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

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Conclusion

What would the postconflict period in the former Yugoslavia have looked like if there had been no ICTY? While ongoing discussion often weighs the debatable legal, political, and social effects of the Tribunal, this research is concerned with its documentary output – the trial record – which stands as an unprecedented collection of historical materials. And from that perspective, it is obvious that without the investigations and procedures of the ICTY, the Yugoslav conflicts would never have been recorded so thoroughly. Slobodan Milošević was the first former head of state indicted and tried for the commission of mass atrocities in an international criminal court. He was indicted in three indictments, each dealing with separate yet related crimes covering a period of almost ten years. No other single trial, at the national or international level, has addressed the mass atrocities committed by Serb forces in Croatia, BiH, and Kosovo. And this scope meant that his trial, even unfinished, left an exceptionally extensive record, serving to remind us that any mass atrocities trial is meant not only to punish perpetrators but also to shed light on past events that led to crimes and suffering.

The role of history inside and outside the courtroom has been contemplated and deliberated since the Nuremberg trials. This study shows that history is important inside the courtroom for at least two reasons: to help judges understand the political and historical context in which mass atrocities have taken place and to help prove the criminal intent of an individual responsible for the planning and execution of those crimes, especially where a motivating ideology has been conceived and developed over a long period of time. The record of a trial, finished or unfinished, endures as a valuable historical source not least because trial proceedings often expose materials that would normally be kept from the public. Indeed, evidence produced as a consequence of a court's power to compel individuals and states to cooperate may include confidential documents that would otherwise be concealed for many decades. By increasing access to sensitive documents from state and other archives, a trial can shorten the temporal distance conventionally assumed to accompany the writing of history. And, outside of the courtroom, the trial procedures and evidence that shape this history often reveal new details of a conflict and sometimes clarify ongoing controversies.

In the Milošević trial, the evidence provided important and fascinating insights into the social and political changes that took place in Yugoslavia, especially in Serbia, in the 1980s. This study

shows that when a trial record is used as a primary historical source, it can add value and depth to an already existing body of knowledge by confirming facts or interpretations or casting them in a new light; and in this particular case, the trial record's significance was even greater because Milošević chose to represent himself. His comments and interventions in court came close, at times, to testimony and his interaction with witnesses, together with his body language – seen in video recordings of trial proceedings – make the trial record a unique historical source. Still, detailed and daunting as a trial record may seem, the history of events as told and captured in court does not represent a definitive historical narrative. A trial record must be critically assessed like any other source.

The courtroom is a place where political, historical, and criminal responsibility intersect. Any investigator considering whether a crime has been committed and any lawyer prosecuting a criminal case must consider evidence that demonstrates what a suspect thought, did, and compelled others to do and whether those thoughts and deeds represent crimes that should be charged and tried. This approach is similar to that of historians, who search for patterns in the speech and actions of a historical figure; but in the case of a prosecutor, it is only when thoughts, words, and deeds are supported by adequate evidence that a case is brought to trial. In fact, charges should not be brought except in cases where the evidence can ultimately satisfy a trier of fact that a crime is proved beyond a reasonable doubt.

The most apparent difference between legal and historical responsibility is that the assignment of legal responsibility is captured in a judgment and remains frozen in time. Historical responsibility, on the other hand, may develop and change over time with the emergence of new sources. Still, legal narratives influence the shape of historical narratives. In mass atrocities trials, which inevitably deal with events that are in controversy, at least two competing 'truths' are presented – in the Prosecution and Defence narratives. These two narratives in the Milošević trial have played a role in shaping collective memory and establishing national histories, and have been traced throughout this study.

Long before the start of the trial in 2002, the historical and political debate about Milošević's role had already divided historians into three camps – the intentionalists, the relativists, and the apologists – and the narratives that developed in the courtroom can also be viewed through these

lenses. The Prosecution narrative addressed the intentions of individuals who held power and thereby strongly reflected an intentionalist historical interpretation of the conflict. Intentionalists see the Yugoslav crisis as having been part of a planned strategy by Milošević that depended on violence to meet clear pre-mediated goals.¹⁴¹⁶ From this perspective, Milošević's failure to achieve these goals does not diminish his political and criminal responsibility for crimes that were committed in the processes of creating the RSK in Croatia and the RS in BiH, and in attempts to hold on to Kosovo. The Defence narrative largely mirrors an apologist interpretation of the conflict, and at times the relativist view; both of which assert that Milošević genuinely sought to preserve Yugoslavia and that his policies were reactive – prompted by developments that were dictated by leaders in other republics and by the international community.¹⁴¹⁷ Relativists are cautious, however, to support their position with authoritative and corroborating sources, which has proven complicated in the case of Milošević, because his overt and covert agendas often clashed. Apologists go further in their defence of Milošević, endorsing his politics and the decisions he made, even in the face of evidence that those decisions brought dire consequences.¹⁴¹⁸

Apologists also tend to cast Milošević as charming and approachable.¹⁴¹⁹ While some may acknowledge negative characteristics such as vanity, sensitivity, and brittleness, the overall appraisal of Milošević by apologists is positive, and some have even described him as a heroic symbol of resistance.¹⁴²⁰ Predictably, many Milošević apologists count themselves among Serbia's nationalist intellectual elite. Their influence on trends within Serbian society cannot be discounted; and thus, it is difficult to say which courtroom narrative – and which historical interpretations of the Yugoslav crisis and of Milošević – will prevail in the end.

¹⁴¹⁶ For example, see: Biserko, *The Fatal Attraction of Serb Nationalism*; Sell, *Slobodan Milošević and the Destruction of Yugoslavia*; and Cigar and Williams, *Indictment in The Hague*.

¹⁴¹⁷ For example, see relativists such as: Cohen, *Broken Bonds*; Cohen, *Serpent in the Bosom*; Jović, *Jugoslavija*; Pavković, *The Fragmentation of Yugoslavia*; and Woodward, *Balkan Tragedy*. For the position of apologists on this issue, see: See: Antičić, *Slobodan Milošević*.

¹⁴¹⁸ See: Antičić, *Slobodan Milošević*; and Jović, *Od Gazimestana do Haga*, 200.

¹⁴¹⁹ For example, Antičić quotes Ivor Roberts, the former UK diplomat who met with Milošević on many occasions in the 1990s and had commented on Milošević's capability to charm. See: Antičić, *Slobodan Milošević*, 5. Antičić does not mention that Roberts also wrote about a not-so-charming conversation he had with Milošević related to the UN hostage crisis in June 1995, when Milošević told Roberts that he could have Karadžić killed if he did not comply. See supranote 1066.

¹⁴²⁰ Antičić, *Slobodan Milošević*, 5; Jović, *Od Gazimestana do Haga*, 39-41 and 200.

The Leader

Almost three decades after his march to power, historical evaluations of Milošević's leadership have evoked the suggestion of 17th century mathematician Blaise Pascal that the story of world history would have been different if Cleopatra's nose, which attracted Mark Antony and thereby led to the fall of the Second Triumvirate, had been shorter. Applied to Milošević, the question is: "Would the recent history of the SFRY and its people have turned out differently if Milošević had not visited Kosovo in April 1987?" Although there is merit to the argument that the history of the former Yugoslavia might indeed have turned out differently had Milošević not risen to power, historian Latinka Perović suggests instead that Serbian nationalists – who were seeking a leader for their movement – would have found someone else, if not Milošević, to direct the expansionist programme that had been their objective for over a century.

While Milošević came to power on the wings of an already potent nationalist movement, it is important to underline that he was not simply a puppet of that project. Indeed, once he rose to power, he became its most powerful executor. His agenda to unite "All Serbs in a Single State" was his path to criminality; and yet, at any stage of the aggression and violence, he could arguably have stopped or severely impeded the Serb war effort by cutting military aid. Instead, he increasingly embraced criminal behaviour in order to address not only cross-border territorial aspirations but domestic political challenges.

