts, there is a growing appreciation that this form of justice may indeed be insufficient and that more weight should be given to *restorative justice* mechanisms that directly address the immediate needs of victims.⁴¹ Judge Patrick

³⁶ See: E. Radosavljević, “Oslobodeni Gotovina i Markač: Oluja iz Haškog suda oduvala pravdu,” *Večernje novosti*, 16 November 2012; and “Svjetski mediji: Osloboden general Gotovina, hrvatski junak Domovinskog rata,” *Dnevno*, 16 November 2012.

³⁷ On reactions in Croatia to the sentences for the ‘Vukovar Three,’ see: Goran Jungvirth, “Croat Anger at ‘Lenient’ Sentences for Vukovar Three,” *Tribunal Update*, no. 519, 28 September 2007.

³⁸ For example, see: “Stanišić i Simatović oslobođeni optužbe za ratni zločin, bit će odmah pušteni na slobodu,” *Klix*, 30 May 2013.

³⁹ ICTY President Judge Theodor Meron visited the “Making the ICTY” Conference in Sarajevo, organised to mark the 20th anniversary of the Tribunal. Victims in attendance expressed dissatisfaction and disappointment over the administration of justice by the ICTY and especially about the acquittals of Perišić, Stanišić, and Simatović. See: “Sarajevo Conference: Ode to Tribunal or Requiem for Justice?” *Sense Tribunal*, 27 December 2013. See also: “Bosnia Victims Protest Against Hague Tribunal President,” *Balkan Insight*, 29 November 2013.

⁴⁰ For example, see: Samantha Power, “Stopping Genocide and Securing ‘Justice’: Learning by Doing,” *Social Research* 69, no. 4 (Winter 2002): 1093-1107.

⁴¹ For discussion, see: Diana F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Institute: 2010); Janine N. Clark “The ICTY and Reconciliation in Croatia: A Case Study of Vukovar,” *Oxford Journal of International Criminal Justice* 10, no. 2 (2012): 397-422; Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford, CA: Stanford University Press, 2007); Roland Kostić, “Transitional Justice and Reconciliation in Bosnia-Herzegovina: Whose

Robinson, who served as President of the ICTY from 2008 to 2011, voiced concerns that victims need more support. He pleaded in 2010 before the UNSC for establishment of a trust fund that would “complement the Tribunal’s criminal trials by providing victims with the necessary resources to rebuild their lives.”⁴² Victim communities regularly stress that they need to know why violence against them occurred; they want to know details of crimes, such as where their family members were killed and buried, but they also want to try to understand how the crimes could have happened at all.⁴³

The End of the Mandate

International criminal tribunals have introduced a new dimension into international affairs and have put the emphasis on justice and accountability, now a standard part of many peacemaking efforts. Their creation was announced as a new era marked by an end to impunity for political leaders who use violence and commit mass atrocities in pursuit of their policies. But over time, the initial ambitions of the ICTY had to be toned down and adjusted to reflect concrete capacities. From 1994 to 2004, 161 persons were indicted for violations of international humanitarian law committed on the territory of the former Yugoslavia. Proceedings against 126 of them were concluded by November 2011; and by March 2015, with the cases of 15 defendants still ongoing – mostly in appeals proceedings – 79 indictees had been sentenced and 18 acquitted.⁴⁴ Of the 161 persons indicted by the ICTY, 36 cases were terminated and indictments withdrawn, and 13 cases were transferred to local courts.⁴⁵ The first indictee at the ICTY was Duško Tadić, a Bosnian Serb charged for the role he played at detention camps for non-Serbs; namely, Keraterm, Omarska, and Trnopolje, in Bosnia’s Prijedor municipality.⁴⁶ He was arrested

Memories, Whose Justice?” *Sociologija* LIV, no. 4 (2012): 649-666; Geoffrey Nice, “War Crimes Courts that Reconcile: Oxymoron or Possibility?” (lecture, Gresham College, London, 18 April 2013).

⁴² President Robinson’s Address Before the Security Council, press release, No. VE/MOW/1353e, 18 June 2010. Available online at: <http://www.icty.org/sid/10422>.

⁴³ Nena Tromp, “A Troubled Relationship: The ICTY and Reconciliation,” in *Regional Co-operation and Reconciliation in the Aftermath of the ICTY Verdicts: Continuation or Stalemate?*, eds., Ernst M. Felberbauer and Predrag Jureković (Vienna: Republic of Austria, 2013), 47-67.

⁴⁴ “Key Figures of the Cases,” ICTY: The Cases, <http://www.icty.org/sid/24> (accessed 24 March 2015).

⁴⁵ The ICTY’s Completion Strategy dictated that cases involving middle- and lower-level suspects would be transferred to the national courts in Croatia, BiH, and Serbia, each of which had established its own national war crimes chamber by 2003. See: “Transfer of Cases,” ICTY: The Cases, <http://www.icty.org/sections/TheCases/TransferofCases> (accessed on 23 December 2013).

