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

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*We waste a lot of time waiting for spectacular new material...  
We haven't sat down and taken a very close look at the material we have.*

*Bettina Stagneth, author of Eichmann Before Jerusalem, interview, New York Times, October 2014*

## **Chapter I: Theoretical Framework, Scope of the Research, and Sources**

Why were expectations so high for the Milošević trial? Why was disappointment about its premature end so widespread? What did victims and the public hope for from the judgement or the verdict? Did they wish to see Milošević found guilty and sentenced to a long prison term? Would the text of a judgement have provided answers as to why mass atrocities had occurred, and at the instigation of whom? And most importantly, can the record of his unfinished trial meet any of those expectations?<sup>112</sup>

Some of these answers can be found in transitional justice literature on mass atrocities trials; trials which, *inter alia*, are meant to adjudicate individual responsibility and establish the truth about controversial events from the past.<sup>113</sup> International criminal trials represent one way of addressing the commission of crimes by past regimes, and they have been reintroduced as a transitional justice mechanism since the 1990s. But debate about the purpose of trials that deal with mass atrocities extends back to the Nuremberg and Tokyo Tribunals and is dominated by two opposing views – one, that mass atrocities trials should fulfil the legal purpose of delivering justice and meting out punishment, and another that stresses the importance of the extralegal objectives of mass atrocities trials in establishing truth and documenting history.<sup>114</sup>

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<sup>112</sup> Some of these questions have been dealt with in: Nena Tromp: “Understanding the Milošević Case: Legacy of an Unfinished Trial,” in *The Genocide Convention: The Legacy of 60 Years*, eds., H.G. van der Wilt, J. Vervliet, G.K. Sluiter, J.Th.M. Houwink ten Cate (Leiden: Martinus Nijhoff, 2012), 27-39.

<sup>113</sup> Teitel, *Transitional Justice*, 72.

<sup>114</sup> For discussion on this debate in general, see: Bilsky, *Transformative Justice*; Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT: Yale University Press, 2001); Michael R. Marrus, “History and the Holocaust in the Courtroom,” in *Lessons and Legacies*, ed., Ronald M. Smelser, vol. 5, *The Holocaust and Justice* (Evanston, IL: Northwestern University Press, 2002), 215–239; Osiel, *Mass Atrocities*; Gerry Simpson, “Didactic and Dissident Histories in War Crimes Trials;” and Teitel, *Transitional Justice*. On the view that trials are meant to deliver punishment, Hannah Arendt quotes Nuremberg Executive Trial Counsel Robert Storey that “the purpose of a trial is to render justice, to mete out punishment, and nothing else,” in Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1963), 233. Also see: Ian Buruma, *Wages of Guilt: Memories of War in Germany and Japan* (Plume: 1995), in which Buruma wrote:

Scholar Ruti Teitel connects transitional justice with five conceptions of justice: criminal justice, historical justice, reparatory justice, administrative justice, and constitutional justice.<sup>115</sup> Teitel characterises transitions as times following a regime change in which ‘successor trials’ are commonly used as a primary means of establishing a measure of historical justice. She argues that the pursuit of historical truth is embedded in a framework of accountability and in the pursuit of justice, to which criminal trials contribute.<sup>116</sup> In defining historical justice, Teitel applies the Enlightenment view, in which history is considered teacher and judge and historical truth is equated with justice.<sup>117</sup> Yet the assumption that ‘truth’ and ‘history’ are one and the same is not universally accepted. Teitel cautions that when history takes its “interpretative turn” there is no single, clear, and determinate understanding or lesson to draw from the past. Instead, one must recognise the degree to which historical understanding depends on political and social contingencies.<sup>118</sup>

Lawrence Douglas qualifies all Holocaust trials as “orchestrations designed to show the world the facts of astonishing crime, but also to demonstrate the power of law to reintroduce order into the space evacuated of legal and moral sense.”<sup>119</sup> He has introduced the term ‘didactic legality’ and argues that the trials of the Holocaust blurred the very boundary between the legal and extralegal.<sup>120</sup> Douglas finds that insisting on the legal aspect of trials is a “needlessly restrictive vision of the trial as legal form.”<sup>121</sup> While recognising that the primary responsibility of a criminal trial is to resolve questions of guilt in a procedurally fair manner, Douglas advocates integration of the legal and extralegal purposes of mass atrocities trials.<sup>122</sup>

Other proponents of recognising the extralegal value of mass atrocities trials stress that criminal trials must be conducted with a pedagogical purpose in mind. Mark Osiel asserts that, in times of democratic transition, the need for a public reckoning with the question of how horrific events of recent history could have happened is more important for democratisation than criminal law’s

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“When the court of law is used for history lessons, then the risk of show trials cannot be far off.” On the view that trials have extralegal purposes, see: Marrus, “History and the Holocaust,” 215–16.

<sup>115</sup> Teitel, *Transitional Justice*, 70.

<sup>116</sup> *Ibid.*, 73.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> Douglas, *The Memory of Judgment*, 3.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, 2.

<sup>122</sup> *Ibid.*, 3.

more traditional objectives. In his opinion, effective mass atrocities trials stimulate public discussion in ways that foster toleration, moderation, and civil respect.<sup>123</sup> Leora Bilsky warns against compartmentalising the discussion into the legal versus the historical, though. In her view, this polarisation distracts from the fact that *transformative* trials – a term she introduced – should “fulfil an essential function in a democratic society by exposing the hegemonic narrative of identity to critical consideration.”<sup>124</sup> In other words, the legal and the historical do not compete with, but rather complement, each other.

A study by Jelena Subotić, aptly entitled *Hijacked Justice*, examines the fact that elites may not be motivated to agree to transitional justice mechanisms because they wish to deal with the past. Instead, they may use transitional justice for purposes other than achieving justice and establishing truth. Subotić identified three political aims of state-level elites in Serbia that inspired them to meet the state’s obligation to cooperate with the ICTY: to get rid of domestic political opponents, to obtain international financial aid, and to gain admission to the European Union. Ignoring the true purpose of the ICTY as an institutionalised legal response to mass atrocities, political elites in Serbia contributed to its politicisation, undermining the primary objectives of transitional justice processes to render justice and ascertain the truth. Subotić argues that ‘hijacking justice’ in this way can backfire because it can “foster domestic backlash, deepen political instability, or create politicised versions of history.”<sup>125</sup>

### **The Courtroom Narrative: “Two Truths” about the Conflict**

Any mass atrocities trial record inevitably reflects complex historical interpretations of the period with which it deals. Each side in any conflict will have its own theory of how the conflict turned violent and who started it; and there is no mechanism to indicate which of the two competing narratives produced in a courtroom will prevail outside of it. The nature of the legal system applied at international criminal courts is such that the Prosecution and Defence are likely to present competing narratives, or two truths, about a conflict.<sup>126</sup> Depending on how many

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<sup>123</sup> Osiel, *Mass Atrocities*, 2.

<sup>124</sup> Bilsky, *Transformative Justice*, 7.

<sup>125</sup> Jelena Subotić, *Hijacked Justice* (Ithaca, NY: Cornell University Press, 2009).

<sup>126</sup> As noted in the Introduction, international law has also incorporated elements of the inquisitorial system to become a unique hybrid system.

persons are on trial, sometimes there are even more than two versions of events presented, and these narratives produced in the courtroom persist regardless of the trial judgement.<sup>127</sup>

Kirchheimer described the polarised narratives that can be introduced in the courtroom as a gamble. In some ways, he asserted, the risk of making every moment of traumatic history subject to criminal law is a “double wager” – not only might a defendant prevail, but even if a trial ends in conviction it may fail in its didactic aim. He called this an “irreducible risk” and the inevitable *sine qua non* of a just trial.<sup>128</sup> In the debate over the prevailing narrative of the Holocaust, for instance, Douglas acknowledges that the law succeeded at times but, at others, lost this wager. Nevertheless, he sees the Nuremberg and Eichmann trials as “powerful, imaginative, and socially necessary responses to extreme crimes.”<sup>129</sup>

Gerry Simpson offers an example of this legal double wager in the case of Klaus Barbie, who was put on trial and eventually convicted of crimes against humanity committed by Nazis in occupied France. His trial, held in 1987, turned quite unpredictably into a test for the entire French nation, causing cultural upheaval and unease. At times, France even appeared to be placed alongside Barbie as a co-defendant, accused of having collaborated with the Nazis during the occupation and of having carried out crimes against humanity in Algeria during the colonial struggle there.<sup>130</sup> With the focus of public attention shifted toward French crimes committed in Algeria, it seemed occasionally as if Barbie was no longer the defendant at all.<sup>131</sup>

Milošević seemed to be very much aware of the double wager of such trials. In his Opening Statements,<sup>132</sup> he repeatedly addressed the responsibility of Germany, the Vatican, the European Community, and the United States as principal actors in the violent destruction of Yugoslavia:

By instrumentalising extremely complex events in the territory of Yugoslavia and by placing the responsibility on Yugoslavia and myself personally as aggressors, a

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<sup>127</sup> “At Nuremberg, with twenty-two defendants, including Martin Bormann who was tried *in absentia*, the accused often disagreed among themselves in describing what had happened in Nazi Germany and reacted quite differently to accounts of the persecution and murder of European Jews.” From: Marrus, “History and the Holocaust,” 229.

