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*Slobodan Milošević in the Hague:
Failed Success of a Historical Trial*

The death of Slobodan Milošević, on March 11, 2006, in the detention unit of the International Criminal Tribunal for the former Yugoslavia (ICTY) put an abrupt end to yet another process dubbed as “the trial of the century.” Three days later the Trial Chamber took notice of the death of the accused, hence terminating the case IT-02-54 that dragged on for more than four years toward its anticlimactic end. Disappointment among the interested parties was as deep as the earlier feeling of success upon his bringing to justice. “I deeply regret the death of Slobodan Milošević. It deprives the victims of the justice they need and deserve . . . It is a great pity for justice that the trial will not be completed and no verdict will be rendered,” reacted ICTY’s Chief Prosecutor Carla Del Ponte.¹ Journalists went on to speculate what the verdict might have been and the protagonists attempted to salvage the remains of this enormous judicial venture.² The body of literature

¹ Carla Del Ponte feels “Total Defeat,” Swissinfo, March 12, 2006.

² Roger Cohen, “To His Death in Jail, Milosevic Exalted Image of Serb Suffering,” *New York Times*, March 12, 2006; Peter Ford, “How Milosevic Death Sets Back Justice,” *Christian Science Monitor*, March 13, 2006; “Milosevic Death Precedes War Crimes Verdict,” *Online News Hour*, March 13, 2006; Joshua Rozenberg, “Trying Milosevic: What Went Wrong?” *Telegraph*, September 14, 2006; Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity* (New York: Other Press, 2008); Florence Hartmann, *Paix et châtimeant, Les guerres secrètes de la politique et de la justice* (Paris: Flammarion, 2007); Geoffrey Nice, *The Victims of Srebrenica—Living and Dead—Deserve the Truth*, <http://www.helsinki.org.rs/doc/geoffrey%20nice%2001.doc>; Geoffrey Nice, *Final Interview*, <http://www.sense-agency.com/en/stream.php?sta=3&pid=7979&kat=3>.

about the trial, which grew alongside with the proceedings, was further enriched with studies dedicated to drawing lessons from its undesired outcome.³ Difficult as it is to contest its failure, this contribution aims to demonstrate that the shadow cast by its sudden end seems darker than it actually is. What is the purpose of judging a criminal leader? Is it simply to put him behind bars or should the court aspire to reveal an extensive record of wrongdoings over which he presided? What is to be done if it proves next to impossible to do both things at the same time? The Milošević case was an attempt to answer these questions.

MILOŠEVIĆ TRIAL—CHRONOLOGY

- March 24, 1999: NATO campaign against Federal Republic of Yugoslavia
- May 26, 1999: Milošević indicted for war crimes on Kosovo
- June 11, 1999: Cessation of hostilities
- October 5, 2000: Milošević ousted from power
- June 28, 2001: Milošević extradited to The Hague
- June 29, 2001: Kosovo indictment amended
- July 7, 2001: Milošević pleads not guilty
- October 8, 2001: Croatian indictment
- November 22, 2001: Bosnian indictment
- February 12, 2002: Milošević trial commences
- February 25, 2004: Prosecution rests its case

³ Norman Cigar, Paul Williams, *Indictment at The Hague. The Milošević Regime and Crimes of the Balkan War* (New York: New York University Press, 2002); Michael P. Scharf, William A. Schabas, *Slobodan Milošević on Trial: A Companion* (New York: Continuum, 2002); Chris Stephen, *Judgment Day. The Trial of Slobodan Milošević* (London: Atlantic Books, 2004); James Gow, Ivan Zverzhanovski, “The Milošević Trial: Purpose and Performance,” *Nationalities Papers* vol. 32, no. 4 (December 2004), 897; Sabrina P. Ramet, “Martyr in His Own Mind: The Trial and Tribulations of Slobodan Milošević,” *Totalitarian Movements and Political Religions* vol.5, no. 1 (Summer 2004), 113. Kari M. Osland, “The Trial of Slobodan Milošević,” in Sabrina Ramet, Vjeran Pavlaković, *Serbia Since 1989* (Seattle: University of Washington Press 2007), 227–251; Gideon Boas, *The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge: Cambridge University Press, 2007); Judith Armatta, *Twilight of Impunity. The War Crimes Trial of Slobodan Milosevic* (Durham and London: Duke University Press, 2010); Timothy William Waters, *The Milošević Trial: An Autopsy* (Oxford: Oxford University Press, 2013).

