The trial of Slobodan Milosevic: a twenty-first century trial?

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At 10.02 am on Tuesday, 3 July 2001, Slobodan Milosevic made an initial appearance before the International Criminal Tribunal for the former Yugoslavia (ICTY).¹ He wore a blue suit, a blue shirt, and a tie in the national colours of Serbia. He was the first former head of state in history to be prosecuted for war crimes by an international tribunal.² This image of international criminal justice was flashed across the world's media.³ The humbling of a former head of state carried massive significance in terms of the power of law and institutions acting in the name of the international community. As many observers and the prosecution noted, the ghost of Nuremberg had finally risen. The trial proper began on 12 February 2002 and was expected to last up to two years.

This chapter considers the principal features of the first war crimes trial of the twenty-first century in terms of personnel and procedures, the alleged crimes, and issues of legality and legitimacy. It also speculates on the narratives or non-narratives of the trial and how these may impact on the professed aims and objectives of the litigation. This last aspect necessarily raises more questions than answers, but a trial of this magnitude justifies both preliminary analysis and speculation, not only to assist observation of the trial as it unfolds but also to challenge and provoke beyond mere observation.

I Slobodan Milosevic

Slobodan Milosevic was born on 20 August 1941 in Pozarevac, in present-day Serbia. In 1964 he graduated from the Law Faculty of the University of Belgrade. During a career in management and banking he held senior positions in a major oil company and in one of the largest banks in the Socialist Federal Republic of Yugoslavia (SFRY). Having joined the League of Communists of Yugoslavia in 1959, he held a succession of important party positions, culminating in the presidency of the Socialist Party of Serbia (SPS), an amalgamation

of the League and the Socialist Alliance of Working People of Serbia. In 1989 he was elected President of the Presidency of the then Socialist Republic of Serbia (now the Republic of Serbia). In 1990, he was elected President of the Republic of Serbia in multi-party elections; he won re-election in 1992. Five years later he was elected President of the Federal Republic of Yugoslavia (FRY). He relinquished that position on 6 October 2000 following his defeat in the presidential election.

During the dissolution of the former Yugoslavia, Serbia fought successive conflicts with Slovenia, Croatia, and Bosnia to maintain the federal state.⁴ It also engaged in a prolonged struggle to keep Kosovo as part of Serbia.⁵ Milosevic rose to international prominence during this period and was surrounded by a cult of personality. He was demonised by Western media, being described as the 'Butcher of Belgrade'.⁶ In relation to Kosovo, in April 1987 he famously told Serbs that the Kosovo Albanians would not beat them any more.⁷

In May 1999, Judge Hunt of the ICTY confirmed an indictment against Milosevic and four others⁸ and issued an international arrest warrant. Two additional indictments followed. In January 2001, warrants to the FRY for the freezing of assets and surrender of Milosevic and the others were reissued. Milosevic was arrested on 1 April 2001 by the local authorities after a 26-hour siege of his presidential villa in Belgrade.⁹ On 29 June 2001, he was transferred to the ICTY and detained on remand at the United Nations Detention Unit in Scheveningen, The Hague. He was kept in solitary confinement for a month. Throughout his incarceration he was been subject to constant electronic surveillance. His initial appearances in respect of the indictments took place on 3 July 2001 (the Kosovo indictment), 29 October 2001 (the Croatia indictment), and 11 December 2001 (the Bosnia indictment).

II Courtroom logistics

The case was set down for trial by Trial Chamber III, composed of three judges. The Presiding Judge is Richard May (United Kingdom), a specialist in criminal law and evidence.¹⁰ The other two judges are Patrick Robinson (Jamaica) and O-Gon Kwon (South Korea). The working languages of the ICTY are English and French. Translation is provided into Serbo-Croat, but Milosevic has refused to use it. He is fluent in English but has spoken only Serbo-Croat at the trial. The trial is held in Court Number One, a small, modern, office space containing twenty-four computer monitors and an electronic projector (an ELMO). The three judges sit at the centre on a slightly raised dais and wear red and black gowns provided by the ICTY. To their immediate left the UN flag is draped on a pole. In front of the bench are the officials from the Registry. To the left is the prosecution team, to the right the three *amici curiae* (friends of the court). The lawyers wear their national legal costumes.¹¹ Milosevic sits on the far right, with two UN security officials close by. On each side of the

courtroom is a series of booths for the translators. The Chamber is separated from the public by a bullet-proof glass wall, which creates a 'fish-bowl' effect. Participants and spectators are asked to rise when the judges enter and leave the courtroom.