It was in 1987 that Milošević discovered his charismatic appeal to the public somewhat accidentally, during his first two visits to Kosovo; and he embraced his newfound influence with the eager vigour of a politician who yearns for power and has found a way to be noticed in a dense political landscape. His metamorphosis from communist functionary to the cult leader of all Serbs occurred in several seconds – just the time it took for him to say those now famous words, "No one is allowed to beat you." Serbian nationalists, who understood that their emerging movement needed to be validated in order for it to transform successfully into a political force, sought a Serbian communist official who could push their agenda in federal and republican institutions. And so, in 1987, when his pragmatism converged with their ideology in that sound bite in Kosovo, Serbian nationalists found their man in Slobodan Milošević.

The details of this 1987 visit to Kosovo were addressed during the trial. And, while it appears that Milošević spoke those particular words spontaneously (although in a less heroic context than his propagandists might have suggested), events that led up to that utterance and its treatment afterward were reflections of the well-oiled media machine that supported his early rise to power. Speeches prepared in advance by Kosovo Serbs about their suffering in Kosovo were broadcast live, and their allegations became a dominant narrative in Serbian politics. And Milošević's words, also captured on Radio Television of Serbia (RTS), were aired repeatedly, thereafter etching them into the history books. In fact, that famous statement was the basis for a popular mythologising of Milošević's leadership.

As much as Stambolić concluded, in retrospect and somewhat reluctantly, that taking his protégé under his wing had been his biggest political mistake, an analysis of Milošević's political career reveals that his power grew through support on several fronts and not only because Stambolić had been his early champion. But it was one thing to conquer power in Serbia and another to hold on to it; and Milošević's ability to retain power is partly explained by the dominant political culture in the Yugoslav state, stretching back to 1918. In 73 years, Yugoslavia never experienced democracy and relied heavily on authoritarian leadership. The death of strong leader Josip Broz Tito in 1980 created an opening for another authoritarian leader to emerge; and it was in this space that Milošević materialised as a politician. He was empowered by the communist party, but encouraged and supported by Serbian nationalist elites, who used the political confusion created by Tito's death as an opportunity to resurrect old grievances about the position of Serbia within the SFRY. They espoused nationalism as the basis for re-defining the constitutional status of Serbia, but in fact used the ideology to legitimise their power and secure Serb domination.

The conflicting influences and interests that shaped Milošević were reflected in his behaviour and observed by others. Warren Zimmerman, former US Ambassador to the SFRY, saw two people in Milošević: an authoritarian leader, ready to use force in the creation of a Greater Serbia, who spoke Serbian and despised Westerners; and a polite, pleasant, and cooperative diplomat who spoke English and reminisced about his banking days in New York. According to Zimmerman, this second Milošević was in charge of correcting the damage that the first Milošević had caused. Reflecting on Zimmerman's observations of Milošević as two-faced, Slobodan Antić evokes a Jekyll-and-Hyde analogy; but, in the case of Milošević, it was not a

potion that transformed him from gentleman into beast, but power.¹⁴²¹ And, indeed, “power for the sake of power” has been underlined as the most important *modus operandi* of his leadership by a wide spectrum of scholars, diplomats, fellow politicians, ICTY prosecutors, and journalists.¹⁴²²

The Ideology

A focus on Milošević’s desire for power has fed the widely accepted notion that he held no ideological convictions. Yet, it is more accurate to say that he adopted a mixed ideology, comprised of elements from various ideologies that served his pragmatic purposes and helped him retain power. For example, though he was not driven by nationalism, he readily accepted the agenda of nationalists and allowed them to elevate him as the protector of all Serbs. In this way, he instrumentalised ideology as a tool of power; and therein promoted specific ideological convictions, whether he believed them or not.

So, what were the ideological underpinnings of Milošević’s policies and when did he begin his turn from communism to nationalism? Did it all start in 1986 with the SANU Memorandum? The scholarly debate on the place of the Memorandum in Milošević’s political paradigm qualifies it as everything from a “blueprint for war” to merely an indicator of “a change in attitude toward the common state.”¹⁴²³ Mainstream views of the historiography of the Yugoslav conflict once held that there was no connection between Milošević and the authors of the Memorandum at the time it was written, and it was assumed that Milošević – like the rest of the Serbian leadership – had condemned it. But the trial record includes material that has shed more light on this issue.

In court, the Prosecution underlined that Milošević had been careful not to commit himself publicly to any ideological concept, including ideas laid out in the Memorandum, but argued that the SANU Memorandum had in fact been the roadmap for Milošević’s Kosovo politics. His tacit adoption of the goals of the Memorandum was in part confirmed by Milošević himself, who spoke highly of the SANU and invited some of the Memorandum’s authors to appear on behalf

¹⁴²¹ Warren Zimmerman, *Origins of a Catastrophe: Yugoslavia and Its Destroyers* (New York: Times Books, 1996), 26.

¹⁴²² See “Power for the Sake of Power” in Chapter II, pages 71-78.

¹⁴²³ Dragović-Soso, “Why did Yugoslavia disintegrate?...” 18-19.

of the Defence. When its two principle authors – Mihailo Marković and Kosta Mihailović – were called to the witness stand, they repeated the same arguments by which they had legitimised the wars in the 1990s, namely that the Serbs needed their own state as a safeguard against inevitable genocide and physical annihilation where they lived intermingled with non-Serbs. They rejected any suggestion that Milošević had carried out a nationalist agenda; however, they acknowledged a connection between the Memorandum and the views he held. Still, they asserted that the Memorandum had not introduced the Serbian crisis to Milošević but had probably confirmed his own observations.

The trial record also includes discussion about the “leaked” version of the Memorandum that reached the public, supposedly before it was finalised. But the Prosecution saw its distribution at every street corner in Belgrade as a deliberate act that had been aimed at stirring up interest among the masses, and contended that the secrecy associated with the document until its publication actually served at least two specific purposes by design. First, it generated public appeal beyond what the contents really merited and, second, the ‘leak’ of the unfinished report allowed the authors to deny its contents on the convenient grounds that it was never finished or officially adopted. Yet, a comparison of this unofficial version from 1986 and the completed version that was published by the SANU in 1995 revealed only six minor differences.

Milošević was not a leader blinded by his hatred of non-Serbs and therefore determined to destroy Kosovo Albanians, Croats, and Bosnian Muslims. Still, the trial record shows the effects of a decade of his reign – which left over 100,000 dead and many more displaced – and in the face of such numbers, it is natural that both observers and victims of the conflicts he waged wish to attach a clear, even if reprehensible, motive to his actions. This desire to understand the causes of violence is reflected in mass atrocities trial proceedings, which must ask: Why did violence occur and at what point was it sanctioned?

From the early days of the conflict in the former Yugoslavia, Milošević was demonised by his political opponents and the world media. After the conflict in Croatia took a violent turn and subsequently expanded into BiH, *Time* magazine published a June 1992 front-page article titled “Slobodan Milošević: Butcher of the Balkans.” In a sharp analysis, the author attempted to capture the essence of Milošević as a man and as a politician, describing his political tenure – at

the time lasting only a couple of years – with more refinement than the title suggested.¹⁴²⁴ The unflattering nickname stuck, though, and not least because Milošević exposed himself as ruthlessly determined to achieve his strategic goals and retain power in the years that followed.