⁴⁶ Duško Tadić (a/k/a Đule or Dušan), “participated in the attack on, seizure, murder and maltreatment of Bosnian Muslims and Croats in opština Prijedor both within the camps and outside the camps, between the period beginning

in 1994 in Germany and was sentenced by the Tribunal to twenty years in prison in 1997. The longest sentence handed down by the Tribunal, life imprisonment, was imposed in 2007 by the Appeals Chamber on General Stanislav Galić, Commander of the Sarajevo Corps of the Bosnian Serb Army between 1992 and 1993.⁴⁷

The ICTY was founded as an ad hoc institution with no fixed time frame for its mandate. By early 2002, it became apparent that international support for the ICTY had started to fade as a consequence of shifting military and diplomatic priorities in a post-September 11th world.⁴⁸ In August 2003, the UNSC passed a resolution that gave the ICTY specific deadlines for completion: 2004 for all investigations, 2008 for all first instance trials, and 2010 for all appeals.⁴⁹ This was a signal to ICTY senior management to start preparing their Completion Strategy; and one of their key aims before the closing date of the Tribunal was the arrest of three last fugitives – Radovan Karadžić was apprehended and transferred to the ICTY in 2008, followed by Ratko Mladić and Goran Hadžić in 2011.⁵⁰

The deadlines for the first instance trials of these defendants had to be pushed back, and estimates were that all three would be finished in 2012, with appeals initially expected to finish in 2014. However, Radovan Karadžić’s trial didn’t finish until late 2014, and the extradition of Mladić and Hadžić led to new extensions. Official estimates now are that the ICTY will finish hearing four of five appeals cases and three of four trials in 2015; but a judgement in the Mladić case is not expected until 2017, just before the Tribunal is set to close.⁵¹ From 1 July 2013 on, the ICTY’s work started overlapping with that of the Mechanism for International Criminal Tribunals (MICT), created by UNSC Resolution 1966 on 22 December 2010 in order to maintain the legacy of the ad hoc UN Tribunals – the ICTR and ICTY – and the ICTY branch of the Mechanism will hear any appeals that may follow the trials of Karadžić, Mladić, or Hadžić.⁵²

about 23 May 1992 and ending about 31 December 1992.... [and] in the killing of Bosnian Muslims in the Kozarac area...” See: Indictment (Amended), *Prosecutor v. Duško Tadić*, No. IT-94-1-I (14 December 1995), para. 1.

⁴⁷ See the “Case Information Sheet” for Stanislav Galić (IT-98-29) at: http://www.icty.org/x/cases/galic/cis/en/cis_galic_en.pdf (accessed 23 December 2013).

⁴⁸ Stover, *The Witnesses*, 38.

⁴⁹ *Ibid.*, 38–39.

⁵⁰ *Ibid.*, 38.

⁵¹ “Completion Strategy,” ICTY: About the ICTY, <http://www.icty.org/sid/10016> (accessed 24 March 2015).

⁵² “About the MICT,” United Nations Mechanism for International Criminal Tribunals, <http://www.unmict.org/en/about> (accessed on 24 March 2015).

The Legitimacy and Legality of the ICTY

When he was first indicted by the ICTY in 1999, Milošević was still a sitting head of state and few people believed that he would be tried in The Hague. Even in 2000, when he lost power, the ICTY was dependent on the cooperation of the successor regime in Serbia in order to apprehend him. Because the ICTY was not imbued with law enforcement mechanisms with which to arrest indictees on its own, Milošević – and any other indictee – was out of reach of the ICTY after it handed down indictments since the Tribunal was reliant upon NATO, UN forces, or local authorities to apprehend indictees that did not surrender voluntarily. But in March 2001, Serbian authorities arrested Milošević and handed him over to the ICTY after having detained him for three months in a Belgrade jail while they investigated him on charges of abuse of power.

Milošević was transferred to The Hague on 28 June 2001 on the authority of the Serbian (republic-level) government despite the fact that FRY authorities led by President Vojislav Koštunica declared the transfer illegal. Serbia – a unit of the FRY – was not an international subject at the time and could not engage in international politics, which was the exclusive domain of the federal government. But Serbian Prime Minister Zoran Đinđić took responsibility for the decision to transfer Milošević, arguing that the Republic of Serbia could legally trump the FRY's authority per Article 135 of the 1990 Serbian Constitution, which indeed stipulated that Serbia could disregard federal law in certain circumstances. The Article – originally included by Milošević's constitutional experts so that, when needed, Serbia could exercise greater power in relation to the then SFRY – was used successfully 10 years later by the Serbian government to facilitate Milošević's transfer without the approval of federal authorities who were not inclined to comply.⁵³

Once in The Hague, Milošević raised questions about the legality and legitimacy of the ICTY during his initial pre-trial appearance on 3 July 2001. He argued that the Court had been illegally constituted because it was not established by the UN General Assembly.⁵⁴ The arguments raised

⁵³ See Article 135 of the Serbian Constitution in: Blaustein, *Constitutions of Dependencies and Special Sovereignties*. Also see: *Human Rights in Transition*, the Annual Report of the Helsinki Committee for Human Rights in Serbia: 2001, 41.

⁵⁴ Milošević told the court, "I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to illegal organ [sic]." Trial Transcript (3 July 2001), 2. Unless otherwise noted, primary trial documents (including trial transcripts,

by Milošević matched those heard in the Tribunal's first trial, the Duško Tadić case, in 1995. Subsequently, a motion challenging the legitimacy of the ICTY was filed on behalf of Milošević by a court-appointed *amicus curiae*, or 'friend of the court.' The Trial Chamber dismissed the motion in November 2001.⁵⁵ The Tribunal ruled that although its creation by the Security Council was without precedent, the ICTY had been founded under the Council's broad powers to act to maintain international peace and security.⁵⁶ And in fact, Milošević had effectively recognised the legitimacy of the ICTY when he signed the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Peace Agreement, in which all parties had agreed to cooperate fully with the Tribunal.⁵⁷

International Criminal Trials: Political Trials, Show Trials, or Transformative Trials?