The ICTY's internet site contains all of the essential documents related to the trial. These include the indictments and their amended versions, the transcripts of the hearings, and all of the Orders and Decisions. After press requests, the Chamber authorised still photography by three designated press photographers at the commencement of all proceedings and the release of the audio-visual record of the proceedings to the media. The ICTY films the proceedings and no independent filming is allowed inside the courtroom. Given the high media interest and limited space, only one person per media organisation has been admitted to the public gallery of the courtroom. For that same reason, and in order to accommodate as many media representatives as possible, media accreditation for the first week of the trial was on a daily basis, with different media representatives having access to the public gallery on each day. A media centre has also been established in the Netherlands Congress Centrum, opposite the ICTY, where the trial was relayed on a large video screen for the first week. On the first day, the opening statements were relayed with a simultaneous English translation. Subsequently, the relay and publication of public proceedings on the ICTY's website in English, Bosnian/Croat/Serb and Albanian has included a 30-minute delay. The delay is to prevent the disclosure of the identities of protected witnesses.

The prosecution team¹² is headed by the ICTY Prosecutor, Carla Del Ponte, a former Attorney General of Switzerland, and includes advocates from the UK and the Netherlands.¹³ There is no defence counsel because Milosevic stated his wish to defend himself.¹⁴ Part of his reasoning was that the ICTY was illegitimate, so he would not require lawyers to conduct a defence before it. The prosecution asked the Chamber to consider appointing a defence counsel, but the Chamber determined that such an appointment would breach international customary law. However, in August 2001, the Chamber requested the Registrar to designate *amicus curiae* for the proceedings.¹⁵ While acknowledging that Milosevic was entitled to represent himself, the Chamber considered that it had the duty of ensuring that the trial was fair and that his rights were fully respected. On 6 September 2001, the Registrar designated Mr Steven Kay QC (London), Mr Branislav Tapuskovic (Belgrade), and Professor Michail Wladimiroff (The Hague) to act as *amici curiae*. The Chamber stressed that the *amici* did not represent Milosevic and could not put forward a positive defence case. Their role was to assist the Chamber in the proper determination of the case by making any submissions properly open to the accused by way of preliminary or pre-trial motion or by interventions during the trial. These could include objecting to evidence, cross-examining witnesses, and drawing the Chamber's attention to any exculpatory or mitigating evidence, but not calling witnesses or cross-examining on instructions. The Chamber later added

that the *amici* should also point out any defences, for example, self-defence, which might properly be open to Milosevic and, significantly, make submissions as to the relevance, if any, of the NATO air campaign in Kosovo.¹⁶ They are provided with copies of all the material provided to Milosevic and other specified documents, but they are not provided with any filings made on an *ex parte* basis. Milosevic protested at the appointment of the *amici*, regarding them simply as part of the ICTY and an expression of what he ironically termed the 'Hague fair play'. In October 2000, Wladimiroff's appointment was revoked after Milosevic complained that Wladimiroff had written articles that gave rise to a reasonable perception of bias.

Milosevic's failure to appoint defence counsel created two problems at the outset of the proceedings. First, the prosecution was uncertain what course to take on the disclosure of exculpatory material, that is, material which helps the accused's case. Normally, meetings on disclosure are held between the prosecution and defence counsel. In the absence of the latter, the Chamber advised the Prosecutor to review the material using a broad definition of 'exculpatory' and, if in doubt, to disclose it to Milosevic and to the *amici*. Second, Milosevic complained that his 'legal advisers' had not been allowed to visit and communicate with him. The rules on detention allowed legal visits only from a nominated lawyer and he had refused to nominate one.¹⁷ Sensibly, the Chamber responded to this formalistic problem by ordering the two persons whom Milosevic had asked to meet, Ramsey Clark¹⁸ and John Livingston, to be his lawyers, as distinct from defence counsel.¹⁹ He was entitled to communicate with them 'fully and without restraint'.

III The indictments and charges

As noted, three separate indictments were issued against Milosevic. They contained a total of sixty-six counts, and conviction on any one count could attract life imprisonment. Each indictment concerned events in different parts of the former Yugoslavia and different types of military conflict. Kosovo was an internal civil war/terrorist situation; Croatia was a civil war and then an interstate war; and Bosnia was an international armed conflict/partial occupation and/or intervention in a civil war in another state. The classification has consequences for the applicable humanitarian law.

If the three indictments were tried separately, it was estimated that the case would run for least three years. The Chamber approved the prosecution's application to join the Croatia and Bosnia indictments, but considered that significant distinctions in time, place, and the nature of the alleged conduct precluded joinder of the Kosovo indictment.²⁰ Thus, the stage was set for two successive trials, with the first, on Kosovo, beginning on 12 February 2002. However, this decision was overturned on 1 February 2002, when the Appeal Chamber ordered joinder of all of the indictments and a single trial.²¹ It did so on the basis that the acts alleged in the three indictments formed

the 'same transaction'. The trial would still begin as scheduled although the prosecution would not be ready to proceed with evidence on the Croatia and Bosnia indictments until 1 July 2002 (that part of the case began in September 2002). For the purposes of the trial, the three indictments were deemed to constitute one indictment with a single case number.²² The single trial allowed the prosecution to present a single historical narrative of events in the former Yugoslavia.²³

The prosecution described the Kosovo indictment as essentially a deportation case.²⁴ It alleged that, between 1 January and 20 June 1999, forces of the FRY and Serbia acting at the direction, or with the encouragement or support, of Milosevic executed a campaign of terror and violence directed at Kosovo Albanian civilians.²⁵ The objective of the campaign was to remove a substantial portion of the Albanian population from Kosovo to ensure continued Serbian control over the province. The indictment described a series of well planned and co-ordinated operations by the above forces. Approximately 800,000 Kosovo Albanian civilians were expelled from the province by the forced removal from and subsequent looting and destruction of their homes, or by the shelling of villages. Survivors were sent to the borders of neighbouring countries, and, en route, many were killed, abused, or robbed. Furthermore, massacres took place in twelve stated locations, including the murders of 118 people in the village of Izbica on 28 March 1999.