The Plan: When and Why Violence Occurred

The courtroom narrative exposed the pre-meditated nature of the actions of Milošević and other Serb leaders. Valuable evidence on the details of this planning came from Defence witness Ratko Marković, who had articulated two strategies for addressing the Serb national question in 1992. The first and preferred option was a centralised Yugoslavia, and the alternative was a Serb state within ethnically-defined borders – the latter of which, Marković admitted, could only be achieved through violence given the ethnic mix of areas designated as Serb. Milošević's attempts to resolve the Serb national question mirrored Marković's strategies and were implemented in five stages: (1) the centralisation of Kosovo; (2) the centralisation of the SFRY; (3) the creation of the RSK, and ethnic separation in Croatia; (4) the creation of the RS, and ethnic separation in BiH; and (5) the retention of Kosovo through forced changes to its ethnic composition. Stages one and two were focused on achieving the first option articulated by Marković. When this strategy failed, the three final stages represented efforts to realise Marković's alternative option by creating an independent Serb state.

The Plan to Centralise Serbia

After consolidating power in Serbia, first by marginalising Ivan Stambolić and later by succeeding him in 1989, Milošević was in a position to press for radical change. In the spirit of the SANU Memorandum, his immediate political goal was to revoke the autonomy of Kosovo and Vojvodina, which would require that Serbia unilaterally undermine the 1974 SFRY Constitution that defined the provinces as federal units and assured their representation in the eight-member SFRY Presidency. And so, beginning in 1988, Milošević mobilised Serbs from Kosovo to lead demonstrations aimed at toppling the leadership in Vojvodina, Montenegro, and Kosovo through seemingly impromptu 'happenings of the people.' Protesting in Novi Sad, the

¹⁴²⁴ James L. Graff, "Butcher of the Balkans," *Time*, 8 June 1992.

capital of Vojvodina, and in Titograd (today's Podgorica), the capital of Montenegro, Kosovo Serbs talked before the TV cameras about hardships they faced in Kosovo. The trial record reveals that even if allegations put forward by Kosovo Serbs about the adversity they faced in Kosovo were truthful, no such complaints were made by Serbs in Vojvodina. Belgrade pushed for revocation of the autonomy of both provinces, though, so that however disguised, it became clear that petitions, speeches, and demonstrations that highlighted the purported suffering of Serbs in Kosovo were meant to topple sitting leaders who were not willing to conform to Milošević's political agenda.

At arguably the most memorable of these demonstrations, held in front of the Federal Assembly in Belgrade in February 1989, Milošević's performance in front of hundreds of thousands of Serbs became one of the landmark events of his career and contributed to the popular appeal and political charisma he enjoyed for years. Milošević celebrated this first major political success in a speech in Gazimestan, in 1989. He presented himself to Serbs gathered from all over the SFRY as a leader who could deliver concrete solutions to the problems Kosovo Serbs felt they faced. Moreover, resonating rhetoric from the SANU Memorandum, he called for the protection of Serbs living in other republics and announced the prospect of an administratively and territorially united Serbia.

One year later, in July 1990, Milošević and his communist associates formed the Socialist Party of Serbia (SPS), which facilitated the continued ideological influence of the authors of the Memorandum in Serbian politics after the fall of communism. Concepts articulated in the Memorandum were built into the SPS party platform and several of the Memorandum's authors became members of the Main Board of the SPS. The protection of Serbs outside of Serbia became one of the major political objectives of the SPS, and one which gained urgency against the backdrop of the disintegration of the SFRY.

Drawing attention to the alleged suffering of Serbs in Kosovo did finally stir up public anger and create legitimacy for the removal of leaders in Kosovo and Vojvodina, as well as in Montenegro, where Milošević's policies did not enjoy support. In September 1990, a new Serbian Constitution was adopted, and exaggerations that had been introduced by Serb nationalists in the 1980s about the risk of physical annihilation faced by Serbs in Kosovo were used to justify changes to the status of the provinces. These same arguments were repeated in the courtroom by

Defence witnesses some twenty years later and were challenged by the Prosecution and the judges. Still, the 1990 Constitution had successfully centralised Serbia, as the SANU Memorandum had proposed, and in December 1990, the SPS won Serbia's first multi-party elections, completing what was probably the single most successful year in Milošević's political career.

The Plan to Centralise the SFRY

The Defence narrative was that, under Milošević's leadership, Serbia did everything it could to preserve Yugoslavia because this would have kept Serbs in a single state. But the Prosecution presented evidence revealing substantial discrepancies between public proclamations and the reality of actions taken by Serbian political and military leaders. It became essential to the Prosecution's case to connect overt political and military activities with covert political and military objectives.

The Prosecution argued that if Milošević had really been interested in preserving the SFRY, he would have accepted federal reforms proposed in 1989 and would have engaged in constructive debate at the 14th Extraordinary Congress of the League of Communists (LC). It was at this sitting of the LC that Milošević had expected to bring his opposition from other republics in line. But Milošević miscalculated his influence, and in the aftermath of this failed Congress, the communist leadership from Slovenian and Croatia returned home and decided to hold multi-party elections, ending a 45-year monopoly of communism.

These political shifts in the two republics came as an unwelcome surprise to Milošević. Although he had adopted a nationalist agenda that placed the position of Serbs in the SFRY as the highest political priority, he was also very much a product of the communist system. He understood and appreciated its advantages in controlling the state through the centralised, well-organised, and omnipresent League of Communists infrastructure. And while Milošević had controlled and dictated the pace of developments between 1987 and 1990, he was far less successful in dealing with the breakaway republics. By failing to bring Slovenia back into the fold at the 14th

Extraordinary Congress in January 1990, he lost the opportunity to push through reforms and legislation that would have centralised the SFRY to the benefit of Serbia.¹⁴²⁵

By the end of 1990, all six SFRY republics had held multi-party elections. Parties that developed from reformed republic-level Leagues of Communists lost the elections in every republic except Montenegro and Serbia, where Milošević's newly formed SPS assured continuity of the policies he had started to implement in 1987. Milošević's rhetorical role as the keeper of communist ideology and of the territorial integrity of the SFRY won him the loyalty of some of the most powerful institutions in the Federation and most notably of the Yugoslav People's Army (JNA), which risked being eliminated if Yugoslavia disintegrated. This was an important alliance, especially because political developments in the Federation lagged behind those in the republics and multi-party elections were not held at the federal level.

While Milošević maintained in court that he had supported a solution which preserved Yugoslavia, and that this had been the best answer to the Serb national question, the testimony of his fellow politicians – including that of Ante Marković, Milan Kučan, and Stjepan Mesić – cast his intentions in another light. Evidence presented in court showed that Milošević had systematically sought accommodation for the interests of Serbia and of Serbs throughout Yugoslavia, while disregarding those of other Yugoslav peoples and republics. Yet, as Milošević told it, if Yugoslavia was a sinking ship, it was the leaders of other republics who had abandoned the Federation in its time of crisis and who were therefore the cause of later political violence; and he was simply a captain working to keep a damaged vessel afloat. In truth, talks among the new republic presidents on restructuring of the Federation revealed two opposing preferences for the form of a common state. Serbia and Montenegro wanted a more centralised federation, and Slovenia and Croatia advocated a confederation, with BiH and Macedonia left balancing between the two, trying but failing to find an alternative solution that could satisfy both sides.

