



The death of Slobodan Milošević and the future of International Criminal Justice

*Paul Tavernier**

The death of Slobodan Milošević on 11 March 2006, in his prison cell at the Detention Centre in The Hague, gives rise to a number of questions and considerations for this French lawyer, who – while not a criminal specialist – has always been in favour of the development of international criminal justice. It raises questions not only regarding the functioning of the judicial institution (impunity and fair and proper procedure) but also in relation to the expectations of the wider international community, which is increasingly committed to seeing former dictators brought to justice and concrete historical truths established.

International criminal justice and the functioning of the judicial institution

The death of Milošević ends a long process, but one which, ultimately, does not give any meaningful conclusion. The trial has come to an abrupt end and the alleged crimes against him will go unpunished. Admittedly, it is a consequence of the principle of criminal responsibility which is individual in nature and therefore results in the termination of the proceedings. However, even if that was not the case, it is difficult to imagine how the trial could have continued given the fact that Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) stipulates that “the accused shall be entitled [...] to be tried in his presence” (article 21 § 3d). This presence is, of course, no longer possible given the death of the accused. Additionally, in accordance with the presumption of innocence principle, recalled in article 21 § 3 of the Statute’s Tribunal: “the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.”

The combination of these two principles can lead to impunity. This can be difficult to comprehend for the general public, lawyers and defenders of human rights alike, but, above all, for the victims who do not enjoy a favourable position in either the Statute of the *ad hoc* Tribunal for the former Yugoslavia or for Rwanda. Fortunately, this position was improved upon in the Statute of the



International Criminal Court (ICC)¹ and further developed by a remarkable decision of the Preliminary Trial Chamber on 17 January 2006.²

The frustration of the victims could have been avoided if the trial of Milošević had not been so protracted and if it had begun much earlier. The initial indictment takes us back to 24 April 1998, when it was partially confidential, before becoming completely disclosed on 2 November 2001. Indeed, the trial could not take place with the accused being present, which required the full co-operation of Yugoslavia (Serbia and Montenegro) which was difficult to obtain. It was only in June 2001 that the accused was imprisoned in The Hague and the hearings could not begin before February 2002. Four years of legal debate can seem like a long time, especially given the brevity of the main Nuremberg Trial (November 1945 - October 1946). Admittedly, the delay was partly due to the attitude of the accused, but it derived from the procedure of the ICTY which is inspired by the Anglo-Saxon procedure, exacerbating some of its disadvantages. It is also true that this seemingly interminable process had to scrupulously respect the rules of fair trial, but one can also ask whether such slow justice is really equitable. This experience should be used by judges, by the Registrar and the Prosecutor at the ICC to avoid falling into a similar trap.

If the death of the main accused before the ICTY seems to have shaken the judicial institution itself, the death of Slobodan Milošević has also questioned the faith that the international community had in international criminal justice.

International Criminal Justice and the expectations of the international community

In order for justice to be effective, it needs to have the confidence of the society in which it is rendered. This is also the case with international criminal justice. In this regard, the ordeal of the Milošević trial was not really satisfactory. The commencement of the trial in 2002 – which gave rise to such great interest and hope - quickly gave way to disinterest and disillusionment as the trial meandered along, inevitably losing the attention of the general public and all those not directly associated with the proceedings. The trial appeared unnecessarily long and too complicated. An important lesson should be learned for future cases: justice rendered in The Hague must be clearer and more accessible to the general public if it is to be perceived as effective justice.

Apart from this requirement of clarity and ‘legibility’, the international community expects international criminal justice to establish historical truths as a prerequisite for attempts at reconciliation. However, the sudden and definitive end to the Milošević trial made it impossible to deliver a verdict. While the thousands of documents and pieces of evidence accumulated by the Prosecution and the Defence, as well as the transcripts of the hearings, will be of much use to

¹ See the ‘Victims’ Guide to the International Criminal Court’ published in 2003 by the NGO ‘Reporters sans Frontières’ and ‘Réseau Damoclès’

² ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, Public retracted version, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006; Decision on the Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006. The Pre-Trial Chamber dismissed the application.



historians who will examine these questions in the years to come, the international community is deprived of judicial assessment of the truth. Furthermore, the establishment of the truth could be hindered and distorted in the coming trials which will take place before the ICTY. Indeed, the accused in subsequent trials (as well as the witnesses) could invoke Milošević's responsibility to diminish their own role.

Another expectation of the international community at the moment that has not been fulfilled is the lack of a conviction or even judgement for a man who was considered by many to be a dictator or a "semi-dictator". This matter must be dealt with further when one looks at the practice of the last few years and the diversity of the solutions that have been attempted. Dictators have been treated in very different ways over the past 20 years. Ceaușescu's trial was a travesty of justice yet it ensured a certain tranquillity in the Romanian society and did not really cause a great stir in the international community. The long awaited trial of Saddam Hussein has recently started in Iraq, but appears to be "pseudo justice" and has been limited, initially, to the prosecution of one event that occurred in the 1980s. The trial seemingly takes place in a vacuum and has failed to capture the interest of the wider public. In Liberia, Charles Taylor was recently charged by the Special Court for Sierra Leone, and the international cooperation worked very well, with Nigeria implicitly agreeing to surrender him to the international community to face justice. The accused has now been handed over to the Special Court. However, the trial will probably have to be relocated to The Hague, in order for the proceedings to take place in a more tranquil and secure environment. This will inevitably result in a decrease in the trial's significance for many Africans.

The punishment of dictators is necessary if justice and democracy are to be combined, but the diversity of the solutions chosen shows that it is not easy to get there. It is also the case for reconciliation after a conflict, and international criminal justice is still looking for the right approach. The Milošević trial is definitely over, but Karadžić and Mladić remain at large... There is much work still to be done for the ICTY, especially at this challenging stage in its history. One can only hope that the "*crise de confiance*" that the Tribunal is currently facing will be temporary. As far the International Criminal Court is concerned, it has many challenges ahead of it as well – especially given the high expectations that it carries. The Court is in the preliminary trial stages and is now able to try its first accused. Let us all hope that it will learn from the experiences of the ICTY and of the aborted Milošević trial.

* Paul Tavernier is Professor at the University of Paris XI and Director of CREDHO