Introduction

On 11 March 2006, Slobodan Milošević died in his bed in the UN Detention Unit in The Hague.[1] At the time, he had been on trial for 66 count of genocide, crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war. The alleged conduct encompassed more than 7,000 allegations of wrongdoing over eight years of conflict in the former Yugoslavia. Milošević's death left a significant hole in the fabric of the development and solidification of international criminal justice. An emblem of a challenge to the impunity of tyrannical heads of state who commit such atrocities ended lamentably. The trial had lasted over four years and, despite *ex post facto* statements by the prosecution that its end was only weeks away,[2] in reality it was some months away from being concluded, and yet many more months from a judgement being rendered. The reasons for the trial lasting so long lay in a number of factors, chief among which were the scope of the prosecution case and the refusal to adjust its case strategy; the Appeals Chamber's ruling to join the three indictments (Croatia, Bosnia, and Kosovo) into one gargantuan indictment; issues relating to the self-representation; and the ill health of the accused, which caused interruptions to the trial and required a reduced sitting schedule.

With the passing away of Milošević, many feared – and some hoped – that international criminal justice was experiencing some sort of death itself. For the victims of the wars in the former Yugoslavia, the people and communities of the region, the family and supporters of the accused, the international community and those dedicated to the process, it was a heavy blow.

[1] See *Prosecutor v. Milošević*, 'Order Terminating the Proceedings', Case No. IT-02-54-T, 14 March 2006; 'Report to the President: Death of Slobodan Milošević', Judge Kevin Parker, Vice-President, 31 May 2006 LM/MOW/1081e www.un.org/icty/milosevic/parkerreport.pdf at 15 August 2006.

[2] Statement by the ICTY Prosecutor, 11 March 2006, FH/OTP/1051e www.un.org/icty/latest-e/index.htm at 15 August 2006.

Yet the trial stands for much in the development and the future of international criminal justice, both politically and legally. In developing principles for the best practice of international criminal trials, the *Milošević* trial is a pre-eminent source for the conduct of such trials, in both positive and negative ways.

The Purpose and Content of this Book

The key purpose of this book is to analyse what lessons can be learnt from the *Milošević* trial that would improve the fair and expeditious conduct of complex international criminal trials of senior political and military officials. Critical to this question is the challenge of striking an appropriate balance between the sometimes competing obligations on a court to guarantee an accused person's right to a fair trial and to bring trial proceedings to a conclusion with reasonable expedition. A common feature of the trials of senior political and military leaders accused of violating international criminal law is that they rarely physically perpetrate the alleged crimes themselves. Instead, individual criminal responsibility for these accused is either based on some involvement in planning, ordering or instigating the crimes, or on a failure to act to prevent or punish the crimes occurring (superior or command responsibility). In such circumstances, the prosecution has the double challenge of proving the crimes themselves as well as the accused's responsibility for those crimes. More often than not, senior political and military leaders are charged not with responsibility for a single isolated incident, but with the design or implementation of a policy encompassing numerous incidents in various physical locations, or with the failure to act to stop patterns of conduct involving multiple incidents of atrocity. These factors usually render such trials exceedingly complex and very long.

Thanks to a war in Iraq and some good luck in digging a cowering former dictator out of a hole in the ground, as well as an apparent change of political will in Nigeria, Milošević did not remain for long the only former head of state to be tried for atrocities on a vast scale against his own and others citizens. At the time the door was closing on the writing of this book, the trials of Saddam Hussein abruptly concluded with his execution, ordered by the Supreme Iraqi Criminal Tribunal in Iraq for his involvement in the Dujail massacre (the Anfal genocide trial obviously being abandoned) and Charles Taylor, charged with crimes against humanity and other serious violations of international humanitarian law, was taken into custody by the Special Court for Sierra Leone and transferred to The

Hague where the Sierra Leone Court will make use of the facilities of the International Criminal Court.

However, the place of the *Milošević* trial remains unique for several reasons. It was the first trial of a former head of state by an international criminal tribunal and one of the most complex and lengthy war-crimes trials in history. It spawned problems and lessons that no other trial had necessarily confronted or contemplated. Despite early hopes for the trials of Saddam Hussein and other former Iraqi leaders, the Iraqi Tribunal has been profoundly plagued with fair trial and impartiality issues that will tarnish any judgement it renders[3] and it is not, at any rate, an international criminal tribunal.[4] Differently placed, the Taylor trial is poised to impact upon some of the fundamental issues considered in this book but will take some time yet to begin and conclude.