In his Opening Statement, Milošević asserted that the entire world knew that his was a political trial.⁵⁸ His brother Borislav, former Ambassador to Russia from the Federal Yugoslav Republic, said at a news conference in Moscow that it was "plainly evident that Slobodan Milošević's trial in The Hague is a political trial aimed to justify NATO's campaign in Yugoslavia."⁵⁹ When defending his right to represent himself, Milošević repeated this argument that the trial was political. He claimed that whether he had committed a crime was not at issue, saying that certain intentions ascribed to him were "beyond the expertise of any conceivable lawyer."⁶⁰

The fact that Milošević's trial (as well as other trials at the ICTY) has been labelled a "political trial" deserves attention, because this criticism potentially reflects on the integrity and authority of the trial record left behind. But there are many different meanings ascribed to the term 'political trial' and trials should not be confused with politicised trials or with show trials simply because they include political elements. Scholars distinguish between political trials, which take

legal filings, exhibits, motions, testimonies, etc.) refer to ICTY Trial Chamber proceedings in the case of *Prosecutor v. Slobodan Milošević* (No. IT-02-54).

⁵⁵ For discussion, see: Preliminary Protective Motion (9 August 2001); Presentation on the Illegality of ICTY (30 August 2001); Amici Curiae Brief on Jurisdiction (19 October 2001) – all filed by the Accused or his representatives. Also see: the Court's Decision on Preliminary Motions (8 November 2001).

⁵⁶ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Duško Tadić*, No. IT-94-1 (2 October 1995), 16-20.

⁵⁷ Michael Scharf and William Schabas, *Slobodan Milošević on Trial: A Companion* (New York: Continuum International, 2002), 99.

⁵⁸ Trial Transcript, Defence Opening Statement (15 February 2002), 352.

⁵⁹ "Slobodan Milošević's Trial Is a Political Case," *The Voice of Russia*, 3 January 2002.

⁶⁰ Trial Transcript, Appeals Hearing (21 October 2004), 53.

place within the rule of law, and ‘partisan trials’ or ‘show trials’, which substitute political expediency for law.⁶¹ There is a widespread view of the term ‘political trial’ as pejorative and referring to trials that use legal systems to eliminate or discredit political opponents. But many scholars accept, to a degree, that all trials have a political element; because in every state, the judicial system is a branch of government and thus part of a political and ideological system. If a “purely legal trial” is imagined to embody ideal justice – depending on fair procedure and neutral assessment only – then a “purely political trial” would be pre-determined and procedure would be irrelevant.⁶²

A number of scholars have posed the question of whether political trials are, by definition, in conflict with the law.⁶³ Or, can political trials be fair despite a political agenda? Otto Kirchheimer, a legal scholar, understood political trials as those in which “the courts eliminate a political foe of the regime according to some prearranged rules.”⁶⁴ Even if political goals may not be inherently unwelcome in judicial processes, as one legal scholar put it, “fairness is the tipping point...[and] the goal is to achieve a process that is fundamentally fair and thus predominantly legal, even if it simultaneously serves some desirable consequentialist purposes.”⁶⁵ Ron Christenson, another legal scholar, identified four categories of political trials – trials of public responsibility, trials of dissenters, trials of nationalists, and trials of regimes.⁶⁶ Christenson described all political trials as “using legal procedure for political ends.”⁶⁷

In a broad sense, all trials dealing with political violence and mass atrocities may indeed qualify as political.⁶⁸ When a regime responsible for human rights abuses or for committing mass atrocities is overthrown, a new regime must decide how to handle members of the old regime.

⁶¹ See: Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor, MI: University of Michigan Press, 2004); Ron Christenson, *Political Trials: Gordian Knots in the Law* (New Brunswick, NJ: Transaction, 1999); Gerry J. Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Cambridge, UK: Polity Press, 2007); Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, NJ: Princeton University Press, 1961); and Judith Shklar, *Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1964).

⁶² Stuart Ford, “Fairness and Politics at the ICTY: Evidence from the Indictments,” *North Carolina Journal of International Law and Commercial Regulation* 39 (2013): 56.

⁶³ Schabas, *Unimaginable Atrocities*, 23. Schabas writes that the political dimension of mass atrocities trials is inescapable.

⁶⁴ Kirchheimer, *Political Justice*, 6.

⁶⁵ Ford, “Fairness and Politics at the ICTY,” 57-58

⁶⁶ Christenson, *Political Trials*, 8-10.

⁶⁷ *Ibid*, xiii.

⁶⁸ Simpson, *Law, War & Crime*, 14.

One option is to put them on trial. When doing so, it is commonly understood that only a limited number of former political and military leaders can be tried; and those brought to trial are likely to be tried by their political opponents. Critics of such trials condemn them for being exercises in selective justice, while proponents praise their value in highlighting the criminality of regimes and tempering calls for vengeance. But any system of justice, whether at the international or domestic level, is only effective if it is seen as legitimate by society.⁶⁹

However, political trials should not automatically be equated with partisan or show trials, which are characterised as criminal legal proceedings instituted by governments for political ends, meaning that inevitable outcomes of guilt are simply couched in the trappings of legality. Show trials are often associated with totalitarian ideologies and regimes – such as that of Joseph Stalin in the Soviet Union – and with the power of a singular leader to influence a trial’s outcome. In Stalinist-style show trials, all the prosecutors, judges, and defence attorneys are employed by the government and the legal system is used as an instrument of politics to secure total power through total control of the population.⁷⁰ The same preordained results can also be achieved through what are known as “structural show trials,” in which it is “the structure of the proceedings that assures conviction, rather than direct control over the judges.”⁷¹

Jeremy Peterson, a legal scholar, social scientist, and practitioner working for the US Justice Department analysed Saddam Hussein’s trial in an attempt to determine if it qualified as a show trial. The trial, held in 2005, ended with the application of a death sentence, unleashing public debate about its fairness. In analysing the trial, Peterson defined a show trial as composed of two essential elements: certainty of the defendant's conviction and a focus on the audience outside the courtroom rather than on the defendant.⁷² He concluded that both criteria applied to the trial of Saddam Hussein. Other scholars have argued that the US military commissions at Guantanamo Bay, though not show trials in the Stalinist sense, employed a system which “retains features that are fundamentally unfair” and are weighted toward conviction.⁷³

⁶⁹ Ibid., 16.

