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978-0-521-87699-5 - The Milosevic Trial: Lessons for the Conduct of Complex  
International Criminal Proceedings

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## The Milošević Trial

When Slobodan Milošević died in the United Nations Detention Unit in The Hague over four years after his trial had begun, many feared – and some hoped – that international criminal justice was experiencing some sort of death itself. Yet the Milošević case, the first trial of a former head of state by a truly international criminal tribunal and one of the most complex and lengthy war crimes trials in history, stands for much in the development and the future of international criminal justice, both politically and legally. This book, written by the senior legal adviser working for the Trial Chamber, analyses the trial to determine what lessons can be learnt that will improve the fair and expeditious conduct of complex international criminal proceedings brought against former heads of state and senior political and military officials, and develops reforms for the future achievement of best practice in international criminal law.

GIDEON BOAS is Senior Lecturer in Law at Monash University Law Faculty and an international law consultant. He was, until October 2006, a Senior Legal Officer of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Senior Legal Adviser to the Chamber on the Milošević case.

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To Pascale

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## FOREWORD

This book makes an important contribution to the development of global justice. It is the most authoritative post mortem on the proceedings against Slobodan Milošević, which were hailed as the first ‘trial of the century’ of the twenty-first century. When Justice Jackson observed, *apropos* of Nuremberg, that ‘courts try cases, but cases also try courts’ he accurately described the *Milošević* case, a test for whether international courts can today deliver on the Nuremberg legacy that political leaders who mass-murder their own people can be made subject to human justice. In Mr Boas’s expert verdict, it was a test that our fledgling system of international criminal justice only narrowly managed to pass.

Others, more prejudiced and less informed, regard the trial as a total failure. The White House, for example, has cited its inordinate length, its massive cost, and its inconclusive end as an argument against producing any kind of fair trial by an international court for the prisoners in Guantanamo Bay. Its short-comings were much in mind when the Iraqi Special Tribunal was set up to try Saddam Hussein: there were no international judges, no right of self-representation, no ‘friends of the court’ allowed to show friendship with a defendant whose death sentence was predetermined rather than self-inflicted. Those of us who champion international justice, and the International Criminal Court in particular, have winced and shuddered in disbelief as this showcase trial went on, and on, and on. It began in February 2002, but the prosecution case alone took three years. By 24 November 2005 this ‘whale of a trial’ had produced 46,639 pages of transcript and 2,256 separate written filings amounting to 63,775 pages. The prosecution had introduced 930 exhibits, amounting to 85,526 pages, as well as 117 videos. The material disclosed to Milošević amounted to over 1.2 million pages of documentation – material he would never have the time to read, let alone absorb. In answer to all this, he initially submitted a list of 1,631 witnesses. By the end of 2005, 75 per cent of the way through the time allocated for his defence, he had introduced 50 videos and 9,000 pages of exhibits but had led only

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40 witnesses and had barely touched on the indictments relating to Croatia and Bosnia. These statistics alone show just how unmanageable this trial really was, during the four years in which both Trial and Appeal Chambers tried to manage it.

When Milošević died and the trial had to be aborted, there was no shortage of instant journalistic hindsight. In contrast, Dr Boas's criticism proceeds from an analysis that is both expert and from the inside: he was the senior legal adviser to the trial judges, sitting in court for four years, from the day on which the prosecution opened to the day on which the trial collapsed. He shows the trial's failings, precisely and irrefutably, and his insight must inform and instruct the future development of international justice. The lessons he draws will be pondered in other courts trying truculent defendants, most notably in the International Criminal Court now taking shape in The Hague. The prosecution mistake of 'throwing the book' at those charged with crimes against humanity must not be repeated: gargantuan indictments are unmanageable and unnecessary. Criminal trials are not truth commissions – the adversary system is a process for determining whether an individual accused committed a particular criminal act, and is not a means for retrospectively testing the morality of a political policy. Just as national courts have abandoned dragnet conspiracy charges in favour of indictments containing sample or representative charges of substantive offences, so international prosecutors must concentrate on specific events – usually specific massacres – for which they have evidence to prove that the defendant bears command responsibility. Prosecutors do not (as many of them think) owe a duty to victims to charge a political leader for every conceivable consequence of his brutal policies: they must observe a sensible divide between facts that can be proved by admissible evidence in court and opinions that must be left to the conjectures of historians.