Milosevic's alleged responsibility rested on his *de jure* authority as President of the FRY, Supreme Commander of the Yugoslav Army ('VJ'), and President of the Supreme Defence Council, and pursuant to his *de facto* authority. Thus, Milosevic was charged with individual criminal responsibility under Article 7(1) of the ICTY Statute, and superior criminal responsibility under Article 7(3), namely, one count of violations of the laws or customs of war (murder), and four counts of crimes against humanity (deportation, murder, and persecutions on political, racial, or religious grounds).

The Croatia indictment alleged that Milosevic participated in a 'joint criminal enterprise' between at least 1 August 1991 and June 1992. The purpose of this enterprise was the forcible removal of the majority of the Croat and other non-Serb populations from approximately one-third of the territory of the Republic of Croatia, in order to join it to a new Serb-dominated state. Serb forces, comprising Yugoslav People's Army ('JNA') units, local Territorial Defence ('TO') units, TO units from Serbia and Montenegro, local and Serbian Ministry of Internal Affairs ('MUP') police units, and paramilitary units, attacked and took control of towns, villages, and settlements in the territories. After the take-over, these forces, in co-operation with the local Serb authorities, established a regime of persecution designed to drive out the non-Serb civilian populations. This regime included the extermination, wilful killing, or murder of hundreds of civilians, including women and elderly persons, the deportation or forcible transfer of at least 170,000 civilians, and the arrest and unlawful confinement or imprisonment under inhumane conditions of

thousands more. Virtually the entire non-Serb civilian population was forcibly removed, deported, or killed in a number of regions, and public and private property was intentionally and wantonly destroyed or plundered.

As with the Kosovo indictment, Milosevic's alleged guilt was based on individual and superior criminal responsibility. During the relevant period, he had been President of the Republic of Serbia and as such exercised effective control or substantial influence over the other participants of the joint criminal enterprise.²⁶ Thus, he was charged with nine counts of grave breaches of the 1949 Geneva Conventions (wilful killing, unlawful confinement, torture, wilfully causing great suffering, unlawful deportation or transfer, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly); thirteen counts of violations of the laws or customs of war (murder, torture, cruel treatment, wanton destruction of villages or devastation not justified by military necessity, destruction or wilful damage done to institutions dedicated to education or religion, plunder of public or private property, attacks on civilians, destruction or wilful damage done to historic monuments, unlawful attacks on civilian objects); and ten counts of crimes against humanity (persecutions on political, racial, or religious grounds, extermination, murder, imprisonment, torture, inhumane acts, deportation inhumane acts (forcible transfers)). One of the specific allegations was that on 20 November 1991, Serb military forces dragged 255 Croats and other non-Serbs out of Vukovar hospital after the Serbs had taken control of the city. The victims were taken to a farm 5 km outside Vukovar, where they were beaten and tortured before being shot and buried in a mass grave.

Finally, the Bosnia indictment alleged that from 1987 until late 2000, Milosevic was the dominant political figure in Serbia and the SFRY/FRY, and that he acted alone and in a joint criminal enterprise whose aim was the forcible removal of the majority of non-Serbs, principally Bosnian Muslims and Croats, from large areas of Bosnia and Herzegovina. This enterprise was directly carried out by the JNA, the VJ, the Bosnian Serb Army ('VRS'), the special forces of the Serbian MUP, and Serbian irregular and paramilitary units. Milosevic exerted control or influence over certain of these groups, and provided financial, logistical, and political support to those outside his direct control. Moreover, he controlled, manipulated, or otherwise utilised the Serbian state-run media to spread exaggerated and false messages of ethnically based attacks by Bosnian Muslims and Croats against Serbs to create an atmosphere of fear and hatred among Serbs living in Serbia, Croatia, and Bosnia and Herzegovina which contributed to the forcible removals.

The indictment further alleged that Milosevic, while holding positions of superior authority, was responsible for the acts and/or omissions of his subordinates. Article 7(3) of the ICTY statute provides that a superior is responsible for the criminal acts of his subordinates, 'if he knew or had reason to know that his subordinates were 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 punish the perpetrators'. The Federal Presidency had direct control over the JNA as its 'Commander-in-Chief' and effective control over units supervised by the JNA. The generals who directed the JNA in Bosnia and Herzegovina were in constant communication and consultation with Milosevic. Furthermore, as a member of the Supreme Defence Council and as president of the FRY, Milosevic had *de jure* and *de facto* control over the JNA and later the VJ. In these capacities he also exercised control over key figures in the MUP as well as in the State Security ('DB'), which together directed the special forces and Serb paramilitary groups. Among the specific allegations made in the indictment was the 1995 Srebrenica massacre of up to 8,000 Muslim men and boys.