In analysing the *Milošević* case, I will seek to identify the criteria for determining what constitutes fairness and what constitutes expeditiousness in international criminal trials. I will also explain how these concepts interact and, on occasion, conflict. I will argue that best practice in the conduct of such trials requires, first and foremost, that the trial be fair, and second, but also extremely important, that the trial be expeditious. I will analyse how these concepts must sometimes be balanced to arrive at criteria of best practice for such trials. This will lead to recommendations for reform concerning the future conduct of international criminal trials.

[3] See Diane Marie Amann, '"The Only Thing Left is Justice": Cherif Bassiouni, Saddam Hussein, and the Quest for Impartiality in International Criminal Law' in David E. Guinn (ed.), *Coming of Age in International Criminal Law: An Intellectual Reflection on the Work of M. Cherif Bassiouni* (forthcoming); report by Human Rights Watch on the removal of Judge Abdullah al-Amiri, the presiding judge of the Hussein trial by a decision of the Prime Minister and Cabinet because, according to a Government spokesman, 'he ha[d] lost his neutrality after he made comments saying Saddam is not a dictator': 'Removal of Judge a Grave Threat to Independence of Genocide Court', Human Rights Watch, 19 September 2006 http://hrw.org/english/docs/2006/09/19/iraq14229.htm at 4 October 2006.

[4] For information about the Iraqi Special Tribunal, how it is structured and will operate and the revocation of the initial statute and transition to the Iraqi High Criminal Court (including rebuffing the notion that the tribunal should be international in nature), see generally Michael J. Frank, 'Justice for Iraq, Justice for All' (2004) 57 *Oklahoma Law Review* 303; Michael P. Scharf and Curtis F. J. Doebbler, 'Will Saddam Hussein Get a Fair Trial?' (2005) 37 *Case Western Reserve Journal of International Law* 21 (recorded debate); Human Rights Watch, 'The Former Iraqi Government on Trial: A Human Rights Watch Briefing paper', 16 October 2005; Diane Marie Amann, '"The Only Thing Left is Justice": Cherif Bassiouni, Saddam Hussein, and the Quest for Impartiality in International Criminal Law', above n. 2; Eric Stover, Hanny Megally, and Hania Mufti, 'Bremer's "Gordian Knot": Transitional Justice and the US Occupation of Iraq' (2005) 27 *Human Rights Quarterly* 830, 838–43.

My use of the reference to best practice in the context of this book is one that requires some explanation. Although the development of modern international criminal law is in many profound respects incipient in nature, some important work has begun to flesh out or suggest meaningful solutions to the myriad problems facing the conduct of complex international criminal trials. The *Milošević* case proved a crucial source for this work, and other cases have followed or have taken different approaches. All of this suggests that the process of determining and defining best practice in the conduct of such trials, while in the early stages of development, is not purely aspirational.

Furthermore, in discussing best practice in the context of this book, I am expressing a clear preference for the view of international criminal trials that their purpose is primarily forensic in nature – that is, to determine the guilt or innocence of individuals for their role in atrocities. I acknowledge that this is not the only view of the purpose and nature of international criminal trials, and that some scholars reason that they should be legitimately viewed as broader sociological and/or political exercises fulfilling a purpose beyond the determination of the guilt or innocence of the accused being tried – whether that be a commemorative or didactic function.[5] However, while these may be legitimate derivative outcomes of international criminal trials (outcomes that are profoundly subjective in nature), I do not believe that these trials can operate effectively or – far more importantly – fairly outside of the forensic trial paradigm. Therefore, when I discuss best practice throughout this book it is in measurement against the more traditional view of a criminal trial as a forensic process.