Dr Boas rightly seeks to shake the complacency of what might be termed the international justice industry – the lawyers and human rights activists who behave as if the struggle to establish a global justice system has been won, just because the ICC and other instrumental courts have been established. Unless these courts achieve measurable improvements in efficiency and expedition in the conduct of their trials, the enterprise will founder, as its high ideals and hopes collapse through delay and massive expense. The symbolic importance of Milošević on trial – the alleged architect of mass murder and genocide in the Balkans denied impunity and brought to justice – was largely squandered by the mistakes that are so rigorously analysed in this book. Dr Boas identifies the principal mistakes as

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the prosecution's incoherent case strategy, the Appeal Chamber's decision to combine three overloaded indictments, the trial chamber's failure to cope with the defendant's malevolent tactics, and the consequences of his self-inflicted harm.

Hindsight, of course, is generally the prerogative of the armchair critic. Dr Boas had to suffer these problems in silence and in person for the years in which he was Senior Legal Adviser to the trial court. It is important to remember that the prosecution and the Appeal Chamber, and indeed the trial judges he advised, were acting in good faith and coping as best they could with unprecedented situations and problems. Nonetheless, he argues that the prosecution was over-zealous and over-expansive, trying to impute too much to Milošević and to attribute too much to his 'Greater Serbia' policy. This is borne out by the fact that it failed, at the close of its case, to establish over 1,000 of the allegations it made at the outset – a massive indictment, by judgement of the court, of the prosecution's own massive indictment. In retrospect, the trial court should have ordered the prosecution to close in September 2002 after its evidence on Kosovo was complete and when the consequences of the defendant's severe heart condition first became clear. Had it ordered Milošević then to proceed with his defence to that separate indictment, a verdict upon it could have been delivered a year before his death.

Paradoxically, however, what also emerges from Dr Boas's critique is that in respects other than its length, the trial was fair. The court, indeed, bent over backwards to help the accused, providing him with the three expert *amici* counsel and ample facilities for his own research team – so ample that he was able to participate in Serbian politics under the guise of preparing his defence.

The adversary system in Anglo-American courts has grown up in the context of defendants who co-operate with court procedures in the hope of achieving acquittals, even on technical grounds. Milošević had no interest in an acquittal: his object was to undermine the court and to exploit its procedures to attack his political enemies and to publicise his own victimhood. This is a common enough phenomenon now in international courts, and the problem is how to adjust procedures to limit such grandstanding whilst retaining an acceptable level of fairness. *Amici* counsel cannot be friends both of the court and of the accused, and it makes no professional sense to order a lawyer to 'represent' a client who refuses all communication with him. Various expedients were attempted by the long-suffering *Milošević* judges, and others have been attempted in other international tribunals, but with little success. It may be necessary to opt

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for a more radical solution: to deny the right of adversary trial to an un-co-operative defendant, and shift instead to a civil inquisitorial process in which a judge examines the evidence and presents his findings to the Court, at which point the defence may challenge them.

It is certainly true that the adversary trial procedure offers the best guarantee for the rights of defendants, but they are only entitled to it if they accept the jurisdiction and the rules of the court that provides it. If they refuse all co-operation or offer it in a form which entails persistent disruption, they should be made subject to an inquisitorial process whether they like it or not – a process recognised as fair in many countries of the world and which does not depend upon the defendant's co-operation.

The *Milošević* prosecution produced no 'smoking gun' although late in its case it was permitted to introduce an amateur video shot at Srebrenica, showing young Muslims being taken out of a truck by Serb paramilitaries who – after a blessing from a Serb orthodox priest – tied them up and murdered them. These grainy, black-and-white images, so reminiscent of the Second World War film of the SS slaughter of Jews in Eastern Europe, did not directly implicate Milošević but had a similar impact to the film of concentration camp victims shown in the Nuremberg courtroom in legitimating the process of putting him on trial. Other evidence pointed to his control over Serb paramilitaries. These bloodthirsty groups – 'Arkans Tigers' and 'Frankie's Boys' – were linked to Milošević through documents found on the bodies of their fighters proving they had drawn pay as well as arms and ammunition from the Yugoslav army. His long-denied backing for Karadžić was demonstrated by electronic intercepts. In respect of the deportations in Kosovo, the prosecution evidence showed Albanians fleeing from the pillaging, raping, and murder instigated by the Serb forces, who made co-ordinated and planned attacks from village to village and even laid on special trains to take the inhabitants to the border after their homes had been looted and burned.

Slobodan Milošević deserved to stand trial: he was no brain-damaged Pinochet or cancer-ridden Honecker, but a defendant suffering from high blood pressure which he brought on himself by insisting on being his own advocate and by not taking medical advice or prescribed medication. He was not an ignorant soldier or an isolated hereditary ruler: he trained as a lawyer and became President of Yugoslavia's biggest bank before becoming President of the Communist Party and of the country. He was the hands-on commander of its army and police force, and the self-confessed architect of the mass extirpation of 800,000 Albanian Kosovars, uprooted from homes where their families had lived for centuries.