This indictment charged Milosevic with two counts of genocide and complicity in genocide (genocide being the most serious possible charge before the ICTY); ten counts of crimes against humanity (persecution, extermination, murder, imprisonment, torture, deportation and inhumane acts (forcible transfers)); eight counts of grave breaches of the Geneva Conventions of 1949 (wilful killing, unlawful confinement, torture, wilfully causing great suffering, unlawful deportation or transfer, and extensive destruction and appropriation of property); and nine counts of violations of the laws or customs of war involving, *inter alia*, attacks on civilians, unlawful destruction, plunder of property, and cruel treatment.

When asked how he pleaded to the Croatia indictment, Milosevic sought to make a speech rather than respond. Judge May cut him off from the microphone saying that, 'it was not the time for speeches'. As he had failed to plead, the Chamber entered pleas of not guilty on every count on his behalf. The same happened with the other two indictments.

IV The mechanics of evidence

There is extensive testamentary and documentary evidence on the events in Kosovo, Croatia, and Bosnia,²⁷ but evidence that is admissible in a criminal trial is much more limited. A court may restrict or exclude evidence on the grounds of reliability²⁸ or efficiency. One of the prosecution's first proposed witnesses was the ICTY's senior investigator for Kosovo. He had prepared a report based on 1,300 interviews by ICTY investigators, but the Chamber excluded his opinions and conclusions as hearsay.²⁹ The number of prosecution witnesses has also been considerably reduced from the total figure of 600 initially estimated by Del Ponte. In relation to the Kosovo indictment, the Chamber set the number of prosecution witnesses at ninety, with leave to apply for permission to present additional witnesses. The Chamber then indicated that further reductions would be necessary to meet the time limit of the end of June/beginning of July for the conclusion of the Kosovo case. Not all proposals to save time have been accepted, however. The Chamber denied the prosecutions motion to disclose witness statements to the accused solely

in English. Article 21(4) of the ICTY statute requires that the accused be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him, and the Chamber determined that the disclosure obligations in this particular case were 'so fundamental as to outweigh considerations of judicial economy'.³⁰

In the early stages of the trial prosecution witnesses testified on a range of issues, including Milosevic's character, events that took place in the former Yugoslavia, and Milosevic's participation in those events. There has been expert evidence from police officials and military investigators, as well as from diplomats, historians, forensic pathologists, economists, constitutional lawyers, social scientists, journalists, and archaeologists. To establish his responsibility, the prosecution's witnesses will have to link the allegations in the indictments to Milosevic and his government's policies. Some of these witnesses will be former Serb government officials awaiting their trials in The Hague. One possible witness is the former Bosnian Serb president Biljana Plavsic.³¹ She is the most senior Serb politician and the only woman brought before the ICTY. Protective measures have been granted for a number of witnesses,³² but a prosecution motion to withhold witness identities until they testified was denied. The prosecution argued that non-disclosure would avoid any possibility of intimidation. The Chamber, however, considered that the proceedings must remain consistently transparent, and that withholding the names of witnesses would defeat that objective.

The first witnesses were Mahmut Bakalli, a former communist leader of Kosovo and now a member of the Kosovo Parliament, Peter Spargo, an Australian police officer who created maps for the ICTY showing the displacement routes from Kosovo, and a Mr Zeqiri, an Albanian farmer from Kosovo, who had allegedly lost twenty-six of the twenty-eight members of his family. All three witnesses were severely cross-examined by Milosevic both as to their evidence and their credibility. Milosevic has stated that he intends to call witnesses, including the former US President, Bill Clinton; the UK Prime Minister, Tony Blair; the former UK Foreign Secretary, Robin Cook; Madeleine Albright, the former US Secretary of State; and Kofi Annan, the UN Secretary-General. He would have to demonstrate to the Chamber that the evidence of such witnesses was relevant to the charges against him. In October 2002, Stjepan Mesic, the President of Croatia, became the first head of state to testify before an international criminal tribunal. One witness who refused to give evidence was held in contempt.

How quickly the trial progresses will partly depend on how much of the written evidence adduced by the prosecution is held admissible by the Chamber.³³ The potential documentary evidence is vast. In relation to the Kosovo indictment the prosecution initially intended to produce 500 documents, 167 extracts of video recordings, 775 photographs, 50 charts and sketches, 30 maps on paper media and an electronic map, 30 slides or other images, and hundreds of police forensic reports. Some of this material was either with-

drawn by the prosecution or rejected or limited by the Chamber. For example, the Chamber agreed to view BBC news videos without the sound because the latter represented opinion or commentary.³⁴ In relation to the Croatia indictment, the documentary evidence represents 3,000 pages in English, along with videotapes, photographs, and forensic reports.