The *Milošević* trial was a fair trial, although some fair trial rights were challenged by its conduct, the responsibility for this resting with the court, the prosecution, and the accused himself. The trial was not concluded expeditiously. The predominant reasons for the lack of expeditiousness in the *Milošević* case were the prosecutorial approach taken, the approach of the accused to the trial and his health, as well as some key trial and appellate decision-making. In discussing these issues, it will not be the purpose of this analysis to disparage those involved in the trial and decision-making process, although inevitably criticism will be made so as to extract

[5] See Gerry J. Simpson, *Law, War and Crime* (forthcoming), chapter four. See also, Laurence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001); Shoshana Felman, The Juridical Unconscious: Trials and Traumas in the Twentieth Century (2002); Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994).

lessons for the future conduct of these important trials. In fact, the struggle to conduct and to conclude this trial provides crucial primary source material for the future achievement of fair and expeditious international criminal trials of senior political and military accused, including that of Charles Taylor.

While nomenclature relating to 'truly' international tribunals (composed entirely of international judges) and 'internationalised' tribunals (otherwise described as hybrid or supranational tribunals, which are composed of a mix of international and national judges) has been employed, it is equally acceptable – and has been said to be preferable by some scholars – to describe all such courts or tribunals as 'international'.[6] The reason for this is that, while the composition, structure, and constitutional framework of such institutions may vary, each tribunal falls at a different point in the 'spectrum of internationality' and each serves the same end of international criminal justice.[7] Differing terminology will be used throughout this book to refer to these courts and tribunals depending on context, sometimes distinguishing their character but often speaking generically of them as 'international', particularly when referring to generally accepted practice or procedure in international criminal law.

The Structure of this Book

The first substantive chapter of this book discusses the principles of a fair and expeditious trial. The analysis focuses on the interpretation and application of such rights in international criminal law, as developed in the jurisprudence of the ICTY and other international criminal tribunals

[6] See Diane Marie Amann, '"The Only Thing Left is Justice": Cherif Bassiouni, Saddam Hussein, and the Quest for Impartiality in International Criminal Law' in David E. Guinn (ed.), *Coming of Age in International Criminal Law: An Intellectual Reflection on the Work of M. Cherif Bassiouni* (forthcoming), where Amann claims that, although useful for some purposes, the distinction between 'international' and 'internationalised' 'obscures that each forum rests at a different point on a spectrum of internationality; that is, each is one of several judicial mechanisms available to serve the international criminal justice project'. See also Jacob Katz Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects' (2002) 27 *Yale Journal of International Law* 111, 127–8; Laura A. Dickinson, 'Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law' (2002) 75 *South California Law Review* 1407, 1411; Mark A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *Northwestern University Law Review* 539, 542–4; Patricia M. Wald, 'Accountability for War Crimes: What Roles for National, International, and Hybrid Tribunals?' (2004) 98 *American Society of International Legal Proceedings* 192.

[7] Diane Marie Amann, above n. 5, 2.

(all of which operate within the same fundamental rights framework) and, in particular, the *Milošević* trial. While fair trial issues emerge and are discussed throughout this book in their context, this chapter focuses on some broad principles and rights, such as the principle of an expeditious trial, the right to a trial without undue delay, the principle of equality of arms, the right to a public trial, the right to confront witnesses, defence representation and particularly the right to self-representation, as well as the interpretation and application of human rights in international criminal law. These issues are of fundamental importance to the framework in which international criminal law is created, interpreted, and applied, and form the basis for any prescriptive discussion about how to conduct international criminal trials.

Chapter 2 turns to the logical first step in an analysis of the *Milošević* trial – the prosecution's indictments, its case strategy, and the substance of its case. The role of the prosecution is extremely significant in international criminal trials. In the adversarial structure of international criminal law, it is the prosecution that conducts investigations, makes decisions about who to indict, and prepares the indictments which determine the nature, scope, and structure of the case. The purpose of this chapter is to examine the prosecution's approach to the *Milošević* case to determine criteria for best practice in the conduct of such trials. This chapter will establish that important strategic and policy aspects of the prosecution case in *Milošević* were far from best practice, and seriously threatened the fair and expeditious trial framework within which international criminal proceedings are to be conducted. The prosecution approach to its case was zealous and overly expansive, creating a trial that was unmanageably complex and long. The factors which contributed to this are examined, as are some of the considerations which motivated the prosecution to approach its case in this way. There are tensions and competing interests in the presentation of complex international criminal trials, which encompass forensic, historical, political, and sociological issues. The prosecution, while seeking in good faith to satisfy the interests it considered significant, made it impossible to conduct an expeditious trial and put at risk its fairness, requirements that are not only the responsibility of the court but also – to a lesser but significant extent – the responsibility of a prosecutor in international criminal proceedings.

