

## **Hague Court's Record Under Scrutiny**

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Tribunal's legacy called into question as Milosevic trial ends.

The trial of former Yugoslav president, Slobodan Milosevic, was formally terminated on the morning of March 14 after a court hearing that lasted barely two minutes.

In a curt, clear statement, presiding judge Patrick Robinson expressed regret that Milosevic's "untimely death" had prevented "all the interested parties" from hearing a verdict on the charges laid out in the indictment.

While the tribunal gave the appearance of trying to close the Milosevic chapter as quickly as possible, critics have seized on ex-Serbian leader's death to launch renewed tirades against the United Nations body for wasting too much time and money.

Once Milosevic has finally been laid to rest, and the questions surrounding the circumstances of his death blow over, the big questions will remain.

Does the fact that the most important trial at the tribunal – encompassing some 66 counts of genocide, crimes against humanity and war crimes – was not completed mean that the tribunal's work is now for nothing?

During the last week, experts and commentators have provided an overwhelming array of analyses of the failure to finally bring the Milosevic trial to a conclusion.

Many have, in hindsight, criticised the prosecutor's apparent desire to create a historical record of the Balkans wars. They argue that achieving justice for the victims should have been balanced with a more practical concern for securing a conviction.

At the court, however, the practical issues facing prosecution and defence are how the overwhelming mass of evidence collected in the Milosevic case can be re-presented at future trials.

Beyond its walls, there is much soul searching about what lessons now need to be learned for the future of international justice.

There is no question of the serious pressure the tribunal is now under, as Milosevic's death has proved a vital rallying point for those who oppose the tribunal's methods or doubt its legitimacy.

But despite the criticism of the way the trial was handled, the consensus among legal observers is that just holding the trial at all, however incomplete, has had a significant effect on the development of international justice.

The stinging attacks on the tribunal's conduct have come from a variety of sources.

A commentary from Moscow's state news agency RIA Novosti slammed into the tribunal, alleging it had suffered a "moral defeat".

"Its reputation has been damaged by several suspected suicides and the death of the main defendant," said the commentary.

The lower house of Russia's parliament on unanimously approved a statement questioning the existence of the Hague tribunal.

The Duma's statement claims that all decisions made by the international court since its creation "testify to a high degree of politicisation and bias". It adds that "double standards have become the norm" at a tribunal which has proved "useless".

Independent commentators have been just as damning. Michael Scharf, a former State Department attorney and international criminal law expert, told the Associated Press news agency that the money spent on the Milosevic trial had effectively been thrown "down the drain".

Criticism has focused on the immense size and range of the indictment - which is actually three separate charge sheets detailing the crimes committed in Kosovo, Bosnia and Croatia.

Professor William Schabas, a genocide expert and director of the Irish centre for Human Rights in Galway, told IWPR, "The tribunal should realise that [Milosevic's death] is a consequence of having trials that are too long. They should have streamlined the procedure and been more modest in the indictment."

Other senior law experts agree. Cambridge University law lecturer, Dr Roger O'Keefe, told IWPR, "The prosecution should have brought fewer and firmer charges against Milosevic. Indicting him for 66 counts rather than for a hardcore handful was unwise."

Schabas suggests that rather than spending four years trying Milosevic for crimes committed across the whole Balkans region, tribunal prosecutors should have first pursued the Kosovo indictment, and then depending on the result, returned to court to address charges relating to Bosnia and Croatia.

This was to be the trial chamber's initial strategy, when it ruled in December 2001 that the Bosnia and Croatia charges would be linked together in one indictment, while the Kosovo case would be tried on its own. This decision was overturned two months later following a prosecution appeal.

And in December last year, the trial chamber considered again the option of severing the Kosovo indictment from the other two, after the possibility had been investigated as a means of reducing the length of the trial - but turned it down.

Some commentators have used the current circumstances to reiterate old arguments about the "political nature" of the tribunal.

According to John Laughland, a potential Milosevic defence witness and author of "Le Tribunal Pénal International: Gardien du Nouvel Ordre Mondial", the tribunal had specific reasons for keeping the indictments together.

"It was politically difficult to exclude Bosnia and Croatia from the indictment because the [tribunal] wanted to make Milosevic the central figure in all the Balkan wars," he told IWPR.