V Arguments of legality and legitimacy

In her opening address Del Ponte argued that the evidence would reveal co-ordination between the VJ, the MUP, and the other forces of the FRY and Serbia throughout the Kosovo campaign, and that the patterns of threats, abuse, property destruction, rape, and murder were relentlessly repeated by these forces.³⁵ Milosevic, however, vigorously denied the allegations of wrongdoing³⁶ and argued instead that responsibility lay chiefly with the Kosovo Liberation Army ('KLA') and NATO. The KLA constituted a terrorist threat to Serbia, against which Serbia lawfully defended itself. This defence did not include ethnic cleansing – on the contrary, the KLA ordered the Kosovo population to flee in order to attract NATO support, and NATO bombings caused further flight, destruction, and death.³⁷ NATO intervention was part of a larger strategy to secure global control. It stirred up conflicts between Slav and Muslim nations in the hope that they would destroy or at least weaken each other so much that control might be established over them. Serbia was the victim of these aggressive actions, whose real criminality lay in the killing of Yugoslavia.

Milosevic did not merely deny the accusations; he denied the legitimacy of the entire ICTY process. The ICTY was not appointed by the UN General Assembly, therefore it was illegal.³⁸ Its chief officers were also biased. The Kosovo indictment suggested that NATO did not commit aggression against Yugoslavia but rather that Yugoslavia committed aggression against itself. Discounting the devastating effects of seventy-eight days and nights of NATO bombing, during which 22,000 tonnes of bombs were dropped, itself showed partiality or bias on behalf of the prosecution.³⁹ If the Chamber refused to take these facts into account then it too was part of the machinery to commit a crime against his country and his people. Milosevic also particularly attacked the presence of a British judge as evidence of a biased tribunal.⁴⁰ Given the UK role in Kosovo, the Chamber could not be impartial.

The biased, false, 'absurd' indictments, including the attempt to blame Serbia 'for the armed secession of Croatia which provoked a civil war, conflicts and suffering of the civilian population'⁴¹ revealed the real aim of the trial, which was to produce a false justification for the war crimes of NATO at the expense of the Serbian nation. He noted that the Kosovo indictment had been issued on the sixtieth day of NATO aggression against Yugoslavia, and that two and a half years after obtaining the Croatia and Bosnia indictments the prosecution was not ready to proceed with them.⁴² Not only was Serbia on trial for

defending itself, the trial was inciting further Albanian terrorism in southern Serbia. That terror, conducted under the auspices of the United Nations, had resulted in 33,000 people being chased out of Kosovo and Metohija. Furthermore, there was a parallel trial through the media. This was part of a 'media war designed to Satanise the Serbian people, the Serbian leadership, Milosevic and his family'.⁴³

Milosevic also argued that his own treatment by the ICTY undermined its legitimacy. He considered that his imprisonment was the product of an illegal arrest. He also complained of his isolation from his family, that he was discriminated against in relation to family visits,⁴⁴ and that his visits and family conversations were monitored. He wanted the cameras removed from his cell and to meet his family in the absence of prison staff. He also wanted to communicate with the press as he claimed that lies were being printed about him. The response of the Chamber to the latter point was that the Rules of the Detention Unit forbade such communication. It is difficult to justify that blanket restriction.

Milosevic stated this litany of complaints orally before the Chamber. In addition, he presented two formal motions challenging the legality of the ICTY by reason of its unconstitutionality, its lack of an independent prosecutor or objective judges, its violations of his right to privacy and freedom of expression, its discriminatory territorial jurisdiction, its lack of competence by reason of his status as former president, and his unlawful surrender. The *amici* presented some similar arguments. They argued that the Chamber should address the jurisdictional issue by seeking an opinion from the highest judicial body of the UN, the International Court of Justice, which is also located in The Hague. They also put the arguments of bias and partiality, submitting that from Milosevic's perspective the ICTY was incapable of giving him a fair trial and faced unacceptable levels of pressure from external sources. An example of partiality was the court's order forbidding him from giving media interviews, while the prosecution faced no such restriction.⁴⁵ The *amici* also argued that trying Milosevic for actions as a head of state violated the principle of state sovereignty. Finally, questions were raised about the legality of Milosevic's extradition from Yugoslavia to The Hague.

The Chamber dismissed all of the arguments in a reasoned opinion⁴⁶ but Milosevic has challenged the legality of his detention and trial in other fora. He sought an order for his immediate release from the Regional Court in The Hague. The court refused, stating that it considered the ICTY to be independent and impartial. In December 2001, Milosevic also submitted an application against the Netherlands before the European Court of Human Rights in Strasbourg.⁴⁷ This claimed that the ICTY was illegal and that his arrest and detention violated the following Articles of the European Convention on Human Rights: Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 10 (freedom of expression), Article 13 (right to an effective remedy), and Article 14 (prohibition of discrimination). In March 2002 the

application was declared inadmissible for failure fully to exhaust domestic remedies.