<sup>128</sup> Kirchheimer, *Political Justice*, 324.

<sup>129</sup> Douglas, *The Memory of Judgment*, 5.

<sup>130</sup> Simpson, “Didactic and Dissident Histories,” 802-3.

<sup>131</sup> *Ibid.*, 834.

<sup>132</sup> In ICTY trials, both parties have the right to make an Opening Statement at the start of each part of the trial; thus, Milošević gave an Opening Statement in both February 2002, at the start of the Prosecution part of the trial, and again in August 2004, at the start of the Defence part of the trial.

very obvious tactic was used to close the circle and prevent logical thinking based on empirical principles. Senseless, vulgar theories about bad guys...cannot serve to explain historical facts and provide the historical responsibility for the destruction of a state. The joint criminal intent existed but it didn't proceed from Belgrade, however, nor did it exist in Belgrade at all. Quite the contrary! It existed through the joint forces of the secessionists, Germany and the Vatican, and also the rest of the countries of the European Community and the United States.<sup>133</sup>

Milošević's choice of Defence strategy, as puzzling as it might have seemed to the Prosecution and the outside world from time to time, reflected an effort to establish his own counternarrative of what happened during the war and why. But, besides Prosecution and Defence narratives, legal and historical narratives are also shaped during a trial. And, legal and historical narratives overlap, complement, and influence each other, with one distinguishing difference between the two: a historical narrative comprises material presented in and outside the courtroom, while a legal narrative is shaped in the courtroom alone.

### *History in the Courtroom*

Research on mass atrocities trials has attempted to determine, among other things, the extent that Prosecution and Defence courtroom narratives influence collective memory and history.<sup>134</sup> In a trial, as in the writing of history, the judge, like the historian, aspires to produce a coherent narrative – one that explains and interprets as well as records.<sup>135</sup> Although historians and legal scholars who have addressed the relationship between the legal and extralegal value of mass atrocities trials see no immediate contradiction between a trial's legal objectives and its extralegal effects, they do emphasise that legal judgements and proceedings should never be looked to for definitive historical interpretations of the events concerned. Historian Charles Maier asserts that “doing justice” and “doing history” are related activities, as a historian endeavours to “do justice” by articulating the aspirations of protagonists and exploring their

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<sup>133</sup> Trial Transcript, Defence Opening Statement (31 August 2004), 32173-32174.

<sup>134</sup> See: Bilsky, *Transformative Justice*, 3, 7; and Charles S. Maier, “Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission,” in *Truth v. Justice: The Morality of Truth Commissions*, eds., R. I. Rotberg and D. Thompson (Princeton, NJ: Princeton University Press: 2000), 271.

<sup>135</sup> Maier, “Doing History, Doing Justice,” 271.

choices.<sup>136</sup> Michael Marrus, who studies the interplay between history and law, sees the records produced at mass atrocities trials as historical sources like any others. He underscores the fact that historians must evaluate every source with an eye to its provenance, since all sources are in some sense “tainted” and war crimes trial records are certainly no exception. The material used in a court is limited by legal standards and procedural rules that exclude some sources commonly depended upon by historians and which would be considered essential for shaping historical opinion. For example, although hearsay is allowed at the ICTY under certain circumstances, other materials used by historians – such as reports about the political atmosphere or general statements made by reliable commentators about the tone set by leaders – may not be allowed as evidence in the courtroom.<sup>137</sup>

Ruti Teitel argues that it is impossible to fix the past, which she says would “be a futile attempt to stop the state’s historical accounting, to exhaust its politics and its potential for progress.”<sup>138</sup> She stresses that any legal response to mass atrocities produces transitional narratives and leaves behind, explicitly or implicitly, a historical account.<sup>139</sup> This means that a judgement, though the final stage in legal proceedings that are fixed in time, does not represent a definitive historical interpretation of the events judged.<sup>140</sup> Yet, there will always be history in a judgement. According to Richard Wilson, a human rights scholar, the judgements in two ICTY cases he has analysed “are characterised by detailed contextualisation of criminal acts and extensive historical interpretation.”<sup>141</sup> He also contends that charges such as genocide, which emphasise the collective nature of the crime, compel the court “to situate individual acts within long-term, systematic policies.”<sup>142</sup>

The Milošević trial illustrates that it is desirable, even essential, for the courtroom to be a place where there is an understanding of history, for at least two reasons. First, historical context is necessary in establishing and proving the guilty mind – *mens rea* in legal terminology – of an

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<sup>136</sup> Ibid., 270.

<sup>137</sup> Marrus, “History and the Holocaust,” 228.

<sup>138</sup> Teitel, *Transitional Justice*, 117.

<sup>139</sup> Ibid.

<sup>140</sup> Fergal Gaynor, “Uneasy Partners: Evidence, Truth and History in International Trials,” *Journal of International Criminal Justice* 10, no. 5 (2012): 1257-1275.

<sup>141</sup> Richard Wilson, “Judging History: The Historical Record of the International Criminal Tribunal of the Former Yugoslavia,” *Human Rights Quarterly* 27, no. 3 (2005): 908.

<sup>142</sup> Ibid.

accused person and of fellow high-level officials involved in articulating and executing a political plan that eventually led to the commission of crimes. Since a criminal plan often derives from ideological concepts conceived in the past, a proper understanding of such an ideology applied contemporaneously is best achieved, or perhaps can only be achieved, when placed in a broader historical context. Second, historical context is necessary in the courtroom because it allows judges to comprehend the political dynamics that led to the occurrence of mass atrocities. In the Milošević case, a knowledge of historical political events was required if the judges were to grasp how political elites in Yugoslavia had articulated Serbian state ideology and when Milošević had embraced it as a platform for political and military action.

Awareness of these complicated and contextual dynamics on the part of judges helps deflect attempts by defendants to reframe history in support of their own narrative. Milošević claimed throughout his trial, for instance, that the international community had conspired against him. “Accusations levelled against me are an unscrupulous lie,” he said in his August 2004 Opening Statement, arguing that Yugoslavia had in fact been destroyed by outside forces “through a war which continues to be waged.” He said the international public had been offered a “distorted picture” and asserted that “everything has been presented in a lopsided manner...in order to protect from responsibility those who are truly responsible and to draw the wrong conclusions about what happened.”<sup>143</sup>

### **The Trial Record**

Materials selected as evidence by the Prosecution and Defence in the Milošević case now constitute an unmatched historical source; and even with some gaps in the trial record, it incorporates documents from state archives that would have otherwise been unavailable to the public and to researchers for many decades. Indeed, some of the trial material would never have surfaced at all were it not for the obligation of states to cooperate with the ICTY, or more precisely, to provide the OTP and the Defence with materials upon request. Still, there remains trial material that is officially available and yet inaccessible to the public; and the (in)accessibility of ICTY records to the public is an important issue. The ICTY Court Record (ICR), an electronically accessible database, is sometimes more of a challenge than an aid to

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<sup>143</sup> Trial Transcript, Defence Opening Statement (31 August 2004), 32158.

researchers because it comprises only a selection of materials, not the full record of every trial, and remains incomplete for a number of technical and other reasons.<sup>144</sup>

Particular attention was paid in this research to pieces of evidence that triggered important debate after being presented in court, compelling former Yugoslav societies to face the past and deal with uncomfortable truths. Among these materials were records from meetings which revealed Milošević's state of mind before, during, and after the armed conflicts. Investigation into Milošević's political and criminal behaviour had initially found that Milošević preferred one-on-one meetings and had suggested that these meetings, both domestic and international, were not officially recorded and archived as prescribed by domestic laws and regulations. Milošević was said to have been regularly accompanied by Goran Milinović, his Chef de Cabinet, who supposedly made notes.<sup>145</sup> But in 2001, the Prosecution discovered that there were indeed records of these meetings; and that the most interesting – and arguably most valuable – material was located in the state archives of the FRY and Serbia.