⁷⁰ Christenson, *Political Trials*, xv. Also see: Ford, “Fairness and Politics at the ICTY,” 53-54.

⁷¹ Ford, “Fairness and Politics at the ICTY,” 53.

⁷² Jeremy D. Peterson, “Unpacking Show Trials: Situating the Trial of Saddam Hussein,” *Harvard International Law Journal* 48, no. 1 (2007): 257.

⁷³ Mary M. Cheh, “Should Lawyers Participate in Rigged Systems: The Case of the Military Commissions,” *Journal of National Security Law and Policy* 1 (2005): 408.

The trials at the ICTY did not lead automatically to a conviction, as there were regular acquittals. Yet some ICTY acquittals raised the question of whether it is not only the certainty of conviction but also the certainty of acquittal that may determine a show trial. This became a topic of debate after the acquittals of three indictees from Serbia in early 2013, which triggered public discussion about whether the ICTY had been under various political influences or was the subject of deals between Serbian leaders and the European Union (EU).⁷⁴ In June 2013, Danish ICTY Judge Frederik Harhoff sent a letter to personal acquaintances in which he strongly criticised the Tribunal's Appeals Chamber for having "suddenly back-tracked" on what he described as the "set practice" that military commanders were held responsible by the court for war crimes committed by their subordinates. Harhoff speculated that some judges may have been externally influenced and that the Chamber's Presiding Judge, an American, had exerted internal pressure on other judges to acquit, suggesting that certain countries had an interest in changing the precedents honoured until then by the ICTY. The letter was leaked, sparking questions among scholars and the public about the reasons the Tribunal seemed to have reversed course.⁷⁵

Drawing on the conceptions of a political trial put forth by Kirchheimer, Christenson, and Simpson, one could argue that all trials held before international criminal tribunals are indeed political trials, because they deal with political violence, specifically with mass atrocities. Accepting, then, that the Milošević trial is by that definition a political trial, this study will explore the value of the trial record based on Leora Bilsky's definition of a 'transformative trial.' Bilsky sees transformative trials as placed somewhere between the political and the legal.⁷⁶ On the one hand, a transformative trial has to remain loyal to the basic liberal value of the rule of law, and on the other hand it performs a unique function as a legal forum in which society's fundamental values can be examined in the light of competing counter narratives as presented in the courtroom.⁷⁷

⁷⁴ General Momčilo Perišić was acquitted in the Appeals Chamber. Jovica Stanišić and Franko Simatović were acquitted in their first-instance trial; they are yet to receive a judgement from the Appeals Chamber, which could still reverse their sentences.

⁷⁵ See: Marlise Simons, "Hague Judge Faults Acquittals of Serb and Croat Commanders," *New York Times*, 14 June 2013. Harhoff's letter can be found in English here: <http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf> (accessed 30 October 2014). For more on how EU integration processes may have impacted Tribunal practices, see: Jelena Subotić, "Legitimacy, Scope, and Conflicting Claims on the ICTY: In the Aftermath of *Gotovina*, *Haradinaj* and *Perišić*," *Journal of Human Rights* 13, no. 2 (2014): 170-185.

⁷⁶ Bilsky, *Transformative Justice*, 7.

⁷⁷ *Ibid.*, 8.

The Trial

The trial of Slobodan Milošević began on 12 February 2002, less than eight months after he was transferred to The Hague – swiftness unprecedented at the ICTY. The start date of the trial was cheered by some, but others questioned if there had been enough time to prepare the case properly given the extent of the charges. Once the trial ended unfinished, more questions arose – about its length, its structure, its procedures, and the evidence – opening a discussion on how to best try a political leader for crimes alleged to have occurred over a protracted period of time.⁷⁸