VI Aims and objectives of this trial?

The final determination of Milosevic's guilt or innocence lies some time in the future. While this is the trial's fundamental purpose, it will not be its only consequence. Law reduces often highly complex stories through legal concepts of relevance and admissibility, and through the legal process important, and arguably new, stories may emerge. The narrative struggle in this trial will determine how much some of the bigger political legitimacy questions will be addressed in this forum. In her opening address, Del Ponte set out her aims and objectives in no uncertain terms.

Today, as never before, we see international justice in action. . . . This Tribunal, and this trial in particular, give the most powerful demonstration that no one is above the law or beyond the reach of international justice. As Prosecutor, I bring the accused Milosevic before you to face the charges against him. I do so on behalf of the international community and in the name of all the member states of the United Nations, including the states of the former Yugoslavia. The accused in this case, as in all cases before the Tribunal, is charged as an individual. He is prosecuted on the basis of his individual criminal responsibility. No state or organisation is on trial here today. The indictments do not accuse an entire people of being collectively guilty of the crimes, even the crime of genocide. It may be tempting to generalise when dealing with the conduct of leaders at the highest level, but that is an error that must be avoided. Collective guilt forms no part of the Prosecution case. It is not the law of this Tribunal, and I make it clear that I reject the very notion. . . . [W]hile I bring the indictment as Prosecutor in the international public interest, I do not mean to ignore the victims of the crimes committed during the conflicts . . . [A]s Prosecutor, I do not directly represent any individual victim. I do, however, consider it to be part of my function in presenting the case to allow the voice of the victims to be heard. . . . With the trial of this particular accused, we reach a turning point of this institution. The proceeding upon which the Chamber embarks today is clearly the most important trial to be conducted in the Tribunal to date. Indeed, it may prove to be the most significant trial that this institution will ever undertake.⁴⁸

Yet how comforting are these words? The trial raises difficult questions with respect to at least four identifiable groups: Serbia and the Serbian people; Bosnian, Croatian, and Serbian victims; other nations and organisations caught up in the conflict; and the ICTY itself. Del Ponte's confidence notwithstanding, the trial may complicate these questions more than it answers them.

To what extent is Serbia actually on trial in this case? Despite Del Ponte's express denial, Milosevic has repeatedly described the proceedings as a crime against his country and an accusation against the Serbian people. If, to some

extent, Serbia is being placed under the microscope of international review, will the experience be similar to that of Germany following the Second World War? The Nuremberg trial contributed to Germany's re-acceptance into the community of civilised states, but did not lift from the German people the burden of collective guilt.⁴⁹ Conversely, the trial may contribute to feelings of denial and isolation. It has been widely reported that many Serbs find the actions taken against them incomprehensible given the role of Serbia in the Second World War, its ethnic kinship with Russia, and friendship with Italy and France.⁵⁰ A response to this feeling of betrayal by the outside world may be denial and historical reconstruction. There have already been reports of Milosevic being written out of Serbian history.⁵¹

Del Ponte has stated that she wishes the voices of the victims to be heard, but how can this be achieved? What role will the trial play in establishing the 'truth' of what happened, particularly as witnesses give oral evidence and the evidence of mass graves is presented?⁵² To what extent can a criminal trial of this kind serve to provide a cathartic experience for victims, and ought this to be one of its aims? If so, how can the proceedings be structured to allow for Serbian, as well as non-Serbian, victims to tell their stories?

In the early stages of the trial Milosevic has drawn attention to the role of the KLA and NATO. Why have there been no indictments for alleged war crimes committed by members of the KLA? Del Ponte has been reported as saying that she would like to issue indictments but that there are problems in obtaining evidence.⁵³ Milosevic has claimed that Osama Bin Laden, allegedly responsible for the attacks on the United States in September 2001, was in Kosovo with the KLA.⁵⁴ Might such information redirect American attention to the Balkans as part of its 'war on terrorism'? Does NATO have immunity for the heavy toll of civilian casualties that resulted from its bombing campaign? If it does not, how are NATO, member states, and individuals to be held responsible for the alleged violations of international law committed against Serbia in respect of Kosovo?⁵⁵ Moreover, what of the other members of the international community, both those which supported and sustained the former Yugoslavia, Serbia, and Milosevic,⁵⁶ and those which failed to intervene to stop the ethnic cleansing and other atrocities?⁵⁷

And, finally, can the independence and impartiality of the ICTY be credibly maintained? Both Milosevic and the *amici* have challenged the legitimacy of the process on the grounds of bias. Can it withstand the critiques of those who consider that the trial is merely another example of 'Victor's Justice' – 'a demonstration of power more than of justice?'⁵⁸ An 'International Committee to Defend Slobodan Milosevic' has been formed and attracted over 1,200 supporters, including the distinguished playwright Harold Pinter.⁵⁹ Perhaps the new permanent International Criminal Court, which is expected to begin work in 2003, will signal the end of all such *ad hoc* tribunals,⁶⁰ but will that tribunal end the debate over the validity of 'international justice' in the context of war crimes?