What makes the Milošević trial record especially interesting as a source of history is the fact that it includes responses by Milošević himself to every piece of evidence brought against him. Milošević not only represented himself in court, and therefore responded in that capacity to the evidence presented, but also made remarks throughout the trial from the standpoint of a man attempting to defend his political and private decisions. The two competing narratives in his trial – those of the Prosecution and of Milošević himself, as the Defence – are traced in this study through the oral and written argumentation in which both parties asserted their positions, by presenting evidence and questioning witnesses in court, and in indictments, briefs, opening statements, and various motions. Some of these sources have evidentiary value and some do not. An example of a document that is informative but is not evidentiary is a pre-trial brief, filed by the Prosecution after an indictment has been confirmed.<sup>146</sup> While an indictment is a reasonably short document, a pre-trial brief lays out the Prosecution case to the Court and to the Defence. It

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<sup>144</sup> There are more than 190,000 public records on the ICTY website as of mid-2014, and it is updated daily. These records range from arrest warrants, to motions and trial evidence, to final appeal judgements.

<sup>145</sup> For examples, see: Testimony of General Wesley Clark (15 December 2003), 30386; Testimony of Zoran Lilić (17 June 2003), 22625; Testimony of Hrvoje Šarinić (21 January 2004), 31263 and 31265; and Testimony of Milan Babić (26 November 2002), 13504. The Prosecution never acquired the notes made by Milinović.

<sup>146</sup> In the Milošević case, The Prosecution filed two Pre-Trial Briefs: one for the Kosovo indictment (26 November 2001) and one for Croatian and BiH indictments (31 May 2002).

makes explicit the legal theories, witnesses, and evidence that the Prosecution plans to use to prove its case. Although a pre-trial brief contains references to concrete documentary evidence and witness testimonies, on the basis of which an indictment is formulated, none of these references can be considered in a final judgement if the documents or witness accounts in question are not discussed in court and tendered into evidence. The Defence might also file its own pre-trial brief, in response to the charges in the indictment and the Prosecution's pre-trial brief. These documents can be used for historical research on a number of topics, even if they are not considered evidentiary.

A trial usually begins with an Opening Statement, delivered by the Prosecution, which has no forensic value and also cannot be included in a judgement. A Closing Argument is different, though; it may draw heavily on opening statements and pre-trial briefs and may repeat the theory of the case by citing the same documents and referring to the same witnesses, but this time under the condition that they were introduced as evidence in the courtroom. The test for the introduction of evidence in court is bound by a strict forensic process, which consists of presentation of evidence by one trial party, followed by cross-examination by the opposing party, and eventually the right of re-direct by the first party. The product of this process – forensic truth – is different from historical truth in several ways. For one, a historian is not bound by the same forensic process in order to include a source in a historical account and instead seeks corroboration in other available sources, of a greater variety than are admissible in a courtroom, and through this analysis develops a historical interpretation of an event. And, over the course of time, this interpretation might be altered by other historians, which is another way in which historical and legal narratives about the same topic may differ considerably; as the latter is captured in closing arguments and judgements, which are formed in the normative legal framework and in rigid court procedures, and remain fixed in time.

At the ICTY, a discrepancy between the public perception of responsibility for mass atrocities and the legal requirements for proof of the crimes alleged against an individual such as Milošević have often led to the accrual of a great deal of evidence in order to prove 'the obvious' in a court bound by strict legal rules and procedures.<sup>147</sup> For every general allegation against

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<sup>147</sup> Louise Arbour, former ICTY Chief Prosecutor, said that "general knowledge" was the ICTY's worst enemy: "I am told all the time, 'Why didn't you indict this man or that man? Everybody knows he is guilty.' It is long way

Milošević, probative evidence was needed to establish that the crime actually happened and that Milošević was criminally responsible for it. The large amount of evidence presented by the parties during the trial was also partially due to the changing world in which we live. Modern technology made the wars in the former Yugoslavia into media spectacles, watched daily on the television and captured on the Internet. Minute details of the conflicts became available and accessible to the public in nearly all the world's languages; and material from these 'open sources,' potentially relevant as evidence, was almost unlimited.<sup>148</sup>

### *History Outside the Courtroom*

Notwithstanding the huge amount of audio, video, and written material that exists about the conflicts and about the role of Slobodan Milošević in them, ICTY Prosecutors – unlike their Nuremberg counterparts – did not have full or easy access to documentary material from the archives of the former leader's country.<sup>149</sup> Documents from the official archives of the FRY and the Republic of Serbia, considered more important from a forensic point of view than open source materials, were difficult and sometimes impossible to obtain.<sup>150</sup> This was in stark contrast to the experience of prosecutors in Nuremberg, for which Allied Powers had simply seized the state and Nazi Party archives of defeated Germany for use as evidence in court. Nonetheless, evidence that did come directly to the ICTY from state archives in Serbia, the FRY, the RS, and the RSK makes the Milošević trial record particularly valuable, as it includes state documents that would otherwise have remained protected for decades or even longer. Once used in court as evidence, most of these documents became public.

The Milošević trial record comprises transcripts, material tendered as evidence, motions on administrative and procedural matters, and decisions and judgements of the Trial Chamber and

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from what everybody ostensibly knows to an indictment for crimes listed in the Statute of the Tribunal that will withstand the test before the court. When the accused are not famous personalities nobody asks us, 'Why haven't you indicted them?'" As quoted in: "Why Did Prosecution Fail to Prove What 'Everybody Knows'," *Sense Tribunal*, 7 April 2008.

<sup>148</sup> 'Open Sources' is the term used at the ICTY to denote media and other publicly accessible information such as scholarly research.

<sup>149</sup> See the sections titled "State Cooperation" or "Cooperation" in the Annual Reports submitted by the ICTY President to the UN Security Council from 2000 to 2006. Available at: <http://www.icty.org/tabs/14/1>.

<sup>150</sup> The FRY, or the Federal Republic of Yugoslavia, existed from 1992 to 2003 as a federation of the republics of Serbia and Montenegro. In 2003, it became known as Serbia and Montenegro, until Montenegro chose independence in 2006. In the text of ICTY documents, it is difficult to discern the FRY and Serbia and Montenegro from the Republic of Serbia, given the political dominance of Serbia in each incarnation of the federation.

Appeals Chamber. The record – the main source for this research – is so large that it is too substantial to be analysed in a single academic study, and it is not examined in full here. Still, missing source materials that were requested but never produced represent a gap; meaning that the trial record, while vast, is not exhaustive. And so, despite its size, the trial record alone was insufficient for the task of this research, and sources from outside the trial proceedings – known as extratrial material – were also analysed.

Extratrial material originating from the ICTY and OTP includes investigative and analytical documentation, such as reports by in-house investigators, researchers, and analysts on the Milošević trial team, which were not used *per se* in court proceedings. ICTY internal policy documents on topics such as indictment strategies or how to conduct the trial also fall under the designation of extratrial material. In other words, a considerable amount of extratrial material was used for the court's investigative and research purposes without becoming a part of the official trial record. The ICTY database contains diverse materials collected by the OTP, from demographic data on the former Yugoslavia to media reports that may have been used in preparation for cross-examination of Defence witnesses to seemingly endless supporting evidence and courtroom exhibits.<sup>151</sup> Access to some of these materials remains limited to OTP employees until, or unless, they are made publicly available, which will depend on the conclusions of the Mechanism for International Criminal Tribunals (MICT).

### *Scholarly Debate on the Causes and Consequences of the Disintegration of Yugoslavia*

This study incorporates extratrial material such as academic analyses and media reports, as well as numerous studies written by scholars, journalists, former diplomats, and Milošević's own contemporaries – who all ascribed to him the lion's share of responsibility for the disintegration of the SFRY and the wars that followed.<sup>152</sup> The scholarly debate on the causes of Yugoslavia's

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<sup>151</sup> The OTP's database included 8.5 million items (each item representing one page of documentation) by mid-2011.