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International law now says that the person in ultimate command is responsible for crimes committed by soldiers, police, and paramilitaries if he knows about them yet fails to take necessary and reasonable steps to stop or to punish them. Although the *Milošević* trial ended without a verdict, and many victims felt robbed of the satisfaction they would otherwise have obtained from his conviction and lengthy imprisonment, the very fact that he was put on trial by the international community stands as a landmark in the struggle for global justice. True, there was no written and reasoned judgement to confound those who deny Serb war guilt: they turned up in their thousands to bid farewell to his coffin with their ‘Slobo the Hero’ banners. But mourners were predominantly elderly and mostly from redneck provinces: their lost leader was denied all state honours and his wife and son stayed away, as did all national and international dignitaries. His chief mourners were fellow indictees, on bail from The Hague, and the release of white doves over his grave provided a surreal, if unintended, promise that his burial might bring peace at last to the Balkans.

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## PREFACE

The trial of Slobodan Milošević got under way on 12 February 2002 with the grand words of the ICTY Prosecutor, ‘Today, as never before, we see international justice in action.’ Four years and one month later, Milošević lay dead in his cell in the United Nations Detention Unit in The Hague, the trial unconcluded and the grand project of international criminal justice apparently in jeopardy.

What had brought international criminal law to this point and what would be the legacy of the *Milošević* trial? This question is the background and motivation for this book. The prosecution, the court, and Milošević himself, had all played a part in the course this trial had run, for better and for worse. The monstrously broad case pressed by the prosecution and the pathological behaviour and ill health of the accused persistently plagued the trial. Yet the complexities faced by the court and its responses to them have yielded profound lessons that should serve the development of best practice in the conduct of fair and expeditious international criminal trials.

These lessons are not just important for the limited remainder of the *ad hoc* Tribunals’ work. As the newly created flagship of international criminal law – the International Criminal Court – stumbles at the first hurdle of its daunting mandate, it is essential that the Court heeds the lessons learnt by the *ad hoc* Tribunals, not the least those from the *Milošević* case, or risk dealing the greatest of blows to the development and continued viability of international criminal justice. The danger staring those of us who care in the face is complacency born of the successful long-term institutionalisation of international criminal law. Having pursued such an institution since the ineffective Treaty of Versailles following the First World War, and more recently and vigorously following the relatively successful post-Second World War trials, those involved in the momentous achievement of creating an International Criminal Court risk – if they do not achieve measurable improvements in the conduct of international criminal trials – frustrating the political and

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financial masters of international criminal law to the point of despondency and, worse, withdrawal of crucial political and financial commitment.

I sat in the courtroom listening to Del Ponte's words at the opening of the *Milošević* trial. I was there throughout most of the following four years as the senior legal adviser to the judges of the Trial Chamber and I was there on the day Judge Robinson formally closed the proceedings at 9.06 am on 14 March 2006. This book was conceived and evolved from this experience, as I realised that for the most part there was little in the way of precedent to assist in the determination of the myriad legal and practical problems raised. This book is therefore coloured by my intimate experience of the case and its characters and, while it is first and foremost an objective legal and factual analysis, it is no doubt affected by my particular experience of the issues confronted.

Finally, some acknowledgements are warranted. This work is a revision of my Ph.D. thesis undertaken at the University of Melbourne. To Professor Tim McCormack, my chief supervisor, sagely *amicus* on the *Milošević* case and good friend, I owe a debt of considerable gratitude for his intellectual and practical advice throughout. To Dr Carolyn Evans, my co-supervisor, for whose advice, relentless and speedy attention to my drafts and, mostly, for pushing me outside of my intellectual comfort zone I am profoundly appreciative. To Pascale Chifflet I owe a great deal, for her extraordinary intellectual clarity that helped dig me out of conceptual holes in which I frequently found myself during this process, and for much more. I am grateful also to Natalie Reid, my friend and former colleague, who painstakingly reviewed drafts and offered sound advice. To Geoffrey Robertson, who agreed to write the Foreword to this book, I would like to express my gratitude, not just for this task but also for the inspiration that his own work has had upon my decision ever to take up the law and to stick at the area of international criminal justice. To Finola O'Sullivan at Cambridge University Press, for her enthusiasm and encouragement for this project, and others, much thanks. Finally, I would like to acknowledge the trial judges and lawyers with whom I had the great privilege to work throughout the years of the *Milošević* trial. The myriad of stories and events that can now never be told were shared with some of these people and I am grateful for their enormous commitment to this one great project of international criminal justice.

Gideon Boas  
October 2006