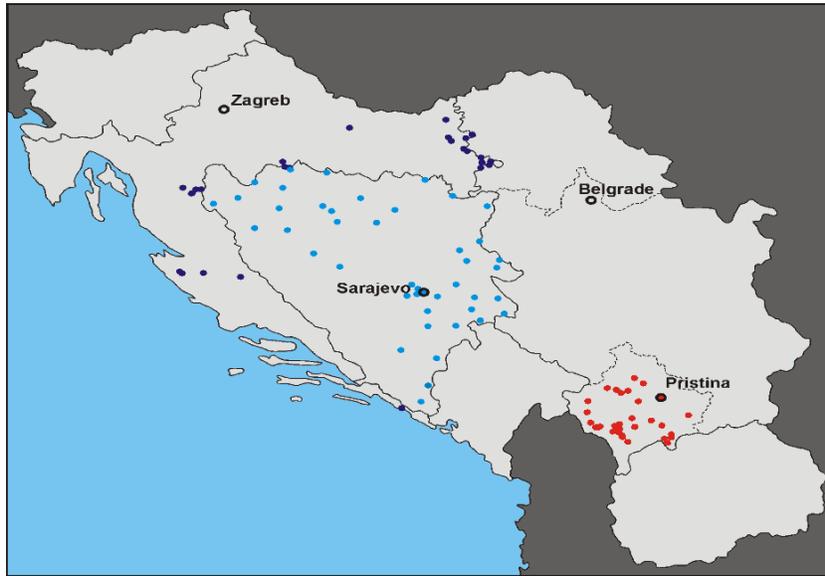
The 66 counts in the indictments were allegedly committed in Croatia, BiH, and Kosovo over a period of nine years. It is useful to keep in mind the distinction between the terms ‘count’ and ‘charge.’ According to the explanation given in the ICTY’s Judgement in the case of *Milutinović et al.*, a charge represents a potential basis for the imposition of liability, while a count alleges the commission of a statutory offence on the basis of one or more charges, related to many different individually named victims, different geographic locations, and different forms of responsibility. A count has been described as “nothing more than a means by which the Prosecution organises the charges in an indictment.” Further, an accused person “may be convicted of a count if only one of the charges under that count is established. It is each charge therefore that holds the potential of exposing the accused to individual criminal liability.”⁷⁹ The 66 counts for which Milošević was indicted reflected many hundreds, if not thousands, of charges.

Milošević faced charges in three separate indictments – for crimes in Croatia, in BiH, and in Kosovo – which included charges of grave breaches of the Geneva Convention, crimes against humanity, violations of laws and customs of war, and genocide. The geographical distribution of

⁷⁸ Human Rights Watch, *Weighing the Evidence: Lessons from the Slobodan Milošević Trial* (December 2006); Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge, UK: Cambridge University Press, 2007); Gillian Higgins, “The Impact of the Size, Scope, and Scale of the Milošević Trial and the Development of Rule 73,” *Northwestern Journal of International Human Rights* 7, no. 2 (Summer 2009): 239-260; Judith Armatta, *Twilight of Impunity: The War Crimes Trial of Slobodan Milošević* (Durham, NC: Duke University Press, 2010). Timothy Waters, ed., *The Milošević Trial: An Autopsy* (New York: Oxford University Press, 2014). For a representation of the trial from the Defence point of view, see: John Laughland, *Travesty: The Trial of Slobodan Milošević and the Corruption of International Justice* (London: Pluto Press, 2007).

⁷⁹ Judgement, *Prosecutor v. Milutinović, et al.*, No. IT-05-87-T (26 February 2009), para. 70.

crimes in the indictments is shown on Map 1 (below). From the outset, the number of crime sites alone indicated that the trial would be a major test of the administration of justice for any court, but especially in one as new and inexperienced as the ICTY. Once the trial ended, and without a judgement, both professionals and the public wondered how the scale of the indictments and the extent of the charges had impacted the speed and management of the trial.⁸⁰



Map 1: Crime scenes as charged in the three Milošević indictments

The extensive nature of the charges caught the attention of the judges, too, and under instructions of the Trial Chamber, the Prosecution amended all three indictments between November 2001 and October 2002, reducing the number of counts and crime sites from the original indictments.⁸¹ In an attempt to manage the trial, the Court also imposed a time limit on the parties in presenting their cases, resulting in a further cutback of the evidence presented, which meant that evidence for some crimes was not presented at all. At the end of the Prosecution case in February 2004, the *amici curiae* filed a Defence Motion for Judgement of Acquittal arguing that some charges

⁸⁰ See, for example: Michael Farquhar and Janet Anderson, “Serb Leader’s Death ‘Tragic for Victims,’” *Tribunal Update*, no. 444, 11 March 2006; Gwyn MacCarrick, “Lessons from the Milošević Trial,” *On Line Opinion*, 26 April 2006, <http://www.onlineopinion.com.au/view.asp?article=4394&page=1> (accessed 4 May 2014).

⁸¹ For comparison, see the original Kosovo indictment from 24 May 1999 and the amended indictment from 19 June 2001; the original Croatia indictment from 1 October 2001 and the amended indictment from 23 October 2002; and the original Bosnia indictment from 22 November 2001 and the amended indictment from 22 November 2002.

should be dismissed on the basis that the Prosecution had not presented enough or any evidence to prove that they occurred.⁸²

In June 2004, the Trial Chamber issued its Decision on the Motion for Judgement of Acquittal (hereinafter, the Half-Time Judgement) and a considerable number of crime site incidents, most of which related to crimes alleged in the BiH indictment, were dismissed.⁸³ The Prosecution had to hope that they had provided enough evidence to meet the ‘widespread and systematic’ test required to establish crimes against humanity and illustrate an overall plan.⁸⁴ Yet, the Prosecution was unsure of what this test was or how to guarantee that they had offered evidence for enough crimes sites to prove a pattern of crimes.⁸⁵

Arguably, the Trial Chamber’s constraint on the time allotted to each party to present evidence should have ensured a brisk pace of the trial. The Prosecution’s part of the trial went smoothly and was within the time limit imposed by the Chamber; which, by its own calculation, determined that the Prosecution spent 360 hours proving its case, not counting those hours used for cross-examination and procedural/legal arguments. Altogether, for the three indictments and including cross-examinations by Milošević and all procedural arguments, the Prosecution part of the case would have occupied 294 full eight-hour working days.⁸⁶

Milošević was given the same amount of time to present his Defence case; again, not including cross-examination and procedural issues. But there was a considerable difference between the

⁸² *Amici Curiae* Motion for Judgement of Acquittal (3 March 2004).