- August 31, 2004: Defence begins its case
- March 3, 2005: Motion for Judgment of Acquittal by amici curiae
- June 16, 2005: Motion for Judgment of Acquittal denied
- March 11, 2006: The accused died

This was hardly the first time that the question was posed. “The purpose of the trial is to render justice, and nothing else,” commented famously Hannah Arendt after the Eichmann trial. She was of the opinion that “even the noblest of ulterior purposes—“the making of a record of the Hitler regime which would withstand the test of history”—can only detract the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out punishment.”⁴ If one ascribes to her influential dictum, it is difficult to perceive the Milošević trial as anything but blunder. However, high-profiled proceedings such as this operate in a complex manner. Law, politics, history, and memory intertwined in an extraordinary media event, which symbolical aspects tend to be at least as important as their legal outcome. Hence this case deserves to be assessed against a similarly complex background, as pointed out recently by Lawrence Douglas, who convincingly contested the Arendtian creed: “No one, I believe, would deny that the primary responsibility of a criminal trial is to resolve the question of guilt in a procedurally fair manner. And certainly one must appreciate the potential tension between the core interest of justice and the concerns of didactic legality. To insist, however, as Arendt does, that the sole purpose of a trial is to render justice and nothing else, presents, I will argue, a crabbed and needlessly restrictive vision of the trial as legal form.”⁵

⁴ The book appeared as Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (London: Faber and Faber, 1963), 233. It was republished a number of times and translated in many languages. Arendt’s views are examined in details in Steven E. Ascheim, *Hannah Arendt in Jerusalem*, (Berkeley: University of California Press, 1999). Cf. Barry Sharpe, *Modesty and Arrogance in Judgment. Hannah Arendt’s Eichmann in Jerusalem*, (Westport: Praeger, 1999); Richard J. Bernstein, *Hannah Arendt and the Jewish Question* (Cambridge: Polity Press, 1996).

⁵ Lawrence Douglas, *The Memory of Judgment. Making Law and History in the Trials of the Holocaust* (New Heaven/London: Yale University Press, 2001), 27. Various aspects of prominent criminal trials were thematized early on by Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press 1964). This approach became increasingly important in the light of the sequence of high profiled trials followed by the re-

In this sense, the real difficulty in departing from a strictly legal assessment lies in finding a convincing yardstick to review the impact of a trial. One of the possible roadmaps for such evaluation is offered by the International Criminal Tribunal for the former Yugoslavia itself. ICTY was founded by the Security Council of the United Nations in May 1993, “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia from 1 January 1991.”⁶ However, over time, the Tribunal has built wider self-definition, resting on six proclaimed goals: (1) Holding leaders accountable, (2) Bringing justice to victims, (3) Giving victims a voice, (4) Establishing the facts, (5) Developing international law and (6) Strengthening the rule of law.⁷ Although Slobodan Milošević was only one among 161 persons indicted by the ICTY, his trial was considered to be the peak of the Tribunal’s activity and it was supposed to be its finest hour. Therefore, it makes sense to juxtapose its achievements to the above listed ambitious set of demands through which the first international criminal court after Nuremberg attempted to define the purpose of judging criminal leaders.



To begin with the issue of *accountability of leaders and developing international law*, with or without a verdict, Milošević will forever remain the first head of the state charged by an international court for the crimes committed during his tenure.⁸ Chief Prosecutor of the ICTY

cent explosion of scholarship on transitional justice. Cf. Ellen Lutz, Caitlin Reiger (ed.), *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009); Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge: Harvard University Press, 2002).

⁶ S/RES/827 (1993), Detailed account on the establishment of the Tribunal in Rachel Kerr, *The International Criminal Tribunal for the former Yugoslavia, An Exercise in Law, Politics and Diplomacy* (Oxford: Oxford University Press, 2004).

⁷ ICTY, About the ICTY, Achievements, <http://www.icty.org/sid/324>.