<sup>152</sup> For discussion on the causes and consequences of the disintegration of the SFRY, see: Christopher Bennett, *Yugoslavia's Bloody Collapse: Causes, Course and Consequences* (London: Hurst, 1995); Lenard J. Cohen, *Broken Bonds: Yugoslavia's Disintegration And Balkan Politics in Transition* (Boulder, CO: Westview Press, 1995); Misha Glenny, *The Fall of Yugoslavia: The Third Balkan War* (London: Penguin, 1992); Branka Magaš, *The Destruction of Yugoslavia: Tracking the Break-Up, 1980-92* (London: Verso, 1993); Victor Meier, *Yugoslavia: A History of Demise* (London: Routledge, 1999); Catharine Samary, *Yugoslavia Dismembered* (New York: Monthly Review Press, 1995); Laura Silber and Alan Little, *The Death of Yugoslavia* (London: Penguin, 1996); Jasminka Udovički and James Ridgeway, eds., *Burn This House: The Making and Unmaking of Yugoslavia* (Durham, NC: Duke

dissolution offers useful insight into the complex socio-political climate in which it occurred.<sup>153</sup> To that end, Jasna Dragović-Soso has identified five categories of causation, focusing on: first, “ancient hatreds” and a “clash of civilisations;” second, the nineteenth century rise of South Slav nationalist ideologies and the first Yugoslav state-building experiment; third, the Yugoslav socialist system, with its complicated federal structure, ideological delegitimation, and economic failures; fourth, Yugoslavia’s breakdown in the second half of the 1980s and the actions of “political and intellectual agency;” and fifth, external factors.<sup>154</sup>

The narrative that developed over the course of the trial tracked Milošević’s political motivations, objectives, and intentions and the trial record provides a unique chance for historians to revisit existing disputes and controversies about historical details, the legality of particular political decisions and actions, and the real nature of policies implemented by leaders at both the republic and federal levels. Many politicians who were in power at the outbreak of violence in fact testified as Prosecution or Defence witnesses.<sup>155</sup> Their testimonies were further enriched by Milošević’s courtroom performance – his comments, protestation, denials, and even his body language regularly gave away more than he would have revealed had he not represented himself.<sup>156</sup>

The part Milošević played in events of the 1980s and 1990s has also been explored in a number of political biographies and is an important sub-topic of analysis. However, the most well-known of these biographies, written in both English and Serbian, were published before his trial or in the

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University Press, 1997); Susan L. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (Washington, DC: Brookings Institution, 1995).

<sup>153</sup> For discussion, see: Dragović-Soso, “Why did Yugoslavia disintegrate?...” 1-39; Nena Tromp, *The Background of the Yugoslav Crisis: A Survey of the Literature*, Appendix VI, in NIOD, *Srebrenica: A ‘Safe’ Area*, (Amsterdam: Boom Uitgeverij, 2002).

<sup>154</sup> Dragović-Soso, “Why did Yugoslavia Disintegrate?...” 1-2.

<sup>155</sup> For example, witnesses for the Prosecution included: Milan Babić, Croatian Serb leader and first Prime Minister of the Republika Srpska Krajina (RSK); Borisav Jović, the Serb representative in the PSFRY and its one-time President; Milan Kučan, the President of Slovenia from 1991 to 2002; Zoran Lilić, the President of Federal Republic of Yugoslavia (FRY) from 1993 to 1997; Ante Marković, the last Prime Minister of the SFRY; Stipe Mesić, Croatian representative in the PSFRY and its last President; and Hrvoje Šarinić, the Chef of Cabinet of President Franjo Tuđman. For the Defence, witness included: Branko Kostić, the Montenegrin representative in the PSFRY and the President of the Rump Presidency from October 1991 to April 1992; and Vladislav Jovanović, the Minister of Foreign Affairs of Serbia and later the FRY, from 1991 to 1995.

<sup>156</sup> Calling Vojislav Šešelj as a witness backfired, for instance. See Dobroslav Ognjanović’s statement in *Milošević on Trial*, Team Productions, 2007.

same year that it started.<sup>157</sup> This means that few authors have presented the trail of evidence that was followed in the courtroom to establish responsibility for the break-up of Yugoslavia and, more importantly, the violence that followed.

A majority of authors agree that Milošević played a central role in events that unfolded in the former SFRY between 1987 and 1999. For the purposes of this study, three categories of interpretations of Milošević's role in the disintegration of Yugoslavia have been identified: intentionalist, relativist, and apologist.<sup>158</sup> 'Intentionalists' see Milošević as having dictated the pace of the Yugoslav crisis through well-articulated and planned objectives that drove the other republics away.<sup>159</sup> According to this view, violence was used cynically and practically with a clear purpose. The intentionalist perspective is that violence against non-Serbs was the result of a pre-meditated strategy – the success of which is irrelevant – to secure Milošević's promise of "All Serbs in a Single State" at any cost.<sup>160</sup>

Alternative to this are authors who tend to see Milošević as an intelligent and ruthless politician but not a good tactician or strategist, whose politics were mostly reactive.<sup>161</sup> These 'relativists' see Milošević's policies as responses to developments that were driven by leaders of Slovenia, Croatia, BiH, and Kosovo, and by the international community. From this standpoint, Milošević genuinely wanted to preserve Yugoslavia but did not succeed.<sup>162</sup> Relativists perceive Milošević as an immensely ambitious politician who endeavoured to achieve more than he was capable of; and his rule has been cast by authors in this camp as a sequence of mistakes and failures – at the

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<sup>157</sup> For discussion on this topic in English, see: Lenard J. Cohen, *Serpent in the Bosom: The Rise and Fall of Slobodan Milošević* (Boulder, CO: Westview Press, 2002); Slavoljub Đukić, *Milošević and Marković: A Lust for Power* (Montreal: McGill-Queen's University Press, 2001); Duško Doder and Louise Branson, *Milošević: Portrait of a Tyrant* (New York: The Free Press, 1999); Adam LeBor, *Milošević: A Biography* (London: Bloomsbury, 2002); Louise Sell, *Slobodan Milošević and the Destruction of Yugoslavia* (Durham, NC: Duke University Press, 2002); and Vidoslav Stevanović, *Milošević: People's Tyrant* (London: I.B. Tauris, 2002). And, in B/C/S, see: Borisav Jović, *Knjiga o Miloševiću* (Belgrade: Nikola Pašić, 2002); and Ivan Stambolić, *Put u bespuće* (Belgrade: B92, 1995). Also see supra note 76.

<sup>158</sup> Dragović-Soso, "Why did Yugoslavia Disintegrate?..."14.

<sup>159</sup> Sell, *Slobodan Milošević and the Destruction of Yugoslavia*, 4-5.

<sup>160</sup> For example, see: Sonja Biserko, *Yugoslavia's Implosion: The Fatal Attraction of Serb Nationalism* (Oslo: Norwegian Helsinki Committee, 2012); Sell, *Slobodan Milošević and the Destruction of Yugoslavia*; Norman Cigar and Paul Williams, *Indictment in The Hague: The Milošević Regime and Crimes of the Balkan Wars* (New York: New York University Press, 2002).

<sup>161</sup> For example, see: Cohen, *Broken Bonds*, 130 and 265.

<sup>162</sup> See: Cohen, *Broken Bonds*; Cohen, *Serpent in the Bosom*; Aleksandar Pavković, *The Fragmentation of Yugoslavia: Nationalism and War in the Balkans* (London: Macmillan, 1997); Woodward, *Balkan Tragedy*; and, in B/C/S, Dejan Jović, *Jugoslavija: država koja je odumrla* (Zagreb: Prometej, 2003).

national and international levels.<sup>163</sup> The violence that accompanied the disintegration of Yugoslavia is thus explained as resulting from a complicated interplay of many factors, leading to an escalation of the crisis that was beyond the control of Milošević alone.

‘Apologists’ share the opinion held by relativists regarding the role of the republics that sought independence and of the international community in the disintegration of Yugoslavia. Yet they not only see his goal to preserve Yugoslavia as well-intentioned but also defend his politics and decision-making in general.<sup>164</sup> They downplay Milošević’s calculating and ruthless side to recast him as a somewhat clumsy, wayward, and inconsistent authoritarian leader who merely failed to deliver on promises he made.<sup>165</sup>

In fact, apologists frame Milošević as an atypical authoritarian ruler who could have secured his power by force but was willing, instead, to compromise his initial goals.<sup>166</sup> Apologists also dismiss arguments about the influence of Greater Serbia ideology on Milošević or on Serbia’s involvement in the ethnic cleansing in Croatia, BiH, or Kosovo. They stress that it was NATO that committed grave crimes in Serbia and Kosovo, for which nobody has been held accountable. And, as to Milošević’s domestic criminality, some apologists say that there has been no definitive proof of his personal involvement in assassinations that took place during his rule; and some go further in their absolution of him, arguing that even if he did play a role in these murders, there were “not many such examples.”<sup>167</sup> Apologists see Milošević as having been a true statesman who resisted foreign pressure.<sup>168</sup>

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<sup>163</sup> Jović, *Jugoslavija: država koja je odumrla*, 491-492; Woodward, *Balkan Tragedy*, 80 and 94.

<sup>164</sup> For example, see: Slobodan Antić, *Slobodan Milošević: još nije gotovo* [“Slobodan Milošević: It’s Not Over Yet”] (Belgrade: Vukotić medija, 2014); Jović, *Od Gazimestana do Haga Vreme Slobodana Miloševića: vreme Slobodana Miloševića* (Belgrade: Metaphysica, 2009), 200. Jović emerged as an apologist in *Od Gazimestana do Haga*, especially in his evaluation of Milošević’s conduct at trial in The Hague, which Jović characterises as a heroic defence of Serbia.