Chapter 2 examines the three indictments against Milošević. An analysis of the prosecution indictments reveals significant defects, and these will be identified and discussed in some detail. The prosecution case revolved around a theory that Milošević espoused the notion of a Greater

Serbia and implemented policies to realise the notion – a case theory which remained unclear until well into the defence case. This theory is discussed in the context of the prosecution's case to better understand its approach and the overall effect on the length and complexity of the trial. The pleading requirements for indictments before the ICTY and the indictment review process in this and other cases is discussed, as is the relevant content of the three *Milošević* indictments. The prosecution application for joinder of the three separate indictments – one of the most important issues in the trial because of its consequent impact on issues of fairness and expedition – is explored. Finally, the ruling of the Trial Chamber on the motion for judgement of acquittal will be analysed. The Decision is important because it dismissed over one thousand individual allegations against the accused and is the only pre-Judgement determinative ruling of the Chamber on aspects of the indictments.

Chapter 3 first considers case management challenges experienced in the *Milošević* trial. The prosecution and defence cases in the *Milošević* trial and how the Trial Chamber managed them are analysed, as are the innovative case management techniques developed and applied, or considered and dismissed, during that trial. Measures for managing complex international criminal law cases are considered and a framework for best case management practice in international criminal law is developed. The scope of the prosecution case in *Milošević* had a direct impact on the scope of the defence case. The Trial Chamber tried several techniques to manage the case, ultimately determining that limiting the time allocated to the parties was the preferable approach. Other radical case management approaches were considered, and these alternatives are analysed in the context of the management of international criminal trials.

The case management experience of the *Milošević* trial is not, however, entirely unique. There is a body of practice in national law as well as developing experience in international law relevant to developing best practice for the conduct of international criminal trials. This chapter will also examine the development and application of case management in domestic criminal law systems and then in modern international criminal law, in particular before the ICTY (where most of the regulatory and jurisprudential developments have occurred). Given the circumstances of Milošević's death, these considerations take on a particular importance in the case management analysis. Lessons abound in the *Milošević* case in how to manage complex international criminal trials to a satisfactory conclusion. Again, balancing a Trial Chamber's commitment to a fair and expeditious trial is central to this analysis.

An issue of developing importance and complexity in the conduct of these cases is the assertion by accused of a right to represent themselves. Chapter 4 commences with a discussion of Milošević's insistence on a right to self-representation. After two and a half years of trial, following the completion of the prosecution case, the commencement of his defence case, and after having upheld on several occasions his right to represent himself, the Trial Chamber imposed court-assigned defence counsel on Milošević. In doing so, the Chamber initiated an important legal development concerning how an accused's right to a fair trial is to be interpreted in international criminal law. The operation of the right to self-representation, and its treatment in the common law, civil law, and regional human rights systems having already been discussed in chapter 1, the development and treatment of self-representation in all the international criminal courts and tribunals that have dealt with this issue will be analysed.

Chapter 4 will then consider the issues related to representation and resources in international criminal law. These matters were some of the most contentious of the *Milošević* trial, and have plagued other international criminal trials of high-ranking accused. In the brief existence of modern international criminal law, there has been significant development of different representation models, ranging from standard defence counsel representation to innovative use of *amici curiae*. Closely related to representation is the issue of adequate resources for an accused to prepare and present an effective defence. In complex cases of this nature, representation and resources issues go to the core of fair trial rights, in particular those of adequate time and facilities for the preparation of a defence; the right to communicate with counsel of an accused's own choosing; the right of defence in person or through legal assistance, and the equality of arms. The application of these principles in the complex international criminal trial process already discussed in chapter 1 is considered with particular reference to the way these principles were applied in the *Milošević* case.