⁸ It is a frequent misconception that Milošević is the first head of the state put to trial. Heads of states were fairly frequently tried on national level (Charles I, Louis XVI...). Even in Nuremberg, Admiral Karl Doenitz, Hitler’s successor as President of the Third Reich was on trial. However, Milošević was the first to be indicted for crimes committed while he was acting in the capacity of the head of the state.

Louise Arbour signed and issued an indictment against him on May 26 1999, while he was well in office, waging a double war against NATO and his own citizens of Albanian ethnicity. The indictment stated that “the campaign undertaken by forces of the FRY and Serbia in Kosovo, was planned, instigated, ordered, committed, or otherwise aided and abetted by Slobodan Milošević, the President of the FRY; Milan Milutinović, the President of Serbia; Nikola Šainović, the Deputy Prime Minister of the FRY; Colonel General Dragoljub Ojdanić, the Chief of the General Staff of the VJ; and Vlastimir Đukić, the Minister of Internal Affairs of Serbia.”⁹ Once the hostilities ended, due to the indictment, Milošević remained a pariah in the international community, without a possibility to repair his tarnished reputation. To be sure, in order for him to land into the ICTY’s dock, it was necessary to fall out of power first. His electoral defeat and the popular uprising in Serbia in October 2000 opened up such possibility. After a protracted political crisis in the country, he was arrested and eventually transferred to The Hague on June 28, 2001.

In this respect, the very fact that Milošević stood on trial represents a breakthrough in implementation of international criminal law. As Carla Del Ponte recollects in her memoirs, “this was a historic moment—the first trial of a head of state before an international tribunal.”¹⁰ The initial indictment was amended immediately upon his arrival. In October, another indictment against Milošević was raised for crimes committed in Croatia, and in November the indictment for Bosnia followed. The indictments were merged in a single trial, which commenced on February 12, 2002.

As far as the issues of *bringing justice to victims* and *giving them a voice* are concerned, strange as it might seem, those two goals could operate in a cross-purpose. The guiding concept of the prosecution was to cover the entire “crime base” and introduce as much evidence as possible, enabling both satisfaction to the victims and giving them an opportunity to testify.¹¹ Therefore Milošević defended against an extensive number of counts covering wide range of war crimes, crimes against humanity, and genocide charges committed between 1991 and

⁹ ICTY, Milošević, Initial Indictment, 38.

¹⁰ Del Ponte, *Madame Prosecutor*, 120.

¹¹ Boas, *The Milošević Trial*, 112.

1999 in Croatia, Bosnia, Herzegovina, and Kosovo. The result was a mammoth trial, in which quite a number of victims testified for the prosecution's case. However, this strategy revealed backlash potential. Milošević was a stubborn defendant, who denied the Tribunal's legality and legitimacy, therefore representing himself in the courtroom in order to further his political message. Uninterested in the legal outcome of the trial, Milošević took considerable pleasure in using cross-examination in order to abuse witnesses, who were time and again bullied by him. To take but a few examples: Agron Berisha, whose relatives were executed by Serbian police in Suva Reka, Kosovo, testified that the police "came to kill Albanian civilians, men, women and children, even pregnant women. The reason, the sole reason, was because they were Albanians." Milošević retorted: "You're an Albanian too. Berisha: Yes. Milošević: They didn't kill you."¹² Some days later, protected witness K15, victim of rape testified. Milošević started the cross-examination in a deeply offensive way: "I am sorry that this young girl was the victim of rape, of course, if it is all true, and I'm not going to ask her any questions with respect to those events. . . . As far as rape is concerned, it wasn't done certainly by the army and police but by criminals. The army and the police arrested criminals of that kind even for attempted rape."¹³ Having in mind that it took considerable courage to step out and testify against the man whose supporters were, and still are scattered across security apparatus, one cannot but conclude that more could have been done to protect the dignity of the victims who testified.¹⁴

In the area of *establishing the facts*, although the judgment was not rendered, it needs to be noted that during the three years of the trial, an enormous record was generated. Chief Prosecutor Louis Arbour, who indicted Milošević, cautioned in 1999 that "we must determine whether it is realistic for a criminal prosecutor to undertake the task

¹² ICTY, Milošević trial, 26.2.2002. P.1034 http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020226IT.htm.