<sup>165</sup> Antić, *Slobodan Milošević*, 478. Some former admirers have more recently referred to Milošević as no more than a “smalltime banker.” See: “Kusturica: Milošević je bio mali bankar, a ne Hitler,” *Kurir*, 19 August 2011, <http://www.kurir-info.rs/kusturica-Milošević-je-bio-mali-bankar-a-ne-hitler-clanak-106097> (accessed 20 September 2014). Also see: Milica Jovanović, “Srećko Horvat: intervju,” 13 January 2014, *Peščanik*, <http://pescanik.net/srecko-horvat-intervju/> (accessed 25 September 2014).

<sup>166</sup> *Ibid.*, 478-479.

<sup>167</sup> *Ibid.*, 479.

<sup>168</sup> *Ibid.*

So, did Milošević genuinely try to save Yugoslavia? Did he, together with others, inadvertently cause its disintegration through a series of well-intended blunders?<sup>169</sup> Or, did he actively work to re-draw its borders? One event that has in particular sparked contesting interpretations about Milošević's attitude toward the break-up of Yugoslavia is the 1991 meeting in Karadžević at which Milošević and Croatian President Franjo Tuđman allegedly discussed the partition of BiH between Serbia and Croatia.<sup>170</sup> Scholars have described this meeting as significant for many different, and sometimes contradictory, reasons.

Both Milošević and Tuđman had managed for years to avoid responding to rumours about what may have passed at the Karadžević meeting; but at the trial, it was addressed in detail by several witnesses with firsthand knowledge of the event. For Milošević, the idea that he had even contemplated the partition of BiH undermined his proclaimed position as the champion of Yugoslav unity. And so, Milošević denied that he and Tuđman had *ever* discussed the partition of BiH, at Karadžević or elsewhere. This denial was significant; for, why disavow facts testified to by reliable witnesses except to distance himself from what such a plan or agreement would have revealed about his state of mind? As he claimed to be fighting for the preservation of Yugoslavia, had his deeds in Karadžević – hidden at the time from the public – reflected the covert objectives he truly wished to achieve?

This highlights a larger problem for historians: historical source material on Milošević, including evidence given in court, exposes a discrepancy between his overt and covert agendas, from his first to last days in power. Take, for instance, the debate about the role of the SANU Memorandum, a document co-authored by several prominent members of the Serbian Academy of Sciences and Arts in 1986. Indeed, it is hard to find any literature on the Yugoslav crisis that does not make note of connections between the SANU Memorandum and the political programme introduced by Milošević, but there are various perspectives on the nature of these connections. One view is that the Memorandum served as the “blueprint” for Milošević's war

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<sup>169</sup> See: Jović, *Knjiga o Miloševiću*, 52-56 and 59-61. Jović described Milošević as an able politician who was a true democrat at the beginning of his political career, but who nevertheless made several significant tactical mistakes – notably his contribution to the dissolution of the League of Communists of Yugoslavia in January 1990, which sped up the disintegration. Milošević postponed multi-party elections in Serbia long as he possibly could, miscalculating the disadvantage this would create for Serbia in relation to the other republics.

<sup>170</sup> For example, see: James Gow, *The Serbian Project and its Adversaries: A Strategy of War Crimes* (London: Hurst, 2003).

policies.<sup>171</sup> Another is that it more generally advocated “a reformed federation.”<sup>172</sup> And alternative to both of these is the view that the Memorandum can be seen as an “explicit post-Yugoslav Serbian national program.”<sup>173</sup>

Dragović-Soso argues that the Memorandum did not advocate the dissolution of Yugoslavia, the creation of a Greater Serbia, or ethnic cleansing, and that no connection has been established between the authors of the Memorandum and Milošević. According to Dragović-Soso, at the time of the Memorandum’s publication, Milošević’s views were no different from other Serbian communist leaders.<sup>174</sup> Nonetheless, some witnesses talked about the importance of the SANU Memorandum in court, and the polarised narratives that unfolded followed the fault lines of pre-existing scholarly debate. And once again, this narrative was significantly shaped by Milošević’s active participation in court, discussing his position on the SANU Memorandum with several of its authors who appeared as Defence witnesses.<sup>175</sup>

Questions about Milošević’s role in the collapse of the SFRY are most relevant where they concern how it became violent. When, why, and by whom was violence unleashed? And for what purpose? In scholarly literature, the outbreak of violence has often been ascribed to Greater Serbia ideology and efforts to create a Serb state. Some authors hold that Milošević’s plans corresponded with the historical goals of Greater Serbia ideologues but that his political choices actually had no basis “in any particular scheme.”<sup>176</sup> And despite the wealth of evidence on the role he played in the dissolution of Yugoslavia – including from the ICTY – no official document, intercept, or meeting transcript can “incontrovertibly implicate Milošević in a coherent, premeditated strategy of breaking up Yugoslavia in order to create a Greater Serbia.”<sup>177</sup> But then, in the history of mass atrocities trials, rarely has there been a single “smoking gun” document clearly ordering a war crime and signed by an indicted former leader. Historians who

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<sup>171</sup> For example, see: Sell, *Slobodan Milošević and the Destruction of Yugoslavia*, 46; Dragović-Soso, “Why did Yugoslavia Disintegrate?...”14.

<sup>172</sup> Dragović-Soso, “Why did Yugoslavia Disintegrate?...”14.

<sup>173</sup> *Ibid.*, 19.

<sup>174</sup> *Ibid.*

<sup>175</sup> This will be explored in Chapters III and IV.

<sup>176</sup> Cohen, *Serpent in the Bosom*, 142.

<sup>177</sup> Dragović-Soso, “Why did Yugoslavia Disintegrate?...”16. For discussion, also see: Eric Gordy, “Destruction of the Yugoslav Federation: Policy of Confluence of Tactics,” in Cohen and Dragovic-Soso, *State Collapse in South-Eastern Europe*, 281-301, 292.

study the regimes of Stalin or Hitler know this all too well.<sup>178</sup> These historians have thus, by necessity, based their interpretations mostly on circumstantial evidence; but that has not diminished the responsibility of both leaders for the mass atrocities carried out under their rule.

Greater Serbia ideology needs to be seen first as a piece of a complex jigsaw puzzle of nineteenth century South Slav nationalist movements. Although it originated in the mid-1800s, Greater Serbia ideology has been closely connected with the formation of a Serb state ever since, and it has been a potent political force for generations of Serb politicians. Yet some historians claim that Serbs abandoned the idea of a Greater Serbia when they accepted the creation of the first Yugoslav state in 1918. They argue that Serbia's genuine dedication to the idea of a common state was proven by rejection of the London Treaty in 1915, a treaty which – if it *had* been accepted – would have created an internationally-brokered Greater Serbia.<sup>179</sup> Other historians disagree. They do not see any contradiction between Greater Serbia designs and the creation of a common state. According to Ivo Banac, when Serb elites accepted a common Yugoslav state in 1918, they envisaged it as a centralised and Serb-dominated state and they were not prepared to treat other nations that entered the union with them – Croats or Slovenes – as equals.<sup>180</sup>

From this viewpoint, Serbian leaders made little sacrifice at all by rejecting the London Treaty, since they achieved the same practical result. Serbian historian Latinka Perović offers useful context for the apparent contradiction between Greater Serbia designs and Serbia's role in the creation of a common Yugoslav state, explaining that two paths to a Greater Serbia have been recognised since the 19th century. The first, a state of South Slav peoples less the Bulgarians, was only acceptable to Serbia if it was centralised and dominated by Serbs. If such a centralised Yugoslavia was not possible, the second option was a Serb state including Serbia proper and

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<sup>178</sup> For example, on Hitler, see: Ian Kershaw, *Hitler: Profiles in Power* (New York: Routledge, 2013). Kershaw argues that a vague doctrine, open-ended decrees, and a complex system of bureaucracy within the Third Reich helped obscure Hitler's direct responsibility for the Holocaust. And, on Stalin, see: Johnathan Brent, *Inside the Stalin Archives: Discovering the New Russia* (New York: Atlas & Co., 2008). Brent writes that even when evidentiary documents emerge about historical events, it is often "only researchers with encyclopedic knowledge of their subject" who can glean meaning from them because there are "no smoking guns as such, documents that could stand alone and tell the 'whole' story." However, he says, there may be "many guns with the smell of smoke in their barrels" (page 92).

<sup>179</sup> Dragović-Soso, "Why did Yugoslavia Disintegrate?...", 7.

<sup>180</sup> *Ibid.*, 6.

Serb-claimed territories in Croatia and in Bosnia-Herzegovina.<sup>181</sup> Still, alongside the fact that Serbian leaders turned down the London Treaty and accepted the first Yugoslavia, some Serbian historians argue that the creation of the Second Yugoslavia in 1945 further demonstrated the genuinely integrative nature of Serbian policy.<sup>182</sup> Others point out that Serbs were yet again only prepared to accept a centralised state, and cite as proof their rejection in 1974 of a confederated model for Yugoslavia.<sup>183</sup> Not altogether surprisingly, all these topics were revisited during the trial.