In chapter 5, the conclusions and outcomes of the analysis in this book are discussed and proposals for reforms to the conduct of complex international criminal trials are made. Fairness and expeditiousness in such trials must be considered in light of the competing interests and issues discussed throughout this book. The *Milošević* trial was fair but it was not expeditious. The lessons learnt from the analysis of this and other international criminal trials considered in this work form the basis for reaching important conclusions about how such trials must be conducted to achieve best practice. Obligations on the prosecution to exercise restraint, focus their

cases, and act responsibly are of paramount concern. Where such restraint is not exercised, courts must act in a measured but firm manner to ensure fairness and reasonable expeditiousness. Courts must themselves develop or have developed for them (depending on the applicable system) their regulatory framework to optimise the procedural and substantive environment in which the goals which make up best practice can be achieved. Courts must also develop and apply consistent and balanced jurisprudence to attain these goals. Within this framework, development of innovative and well-considered case management must occur. Again, the *Milošević* trial created a basis from which this important area of procedural law can – and already has started to – develop. Proposals for future reform and perimeters within which case management principles can be applied are discussed and concrete proposals are made for how to manage these cases. Conclusions relating to the management of resource and representation issues in complex international criminal law cases are made, as are proposals concerning the future conduct of these trials where the right to self-representation is asserted. The tension in the application of common law and civil law principles is an issue that re-emerges throughout this book. It is argued that while these tensions were instrumental in the development of important aspects of international criminal law, it is now time to abandon the preoccupation of international criminal courts and tribunals with this dichotomy and embrace the newly created system of international criminal law as a jurisdiction in its own right. This chapter will then consider problems in the appellate structure, particularly flowing from the *ad hoc* Tribunals, but also more generally the structure of appellate review in international criminal courts and tribunals and propose an appropriate way in which to provide for appellate review in international criminal law. In tying these conclusions together, I will discuss the crucial lessons from the *Milošević* trial and what potential reforms emerge that will contribute materially to the achievement of fair and expeditious international criminal trials of senior officials in the future.

The Context of this Book

One of the critical analyses of the *Milošević* case is an understanding of what worked, what did not work, and why, so that lessons can be drawn for future trials of this kind. Complex international criminal trials are fraught with difficulties, requiring the existence and application of a well-structured legal process that respects the fundamental rights of the accused. However, as can be seen from the *Milošević* trial, the modern

international criminal trial process, with its well-articulated fair trial guarantees for accused persons, is not strictly speaking designed to deal with intelligent and manipulative accused, who do not accept the legitimacy of the judicial process to which they are subjected and who have a political agenda to pursue, using the forensic trial process as their stage. Milošević was exactly such an accused, and he exploited the niceties of the criminal legal process and the weaknesses inherent in a prosecution and a court trying someone of this stature for the first time. Milošević made his position clear from the outset. At his initial appearances and early on in the trial, he adopted a robust rejection of the Tribunal's legitimacy – accusing it of being the puppet of NATO, and the indictments against him another farcical extension of the international community's persecution of the Serbs in general, and of him in particular.[8] At Milošević's initial appearance, he predictably rejected the legitimacy and legality of the Tribunal, and the purpose for which it sought to try him:

> I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to [an] illegal organ . . . This trial's aim is to produce false justification for the war crimes of NATO committed in Yugoslavia.[9]

Milošević continued to stress this position in subsequent hearings prior to the commencement of his trial, and at times – although with diminishing frequency – during his trial.[10] Exemplifying his use of the forensic trial process for political purposes, Milošević stated at the pre-trial conference for the Kosovo part of the case:

> [A]n operation is under way to reverse the scene and the culprit and accused, and all this is geared towards a construed justification for the crimes committed during the NATO aggression on my country and my nation. Even the indictment represents proof that what I say is true, that is, further evidence of it, because all the alleged misdeeds committed in conformity of that indictment by the armed forces of Yugoslavia, which I had the honour to be at the head and command, were precisely put into a time framework which is the time framework during which the NATO air campaign and aggression against my country was committed.

[8] See e.g., *Prosecutor v. Milošević*, Hearings, 3 July 2001, at Transcript, 2; 30 August 2001; 12 November 2001; 9 January 2002.
[9] *Prosecutor v. Milošević*, Hearing, 3 July 2001, Transcript, 2, 4.
[10] See e.g., *Prosecutor v. Milošević*, Hearings, 30 August 2001; 12 November 2001; 9 January 2002.