¹³ ICTY, Milošević trial, 1.3.2002, P.1384 http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020301CR.htm.

¹⁴ More about witnessing in the ICTY in Eric Stover, *The Witnesses. War Crimes and the Promise of Justice in The Hague* (Philadelphia, PA: University of Pennsylvania Press, 2005).

of a historian. History leaves room for doubt.”¹⁵ Once Milošević was in the dock, the temptation proved irresistible to Arbour’s successor, Carla Del Ponte. Del Ponte loathed the idea that Milošević should have a limited, Al Capone-esque trial on the basis of selection of most provable counts, and insisted that indictments need to expose as full scope of wrongdoings as possible. At the very opening of the trial, she boldly announced: “I recognize that this trial will make history, and we would do well to approach our task in the light of history.”¹⁶ Over 1,250 exhibits—documents, photos, maps, expert reports—were presented in open court. The transcript of the trial itself amounts to 46,639 pages, which contain testimonies of nearly 400 witnesses. Prosecution tendered 930 exhibits on 85,526 pages, plus 117 video records, and produced 352 witnesses (114 viva voce, 218 testimonies in written form, 20 expert reports), whereas Milošević submitted 9,000 pages of exhibits including 50 videos and brought 40 witnesses from the list which initially amounted to 1,631.¹⁷ Witnesses included personalities such as leader of Kosovo Albanians Ibrahim Rugova, President of Croatia Stjepan Mesić, and the last Yugoslav Prime Minister Ante Marković as well as a number of high profile international mediators who took part in solving the crises in Southeast Europe. The majority of this collection is in the public sphere. Documents which would normally be inaccessible for decades are now available for research and scrutiny, which both prompts scholarly research on the topic and influences the process of creating new indictments.¹⁸

Such an approach came with a high price, insofar as the management of the case was concerned. The scope of the indictment, coupled with the intent to expose the entire crime base and political intent

¹⁵ Louise Arbour, *War Crimes and the Culture of Peace* (Toronto: University of Toronto Press, 2002), 35.

¹⁶ ICTY, Milošević trial, 10 April 2002.

¹⁷ Cf. Human Rights Watch, *Weighing the Evidence. Lessons from the Slobodan Milošević trial*, vol. 18, no 10(d), December 2006, <http://www.hrw.org/sites/default/files/reports/milosevic1206webwcover.pdf>; See also, Boas, *The Milošević Trial*.

¹⁸ Video record accessible at Milošević Trial Public Archive, <http://haguebard.edu/>. Full transcript in 45 volumes from the trial was published by Humanitarian Law Center in Belgrade: *Suđenje Slobodanu Miloševiću*, Transkripti 1–45, Fond za humanitarno pravo, Beograd 2007.

behind it resulted in a complex and hectic case presentation spanning chronologically from 1991 until 1999 and geographically from Slovenia to Kosovo. Understandably, this pace was difficult to follow, both for the judges and the interested spectators.¹⁹ A large number of witnesses and an enormous quantity of documents had an immediate effect on the duration of the trial, which seemed never ending and convinced many that the more prudent strategy would be to expose the general pattern of criminality, followed by a selection of crimes which could be easily proven, and a credible link toward the accused. The Trial Chamber reacted by limiting the time allocated to the prosecution and significantly curbing the number of proposed witnesses.²⁰ Still, the complexity of the case, the decision of the accused to represent himself and frequent recesses due to the state of his health took their toll in the most dramatic way. Milošević suffered from high blood pressure, aggravated by the strains of his workload. Still, he resisted the attempts to appoint an attorney to represent him, as he viewed the trial as a political forum to address his audience in Serbia. Once his defense case commenced, it was clear that he is not interested to defend. His opening statement was filled with accusations against his former and current enemies, and the choice of his witnesses was clearly serving propaganda purposes, addressing mainly the audience back home.