This volume has considered some of the most significant war crimes trials of the twentieth century. That century began with a failure for such trials when the Netherlands government refused to hand over the ex-Emperor of Germany to an international tribunal. In the *Milosevic* trial, the twenty-first century may begin with a success, or with failure of a different kind. Whatever its outcome, this trial may have deep and lasting significance for international law and international institutions. War crime trials have been defended as the means by which the most important international norms are finally, fairly, and peacefully enforced. If an individual trial fails to achieve these aims, it can undermine the validity of the trial process generally in this context. Del Ponte has also spoken of the trial's place in the history of conflict in the Balkans:

I recognise that this trial will make history, and we would do well to approach our task in the light of history. The history of the disintegration of the former Yugoslavia and the fratricidal conflicts of another age which brought it about is a complex process which must be written by many people. This Tribunal will write only one chapter, the most bloody one, the most heartbreaking one as well; the chapter of individual responsibility of the perpetrators of serious violations of international humanitarian law. It is up to other courts to make the moral, historical, or even psychological diagnosis of the accused and to analyse the social, economic, and political dynamic which constituted the basic fabric of the crimes that we are going to consider.⁶¹

Even accepting her caveat, it is a heavy burden to bear.

Notes

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- 1 *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54. All of the case documentation and transcripts are available at the ICTY's website, www.un.org/icty.
- 2 Paul Akayesu was tried and convicted before the ICTR in 1998, confirmed on appeal in 2001, but he was a head of government, not a head of the state.
- 3 In Belgrade in November 2001, 'smiley glamour postcards' of suspected war criminals were on sale, E. Mahoney, radio review of 'Crossing continents – the new Serbia' (BBC, Radio 4), *Guardian* (16 November 2001).
- 4 See L. Sell, *Slobodan Milosevic and the Destruction of Yugoslavia* (Chapel Hill, N.C.: Duke University Press, 2002).
- 5 See D. Leuridijk and D. Zandee, *Kosovo – from Crisis to Crisis* (Aldershot: Ashgate, 2001).
- 6 See D. Doder and L. Branson, *Milosevic – Portrait of a Tyrant* (London: Simon & Schuster (Free Press), 2000); L. J. Cohen, *Serpent in the Bosom: the Rise and Fall of Slobodan Milosevic* (Boulder, Colo.: Westview Press, 2000).
- 7 A video of this speech was shown on the first day of the trial.

- 8 The others were Milan Milutinovic (as President of Serbia, member of the Supreme Defence Council, and pursuant to his *de facto* authority); Nicola Sainovic (as Deputy Prime Minister of the FRY); Dragoljub Ojdanic (as Chief of General Staff of the Yugoslav Army (the VJ); and Vlatko Stojiljkovic (as Minister of Internal Affairs of Serbia).
- 9 The UK website of the *Guardian* newspaper carried twenty-six pictures of arrest. It had an interactive website guide entitled 'Slobodan Milosevic on trial'.
- 10 May was also the pre-trial judge.
- 11 For the British *amicus* this included his wig.
- 12 On the lawyers generally, see B. Malkin, 'Killing time', *Lawyer*, 15: 3 (2001), 21–5.
- 13 See E. Vulliamy, 'Avenging angel', *Observer* (4 March 2001). (The article also considers the 'feminisation of The Hague Tribunal'.)
- 14 He was provided with relevant materials but refused to read them.
- 15 Order Inviting Designation of *Amicus Curiae*.
- 16 See note 55 below.
- 17 See 'Regulations to Govern the Supervision of Visits to and Communications with Detainees', ICTY Doc. IT/98/Rev.3.
- 18 A former US attorney-general.
- 19 Another legal adviser was a Mr Ognjanovic.
- 20 See the transcript of 11 December 2001 for the joinder application, which the *amici* supported. See Decision on Prosecution's Motion for Joinder, 13 December 2001.
- 21 Decision of 1 February 2002. See the transcript of 30 January 2002.
- 22 The original three case numbers were No. IT-01-50 (Croatia), IT-01-51 (Bosnia), and IT-99-37 (Kosovo).
- 23 See the transcripts of 12 and 13 February 2002. The chamber made it clear that it was willing to hear only very limited historical evidence.
- 24 Transcript of 13 February 2002.
- 25 See A. D. Amato, 'A brief review of the indictment against Milosevic and others', *International Peacekeeping*, 5: 3 (1999), 91–3.
- 26 Among the connecting links listed by the prosecution were the supply of personnel, payment of officers' salaries, supply of twenty-three military equipment and munitions, provision of training, sharing of twenty-four communication systems, sharing of intelligence, linkage between twenty-five radio/technical reconnaissance systems. It also sought to rely on the ICTY's Appeal Chambers' holding in the *Tadic Case* that, 'The armed forces of the Republika Srpska were to be regarded as acting under the overall control and on behalf of the FRY.' 35 I.L.M. 35 (1996) para. 162.
- 27 See K. Booth (ed.), *The Kosovo Tragedy – the Human Rights Dimensions* (Southgate: Frank Cass Publishers, 2001); Human Rights Watch, *Under Orders: War Crimes in Kosovo* (New York: Human Rights Watch, 2001).
- 28 In October 2002 the Appeal Chamber of the ICTY overturned the convictions of three individuals in the *Kupreskic Case*, IT-95-16. It held that the charges were too vague and general, and were dependent on the testimony of unreliable witnesses.
- 29 The Chamber may, in its discretion, admit hearsay evidence, but it is of limited probative value.
- 30 Decision of 19 September 2001.
- 31 A. Osborn, 'Fellow Serb turns on Milosevic', *Guardian* (12 October 2001).
- 32 Among the possible measures are expunging names and identifying records from the public record, non-disclosure to the public of any records identifying the victim,