Other observers say the judges should have been stricter with Milosevic – who insisted on defending himself – and worked harder to maintain order in the courtroom.

Heikelina Verrijn Stuart, an international criminal lawyer and trial observer, suggests that the chamber was "over-gentle" with the ex-president and by giving him "so much room to manipulate them" they showed themselves perhaps "a bit amateur".

Matters were made worse by the fact that the defendant frequently delayed proceedings with interminable witness examinations and florid political bombast.

The accused's increasingly worsening health led to a decision in September 2004, to reduce trial sittings to three per week, rather than the usual five, on the advice of Dutch medics.

"If Milosevic could have worked full time, the trial would have looked very different," said Verrijn Stuart.

The need to balance control of such a recalcitrant accused with the importance of maintaining a fair trial was a constant battle for the trial chamber.

When judges sought to take the pressure off the ailing ex-president by imposing assigned counsel in September 2004, there was uproar from the international community, which claimed that the tribunal was in breach of a defendant's right to represent himself.

As Scharf told the Associated Press, Milosevic eventually ended up manipulating proceedings to the extent that he effectively "cheated history".

Not only did the former president manage to escape being sentenced himself, he also made it significantly more difficult for the tribunal to secure further convictions.

"Had Milosevic been found guilty of genocide in Bosnia, it would have been much easier to process all other Bosnian Serb leaders responsible for war crimes," Amir Ahmici, the Bosnian representative to the tribunal, told IWPR.

A judgement against Milosevic would have described the precise details of what crimes actually occurred, as well as identifying a chain of command which was responsible for the illegal actions.

Edgar Chen, from the Coalition for International Justice, told IWPR that the tribunal's strategy of concentrating its genocide charges on the ex-president, rather than other Serb government and military

officials, now seems to have backfired.

"Milosevic was the only Serb from Belgrade who was on trial for genocide at the [tribunal] and now Bosnia has nothing - or nobody - to point to at the [court] who is legally implicated with having genocidal criminal responsibility," he said.

Ahmic shares Chen's concerns and says since Milosevic was the only person from Serbia indicted for genocide in Bosnia, his death means "that link is now missing".

Nevertheless, those who have studied the trial agree that evidence presented will be recycled. The significance of these testimonies and documents was underlined by the judges' decision in June 2004, at the end of the prosecution case, that Milosevic had a case to answer.

The trial chamber ruled that there had been evidence presented which pointed to "the genocidal intent of the Bosnian Serb leadership" and that "the scale and pattern of the attacks, their intensity, the substantial number of Muslims killed... and the targeting of persons essential to the survival of the Muslims as a group, are all factors that point to genocide".

There are cases against more than 30 other persons that overlap with that of Milosevic, says Florence Hartmann, spokesperson for the Office of The Prosecutor. "The evidence collected for Milosevic was conceived to be used in other cases," she said.

Bogdan Ivanisevic of Human Rights Watch in Belgrade points out that "the complexity of the case against Milosevic was unique".

Many of the future trials, he says, "contain smaller number of charges and are easier to handle".

That will almost inevitably lead to a more piecemeal account of what happened in the Balkans during the Nineties, but it is less likely that there would be a repeat of such a hugely long lasting trial as that of Milosevic.

As if to show its determination that the ex-president's death does not change its fundamental purpose, within two days the tribunal was already back at work.

A judgement was handed down against two senior Bosnian Muslim army commanders, Enver Hadzihanovic and Amir Kubura, for their roles in war crimes against Croats and Serbs during fighting in central Bosnia in 1993.

Long-term tribunal observers say that Milosevic was not the only game in town. "The success or failure of the tribunal does not hang on one case," said Judith Armatta, former trial observer for the Coalition for International Justice.

"No matter how responsible he was for the massive decade of crimes across Yugoslavia, just as one man could not have done all that damage on his own," she said.

So far the tribunal has issued indictments against 161 persons, found 43 guilty with another 14 awaiting appeal. Of the others, 44 are awaiting trial, six are currently on trial, eight have been acquitted, another ten are expected to have their cases referred to local jurisdictions, and the others have either died or had their indictments withdrawn.