Another recurring topic was the role of Milošević's personality. Biographies that offer an overview of Milošević's early years often note that his life was marked by the three tragic deaths – all suicides – of his father Svetozar in 1962, his maternal uncle Milisav Koljenšić in 1963, and his mother in 1974.<sup>184</sup> However, no author has managed to establish any clear link between these losses and Milošević's development into the particular person and politician he became. And such loss cannot solely account for the lack of empathy that ultimately characterised Milošević. Nor can another prominent influence that was critical throughout Milošević's life and is discussed in almost every biography written about him – the close, almost pathological, relationship he had with his wife Mira. He began courting her when both were still in high school and the relationship remained strong until his death.

Milošević's relationship with his one-time political mentor and friend Ivan Stambolić also turned out to be significant, and the path it took was a reflection of the seeming incongruity of his personality. After being ushered into politics by Stambolić in 1984, Milošević turned against him in 1987 in a calculated series of political manoeuvres, and in 2000, ordered his assassination. Seeking to identify the personal pathology that might adequately describe, and perhaps even explain, Milošević's alleged ruthlessness and lack of empathy, biographers have assigned him titles such as “Tyrant” and “Cold Narcissus,”<sup>185</sup> the “Despot from Požarevac,”<sup>186</sup> “Sociopath,”<sup>187</sup>

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<sup>181</sup> Latinka Perović, interview (11 August 2004). Perović was approached by the OTP as a potential rebuttal witness regarding topics brought up by Defence expert witnesses Čedomir Popov, Kosta Mihailović, and Slavenko Terzić.

<sup>182</sup> Dragović-Soso, “Why did Yugoslavia Disintegrate?...” 6.

<sup>183</sup> Ibid.

<sup>184</sup> Doder and Branson, *Milošević: Portrait of a Tyrant*, 15-16, 24, 26.

<sup>185</sup> Ibid., 11.

<sup>186</sup> Dobrica Ćosić: *Pišćevi zapisi, 1992-1993*, 183.

<sup>187</sup> Betty Nguyen, interview with Richard Holbrooke, *Saturday Morning News*, CNN, 11 March 2006.

and the “Butcher from the Balkans.”<sup>188</sup> These unflattering names suggest that he was “different” from the rest of us and they lead readers to leap to conclusions about Milošević being the singular driving force behind all that went wrong in the former Yugoslavia. But how different was he? He has been described as intelligent, charming, engaging, and attentive on one hand, and deceitful, manipulative, and forbidding on the other.<sup>189</sup> But duplicity and indifference do not alone make a tyrant. How did the trial contribute – if at all - to a better understanding of a man and a politician?

### *The Transformative Value of the Evidence*

The opinion of some historians is that existing interpretations of the disintegration of Yugoslavia are based chiefly on “contradictory and hardly impartial evidence” such as witness accounts, personal memoirs, and Milošević’s own public statements. This view is sometimes supported by the assertion that Milošević was “extremely secretive, leaving very little documentary trace,” and that his strategic decisions were made in the seclusion of his home, where only his wife and a small group of advisors were party to his thoughts.<sup>190</sup> Even among historians who take this position, there is some recognition of the need to explore new material that has emerged from the ICTY and government archives.<sup>191</sup> And, for good reason, because research of the trial record reveals a different picture – that Milošević did at times leave traces, and that audio and video records in some cases irrefutably establish the veracity of certain events or claims.

Documents tendered by the Prosecution and pertaining to Milošević’s state of mind before, during, and after the wars in Croatia, BiH, and Kosovo – which were analysed for this research – are thus important to the developing historiography of the conflict. During the early years of war, in the period relevant to the Croatia indictment, telephone intercepts, records of meetings of the Presidency of the SFRY (PSFRY), and a video known as the Kula Camp Video illustrate the evolution of Milošević’s state of mind. For the period covered by the Bosnia indictment, this evidence again includes telephone intercepts, but also records from two FRY state organs, the Council for Harmonization of Positions on State Policy and the Supreme Defence Council

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<sup>188</sup> James L. Graff, “Butcher of the Balkans,” *Time*, 8 June 1992.

<sup>189</sup> Stambolić, *Put u bespuće*,

<sup>190</sup> Dragović-Soso, “Why did Yugoslavia Disintegrate? ..”16.

<sup>191</sup> *Ibid.*, 27

(SDC). For years covered by the Kosovo indictment, documents from an ad hoc body known as the Joint Command were of great value, but the key piece of evidence shown at the trial was undoubtedly a video that featured a Serbian-based paramilitary group, the Scorpions, executing civilians taken from Srebrenica in the summer of 1995. The Scorpions were re-deployed by the Serbian Ministry of Internal Affairs (*Ministarstvo Unutrašnjih Poslova*, or MUP) in 1999, when they again committed crimes against civilians. Although footage from the Scorpions Video was shown during the cross-examination of a Defence witness, the video was never tendered into evidence. Yet, what transpired in the courtroom was the cause of an unprecedented uproar in the world and in the region.

It will be argued in this text that evidence with transformative value has an impact on public opinion and on political processes, and contributes to shaping narratives about a conflict. In some cases, the transformative value of trial evidence may also be reflected in the efforts of postconflict elites to control or contain the damage that exposure of incriminatory evidence in the courtroom might cause for alleged perpetrators. In the Milošević trial, early obstruction by Belgrade authorities regarding requests for certain materials added weight to the power of that evidence once it was later acquired and presented in court. And, several pieces of evidence had significant and undeniable impact on Serbian and post-Yugoslav society by laying bare the reality of wartime crimes and the degree to which state actors and institutions were linked to criminal activities. The evidence selected for examination in this study has been analysed – at least in part – according to its effect on public debate outside the courtroom and its role in:

- contributing to the existing scholarly discussion on the causes and consequences of the disintegration of Yugoslavia;
- exposing the *de facto* and *de jure* power of Milošević and the elites around him;
- exposing how Milošević and his associates plotted together to establish and re-draw Serbia's borders by force;
- exposing efforts by members of the Milošević regime to cover up their real intentions;
- exposing the extent of Milošević's criminality – after the wars in Croatia, BiH, and Kosovo – in the assassinations of his political opponents in Serbia;
- exposing the reluctance of post-Milošević political elites in Serbia to accept or assign responsibility for mass atrocities committed by the Milošević regime;

- triggering public revelations of crimes committed by Serb armed forces in the 1990s;
- generating public discussion about the obligation of states to cooperate or not with international courts, and the need for transparency in court proceedings, in cases where trial evidence and other documents from state archives have been protected from public view on national security grounds.

## **What the Trial Record Tells Us about the Leader, the Ideology, and the Plan**

### *Who? The Leader*

The personal and political development of Milošević as a leader whose politics led to mass atrocities can be fully appreciated only when analysed together with concurrent political, ideological, and historical processes. An analysis of several African leaders and the commission of mass atrocities in Africa suggests, though, that the ‘evilness’ of a leader is a concept more easily understood than the historical and political processes that actually make the emergence of such a leader possible.<sup>192</sup> And mass atrocities are indeed most likely to be unleashed by authoritarian political regimes, which by their nature rely on leadership that may be “instrumentally effective, even if morally repugnant.”<sup>193</sup> Thus, legal and historical discourse that emerges from trials that deal with individual criminal responsibility must be careful to not neglect collective or state responsibility by overemphasising the criminality of an “evil leader.”<sup>194</sup>

At the turn of the 20th century, German sociologist Max Weber identified three types of authority: traditional, legal, and charismatic. Traditional authority rests on the understanding that traditional rules are to be respected and that subordinates accept the traditional right to power of a dominant and powerful individual or group. Weber classified ‘patrimonialism’ as a form of traditional authority that reflects the authority of fathers within families. Patrimonialism, applied more recently in the analysis of present-day regimes, is defined by Nathan Quimpo as “a type of

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<sup>192</sup> Angelo Izama: “Kony is not the problem,” *International Herald Tribune*, 21 March 2012. The author argues that: “While the evil methods of men like Kony are easily understood by millions, the politics so crucial to sustaining their brutal campaigns are harder to grasp.”

<sup>193</sup> Joseph Masciulli, Mikhail A. Molchanov and W. Andy Knight, eds., *The Ashgate Research Companion to Political Leadership* (Surrey, UK: Ashgate, 2009), 10.