the giving of testimony through image- or voice-altering devices or closed circuit television, assignment of a pseudonym or closed sessions of the Chamber. Milosevic complained of unfairness in the use of protected witnesses against him.

- 33 See Rule 92bis of the ICTY's Rules of Procedure and Evidence.
- 34 The videos showed people crossing borders and in camps, and damage from NATO air strikes.
- 35 Transcript of 12 February 2002, pp. 2–9.
- 36 See transcripts of 13 February, pp. 215–20; and 14, 15, and 18 February 2002.
- 37 Milosevic relied on a number of videos and an extensive number of pictures, for example, of bodies carbonised by NATO bombing.
- 38 His argument is that the ICTY was not based on a treaty to which states could or could not consent.
- 39 Another concern from a human rights perspective would be that predictions by Del Ponte that Milosevic would be found guilty violated the presumption of innocence.
- 40 I. Black, 'Milosevic attacks Hague Tribunal for British bias', *Guardian* (10 January 2002); Transcript of 9 January 2002.
- 41 Transcript of 29 October 2001.
- 42 Tapuskovic, one of the *amici*, also complained about this delay on the basis that the proceedings were not expeditious and effective, and 'thereby also one can ask how fair they can be'.
- 43 Transcript of 11 December 2001.
- 44 He was visited by his wife, Misa, known in Belgrade as Lady Macbeth, and members of his family. He complained to the Chamber when his wife was not given a visa to visit him.
- 45 See 'Tribunal warns Milosevic over jail interview', *Guardian* (25 August 2001).
- 46 Decision on Preliminary Motions, 8 November 2001. The decision was not appealed.
- 47 See www.echr.coe.int (Application number 77631/01).
- 48 Transcript of 12 February 2002.
- 49 See I. Buruma, 'The Hague vs Belgrade', *Guardian* (19 February 2002). Serbia has been admitted to the UN and the OSCE. See A. Bloed, 'OSCE news: Yugoslavia returns to the OSCE', *Netherlands Quarterly of Human Rights*, 18: 4 (2000), 531–2.
- 50 See T. Weymouth and S. Henig (eds), *The Kosovo Crisis – the Last American War in Europe?* (Harlow: Reuters, 2001).
- 51 See R. Carroll, 'Milosevic disappears from history', *Observer* (12 September 2001).
- 52 'Depressingly, the programme revealed was that many [in Serbia] prefer to live an "affected indifference behind which lies a seething resentment"'. Mahoney, 'Crossing continents'.
- 53 See 'Carla Del Ponte', *Guardian* (31 December 2001).
- 54 Milosevic catalogued attacks against the Serbs before and after the NATO bombings (transcript of 15 February 2002).
- 55 In *Bankovic and Others v. Belgium and 16 other NATO States*, the grand chamber of the European Court of Human Rights considered an application by a number of alleged victims of bombings of Radio Televizije Srbije ('RTS') in Belgrade by NATO forces in 1999. It found the application inadmissible because the applicants did not come within the jurisdiction of the respondent states, Application no. 52207/99 (12 December 2001). The ICTY prosecutor considered the evidence on the bombing campaign but found no grounds to prosecute.

- 56 See I. Traynor, 'Trying the tyrant we helped to create', *Guardian* (16 January 2002).
- 57 See B. Simms, *Unfinest Hour – Britain and the Destruction of Bosnia* (London: Allen Lane, 2001); N. Cohen, 'Betrayal in the Balkans', *Observer* (4 November 2001).
- 58 See S. Milne, 'Hague is not the place to try Milosevic – the tribunal is effectively the legal arm of NATO in the Balkans', *Guardian* (2 August 2001); N. Thorpe, 'Hague indictments spark Croatian crisis', *Guardian* (9 July 2001); J. Laughland, 'This is not justice', *Guardian* (16 February 2002).
- 59 See F. Gibbons, 'Free Milosevic, says Pinter', *Guardian* (26 July 2001).
- 60 See M. Caplan, 'The right way to try Milosevic', *The Times* (19 February 2002).
- 61 Transcript of 12 February 2002.