Perhaps the most significant judgements so far are those in the cases of commanders of the Bosnian Serb Army, the VRS – Radislav Krstic and Vidoje Blagojevic – who received prison terms for their roles in the crime of genocide in Srebrenica. VRS troops executed thousands of Muslim men and boys captured after the fall of the Srebrenica enclave in July 1995.

Later this year, the tribunal will mount its biggest-ever joint trial, when at least eight senior military and police commanders will face charges of genocide or complicity to commit genocide in relation to that massacre.

The indictments against Milosevic not only covered three geographical areas - Bosnia Croatia and Kosovo - but also traced out three main lines of command – the political, military and state security.

One example of the kind of witnesses who may give evidence again at other trials could include general Aleksandar Vasiljevic, former head of the Yugoslav military's security service, who described a web of links centred on Milosevic, which led to the army, the Serbian interior ministry and the territorial defence units.

According to Vasiljevic's testimony, Milosevic operated in Kosovo through a so-called joint command, headed by his key Kosovo coordinator, the then deputy federal prime minister Nikola Sainovic.

The former deputy prime minister faces trial alongside other close political associates of the Milosevic regime such as Milan Milutinovic, the ex-president of Serbia. Four Serbian generals also face charges for their roles in a brutal campaign to drive hundreds of thousands of Kosovo Albanians from their homes in 1999.

Even the evidence of one of Milosevic's defence witnesses, Yugoslav army general Bozidar Delic, who – apparently inadvertently – showed the court documents corroborating the existence and the nature of the Joint Command for Kosovo will be used in subsequent trials.

Another trial which will use material already presented relating to the funding and support allegedly ordered by Milosevic for Serb armies in Bosnia and Croatia army, will be that of former chief of staff for the Yugoslav army Momcilo Perisic – alleged to have acted as the main conduit.

Insiders suggest this may be the “most significant” case in terms of determining the extent of Belgrade's role in the Bosnia and Croatia wars.

Among the Croatian Serb politicians who had very close connections to Milosevic are Milan Martic, currently on trial, while another former president of the so-called Republic of Serbian Krajina, Goran Hadzic, remains on the run. He is implicated in mass deportations and a number of killings, the most notorious being the massacre of over 260 people taken from a hospital in the Croatian town of Vukovar in 1991.

Of senior Bosnian Serb politicians, the former president of Republika Srpska Biljana Plavsic has already pleaded guilty to crimes against humanity, while Momcilo Krajisnik, the former speaker of the Bosnian Serb parliament, is currently defending himself against allegations of genocide and crimes against humanity across the territory of Bosnia and Hercegovina.

For the government in Sarajevo, without Milosevic, the determination of whether genocide occurred in parts of Bosnia beyond Sarajevo will now depend on trials like Krajisnik's.

"We've been trying to prove all along that genocide didn't take place only in Srebrenica," explained Ahmic, "but also in other Bosnian municipalities, such as Brcko, Bijeljina and five municipalities in Bosanska Krajina [Republika Srpska]."

Further elements of the web of links that led from Milosevic should emerge during the trials of the state security service boss Jovica Stanisic and Franko Simatovic, the alleged founder of the special operations unit known as the "Red Berets", who are alleged to have been responsible for ethnic cleaning in Croatia, Bosnia and Kosovo.

Their amended indictment now includes counts charging them with crimes committed by the special military unit known as the Scorpions in July 1995 in the Srebrenica area. A video showing the Scorpions' role in murders of men from Srebrenica was presented at the Milosevic trial last year, and led to a major trial in Belgrade.

Much of the evidence in the Milosevic case has been kept secret, such as the Supreme Defence Council documents supplied by Belgrade, which remained confidential because Belgrade cited "national security", says Hartmann.

But the prosecution has challenged that ruling and is still awaiting a decision from the appeals chamber.

Ahmic says "sealed documents - which could be extremely important to us - could be used in other trials at the tribunal, should the prosecution or defence lawyers demand that and the chamber grants it".

Hartmann plays down any suggestion that such documents could have provided the prosecution with "a smoking-gun", tying the authorities in Belgrade directly to events in Bosnia.

But, she says, just like the Scorpions video, some documents could have a "palpable" effect and revealing them "could have more impact on public understanding".