<sup>194</sup> Izama, “Kony is not the problem...”

rule in which the ruler does not distinguish between personal and public patrimony and treats matters and resources of state as his personal affair.”<sup>195</sup>

Legal authority, also known as rational authority, relies instead on enacted rules and laws. In modern societies, it is bureaucracies that largely exercise such authority.<sup>196</sup> While traditional authority is seen to be pre-ordained by status and legal authority is pre-ordained by policy, charismatic authority rests on a “devotion to the exceptional sanctity, heroism, or exemplary character of an individual and of the normative patterns or order revealed or ordained by him.”<sup>197</sup> Expanding on this concept of charismatic authority as set out by Weber, modern day authors describe how a charismatic leader projects onto his followers characteristics such as “self-security, a need to influence others, and a strong conviction in the moral integrity of his/her belief.”<sup>198</sup>

Most theories of charismatic leadership emphasise the attribution of extraordinary supernatural or superhuman qualities to a leader by his or her followers.<sup>199</sup> And so, layered atop these different types of authority, the concept of transformational leadership considers how a leader affects his or her followers. It focuses on how, when, and why followers develop trust, admiration, loyalty, and respect for a leader and it explores leadership in terms of the degree to which a leader holds influence over followers and the type of leader-follower relationship that emerges as a consequence of this interaction.<sup>200</sup> Milošević understood the impact of his interaction with his followers very well, casting his political aspirations and choices as an expression of the will of Serb people everywhere and asserting that he was seen by officials at the ICTY as an agent of Serbs and Serbia. Referring to Prosecutor Geoffrey Nice, Milošević said:

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<sup>195</sup> Nathan Quimpo, “Trapo Parties and Corruption,” *KASAMA* 21, no. 1 (January–February–March 2007).

<sup>196</sup> For discussion, see: Max Weber, *The Theory of Social and Economic Organizations* (New York: The Free Press, 1947); Gary Yukl, “An evaluation of conceptual weaknesses in transformational and charismatic leadership theories,” *The Leadership Quarterly* 10, no. 2 (Summer 1999): 285–305; Michael Hechter and Christine Horne, eds., *Theories of Social Order: A Reader* (Stanford, CA: Stanford University Press, 2003); and Ingo Winkler, *Contemporary Leadership Theories: Enhancing the Understanding of the Complexity, Subjectivity and Dynamics of Leadership* (Berlin: Verlag, 2010).

<sup>197</sup> Weber, *The Theory of Social and Economic Organizations*, 215; Hechter and Horne, *Theories of Social Order*, 104.

<sup>198</sup> Winkler, *Contemporary Leadership Theories*, 32-33.

<sup>199</sup> Yukl, “An evaluation of conceptual weaknesses,” 285-286.

<sup>200</sup> *Ibid.*, 286-287.

He has accused Serbia and all Serbs who supported me in Serbia and those Serbs who supported me outside Serbia, and all the people who support me in Serbia to this day. And then he is accusing the people, the nation.... And then he says that he is just accusing an individual, and that individual is myself. And he probably thinks that I am superhuman, having these superhuman powers of influencing people and responsibility and accountability outside the territory of my own country.<sup>201</sup>

While this depiction by Milošević of his leadership may have been a gesture to long-term Serb nationalist loyalists, it also reflected his appreciation of the important legal question of to what extent political and criminal responsibility can be ascribed to one individual. International criminal trials do allow individuals to be held accountable for what may have been state violence committed through institutional state structures and state bureaucracies; but a focus on individual criminal responsibility in the investigation into and prosecution of alleged mass atrocities has a number of potential pitfalls. The first is that charging a single person with extensive crimes spread over years carries the risk of ‘over-prosecution’ or even of distorting the complex historical and political realities that led to the mass atrocities in question. In his Opening Statement before presentation of the Prosecution’s evidence for the Croatia and Bosnia indictments, Prosecutor Geoffrey Nice warned the Court to resist characterising Milošević as the sole architect of the plan and policies that led to mass atrocities:

Before we move on through the events of these two indictments...a word of resistance to temptation: There may be a temptation to characterise this Accused simply as the sole architect, and that temptation may have to be resisted until the precise outlines of his role are etched by evidence, because plans can emerge without a single originator. Such plans can be joined, and there can be those who choose to lead such plans, once they join them, being criminally opportunistic and coming to be seen as, and indeed to be, central to the plan itself. And this may be a reality of this Accused’s personal history, he being a man to whom others committed to the plan looked for leadership that he was able to provide.<sup>202</sup>

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<sup>201</sup> Trial Transcript, Defence Opening Statement (14 February 2002), 248.

<sup>202</sup> Trial Transcript, Prosecution Opening Statement (26 September 2002), 10187.

The second pitfall is that isolating a political leader's criminal responsibility for mass atrocities risks scapegoating an individual for what was in fact the criminality of a state and of state institutions. Because international criminal law as practised at the ICTY deals exclusively with individual criminal responsibility, an individual is placed at the centre of a criminal investigation and as the focus of accountability.<sup>203</sup> The state thus disappears into the background as a vague collection of institutions, disregarding the fact that every state institution is populated by individuals who run and represent it according to a prescribed hierarchy.<sup>204</sup> It is therefore necessary to address the relationship between individual, collective, and state criminal responsibility when necessary.

Recognising the overlap between individual and collective criminal responsibility, the ICTY invoked the legal doctrine of Joint Criminal Enterprise (JCE) in the Milošević case, or, very roughly, what is termed a 'conspiracy' in some national legal systems.<sup>205</sup> This doctrine serves to link crimes to several, at times many, individuals who participated as perpetrators of crimes, or who acted as instigators, accomplices, or planners. While connecting some individuals to the commission of actual crimes, for example the killing of civilian victims, the doctrine allows forensic consideration of the interactions between – and cooperation among – all the individuals who may be members of a group or organisation, or who may simply have acted in concert, for the purposes of the JCE.<sup>206</sup> The scope of the JCE doctrine includes 'common purpose,' wherein the members of a JCE are not only involved in the perpetration of crimes but share a common understanding of its goals. Types of JCE as charged at the ICTY also recognised different levels of participation; but each level requires JCE members to have shared a common criminal purpose

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<sup>203</sup> The ICTY Statute allows for two types of criminal liability, as defined by Articles 7(1) and 7(3). Article 7(1) reads: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." And Article 7(3) reads: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

<sup>204</sup> For discussion on the criminal responsibility of states, see: Osiel, *Making Sense of Mass Atrocities*, 189-194; and Schabas, *Unimaginable Atrocities*, 125-153.

<sup>205</sup> "The notion of Joint Criminal Enterprise denotes a mode of criminal liability of all participants in a common criminal plan." See: Antonio Cassese "The Proper Limits of Individual Responsibility under Doctrine of Joint Criminal Enterprise," *Journal of International Criminal Justice* 5 (2007): 110–111.

<sup>206</sup> For discussion, see: Harmen van der Wilt, "Joint Criminal Enterprise: Possibilities and Limitations," *Journal of International Criminal Justice* 5, no. 1 (2007): 91-108; Allison M. Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law," *California Law Review* 93, no. 1 (2005): 75-169.

or to have, at minimum, knowledge that crimes were being committed by others. Critics of the doctrine point to its inability to account for “(co)responsibility in case of functional fragmentation where the lines of communication between the accomplices are diffuse or are even completely obliterated.”<sup>207</sup>

### *What? The Ideology and the Plan*

For the purpose of this study, a distinction is made – for practical and conceptual reasons – between the Ideology and the Plan which, together, contribute to answering that essential question of criminal investigation: *What?* The Milošević trial record contains a great deal of evidence that exposes the development and evolution of Serbian state ideology since the 19th century. Some of this evidence does not necessarily relate directly to Milošević, who occupied a position of power only between 1989 and 2000. But continuity of this ideological concept demonstrates how Milošević incorporated key elements of an already existing ideological template into his political platform, then developed it a step further by re-addressing Serbian statehood and the Serbian national question in the 1980s and 1990s. Despite differences in rhetoric, Milošević’s objectives regarding borders and the geostrategic viability of a single state for Serbs overlapped significantly with long-espoused ideologies.

The Plan is conceptualised here as a separate topic, in order to mark the stages where and when the Ideology became a platform for action at the level of state policy; and this notion of the Plan is very similar to the legal concept of a common purpose used to illustrate ties between the members of a JCE.<sup>208</sup> While the Ideology is a broader concept, reflecting the historical evolution through two centuries of efforts to form a state that would include all Serbs scattered across, most recently, the former SFRY republics; the Plan manifests the concrete objectives that Milošević and the political elites around him strove to achieve.<sup>209</sup>

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<sup>207</sup> Van der Wilt, “Joint Criminal Enterprise,” 92.

<sup>208</sup> For example, see: Judgement, *Prosecutor v. Milutinović et al.*, No. IT-05-87-T (26 February 2009), para. 97 and 103.