The reactions of that audience are indeed the real crux of the matter, hidden under the last goal of the ICTY, *strengthening the rule of law*. It reads: “The Tribunal has influenced judiciaries in the former Yugoslavia to reform and to continue its work of trying those responsible for war crimes. The Tribunal works in partnership with domestic courts in the region—transferring its evidence, knowledge and jurisprudence—as part of its continuing efforts to strengthen the rule of law and to bring justice to victims in the former Yugoslavia.” Actually, this goal deals with the ability of the court to induce a change of attitudes in the post-

¹⁹ Boredom in historical trials is seldom recognized and scrutinized, yet it is commonplace. Even Rebecca West, attentive observer of the Nuremberg trials was forced to acknowledge that the courtroom was, more than occasionally, “a citadel of boredom.” The length and complexity of any trial present a challenge to ones’ attention, even if their historical significance is beyond any doubt, and Milošević case was no exemption.

²⁰ Armatta, *Twilight of Impunity*, 44–45.

war setting and primarily to break the wall of denial. This is the true symbolic battlefield of the case, and its results are rather mixed.

The history of the reactions to the Milošević trial in Serbia is complex. By the time he fell out of power, he was widely hated by his former subjects. As Erich Gordy noticed, “everyone in Serbia thinks Milošević is guilty of something.”²¹ However, there was no consensus over the exact nature of his guilt, nor on his extradition to The Hague. In a post-Milošević period, much of the anti-Hague discourse survived and was utilised by moderate and extreme right-wing political groups. These narratives also proved to be “the last refuge of scoundrels,” who used patriotic rhetoric to paralyze proceedings and mobilize parts of Serbian society unwilling to question the legacy of the Milošević period. Stjepan Gredelj claimed that “the views of the public opinion about The Hague Tribunal are predominantly negative, since the respondents manifest a high level of agreement with some of the most widespread negative stereotypes about the institution which are increasingly placed in public.”²² The attempts of the Serbian reformist government to extradite the accused persons added to its unpopularity and led the country on the brink of *coup d'état* at least twice—in November 2001 and in March 2003. Only after the murder of Zoran Đinđić, the first democratically elected Serbian Prime Minister, who played a decisive role in Milošević’s transfer to The Hague, wide governmental crackdown on organized crime changed the political landscape significantly. Practically overnight, cooperation with the ICTY became much more popular, and the state formed a specialized War Crimes Prosecutor’s Office in Serbia in June 2003.²³

²¹ Eric Gordy, “Rating the Sloba Show. Will Justice Be Served?” *Problems of Post-Communism*; May-June 2003, vol. 50 no. 3, 53.

²² Stjepan Gredelj, “War, Crimes, Guilt, Sanctions,” in Ivana Spasic, Milan Subotic (ed.), *R/Evolution and Order. Serbia After October 2000* (Belgrade: Institute for Philosophy and Social Theory, 2001), 255. Shifts in public opinion toward war crimes were subject of repeated surveys. Cf. OESC and BCHR, *Public perception in Serbia of the ICTY and the national courts dealing with war crimes*, http://www.osce.org/publications/srb/2009/12/41942_1399_en.pdf.

²³ Republic of Serbia, Office of the War Crimes Prosecutor, http://www.tuzilastvorz.org.rs/html_trz/pocetna_eng.htm.

However, setting up of the institutional framework was no more than a precondition in the area of strengthening the rule of law. The creation of domestic war crimes offices did not lead to an immediate synergic effect.²⁴ National proceedings for war crimes were invariably following the bottom-up strategy, indicting low-ranked perpetrators for isolated crimes. Consequently, the audience was unable to comprehend that the proceedings in The Hague and in Belgrade deal with the same subject. Still, through this activity an indispensable channel for the internalization of the process of prosecuting war crimes was set.²⁵ It was a question of time when would the effects take place.



By the beginning of June 2005, the Milošević trial was viewed in Serbia with a mix of boredom and occasional sympathy for the accused, until one day, when the prosecutor Geoffrey Nice played a tape in the course of the cross-examination of Serbian police General Obrad Stevanović. The prosecutor was describing the footage: “This video, which is potentially distressing viewing and I’m only going to play very small parts of it, reveals, Mr. Stevanovic . . . that men were brought from Srebrenica in batches to this group of Scorpios to be executed and they were executed. . . . The lorry leaves. The men are eventually taken up into the hills. . . . Here they are taken up into the surrounding countryside. Two remaining not shot are untied. . . . They’re untied, they move the four bodies, and then they are themselves shot, and I’ll leave it there.”