The debate that preceded the disintegration of Yugoslavia was focused on whether or not a confederative system could be agreed upon. During the trial, Milošević and his Defence witnesses insisted that a confederation was an anachronistic model that never could have worked and was thus designed for failure. But Prosecution witnesses assigned responsibility for the end

¹⁴²⁵ Testimony of Stjepan Mesić (3 October 2002), 10776.

of Yugoslavia and the subsequent violence to Milošević and Serbian leadership because they had rejected a confederation and, thereby, the internationally-brokered Carrington Plan.¹⁴²⁶ The European Community had arranged for a peace conference as a last chance for the republics to work together to negotiate the terms of a reformed common state, but it ended with Serbia holding out as the only republic to snub the Plan. In court, witnesses and documentary evidence brought to light that Milošević had originally agreed to the draft Carrington Plan but had changed his position due to pressure from JNA leadership. By rejecting the notion of a confederation, Milošević had effectively reduced inter-republic discussions to little more than window dressing, and by the end of 1991, federal governmental institutions became completely paralysed by division and indecision. In December of that year, SFRY Prime Minister Ante Marković left Belgrade never to return, marking the end of an era.¹⁴²⁷

Qualifying the recognition by the international community of the independence of Slovenia, Croatia, Macedonia, and BiH as “premature” was another important part of the Defence narrative. The term “premature recognition” was coined in 1991 and was used to communicate a warning about the potential consequences of hasty recognition on the part of analysts and diplomats, by politicians who preferred that recognition of independence come at the end of a negotiating process. But that was in fact exactly what happened, after talks at Brioni in July 1991. The Defence attributed the violence that followed to the Slovenian and Croatian declarations of independence, which it characterised as unilateral. The Prosecution claimed that Milošević had already reconciled Slovenia’s independence by that time, but argued that he had not been prepared to let all of Croatia go before the Croatian Serbs had a chance to seize Serb territories there – and so, the ensuing violence was motivated by territorial aspirations. Indeed, the Prosecution presented evidence that Milošević had accepted the inevitability of the end of the SFRY and, by agreeing to Slovenia’s independence (and to part of Croatia’s), had created legitimacy for his own political aim to unify all ‘Serb-designated territories.’ Still, attempting to construct a history in which Serb crimes in Croatia and BiH were merely a reaction to aggression by Croats and Bosnian Muslims, Milošević repeated over and over again in court that violence

¹⁴²⁶ Trial Transcript, Defence Opening Statement (31 August 2004), 32172. Also see: Testimony of Smilja Avramov (8 September 2004), 32546; and Testimony of Vladislav Jovanović (22 February 2005), 36377.

¹⁴²⁷ Testimony of Ante Marković (24 October 2003), 28040-28042.

had resulted from the secession of the republics and that Serbs in Croatia and BiH were forced to take up arms to defend themselves.

The dispute over the nature of and accountability for the disintegration of the SFRY was refereed by an international Arbitration Commission – known as the Badinter Commission – in eleven Opinions on key questions of disagreement. In Opinion No. 1, issued in November 1991, the Commission determined that the SFRY was already in the process of dissolution when the republics started to opt for independence.¹⁴²⁸ The Commission’s final Opinion, issued in 1993, established the precise dates of independence of the SFRY successor states – Croatia and Slovenia on 8 October 1991, Macedonia on 17 November 1991, and BiH on 6 April 1992.¹⁴²⁹ Serbia and Montenegro did not seek independence but formed a federation in 1992.

From 1987 to 1991, as Milošević worked to centralise Yugoslavia, he had developed and demonstrated his savvy as a populist leader. He was capable of manipulating his adversaries, mobilising the masses to pressure his opponents, and bending the law to achieve what he wanted. But it was not until Milošević and his allies decided to apply a strategy of “ethnic separation” in pursuit of a Serb state – on sovereign territories in Croatia and BiH – that his criminality was exposed. Eventually, this strategy led to the formation of the Republika Srpska Krajina (in Croatia) and the Republika Srpska (in BiH). And, while Kosovo was seen as part of the same strategy, territory there was claimed not on ethnic but on historical and geostrategic grounds.

The Plan to Carve Out ‘Serb-Designated Territories’ in Croatia

The Prosecution concentrated on presenting evidence that showed how and when Milošević’s political behaviour first became truly criminal; and in the pre-trial investigation period, as well as in the courtroom, followed evidence that marked the moments and processes by which his criminality had emerged and developed. But this was difficult to prove since, as a sitting political leader using violence outside a constitutional and legal framework, Milošević had been careful not to leave an obvious evidentiary trail. Therefore, investigators worked to identify facts and

¹⁴²⁸ “Conference on Yugoslavia Arbitration Commission (Badinter Commission),” Opinion No. 1.

¹⁴²⁹ Ibid., Opinion No. 11.

events that exemplified where the line between the legal and the illegal had been crossed, either at Milošević's instigation or with his knowledge.

Arguably, any political leader determined to create a similar Serb state would have left behind a comparable record of violence against non-Serb populations. In Croatia, efforts to establish the western border of such a state led Serb forces to seize one-third of Croatian territory before undertaking efforts to make it ethnically homogenous – triggering the commission of mass crimes and significant loss and suffering among non-Serb populations. The proclamations of independence by Slovenia and Croatia in 1991 had prompted Serbia to develop the Belgrade Initiative, which called on all parties who wished to stay in a reduced Yugoslavia to lobby for that option jointly. For Croatia, the Initiative meant that Serbs who wanted to remain in the Federation sought to claim territories in which they were a majority and then break away from the rest of the country. Thus, from August 1990 to December 1991, Serb forces established Serbian Autonomous Regions (SAOs) across Croatia, eventually proclaiming the Serb para-state entity of Republika Srpska Krajina (RSK), which existed until August 1995. Serb leadership in Croatia coordinated with officials in Belgrade to implement and enforce ethnic separation between Serbs and non-Serbs.

At its core, the Belgrade Initiative was intended to keep the whole of BiH in a reduced Yugoslavia that included 'Serb-designated territories' in Croatia. The Prosecution asserted that this could not have been achieved without violence. In Croatia, any claims made to Croatian territory by Serbs – which presupposed ethnic separation between Croats and Serbs and the eventual partition of Croatia – were bound to cause inter-ethnic violence in areas with a mixed population. And in BiH, the most ethnically diverse republic, success of the Initiative depended on large numbers of non-Serbs essentially agreeing to remain in a Serb-dominated Yugoslavia. Evidence presented in court showed that the map of a Rump Yugoslavia proposed by the Belgrade Initiative closely resembled historical Greater Serbia designs, with the borders of both imagined roughly along the Virovitica-Karlovac-Karlobag (V-K-K) line. A Rump Yugoslavia never materialised, though, because BiH did not agree to remain in the Federation.

The first stage of ethnic separation in Croatia was undertaken with the help of the JNA in the summer and autumn of 1991, with the goal to split Croatia in two along the V-K-K line,

awarding the Dalmatian coast to the Serbs. Eventually, military resistance from Croatian armed forces and condemnation by the international community led Serbs to abandon the V-K-K line and with it the coastal zone that includes the towns of Dubrovnik and Zadar. The role of the JNA in these early operations was examined by the Prosecution, which presented evidence that JNA leadership had been hostile to new authorities in the Republics of Croatia and Slovenia. This was due at least in part to the fact that the secession of these republics undermined the sovereignty of the SFRY, which the JNA was constitutionally obliged to defend; however, evidence revealed that the JNA had started preparing for the possible disintegration of the SFRY as early as 1988, with tactical plans that also featured the V-K-K line. On 17 August 1990, the JNA assisted in organising an uprising by Croatian Serbs that is considered by some to be the start of the war in the former Yugoslavia.

The Creation of the Republika Srpska in BiH and the Commission of Mass Atrocities

The involvement of Milošević in events in BiH started before violence was unleashed there, and Bosnian territory remained at the centre of his political and military planning from the pre-war period through the conflict. Certain events of particular relevance, such as the 1991 meeting between Milošević and Tuđman at Karadžorđevo, were explored in depth in the courtroom, with new facts and interpretations emerging from the evidence. Indeed, early plans to split BiH between Serbia and Croatia led back to that March 1991 Karadžorđevo meeting; and although neither Milošević nor Tuđman ever confirmed rumours that they had discussed partitioning BiH along ethnic lines, evidence that such a plan may have existed was important to the Prosecution's effort to prove Milošević's state of mind regarding Bosnian territory.