⁸³ Decision on Motion for Judgement of Acquittal (16 June 2004), Schedules A through F. The Decision is hereinafter referred to as the Half-Time Judgement. Also see: Boas, *The Milošević Trial*, 80. The Decision on Motion for Judgement of Acquittal is the only document akin to a judgement offered by the Chamber regarding those counts that the *amici curiae* claimed were inadequately established. The test applied by the judges at that stage was not whether they were satisfied beyond a reasonable doubt that the offence(s) had been committed but whether there was sufficient evidence for the case on that count to continue and whether there was enough evidence to convict.

⁸⁴ For discussion, see: Prosecution’s Position in Relation to Management of Trial Proceedings and the Regime for Presentation and Admission of Evidence with Comments on Issues Concerning the Accused’s Health (5 April 2002).

⁸⁵ “If you only prove one spot in Bosnia or one spot in Croatia, you never prove the widespread and systematic nature of the campaign, which is what this trial is about. We have recently, and quite specifically, effectively invited the judges to look at this and indicate have we got enough. Because there’s no test. Is it ten villages? Is it four municipalities? Or is it one? I don’t know. And if I put on too little, then the case fails.” Statement by Prosecutor Geoffrey Nice, as recorded in *Milošević on Trial*, directed by Michael Christofferson (Copenhagen: Team Productions, 2007).

⁸⁶ For discussion, see: Order Rescheduling and Setting Time Available to Present Defence Case (25 February 2004); Order Concerning the Time Available to Present the Defence Case (10 February 2005); Order Recording Use of Time Used in the Defence Case (1 March 2005); and Human Rights Watch, *Weighing the Evidence*, 72.

technically efficient way the team of professional Prosecution attorneys presented evidence and Milošević's slow progress. The Prosecution presented its whole case, including the testimonies of 296 *viva voce* witnesses and 59 witnesses whose testimonies were presented in written form, in their 360 hours.⁸⁷ Milošević used his time less efficiently, partly because he insisted on examining all his witnesses orally, often at length, and chose not to make use of the possibility of written testimonies. Milošević presented the testimonies of only 42 Defence witnesses, covering mostly the Kosovo indictment, and was just starting to call witnesses for the Croatian indictment when he died. Several months beforehand, in November 2005, the Trial Chamber had calculated that Milošević had already used 75% of the 360 hours allotted to him, in which he had dealt almost exclusively with the Kosovo part of the case.⁸⁸ Even if the trial had reached its conclusion, the Defence case could not have been completed by April 2006, as mandated by the Trial Chamber, because no evidence for the Bosnia indictment would have been presented by then.

Self-Representation

In August 2001, the Trial Chamber granted Milošević the right to represent himself. This is allowed under the Statute and Rules of the ICTY; however, no mechanism, guidance, or protocol regulates the right of self-representation.⁸⁹ Self-representation in such a complex case would have been a challenge for the court in the most ideal of circumstances, but in combination with Milošević's deteriorating health condition, it became a major obstacle to efficiency. Delays attributed to Milošević's recurring health problems highlighted the issues of fairness that exist in a trial of this kind. Is fairness delivered only if the right of the Accused to represent him/herself is preserved even if he/she is physically unfit? Is fairness delivered only when victims have the right to see justice done, even if that requires the forced imposition of defence counsel on a sick accused person and continuation of the trial proceedings in his/her absence? Can both be achieved or must one concept of fairness yield, in whole or in part, to the other? The judges

⁸⁷ 'Viva voce' is live evidence given by a witness in court.

⁸⁸ Scheduling Order for a Hearing (22 November 2005), 3.

⁸⁹ Trial Transcript, Pre-Trial Status Conference (30 August 2001), 18. Status conferences are held before a trial starts so that the Prosecution and Defence can discuss practical issues concerning the preparation and conduct of the upcoming trial. Also see: ICTY Statute, Article 21, section 4(d).

resolved this question by affording extensive rights to Milošević to represent himself, whatever additional difficulties this caused due to his ill health.

Adding to the confusion over Milošević's legal representation, the Trial Chamber invited the Registrar to assign three *amici curiae* to the case. The order that assigned them to the case explicitly stated that the *amici* did not represent the Defendant but were there to assist the court to ensure that the case was conducted properly.⁹⁰ Yet, no concrete instructions were given as to how the *amici* should play this role and Milošević chose not to give them such instructions himself. Still, the *amici* managed to file hundreds of motions, and all three *amici* – including Branislav Tupušковиć, the only one from Serbia – took part in cross-examining Prosecution witnesses.⁹¹ Milošević also had a team of legal advisors of his own choosing, who met with him regularly and assisted him with preparations.⁹²

Self-representation by Milošević impacted the pace of the case largely because of the time he spent cross-examining Prosecution witnesses and, later, examining his own witnesses; often addressing issues that had no probative relevance for the case – something about which he was cautioned by judges on a regular basis.⁹³ His health was also regularly on the agenda of the court. In November 2002, nine months after the start of the trial, the parties were invited by the Trial Chamber to submit their views and proposals on how to deal with the effects of Milošević's health on trial proceedings. The possibility of appointing counsel to assist Milošević was discussed, something that would have been very different than the appointment of *amici curiae*. He resisted this proposal and defended his right to self-representation, saying that under no conditions would he abandon his fight in the courtroom.