Milošević’s witness seemed shaken: “As I am upset, I have to say that this is one of the most monstrous images I have ever seen on a screen. Of course I have never seen anything like this—live. I am astonished that you have played this video in connection with my testimony because you know full well that this has nothing to do with me

²⁴ Diana F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, Centre for Transitional Processes, Belgrade, 2008, 69–94.

²⁵ Vladimir Petrović, *Gaining Trust Though Facing the Past? Prosecuting War Crimes Committed in the Former Yugoslavia in a National and International Legal Context*. CAS Working Paper Series No. 4/2011: Sofia 2011, 1–35. Shaken Order: Authority and Social Trust in Post-Communist Societies (Case Studies in Law), a project of the Centre for Advanced Study Sofia.

or the units I commanded.”²⁶ The infamous footage was filmed by a Serbian paramilitary unit called “The Scorpions,” depicting the execution of Muslim civilians in the vicinity of Srebrenica in July 1995.²⁷ This screening had multiple consequences, none directly related to the Milošević case. An evidentiary role of the visual record was virtually nonexistent. The prosecution screened it in a belated phase of the process, and in December 2005 the judges ruled out the possibility of admitting it as evidence. They also decided against the reopening of the case in light of new evidence, the tape being the most relevant one.²⁸ However, its collateral effect cannot be overemphasized. Avril McDonald, a professor of international law from Asser Institute, estimated that “it was significant at the time that it came out because a lot of people were presented with something that they might not have wanted to believe.” She added that its showing in court “got exposure that it wouldn’t have had, had it just simply been a regular news story.”²⁹

After the release of the footage, which was aired by the most important world broadcasting services, the capacity for denial in Serbia has shrunk over the night, giving space to horror and remorse, as well as contempt and whitewashing. In a matter of hours, Serbian police has identified and apprehended several persons seen on the footage. Their arrest was hailed as a “change of heart” in Serbia.³⁰ The video was broadcast on Serbian national television and Serbian Presi-

²⁶ ICTY, Milošević case, Transcripts, 1.6.2005, p.40277 <http://www.un.org/icty/transe54/050601IT.htm>.

²⁷ The basic details about the handover of the tape are given in Daniel Williams, *Srebrenica video vindicates a long pursuit by Serb activist*, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/24/AR2005062401501.html>, accessed December 1, 2006.

²⁸ ICTY, Cases and Judgments, The Milošević Case, Decision on application for a limited re-opening of the Bosnia and Kosovo components of the prosecution case with confidential annex.

²⁹ *Judges Crack Down on Milošević Case*, Institute for War and Peace Reporting, http://www.iwpr.net/?p=tri&s=f&o=258726&apc_state=henptri, accessed December 1, 2006.

³⁰ Reuters, 3.6.2005, *Srebrenica Video Sobers Serbia, Prompts Arrests*, <http://www.tiscali.co.uk/news/newswire.php/news/reuters/2005/06/03/world/srebrenicavideosobersserbiabringarrests.html>, accessed December 1, 2006. Radio Free Europe, *A Video Shocks Serbia*, <http://www.rferl.org/featuresarticle/2005/6/2DF1E167-F27F-46F3-A2B1-0548E86FCE88.html>.

dent Boris Tadić gave a speech condemning the crime. The effect of the release of the Scorpions' tape strengthened optimism, best expressed through the opinion of Prosecutor Carla Del Ponte, who labeled it a turning point of the trial: "Internet will make the Scorpions' video accessible to everybody any time, with a computer mouse click, which would roll Milosevic legacy in the dust next to the Bosnian road where Scorpions killed their victims. . . . Consciously or perhaps more importantly unconsciously, Milosevic had to know that he will never be a free man again."³¹

However, after the initial local reaction, which indeed had elements of awakening from the decade-long denial, public discourse again accommodated the voices of dissent, occasionally even doubting the authenticity of the tape or relativizing its importance.³² The Scorpions were prosecuted in Serbia, and on April 2007 they received their sentences. Two of them got twenty years, one got thirteen years, and another received five years in jail, in a highly controversial ruling.³³ Members of the Scorpions unit were sentenced by the Serbian judiciary, but their connection with the Serbian authorities was not clearly demonstrated during the proceedings. They were convicted solely for war crimes against civilian population, even though it was apparent that the victims were executed in a wide pattern of elimination of thousands of prisoners taken after the fall of Srebrenica, qualified as genocide by several judgments of the ICTY.