It was actually Milošević's adamant denial that he had ever discussed splitting BiH with Tuđman that hinted at a guilty mind. Why was so much effort put into obscuring the nature of talks that others claimed had taken place if they were evidence of nothing? This caught the attention of ICTY judges, too, who considered the Karadžorđevo meeting important enough to refer to it in their 2004 Half-Time Judgement, calling it a "secret meeting" at which Milošević and Tuđman had discussed "the division of Bosnia and Herzegovina along ethnic lines and its annexation to Croatia and Serbia respectively..."¹⁴³⁰ However, plans made at Karadžorđevo were not brought to

¹⁴³⁰ Half-Time Judgement, para. 525.

fruition because Tuđman could not take the risk that ethnic separation in BiH would set a precedent for the similar partition of Croatia, and any such arrangements fell apart by June 1991, when Croatia declared its independence.

The failure to divide Bosnia between Serbia and Croatia led Milošević to focus on keeping all of BiH in a reduced Yugoslavia that would be controlled by Serbia. But this option was also excluded when BiH opted for independence in March 1992 and was subsequently recognised by the EU in April, followed by UN membership in May. As had been true in Croatia six months earlier, recognition of Bosnia's independence led Serbs to implement a strategy of ethnic separation there, and to establish Serb Autonomous Regions. And, rejection by Bosnian Serbs of independence for BiH was used to legitimise and mobilise support for the ethnic separation policy.

Questions such as which side started the war in BiH and for what purpose were addressed by both sides in court. But two crucial documents revealed that a Serb strategy of ethnic separation and then homogenisation had been developed for BiH even before the conflict there began. The first dates from December 1991 and was known colloquially as the "Variant A and B Document," in which two plans were made for the BiH territories Serbs sought to take – one for municipalities with a Serb majority (Variant A) and the other for municipalities where Serbs were a minority (Variant B). The crimes committed by Serbs were gravest in the municipalities defined in Variant B. The other important document that served as a blueprint for the commission of crimes in BiH by Serb forces is known as The Six Strategic Objectives, issued by the Bosnian Serb Assembly in May 1992. It identified strategically important regions that would secure the contiguity of Serb-claimed territories in BiH with both Serbia and Serb territories in Croatia, and included areas that had an overwhelming Bosnian Muslim majority. It was in those territories – in municipalities in Northern and Eastern Bosnia – that the most horrific crimes were committed and where Milošević was charged with genocide.

Genocide in Bosnia and Herzegovina

Returning to the question of whether the history of Yugoslavia would be different if someone other than Milošević had taken leadership of Serbia in the 1990s, the simple answer is "yes."

History may well have taken a different course if he had been less persistent or less adept as an international negotiator; were it not for his success at the negotiating table, the worst crimes of the wars may have been prevented. But his personality and education – accented by his fluency in English and his capacity to engage – made him an obvious negotiating partner among international diplomats, and his grip on Serb politicians inside and outside Serbia designated him as the principle negotiator of a peace agreement. And so, he was able to drag out the war in Bosnia by dragging out peace talks, eventually securing ethnic separation for Serbs in BiH in an internationally-brokered accord.

He succeeded in dividing Bosnia with the approval of the international community not just by insisting that territorial gains on the ground be reflected in a peace settlement, but through the skilful use of anti-Muslim rhetoric that warned of a “Green Transversal.” He rarely spoke publicly in derogatory terms about any ethnic group, but preferred to refer instead to global threats of fascist or Islamist domination. His words reflected the private thoughts of some Western politicians, who – according to Bill Clinton’s account – opposed the establishment of a Muslim majority state in the heart of Europe.

Peace Negotiations and the Strategy of Ethnic Separation

Milošević’s hold on power in Serbia after the summer of 1995 did not seem to be affected by his failure to deliver his promise of “All Serbs in a Single State.” He basked in having legalised the Republika Srpska in the Dayton Peace Agreement, which he hailed as a victory and a validation. At a high level meeting in December 1995, held immediately after the negotiations, he referred to the great success of Serbs in having created an internationally sanctioned “Serb state” in BiH. For Milošević, Dayton was a triumph that allowed him to reinvent himself as a politician. Internationally, he took on the identity of a peacemaker who had compelled Bosnian Serb leaders to accept the peace agreement. Actually, Radovan Karadžić and General Ratko Mladić had been indicted by the ICTY in July 1995 and were not permitted to travel to Dayton.

Milošević’s attitude toward peace negotiations, which manifested in years of internationally-brokered talks, was more complex than his expressed dedication to peace suggested. His backing of a political – as opposed to a military – resolution to the conflict masked his determination to

transform *de facto* military conquests into *de jure* territorial gains, with the ultimate goal that territories seized by Serbs in Croatia and Bosnia be recognised in a peace settlement mediated by the international community. Thus, in Croatia, the Serbian government's support for United Nations Protected Areas (UNPAs) had not represented a discontinuity in efforts to unify all Serbs, but was a tactical move meant to achieve ethnic separation in Croatia with both international arbitration and approval. And in BiH, ethnic separation and the preservation of territorial gains were not only important as political and military objectives to Serbs, but were also part of their negotiating strategy during the war. In peace negotiations, Serbs legitimised military conquests, paying special attention to ensuring territorial adjacency so that the RSK and the RS could be connected to Serbia through negotiated corridors. This would be the foundation for later unification as permitted by the FRY Constitution of 1992 – which stipulated that the Republics of Serbia and Montenegro could be joined by other federal units.

Backing for the policy of ethnic division in BiH was in fact remarkably easy to come by among representatives of the international community. Witnesses testified that the rumoured partition agreed to at the 1991 Karadžević meeting had actually enjoyed European support, because Europe was not prepared to allow the formation of a unitary BiH, with a Muslim majority.¹⁴³¹ In the period from February 1992 to December 1995, international negotiators proposed five peace plans, all of which were based to varying degrees on the principle of ethnic separation. The first, the Cutileiro Peace Plan – proposed almost one year after the Karadžević meeting and two months before war broke out in BiH – evoked the arrangement Tuđman and Milošević had reportedly discussed at Karadžević. Ethnic separation of BiH was also the basis of the Vance-Owen Peace Plan of 1993, which proposed the creation of ten cantons. During negotiations for the Vance-Owen Plan, violence escalated as Serbs and Croats fought for more territory, anticipating that it would be awarded to them at the negotiating table. Instead, negotiations failed by mid-1993, as they did for two subsequent peace proposals: the Owen-Stoltenberg Peace Plan of 1993 and the Contact Group Peace Plan of 1994. Although Serbs were pleased with the ethnic separation principle reflected in these plans, none afforded them enough of the territorial corridors they felt they needed in order to later unify a Serb state; so, they fought for more.

¹⁴³¹ Testimony of Ante Marković (23 October 2003), 28027.

Genocide in Srebrenica

The Bosnia indictment was the only one in which Milošević was charged with genocide. The Trial Chamber's Half-Time Judgement – issued at the end of the Prosecution case in 2004 – did not determine whether genocide was in fact committed in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ, and Bosanski Novi; its practical implication was that Milošević would have had to present evidence during the Defence part of the case in order to refute genocide charges in those municipalities, and to counter Prosecution evidence and create reasonable doubt.¹⁴³² Some of that evidence addressed the relationship between Milošević and Bosnian Serb leader Karadžić, and was important to establish the extent of Milošević's power and responsibility for events in BiH. The Prosecution insisted that, despite occasional discord, Milošević and Karadžić never abandoned their common project and that the war efforts of Serb forces in BiH were not possible without the constant financial, military, political, and diplomatic support of Belgrade and of Milošević personally. At any time, he could have denied this aid, but he never did; only reconsidering it after the highly publicised fall of Srebrenica and Žepa, when the war was almost at its end.