The Milosevic indictment itself also lists many others, who have never been indicted at the tribunal, as part of a "joint criminal enterprise". In the 2004 ruling the trial chamber said, in reference to the Bosnia element, that it "could be satisfied beyond reasonable doubt that there existed a joint criminal enterprise, which included members of the Bosnian Serb leadership". It made similar judgments on the Croatia and Kosovo elements.

Historian Marko Attila Hoare, who worked as a researcher in the Office of the Prosecutor, has written that the decision not to pursue all the members of the joint criminal enterprise wasn't a matter of lack of evidence, but rather a decision by Del Ponte herself.

Hartmann argues that as the prosecution is no longer able to bring forward new indictments, because of time constraints imposed by the UN Security Council, the plan is, and has been, to hand over material to local courts in the Balkans to pursue.

"We had unfinished investigations," she told IWPR. "They have been the subject of exchanges with war crimes prosecution teams in Bosnia, Croatia and Serbia."

Two key figures on both the military and political fronts, General Ratko Mladic, the former head of the Bosnian Serb army, and Radovan Karadzic the ex-Bosnian Serb president, do face indictments, and are still not in detention. Their trials, say observers, will provide the central focus, now that the Milosevic case is closed.

Avril MacDonald, law lecturer at The Hague's Asser Institute, however, hopes that if those trials go ahead, the prosecution will have learnt some lessons from the Milosevic case and that the tribunal officials as it prepares for Karadzic and Mladic, "look a little bit more critically at their strategy".

The latest deadline set by the European Union for Serbia to hand over Mladic was April 5. Otherwise, Belgrade faced the prospect of a suspension of negotiations on its plans to join the EU in the future.

With Milosevic's body lying on show outside the parliament building in central Belgrade, and plans for a showy funeral in his hometown, the Serbian authorities are already under considerable pressure. Given that the Serbian public is so apparently disenchanted with the tribunal's handling of Milosevic's health issues, a swift delivery of Mladic seems unlikely.

But according to at least one member state, the EU's position is not going to change. A Dutch foreign ministry spokesperson told IWPR there would be no change in their stance toward Belgrade following Milosevic's death. "As far as we are concerned the pressure remains on Serbia," he said.

Even without a verdict on Milosevic, the consensus among legal observers is that the trial itself had great significance.

Mark Ellis, executive director of the International Bar Association, says that bringing Milosevic to trial was, in itself, a cause for optimism. "The tribunal did something that had never been done before, which was to bring a head of state to trial for genocide," he told IWPR.

"This death will not diminish the initial step made by the tribunal," he said.

Verrijn Stuart agrees. "The tribunal has shown that the rule of law exists and a trial can be fair to even to the worst of perpetrators," she said.

The Milosevic trial was exceptional, a first in international legal history. Judith Armatta, a long-term tribunal observer, says that she sees the work of the court - and the trial of the ex-Serbian leader - as part of an

“ongoing historical process”, towards a worldwide system where “human rights are valued and those who violate them are held to account”.

“The tribunal has made and will make mistakes,” said Armatta. “Those provide useful lessons. The lesson is not ‘this doesn't work because it wasn't 100 per cent perfect’ but ‘how do we improve it, given what we have learned’.”

And McDonald points out that the tribunal – the first such court since Nuremburg more than fifty years before – has enabled a series of developments in international law which may not have come about otherwise.

“We wouldn't have the International Criminal Court; we wouldn't have any of these ad hoc tribunals; we would have nothing. And we wouldn't have a whole new jurisprudence which hardly existed before,” she said.

Other observers also point to the way that much of the evidence in the Milosevic case has been utilised at neighbouring court in The Hague – the International Court of Justice, ICJ, where Bosnia has brought a case against Serbia for genocide.

Christopher Le Mon, an international lawyer, who writes on transitional justice issues, says the ICJ case is, in any case, “an essential complement” to the work of the tribunal, because it may “force a moral and financial accountability on those citizens of Serbia and Montenegro that tolerated Milosevic's genocidal policies”.

While Milosevic himself will never be judged for his alleged individual criminal responsibility for ethnic cleansing policies during the Nineties, Bosnia may still wrest justice from the Serbian regime as a whole.

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