This legal Rashomon was bound to become even more complex, including another court—International Court of Justice (ICJ), where Bosnia and Herzegovina sued Serbia for breaking the Genocide Convention. According to the ICJ ruling from February 2007, Serbia did

³¹ Del Ponte, *Madame Prosecutor*, 308.

³² See Nebohsa Malic, Deaths, Lies and Videotape, <http://www.antiwar.com/malic/?articleid=6275>; Julija Gorin, Serbs, Lies and Videotape, *Frontpage Magazine*, <http://www.freerepublic.com/focus/f-news/1424168/posts>; Some of those critiques contain very sophisticated post-modern argumentation. The other ones, f.e. Milan Bulajic, *Srebrenica—Outline for Revision of the ICTY Judgment on Genocide*, <http://guskova.ru/misc/docs/2004-may>, accessed December 1, 2006.

³³ Transcript of the case is published by Humanitarian Law Centre, *Škorpioni—od zločina do pravde* (Fond za humanitarno pravo: Beograd, 2007).

so, not through committing or adding and abetting genocide, but through failure to prevent it.³⁴ This case was dragging from 1993, and was considered to be a Damocles' sword for the fragile post-Milošević government. This later aspect helps one better understand the rationale for the ambivalence of the Serbian public's reactions toward the Milošević case. One can now only speculate what this ruling would be had Milošević lived to hear his own verdict, as he was indicted for Srebrenica genocide as well. However, his death in spring 2006 made the clarification of the exact measure of involvement of the leadership of Serbia and Federal Republic of Yugoslavia in the Srebrenica genocide more difficult.

The dynamic afterlife of the Milošević case shows that the trial not only played, but also continues to play an important role in the process of coming to terms with the atrocious decade for the region of former Yugoslavia. Its legacy of mixed record seems to indicate that the effects of high-profile trials are neither immediate, nor fully predictable. They tend to manifest themselves long after the courtrooms emptied, as Michael Scharf, one of the first observers of the ICTY, suggested at the time of its creation: "Will an assessment of the brutal history of Yugoslavia by three judges from outside the Balkans, skilled jurists all of them but acknowledged amateurs when it comes to history and politics, help the fractured country to recover? We recall the words of former Chinese premier Chou En-Lai who, when asked whether the French Revolution had been a success, famously replied: 'It's too early to tell.'"³⁵ As the Milošević trial moves from the legal field to join the ongoing memory wars over his role in the Yugoslav wars, it seems that the same could be said about its success or failure. In the meanwhile, some concluding interim remarks are warranted.



³⁴ *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] Judgment, ICJ General List No. 91, 108, paragraph 297. <http://www.icj-cij.org/docket/files/91/13685.pdf>.

³⁵ Scharf, *Milošević on Trial*, 147.

The death of Milošević seemed a blow so serious that the Prosecutor of the ICTY Carla Del Ponte felt the need to organize a press conference to “make it clear that the Yugoslavia tribunal was something more than just the Milosevic tribunal and that its success of failure did not depend solely upon the case against Milosevic.” Del Ponte’s memoirs also reveal the bitter taste of failure: “In many ways, on a deeper level, Milosevic’s death angered me. After four years of hearings, only forty hours remained for the defense to present its case. The proceedings were likely to end in a matter of weeks. . . . Slobodan Milosevic had nothing to gain by living longer, and he had everything to lose. In death, Milosevic had escaped. He had deprived his hundreds of thousands of victims of the full degree of justice they deserved.”³⁶ Against such background, it is understandable that the prevailing comments were highly critical of the trial’s performance, focusing on what was perceived as prosecution’s attempt to judge history as the most important reason for the scope, length, and ultimate procedural failure of the trial. From a strictly legal perspective, which perceives judgment as the ultimate goal of a criminal trial, the Milošević case was undoubtedly a fiasco.