Evidence of a "Swap of Territories"

The Milošević trial record contributed significantly to military and political reconstruction of the crimes committed in Eastern Bosnia in 1995, and evidence presented in court revealed the complex military and diplomatic circumstances in which these crimes took place. Still, despite this extensive record, fully tracing individual criminal responsibility for the genocide in BiH is still impossible, 20 years later. When he died, almost all the evidence Milošević had presented had been on Kosovo, with evidence on Croatia incomplete, and hardly any at all presented for Bosnia. Had Milošević lived to present all his evidence for the Croatia and Bosnia indictments, the imbalance in evidence presented for the three indictments would be less significant. But this imbalance has meant that, for Bosnia especially, it has been necessary to look beyond the trial record for evidence, especially in respect to Srebrenica.

¹⁴³² Half-Time Judgement, para. 246 and 288. Also see: supra note 81.

And so, the case of the Srebrenica genocide is a good example of the paradox that a trial record can, at the same time, be too sizeable for analysis in a single study and yet not exhaustive enough that supplementation by other trial records, academic studies, archival material, or media reports isn't necessary. For instance, the Prosecution did not address the "swap of territories" strategy in the evidence; though it had emerged during the pre-trial investigation that there may have been a coordinated effort by the international community, Serbia, and Croatia to allow Serbs to take territories in Eastern Bosnia (the RS) in exchange for the return of Croatian territories claimed by Serbs. The ease with which the Republika Srpska Krajina was lost in August 1995 – with hardly any resistance from Serb forces – supports the possible existence and success of a swap of territories approach. Indeed, by mid-1995, representatives of the international community had lauded the ethnic homogenisation achieved by creation of the RSK and RS for "simplifying" the situation on the ground as efforts to reach a permanent peace settlement intensified.

Dubiously, Western intelligence showing movements of Serb military installations that indicated the potential for a major massacre, if not genocide, was also collected in the summer of 1995; but none of the countries privy to this intelligence, including the US, France, and Great Britain, acted to prevent genocide. This may be why crucial intelligence that could lead to a greater appreciation of what happened in Srebrenica and Žepa remains obscured from the public, and thus from the courts, two decades after their fall. While support for a swap of territories did not mean the international community also gave a green light to the crimes committed by Serb forces after they took the two Bosnian Muslim enclaves, more than 8,000 men and boys were captured and killed over several weeks as UNPROFOR soldiers looked on. And in negotiations, the Serbs' obstinate determination to defer a settlement until they had taken the Drina Corridor – one of their strategic objectives – seemed to pay off. The Dayton Peace Agreement formalised the internal division of Bosnia by incorporating much of the Drina River Valley, which lies along the Serbian border, into the entity of Republika Srpska.

Through this lens, the July 1995 conquest of Srebrenica and Žepa was a particular strategic victory for Bosnian Serbs given the location of these towns on the border with Serbia. Indeed, territorial conquests made in the summer of 1995 led to even greater ethnic homogenisation in both Croatia and BiH. Following the capture of the Eastern Bosnian enclaves by Serbs, Croatian forces had re-conquered the RSK in Operation Storm, compelling Croatian Serbs to leave

Croatia and leaving the Croatian population more ethnically uniform than ever before. The fall of the RSK made the western borders of the RS less relevant, especially since the conquest of the Eastern Bosnian enclaves had allowed for territorial contiguity between the RS and Serbia in the east. And these territorial realities became the basis for peace talks in Dayton. The Bosnian Serbs had successfully deferred a peace settlement until they had established control of the Drina River corridor, and they were rewarded for holding out. The Dayton Peace Agreement accepted conditions on the ground that had been created through the commission of crimes aimed at achieving ethnic separation, and gave the Serbs the territorial corridors they had aspired to in previous negotiations but had never been granted. It divided Bosnia into two entities – the Bosnian Muslim-Croat Federation and the Republika Srpska – affirming wartime conquests and, for some, the means to that end.

The Plan to Change the Ethnic Composition of Kosovo

As the dissolution of Yugoslavia was hashed out at the republic and federal levels and wars were waged in Croatia and BiH, tensions within Serbia over the status of its provinces, especially Kosovo, remained a constant threat to Serbian political stability. Kosovo had been something of a switch Milošević could flip throughout his career to revive his popularity whenever he found himself in a difficult position domestically. From 1990 to 1998, Serbian leaders had mainly concerned themselves with maintaining the status quo in Kosovo; however, this had proved to be very difficult and then impossible, due to the province's overwhelming ethnic Albanian majority. To counter this, discrimination in favour of Serbs and against Kosovo Albanians had been implemented through a number of decrees, starting in 1990, but none of these measures was enough to encourage Serbs to stay in or move to the province, as had been hoped. Instead, these policies simply amounted to a form of apartheid in which the Kosovo Albanian population was excluded from many spheres of public life. When Kosovo Albanian children were prevented from attending school, parallel Kosovo Albanian structures and an informal government were finally formed. Still, in the face of this discrimination, Kosovo Albanian politicians led by Prime Minister Ibrahim Rugova adopted a policy of peaceful resistance.

The trial record reveals that relations between Serbia and Kosovo were troubled for decades, long before the adoption of the 1990 Serbian Constitution, which revoked the autonomy of the

provinces. Despite a majority ethnic Albanian population in the province, the Serb nationalist paradigm – which was built partly on the claim of Serb rights to Kosovo – offered only two solutions to the ethnic conflict there: to find a way to keep all of Kosovo within Serbia or to accept the Kosovo Albanian majority as a fact and divide Kosovo into Serbian and Albanian parts. Milošević never recognised the latter option, though, and during his political tenure, the retention of Kosovo within Serbia was a key aim. But, the formal constitutional revocation of the autonomy of Kosovo and Vojvodina in 1990 had not been followed by efforts to resolve ongoing social, economic, or political problems in the provinces.

Having failed to include Kosovo on the agenda of the Dayton peace negotiations in 1995, the international community eventually pressured Serbia to start talks with Kosovo Albanian leaders in order to normalise life in the province. But these negotiations failed by 1996 due to the refusal by Belgrade to accept any political settlement that would involve a change in the status of Kosovo. By that time, Rugova's policy of peace had not borne results and alternative approaches were sought by a younger generation of Kosovo Albanians who chose to resist Serb hegemony by arms, forming the Kosovo Liberation Army (KLA). As Kosovo's conflict escalated, the KLA gained both notoriety and strength. Serbia attempted to stop the KLA through extensive use of force and the indiscriminate targeting of both Kosovo Albanian civilians as well as KLA fighters, causing a humanitarian catastrophe that displaced approximately 300,000 Kosovo Albanian civilians from their homes by the end of December 1998. In a twist of irony, Defence witnesses argued that these policies were necessary to prevent Kosovo Albanians from uniting with Albanians from neighbouring countries to join in a Greater Albania. The Prosecution saw the expulsions of Kosovo Albanians from their homes as an attempt by Serbia to change the ethnic composition of targeted areas in order to make the governance of Kosovo more manageable for Belgrade.

Milošević succeeded for almost a decade in keeping the Kosovo conflict away from international mediation or interference. By mid-1998, having been reprimanded and criticised by the international community, he turned unsuccessfully to the Russian Federation. Faced with either complete international isolation or international mediation, Milošević finally agreed to allow monitors to enter Kosovo that October. For several months, the Kosovo Verification Mission (KVM) struggled to fulfil its mandate and then, in January 1999, despite the KVM's presence in

the province, Serb forces attacked the small village of Račak and killed 40 civilians. The Račak massacre led to the first serious initiative to compel the two sides to reach a political solution in Kosovo, and the international community called for a peace conference in Rambouillet, in France, in February 1999. By the end of that month, it was clear that Serbia would not accept the draft Rambouillet Peace Plan and, despite threats of external military intervention aimed at stopping the humanitarian catastrophe in the making, Milošević called the Kosovo Albanians “scoundrels” and refused a last call for cooperation. With the failure of the talks, on 24 March 1999, NATO intervention began.