⁹⁰ Order Inviting Designation of *Amicus Curiae* (30 August 2001). The following tasks were assigned to the *amicus*: “(a) making any submissions properly open to the accused by way of preliminary or other pre-trial motion; (b) making any submissions or objections to evidence properly open to the accused during the trial proceedings and cross-examining witnesses as appropriate; (c) drawing to the attention of the Trial Chamber any exculpatory or mitigating evidence; and (d) acting in any other way which designated counsel considers appropriate in order to secure a fair trial...” Their tasks were expanded by the Order Concerning *Amici Curiae* (11 January 2002), to: “1) drawing the attention of the Trial Chamber to any defenses, for example, self-defense, which may properly be open to the accused to raise on the evidence; and 2) making submissions as to the relevance, if any, in this trial of the NATO air campaign in Kosovo. The *amici curiae* may also assist the Trial Chamber, if appropriate, by identifying witnesses whom the Trial Chamber may itself wish to call pursuant to Rule 98 of the Rules and reiterates that the *amici curiae* should assist the Trial Chamber in any other way they consider appropriate.”

⁹¹ Human Rights Watch, *Weighing the Evidence*, 72.

⁹² Milošević's legal advisors were Zdenko Tomanović, Dragoslav Ognjanović, and Branko Rakić.

⁹³ For example, see the reactions of the judges in the courtroom: Trial Transcript (15 March 2002), 2461; Trial Transcript (12 June 2002), 6824-6889 and 6895; and Trial Transcript (10 April 2003), 18933.

...you yourselves have provided for that possibility in your Rules and regulations, although I don't consider this Tribunal of yours to be legal. But as you yourselves do, then I assume you adhere to the Rules you laid down yourselves. Therefore, this position on the part of the opposite party I consider to be completely illegal, absurd, and ill-intentioned, and I don't think it deserves any further explanations at all, nor can anything along the lines of what they have proposed be acceptable.⁹⁴

The Trial Chamber decided against imposing Defence counsel in light of the objections of Milošević. However, his health did not improve over time, and delays became more frequent as the case progressed. In September 2003, the Prosecution again pushed for counsel to be appointed to assist Milošević, at least with crime site evidence. If that were that to happen, the Prosecution argued, it would be possible to continue with trial proceedings when Milošević was unable to attend court as a result of ill health.⁹⁵ After all, the trial proceedings were interrupted thirteen times just during the Prosecution's part of the case. Nonetheless, Milošević's resistance persisted and the Trial Chamber repeatedly decided against the appointment of counsel. While the Prosecution correlated his frequent ill health episodes with the appearance of witnesses who were unpleasant or unfavourable to Milošević – such as Ante Marković, whose testimony had to be postponed – a detention unit official monitoring Milošević's health did not find any evidence of this, nor that he had tried to use his blood pressure problems as a tool to slow the trial more generally.⁹⁶

The Defence part of the case, originally scheduled to start on 8 June 2004, was postponed on five occasions.⁹⁷ It eventually began on 31 August 2004, and in September 2004, the Prosecution once again called upon the Trial Chamber to reconsider the right of the Accused to self-representation.⁹⁸ The Chamber responded with an order that adjusted the court schedule to accommodate Milošević's failing health, reducing the working week from five to three days, and

⁹⁴ Procedural Hearing (11 November 2002), 12835.

⁹⁵ Prosecution's Submission on the Implications of the Accused's Recurring Ill-health and the Future Conduct of the Case (Corrected Version) (30 September 2003), 2.

⁹⁶ See: US Department for War Crimes Issues (S/WCI), "ICTY: AN INSIDE LOOK INTO MILOSEVIC'S HEALTH AND SUPPORT NETWORK," Diplomatic Cable, 12 November 2003. Available on Wikileaks: https://www.wikileaks.org/plusd/cables/03THEHAGUE2835_a.html (accessed on 19 March 2015).

⁹⁷ Scheduling Order for Hearing (22 December 2005), 3.

⁹⁸ Reasons for Decision on Assigned Counsel (22 September 2004).

it finally assigned legal counsel to assist Milošević. The ruling stated, *inter alia*, that there was a “real danger” that the trial would not conclude without the assistance of counsel.⁹⁹ The order allowed Milošević to continue to participate in the conduct of his case, “with the leave of the Trial Chamber” and to examine witnesses after the assigned counsel had done so.¹⁰⁰ However, this decision was effectively overturned by the Appeals Chamber, which agreed in principle on the necessity of assigning legal counsel but which modified their responsibilities so as to minimise their impact. In reality, nothing changed, and the Defence case continued as it had before.¹⁰¹

In April 2005, Milošević again fell ill, during the testimony of Defence witness Kosta Bulatović, and the Trial Chamber decided for the first time to proceed in Milošević’s absence. The attempt failed, as the witness refused to answer questions in cross-examination by the Prosecution, saying that he had come to testify at the request of Milošević, whom he still considered his President. As long as Milošević was absent from the courtroom, Bulatović refused to testify or make any statements, explaining:

I have come at your invitation to testify here for my president, the president of the state, Mr. Slobodan Milošević. He asked me questions in your presence, and his examination has been completed. I was cross-examined for half an hour by Mr. Nice, the Prosecutor, and I think that there are some 40 minutes to go... I am Milošević’s witness and nobody else’s witness. So without his presence, I cannot make any statements nor can I have any conversation. Thank you.¹⁰²

Bulatović was subsequently charged with contempt of court on 20 April 2005, which led to a four-month prison sentence, suspended for two years due to his own poor health.¹⁰³ Bulatović might actually have gone to jail if he had committed further contempt by refusing to answer questions on a second occasion; but, by the time Bulatović returned to give evidence on 25 April 2005, Milošević had recovered sufficiently and Bulatović’s testimony was concluded in his presence. Temporary continuation of the trial *in absentia* would have represented a major

⁹⁹ Ibid., para. 65.