However, moving from the Arendtian position on the functions of a high-profiled trial to a more contemporary understanding of its functions, the outcome is not so clear-cut. By opting for a historical trial, the prosecution was undoubtedly running a significant risk, as it became clear that such demanding approach was adding to an already unbearable strain on the management of the case. In the opening of the trial, senior prosecutor Geoffrey Nice noted: “This trial, as, again, the Prosecutor has correctly explained, will not be making findings as to history. Matters of history always leave scope for argument, for doubt between historians. But history, even distant history sometimes available to this Court through the witnesses, will have a relevance from time to time in showing what the accused thought, what those identified in indictments as his co-perpetrators thought, what his compliant supporters thought, and what was available in history to fire up the emotions.”³⁷ In practice, this meant that the prosecution explored

³⁶ Del Ponte, *Madame Prosecutor*, 331–332.

³⁷ ICTY, Milosevic Trial, Prosecution’s Opening Statement, February 12, 2002, 15 <http://www.un.org/icty/transe54/020212IT.htm>.

and presented a detailed overview of the context in which war crimes were perpetrated.

Expectedly, shielding behind history became an important cornerstone of Milošević's defense, announced in his own opening statement: "Accusations leveled against me are an unscrupulous lie and also a tireless distortion of history. . . . Scholars will be coming here, academicians, if they dare come."³⁸ As a consequence, the Milošević trial has drawn an impressive range of historians and social scientists, who testified in capacity of expert witnesses.³⁹ What followed was a set of more or less incompatible historical narratives of dubious relevance for the trial's outcome. These excursions proved to be consuming considerable time, as well as the patience of judges and spectators, adding to existing debates about usage of history in the courtroom.⁴⁰

With some years of distance, one needs to reconcile with inherently mixed record of the Milošević trial. His unlikely appearance in front of the international court signifies a major breakthrough in the area of establishing accountability on the highest level and for eroding the impunity of state leaders. This is indeed an important development in international law. The ambitious design of the prosecution was reflected in a set of expansive indictments and it resulted in an

³⁸ ICTY, Milošević Trial, Defense's opening statement February 14, 2002, 246, 258, <http://www.un.org/icty/transe54/020214IT.htm>.

³⁹ For the prosecution, two of the most representative historical testimonies have been given by Dr. Robert Donia and Dr. Audrie Budding. The defense called upon Serbian historians academician Čedomir Popov, professor of the University of Novi Sad and Dr. Slavenko Terzić, director of the Historical Institute, Serbian Academy of Sciences. For the submitted expert reports see *Milošević Trial Public Archive*, Expert Report of Robert Donia, "The Assembly of Republika Srpska, 1992–1995, Highlights and Excerpts," submitted August 1, 2003, Expert Report of Audrey Budding, "Serbian Nationalism in the Twentieth Century," submitted May 29, 2002, http://hague.bard.edu/icty_info.html, accessed May 29, 2001.

⁴⁰ Cf. Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia," *Human Rights Quarterly*, vol. 27, no. 3 (2005), 908–940. Ksenija Turković, "Historians in Search for Truth About Conflicts in the Territory of Former Yugoslavia as Expert Witnesses in Front of the ICTY," *Časopis za suvremenu povijest*, vol. 36, (2004), 41–67., Robert J Donia, "Encountering the Past: History at the Yugoslav War Crimes Tribunal," *The Journal of the International Institute*, vol. 11 (2004), <http://www.umich.edu/~iinet/journal/vol11no2-3/donia.htm>.

unmanageable, prolonged, and eventually aborted trial, which ultimately collapsed under its own weight. At the same time though, it has produced a massive body of evidence, inspiring further proceedings on both the international and national level. Had the trial been less ambitious, it could have ended with a verdict, perhaps at the expense of other demanding goals ICTY had set for itself. Unfinished as it was, it remained an enormous prosecutorial venture to collect and exhibit an extensive record about individual criminal responsibility of a head of the state in the whirlwind of a complex conflict. Milošević trial succeeded to meet that challenge, at the high cost of its own failure.