<sup>209</sup> Serbs in the SFRY lived not only in the Republic of Serbia but in large numbers in the republics of Croatia, BiH, Montenegro, and Macedonia. But, Greater Serbia ideology and Serbian state ideology pre-date the Yugoslav Federation, extending back to the Ottoman era.

In order to make this distinction between the Ideology and the Plan even clearer, it is necessary to review several theoretical concepts that underpin ideology generally. John B. Thompson, an authority on the theory of ideology, makes a link between language and ideology, stating that language is not simply a structure employed for communication or entertainment, but a social-historical phenomenon.<sup>210</sup> His work represents a series of attempts to explore the relationship between the theory of an ideology and the language by which it is promulgated.<sup>211</sup> Thompson recognises three major conceptions of ideology. The first, the neutral conception, denotes ideology as a “purely descriptive term,” when speaking for instance “of ‘systems of thought,’ of ‘systems of belief,’ [or] of ‘symbolic practices’...”<sup>212</sup> The second, critical conception, invests the term ‘ideology’ with a negative connotation. And Thompson’s third, rational conception of ideology suggests that “to study ideology is to study the ways in which meaning (or signification) serves to sustain relations of domination” through analysis of power dynamics “between actions, institutions, and social structures.”<sup>213</sup>

Thompson writes further that if ideology is understood as a belief system, politics and ideology are inseparable because “all political action is ultimately oriented toward the preservation, reform, destruction, or reconstruction of social order, and hence all political action is necessarily guided by an ideological system of beliefs.”<sup>214</sup> And so, adopting a combination of these conceptions, ideology is a system of beliefs with the propensity to impose or sustain domination; and it will be argued in this study that the moment at which an ideological concept becomes a dominant political force and political leaders choose to act upon it, an ideology transcends into a plan.

Terry Eagleton, another scholar studying ideology, advances this discussion by exploring the role of ideology in legitimising the power of a dominant social group or class. His analysis of the ways in which a dominant power legitimises itself “by promoting beliefs and values congenial to it” is useful for understanding how witnesses appearing for Milošević defended elements of Serbian state ideology in court. Eagleton writes that the proponents of an ideology will attempt to naturalise and universalise their ideological beliefs and values, trying to make them appear “self-

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<sup>210</sup> John B. Thompson, *Studies in the Theory of the Ideology* (Berkeley, CA: California University Press, 1984), 2.

<sup>211</sup> *Ibid.*, 3.

<sup>212</sup> *Ibid.*, 3-4.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*, 78-79.

evident and apparently inevitable.”<sup>215</sup> These ideologues will also malign competing ideas, exclude rival ideologies, and cover over social reality to serve their paradigm. Referred to as ‘mystification,’ this is meant to mask or suppress social conflicts, “from which arises the conception of ideology as an imaginary resolution of real contradictions.”<sup>216</sup>

The Prosecution’s approach to the Plan was based on the assumption that there was not a single, comprehensive political programme espoused by Serbian political elites since Milošević’s rise to power that could be seen as a blueprint for the events that led to war and violence between 1991 and 1999. In other words, the Plan changed over the course of the conflict and was influenced by political actions and reactions from other Yugoslav republics and the international community. Thus, this study identifies five goals that reflect key elements of the Plan at different intervals, extending from 1987 to 1999. Analysis of these goals explores how and when the Plan and its implementation became criminal:

**Goal 1, 1987 to 1990:** to centralise the Republic of Serbia by revoking the autonomy of Kosovo and Vojvodina.

**Goal 2, 1990 to 1991:** to centralise the Yugoslav Federation with the Republic of Serbia as its dominant force.

**Goal 3, 1991 to 1995:** to create a reduced Yugoslavia, including ‘Serb-designated territories’ in Croatia. For that purpose, the Republika Srpska Krajina (RSK) was established. This is the point at which the criminality of the Plan and its implementation emerged in full, as the creation of the RSK was achieved through the commission of crimes.

**Goal 4, 1992 to 1995:** the formation of the Federal Republic of Yugoslavia (FRY), a federation including Serbia and Montenegro, with contingencies in its Constitution for later absorption of other Serb territories. Following the model of the RSK, the Republika Srpska (RS) was created in BiH.

**Goal 5, 1998 to 1999:** continuation of efforts to dominate Kosovo (Goal 1), in the face of rising opposition from the majority ethnic Albanian population. This led to conflict between Serbia and Kosovo on the status of Kosovo, resulting in full-scale war in 1999, during

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<sup>215</sup> Terry Eagleton, *Ideology: An Introduction* (London: Verso, 1991), 5.

<sup>216</sup> *Ibid.*, 6.

which Serbian forces committed grave crimes in an attempt to alter the ethnic composition of Kosovo by displacing and expelling Kosovo Albanians.

### *How? The Plan Becomes Criminal*

At the core of every international criminal trial is evidence about the criminal nature of acts committed in the process of implementing political and military objectives – evidence from crime sites, the accounts of direct perpetrators and victims, forensic scientific evidence, eyewitness reports, etc. Reflecting on the five goals articulated above, Goal 1 was achieved through political pressure from the streets, and through manipulation and deception that led to changes to the Serbian Constitution in 1990. Political manipulations, bullying, and eventual military intervention – in Slovenia, upon its declaration of independence – were again employed in the effort to achieve Goal 2. Yet, the violence in Slovenia was short lived. The military intervention there ended after ten days, and with Slovenia's secession, efforts to centralise the SFRY failed and the Federation disintegrated.

The question of *How?* becomes very important when considering Goals 3, 4 and 5. Those goals mark stages of planning during which mass atrocities occurred. Goal 3 led to a full scale war in Croatia and an attempt to split Croatia into two, through a strategy of 'ethnic separation' in Serb-designated territories that was aimed at keeping all Serbs in a Rump Yugoslavia.<sup>217</sup> The goal of ethnic separation meant that crimes had to be committed against non-Serbs living in those territories. And, despite the failure to establish a Rump Yugoslavia, the Republika Srpska Krajina was established by the end of 1991 and continued to exist until the summer of 1995.

Goal 4 developed in response to the February 1992 vote for independence in Bosnia, which effectively ended any prospect of the Rump Yugoslavia for which Milošević had hoped. Serbia reacted by creating the Federal Republic of Yugoslavia in April 1992, as a federation between Serbia and Montenegro that was envisaged to eventually include Serb-claimed territories in Croatia and in BiH. Bosnian Serbs had refused to participate in the referendum on independence in BiH, or to accept the outcome. Applying the same methods as Croatian Serbs had, Bosnian

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<sup>217</sup> The term 'ethnic separation' refers to a condition in which ethnicities are physically segregated; but if this segregation is not self-imposed, reaching a state of ethnic separation requires the forced movement of people – in other words, ethnic cleansing. Ethnic cleansing can refer to a range of ways through which population transfer or demographics shifts are manufactured, from deportation to mass murder.

Serbs began a military campaign of ethnic separation, seizing territories by violence and through the commission of mass atrocities from April 1992 to September 1995. The violence was most severe in areas where Bosnian Serbs did not have a majority but sought territory for its geostrategic importance. One such area was Eastern Bosnia – a region which became world renowned for the genocidal massacre that took place in the town of Srebrenica in July 1995.

Goal 5 was focused on keeping Kosovo a part of Serbia by changing its ethnic composition, and reflected efforts that began in 1990 with the introduction of various laws and decrees that encouraged the settlement of Serbs in the province. In 1998, the ineffectiveness of these policies to change the ethnic balance in Kosovo resulted in an attempt to force these demographic changes through the commission of mass atrocities against the Kosovo Albanian population. These crimes were committed under the pretext of fighting Kosovo Albanian terrorism, which led to a massive police and army deployment in the province. In fact, violence was used indiscriminately against the entire population in targeted areas; and the Kosovo conflict proved to be a flagrant example by Serbia of the hostility of a state against its own citizens. Then, as the Prosecution asserted in the courtroom, Serbia used the 1999 NATO military intervention that was intended to end this violence as an excuse for the organised expulsion of Kosovo Albanians to the neighbouring states of Albania and Macedonia. But Goal 5 also ended in failure for Milošević. In June 1999, Serbian and FRY forces were made to leave Kosovo, and in 2008, Kosovo proclaimed its independence.

Development of the Plan, expressed in these five goals, reflects Milošević's development from an ordinary politician to a criminal leader. In order to prove its case, the Prosecution highlighted events that demonstrated when and how the line was crossed between the lawful and the unlawful, and how unlawful (criminal) acts by Milošević led to the particular crimes alleged in the indictments to have been committed by Serb forces. Of all the goals outlined above, Milošević achieved only the first. And in failing to reach the others, Milošević forever became associated in the history books with savagery and mass atrocities not seen in Europe since 1945.