¹⁰⁰ Ibid., para. 69.

¹⁰¹ Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel (1 November 2004), para. 20.

¹⁰² Testimony of Kosta Bulatović (19 April 2005), 38591-38592.

¹⁰³ Decision on Contempt of the Tribunal (13 May 2005).

breakthrough in resolving the problems caused by Milošević's ill health. But witnesses like Kosta Bulatović forced the court to submit to Milošević's notion of how the trial should be managed.

A workable and effective solution, to continue the trial with assigned counsel, did not materialise; and many interruptions due to Milošević's health problems extended the duration of the trial beyond the total of its actual courtroom hours. The length of the trial – slightly over four years – does not accurately reflect the time spent in the courtroom. If sessions had been held five working days each week, with a daily schedule from 9.00 to 16.00, the whole trial would have been considerably shorter and could have been concluded in two to three years.

Joinder or Severance?

The issue of the scope of the indictments remained an important one in debates about best management of the trial. The difficult question was whether all three indictments should have been tried together or in two separate trials: one for the Kosovo indictment and one for the Croatia and Bosnia indictments. But in December 2001, the Prosecution filed a motion seeking joinder, whereby all three indictments would be addressed in a single trial on the basis that they were all part of the same overarching plan.¹⁰⁴ The Trial Chamber initially ruled against combining all three indictments but was subsequently overruled by the Appeals Chamber in February 2002, which left open the possibility of severing one or more of the three indictments if the trial threatened to become unmanageable at any later stage.¹⁰⁵ The Trial Chamber did indeed later raise the possibility of severing the indictments, proposing two trials in July 2004.¹⁰⁶ The Prosecution strongly rejected severance, though, arguing that the problem arose not from Milošević's ill health but from his insistence on self-representation and contending that the solution was the imposition of professional legal counsel to conduct Milošević's defence.¹⁰⁷ A submission filed by the *amici curiae* also opposed severance, and the Trial Chamber made the decision not to sever the cases.

¹⁰⁴ Motion on Joinder (27 November 2001).

¹⁰⁵ Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (18 April 2002), para. 26.

¹⁰⁶ Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments (21 July 2004).

¹⁰⁷ Prosecution's Submission in Response to Trial Chamber's Decision (19 July 2004).

Discussion of this topic was again on the Court's agenda in November 2005, as the judges grew concerned about the time the trial was taking and the prospect that it might never conclude. The Trial Chamber invited the parties to consider severance of the Kosovo part of the trial in order to secure a judgement for Kosovo, leaving the Croatia and BiH crimes to be tried later.¹⁰⁸ At a hearing held on 29 November 2005, both the Prosecution and Milošević argued – for different reasons – that all three indictments should continue to be tried together. Milošević argued that there had been one war, in which Yugoslavia had been destroyed in a planned manner, and that his trial was a continuation of that war and the ICTY one of its instruments.¹⁰⁹ The Prosecution made a case for “judicial economy,” noting that many high-level witnesses would need to be called twice if there were two trials. But the most persuasive argument articulated by the Prosecution was that trying events “back to front” could prejudice both parties to the case in unpredictable ways. The Prosecution argued that the Trial Chamber's December 2001 Decision to start the trial with the Kosovo part of the indictment effectively made severance impossible. In any Kosovo-only trial, evidence from the Croatian or Bosnian wars that could illuminate Milošević's developing state of mind applicable to the Kosovo conflict would have been excluded from consideration. And, if evidence was presented in the Kosovo trial that related back to events in the earlier conflicts, findings made might have had to be accepted without challenge in the subsequent trial that would cover earlier events.¹¹⁰ With this consideration in mind, the Prosecution's position was that the trial could be severed only if the Croatia and Bosnia indictments were tried first, following the chronology of events from 1991 to 1999.

Milošević's assigned counsel filed a submission on his behalf that focused on the unmanageability of the case, caused, in their view, by the Prosecution's presentation of the case. Still, even they did not support severance. In fact, the only person in the courtroom who supported severance for the Kosovo indictment was an *amicus curiae*, and the length of the trial was his core argument in favour of severance.¹¹¹ The time allocated for the Defence was used in such a way that, by November 2005, Milošević had just 25% of his time remaining and still

¹⁰⁸ The Trial Chamber issued an Order inviting the parties to make a submission. See: Scheduling Order for a Hearing (22 November 2005).

¹⁰⁹ Trial Transcript, Procedural Hearing (29 November 2005), 46695.

¹¹⁰ Prosecution Submission in Response to the Trial Chamber's 22 November 2005 ‘Scheduling Order for a Hearing’ on Severing the Kosovo Indictment (28 November 2005), para. 53.

¹¹¹ Trial Transcript, Procedural Hearing (29 November 2005), 46714-46715. Also see: Decision In Relation To Severance, Extension of Time and Rest (12 December 2005).

needed to present the rest of his Kosovo defence and start and finish the defence for both the Croatia and Bosnia indictments.

On the basis of the way this trial developed, one could conclude that a defendant who is not physically fit enough to conduct their own defence on a daily basis, as professional attorneys must do, should not be given the option of self-representation. Instead, a defence lawyer should be imposed by the court on any such accused who declines to engage counsel, from the outset of proceedings. For Milošević – whose absences due to ill health were a permanent threat to the trial and to his own ability to defend himself – counsel should have been imposed much earlier, for his own sake and for the sake of justice. The judges, acting out of concern for the Accused personally and in order to uphold (or be seen to be upholding) judicial standards of fairness, may have inadvertently deprived victims of the justice they so needed and deserved.