The NATO bombing lasted ten weeks. According to the Prosecution, Serbia used the intervention to cover up mass forced expulsions and killings of Kosovo Albanians. Indeed, evidence presented in court indicated that there were plans by politicians such as Vojislav Šešelj, expressed as early as 1990, to expel up to 300,000 ethnic Albanians from Kosovo. While the Defence claimed that Kosovo Albanian civilians left Kosovo because of the NATO bombing, the Prosecution contended that the organised nature by which civilians were moved to the Albanian and Macedonian borders by police-escorted buses and trains indicated otherwise. Serbian police even seized identity documents from Kosovo Albanians at border crossings to make it more difficult or impossible for them to return. And, among the most compelling evidence that Serbia had been involved in the commission of crimes was the fact that a number of mass graves were exhumed and bodies reburied in Serbia after it became clear in May 1999 that Serb forces would lose the war. After nearly two-and-a-half months of bombing, Serbia was compelled to sign the Belgrade Peace Agreement on 4 June 1999 and the Kumanovo Military Agreement on 10 June – according to which all Serbian and FRY military forces had to leave Kosovo. With the withdrawal of these forces from Kosovo, it became even more ethnically homogeneous than before the war, reducing the Kosovo Serb population to a few enclaves.

The Evidence

Those of us with a professional interest in international criminal trials must work on the basis that lawyers and judges in international courts are doing their best with the material available to them; but we would be wise to remind ourselves that, sometimes, significant political manipulations influence what evidence is made available. During the Milošević trial, revelations about a deal to protect portions of archival records from Serbia highlighted the

importance of transparency in the way evidence is presented in mass atrocities trials. The protection of evidence should be possible only on the most solid legal grounds, for obscuring the truth from those who are entitled to know it – the public, and especially victims – can undermine the integrity of such a trial, finished or unfinished. And, once a trial such as that of Milošević is over, the trial record remains a monument to generation after generation that has sought justice.

From the number of counts charged to its protracted length, the Milošević trial reflects so many reasons that a more efficient and transparent system for obtaining documentary evidence is necessary. International criminal courts and trials will need to prioritise the creation of systems that allow these materials to be obtained in days or weeks, not in months or years, and make them public as early as possible. This may require that the acquisition of documents (and witnesses) be the responsibility of any political body that establishes a court – a responsibility that would have to be supported by the ability to sanction parties for non-compliance. Beyond adding to legal efficiency and transparency, this approach would improve the quality of trial records and make them more complete.

Evidence on the de facto and de jure Responsibility of a Leader

Trying a former head of state for mass atrocities requires gaining access to insider witnesses and confidential documentary evidence. After all, holders of high political, military, and state positions typically have mechanisms at their disposal to destroy or hide evidence that might point to their criminality. Evidence presented in the trial revealed the trouble that Serbian leaders had taken to keep their wartime political and military plans and activities from the public, and from the ICTY; but some of this evidence was a potent reminder that traces of crimes committed on such a mass scale can never be completely erased, especially not after the political downfall of those responsible. Sooner or later pieces of the puzzle surface, and in the case of Milošević, documents from state institutions that offered proof of Milošević's *de jure* and *de facto* power were important to illustrating his overarching criminal plan.

Milošević's *de jure* position changed over the period covered by the three indictments against him. He was President of Serbia from 1990 to 1997 and then President of the FRY from 1998 to 2000, and the Prosecution had to demonstrate both his *de facto* and *de jure* powers during each

of the wars. The key to establishing his criminality was to reveal the extent of his power over military and special police units.

For the years encompassed by the Croatia indictment, the Commander-in-Chief of Yugoslav forces was the collective Presidency of the SFRY, and evidence from PSFRY meetings was therefore paramount, especially as it related to decision making about use of the JNA. As President of Serbia, Milošević was not a member of the PSFRY, but he wielded *de facto* control of the body through four compliant members known as the ‘Serbian Bloc.’ The Serbian Bloc took power over the PSFRY after the representatives from Croatia, Slovenia, Macedonia, and BiH stopped attending meetings on 1 October 1991 as the result of growing political and military tensions. Members of the Serbian Bloc continued to meet, forming a Rump Presidency and assuming all constitutional powers of the Presidency, including that of collective Commander-in-Chief.

During the period covered by the Bosnia indictment, the Supreme Defence Council (SDC) was the Commander-in Chief of the Yugoslav Army after the PSFRY dissolved, and records from SDC meetings were essential to proving Milošević’s knowledge of operations by Bosnian Serb and Yugoslav forces in BiH. SDC records showed that only the thinnest line exists between individual, collective, and state responsibility in the commission of mass atrocities; and the condition set by Belgrade that portions of these records be protected added to the weight of their content. Indeed, these records showed the direct involvement of the FRY in the war in Bosnia.

A state that has been involved in conflict may be seen to owe a duty to itself (as opposed to any responsibility it may have to the international community) to ensure that an adequate record of its own history is left behind. But, for many reasons, states often choose to obscure their role in conflict, and for obvious reasons, their role in the commission of mass atrocities. The nature of Serbia’s cooperation with the ICTY has been an example of how elites may invest great effort over decades to keep evidence from the courts that they fear could implicate a state; in this case, as a party to genocide in BiH.

One might argue that Serbia’s effort to control the flow of evidence that could prove the culpability of the state or its high-level officials in the commission of genocide has been successful. It’s true that the legal history of genocide in BiH as recorded in decisions of the

ICTY and the ICJ exonerates Serbia. It is hardly surprising, though, that no “smoking gun” unequivocally linking Serbia to genocide exists. After all, a state accused and found liable for genocide at the ICJ would most likely be ordered to pay enormous reparations, and would bear the stain of the history told in an associated trial record. By creating a counter narrative, Serbian elites contribute to a false sense of equivalence regarding criminal and historical responsibility for the conflict, or even cast the victims as villains. A refusal by current Serbian leaders to admit to crimes committed by the former regime also frees them up to pursue the ‘unfinished’ geopolitical objectives their predecessors failed to achieve, without having to make the inconvenient admission that these objectives have been linked to mass atrocities. Indeed, for some, the formation of an enlarged Serb state is an ongoing project; and many Serbian political elites still hope to redraw Serbia’s western border through the incorporation of the Republika Srpska – the Bosnian entity that was “homogenised” through the commission of crimes, including genocide, and was then awarded to Serbs in negotiations to end the war.

Serbia’s attempts to keep documents away from the courts and the public may have successfully protected the state from legal responsibility, but one hopes that future efforts to control the legal process and the historical narrative by withholding documents may be less effective now that national and international courts can compel states to cooperate. In the case of the SDC records, obtained by the ICTY in 2003, their redactions remained until the 2011 trial of Yugoslav Army General Momčilo Perišić. Still, since his acquittal on all charges in 2013, the substance of SDC documents – finally accessible to the public – has not been fully analysed.

Reviewing formerly protected parts of these records for the purpose of this research, it was notable that Serbia had chosen to redact details about the links between and interoperability of Yugoslav, Serbian, and Bosnian Serb and Croatian Serb forces. SDC session notes revealed the state of mind of Council members as they sought a solution to the question of how to regulate Yugoslav officers serving in Bosnia, and arrived at the fiction of the 30th and 40th Personnel Centres as the answer. All commanding officers of Serb forces outside of Serbia were thereby paid and managed through these Centres, which were formal parts of the Yugoslav Army (VJ) hierarchy. This meant that officers who were directly involved in ordering the takeover of Srebrenica and in the commission of genocide there – some of whom were later tried and convicted at the ICTY for the crime – were on the payroll of the VJ. Yet, after the fall of

Srebrenica and Žepa in the summer of 1995, Belgrade took no measures of its own to investigate these officers; not even General Ratko Mladić, who commanded Serb forces in BiH. In fact, Mladić remained on the VJ payroll until 2002, when he began receiving a pension.

Among the most compelling parts of the SDC records were those that exposed that the VJ had sent its own units to fight in BiH. The effort of SDC members, and in particular of Milošević, to hide this fact indicated that they knew these operations were unlawful and unconstitutional. Further, given the amount of reporting about mass atrocities committed in BiH, SDC members also had to know that these actions were criminal. Nonetheless, and despite unavoidable evidence of the crimes committed by Serb forces, Belgrade continued to finance the Bosnian Serb war effort.

Though some Bosnian Serb leaders desired more BiH territory than they were awarded at Dayton, as far as Milošević was concerned, Mladić had secured a victory. At the SDC session held on 6 December 1995, with Dayton negotiations behind him, Milošević referred to the success of Serbs in Bosnia, their victorious creation of a Serb state, and its acceptance internationally. He stressed that the Republika Srpska was twice as large as Montenegro and spoke of the necessity of moving refugees from the FRY to populate it. The Serbs had managed to take every town along the Sava River and the whole of the Drina corridor, except for Goražde. And despite the crimes committed in the process of ethnic separation in BiH, a Serb territory in Bosnia was indeed legitimised in the Dayton Peace Agreement. The establishment of the RS as a separate entity in BiH is considered the most important military victory and historical achievement of the wars of the 1990s by the elites who instigated them.

Save for Milošević, who died in 2006 before his trial finished, no other individual from the FRY (or from Serbia and Montenegro) has been indicted for the crime of genocide. Two ICTY indictments of three former high-ranking officers in the Yugoslav Army and the Serbian Ministry of Internal Affairs – *Prosecutor v. Perišić* and *Prosecutor v. Stanišić and Simatović* – did include charges related to Srebrenica, but for crimes against humanity not for genocide. All three were acquitted of all charges, and their judgments were received in Serbia with celebration. For many, their acquittals were seen as an exoneration of Serbia as a whole.

Evidence for the Kosovo Indictment Period

The SDC allegedly stopped meeting during the period relevant to the Kosovo indictment; but an ad hoc body known as the Joint Command was formed at that time, designed to hold *de facto* control over military decision making but obscure *de jure* lines of responsibility. And so, although Milošević was still the Commander-in-Chief of the VJ during the Kosovo conflict, it was not his *de jure* position that led to a straightforward criminal case against him. The Joint Command for Kosovo and Metohija had given orders to forces on the ground in the province, and the name referred to cooperation between Serbian security and police officials with the VJ, under the political coordination of SPS politicians. Denials by Milošević and his Defence witnesses about the purpose of the Joint Command, despite solid evidence showing the nature of its activities, was seen by the Prosecution as confirmation that Milošević knew very well that VJ and MUP units subordinated to the Joint Command were committing crimes in Kosovo in 1998 and 1999.

Perhaps the most telling proof of these crimes came from Defence witnesses who had been members of the Joint Command, including one who confirmed in cross-examination that a meeting to discuss the removal of bodies from graves – during which he had noted, “no bodies, no crime” – had taken place in the office of President Milošević. The meeting, held in May 1999, took place during the NATO bombing. Understanding that capitulation or defeat would mean losing Kosovo, Serbian leaders calculated that the reburial of Kosovo Albanian victims in secondary mass graves inside Serbia might remove traces of their crimes. Eventually, though, these secondary graves were uncovered.

The Transformative value of the Trial Evidence

The Milošević trial was an example of the transformative social value that the exposure of evidence of this nature can have; and it generated public debate about the part played by Serbia, its state institutions, and its officials in post-Yugoslav violence. Some of this evidence had particularly powerful reverberations in Serbian society and politics. When the Kula Camp Video surfaced in the courtroom, showing Milošević shaking hands with notorious members of paramilitaries in 1997, it exposed to the public that officials in the Serbian MUP had been involved in committing mass atrocities. Revelations of the war history of individuals who

maintained important positions within the MUP in the post-war period led to a mutiny of top Serbian police officials in November 2001, seriously destabilising the Serbian government under reformist Prime Minister Zoran Đinđić, who had been instrumental in transferring Milošević to The Hague in June of that year.

In 2003, Đinđić was assassinated by paramilitary members featured in the Kula Camp Video. One of the most revealing statements about the climate that surrounded Đinđić's assassination came from a Serbian representative responding to complaints by the Prosecution about Serbia's level of cooperation with the ICTY, who said:

It should be remembered that it is this government that arrested and surrendered Mr. Milošević in the first place. It should also be remembered that Mr. Djindjic, who was prime minister, took responsibility for this act, was assassinated in March, and at the same time from the investigation into his murder, it has transpired that there has been a further list of targeted officials, prominently including certain ministers responsible for cooperation with the International Tribunal. To suggest in these circumstances that the government is actually withholding evidence is quite cynical, especially if one compares the armchair perspective of the Prosecution with the tangible challenges faced by the government.¹⁴³³

The legacy of Milošević's regime has become the Achilles heel of his reformist successors. A decade of violence did not bring the results that Serbian nationalists hoped for; and, two decades after Milošević embarked on his effort to create a Serb state, the project remains unfinished. It was the legacy of his policies in Kosovo that eventually became his own vulnerability, too. It was in Kosovo, and because of his Kosovo politics, that Milošević had become a leader in 1987; but twelve years later, Kosovo brought him military, political, and personal defeat and humiliation.

Still, while Milošević may have lost his lustre, Kosovo and the Republika Srpska continue to play prominently in Serbian politics, where political and intellectual elites have held tight to ambitions to expand Serbia's western border to include the RS. In fact, in 2013, Prime Minister

¹⁴³³ Trial Transcript (3 June 2003), 21667.

Dačić publicly reiterated the importance for Serbia of insuring preservation of the Bosnian entity, calling it even more important for Serbia than Kosovo.¹⁴³⁴ Rhetorically committed to EU integration, which stands as the only viable geopolitical option for Serbia at the moment, Serbian politicians are aware that accession to the EU would exclude changes to state borders. And so, not surprisingly, Belgrade has looked to Vladimir Putin's Russia as an alternative ally for diplomatic, economic, and geopolitical support – though, so far, without success.¹⁴³⁵

Mass Atrocities Trials and the Right to Know

Serbian politics two decades after the breakup of the SFRY reflect a development of the postconflict period in the former Yugoslavia that is not altogether surprising – that the former warring sides have advanced their own interpretations of the history of the conflict, echoing the very ideological divisions that triggered violence in the first place. But the ability of future generations to create false narratives may be limited by the history told in records of ICTY trials, even of the unfinished trial of Milošević.

While this study focuses on the role of Milošević specifically, there is a need for comparative research that examines the roles of other leaders of former SFRY republics during the 1990s. Analysis of the evidence contained in both national and international trial records will allow for a more complete accounting of what occurred, and on whose orders, in the wars that followed Yugoslavia's disintegration. To that end, this study can pave the way for similar research.

¹⁴³⁴ “Dačić: Opstanak Republike Srpske mnogo važniji državni interes nego opstanak Kosova u okviru Srbije,” *Blic*, 26 April 2013.

¹⁴³⁵ See: “Serbia won't impose any sanctions against Russia, premier says,” 15 October 2014, *TASS*, <http://en.itar-tass.com/world/754456> (accessed 30 October 2014); and Andrew Rattman, “Serbia refuses to join EU sanctions on eve of Putin parade,” 15 October 2014, *EUobserver*, <http://euobserver.com/foreign/126078> (accessed 30 October 2014).