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“Substantial Disruption” at The Hague: Will Slobodan Milosevic be Tried In Absentia?

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In an appellate decision which appears to have been painstakingly devised to convince public opinion that President Milosevic’s rights have been restored– or even, as stated by some media, “increased”, or exaggerated in the favor of the defendant– the ICTY has opened the door to in absentia trials before international bodies, and reduced fundamental trial rights into mere “presumptions”, matters of discretion.

Ominously, this decision is the direct echo of reports that the ICTY will be shut down quickly by the US, well ahead of the deadline imposed in the UN Security Council’s “completion strategy”. The Milosevic case is the last remaining thorn in the side of the institution whose outright politicization he has exposed. But his defense is far more threatening still: to establish that the “Balkan Wars” were in fact one war, against Yugoslavia, waged by Western powers in their interest. The Appeals Court has now fashioned a device to prevent that case from being made at the ICTY, which would close down, rather than hear the evidence.

The decision handed down by the ICTY’s President, Theodor Meron, who also acts as President of the Appeals Chamber, as well as a Trial Chamber judge, permits Slobodan Milosevic’s effective removal from the courtroom. Indeed, the judgment states that “substantial disruption” of a trial does not necessarily have to be intentional to justify holding proceedings in the absence of the accused, and that even the ill health of a defendant can constitute such a “substantial disruption”. In such cases, according to the ICTY’s “court of last resort”, both imposition of counsel and removal from the proceedings are justified.

The current situation is infinitely worse than that brought about by the Trial Chamber’s ultimately embarrassing ruling imposing counsel against the wishes of Mr. Milosevic, and granting what were described as “rights” to assigned counsel who had acted for another party in the proceedings as amici curiae. Imposed counsel predictably failed to present any meaningful defense, as scores of witnesses refused to participate in proceedings that shared characteristics with the notorious Star Chamber. In fact, most of the recalcitrant witnesses expressed their view that what the imposed counsel were presenting was not and could not be Mr. Milosevic’s defense at all, and that their participation would only serve to further violate his fundamental rights.

Playing out as predicted

Presciently, perhaps, the ICTY’s designated counsel had themselves argued against imposition of counsel last August 13th, stating that they were “concerned that the witnesses

to be called by the accused, whilst they may be willing to cooperate with him, would in the event of a conflict make themselves unavailable to the Amici Curiae as imposed counsel." Despite having expressed this concern almost three months ago, Mr. Steven Kay and Ms. Gillian Higgins accepted their assignments without objection, and for two months, the "defense" of Slobodan Milosevic stumbled along gracelessly from postponement to postponement as only 5 witnesses were called. Stunningly, counsel failed to object to irrelevant, inflammatory, and frankly discriminatory if not actually racist cross-examinations by the prosecution team, who judged necessary to attempt to impugn a witness' credibility based on his ethnic affiliation (Greek) and religion (Greek Orthodox). No objection was made to a question posed as to whether the father of the witness had donated money to a Serbian NGO, the Serbian Unity Congress, an organization dedicated to the preservation of Serbian heritage with chapters in 9 countries. But the question was posed to suggest, somehow, in an almost educational display of impermissible cross-examination, that the witness could be tainted by his father's support of what was assumed to be a shadowy Serb outfit. Guilt by association disguised as cross-examination, but the imposed counsel let it slide. The Trial Chamber had no comment about this line of questioning, nor did it upbraid the Prosecutor, Mr. Nice for "wasting time on irrelevant matters", even during a cross-examination that delved into obscure issues of comparative theology. Another cross-examination focussed witheringly on why Serbs would think they were "so special", and deserve to live on one territory because they were "historic victims." (800 000 people– Serbs, Jews, Roma– were killed at the Croatian Ustase-run Jasenovac concentration camp. These systematic murders constitute one of the tragic chapters of the Holocaust, and can assuredly be considered to be a "special" part of Yugoslav history.) It goes without saying that no remotely similar question was asked of Elie Weisel, when he testified during Biljana Plavsic's sentencing hearing in December 2002. Some questions are indecent, and cannot be asked. Others, however, equally indecent, and revisionist in their assumptions are asked, and with full impunity.

Ethics, suddenly

Only a little over that a week ago did the imposed counsel request to be withdrawn from the case, citing ethical quandaries that should have been clear to them– and obviously were, since they had already articulated them, in detail, last August, in their arguments opposing the imposition of counsel– many months ago. Before the Appeals Chamber, on October 21st, they complained of the fact that neither President Milosevic nor the witnesses were cooperating with them, again, a state of affairs they had themselves predicted, and therefore had reason to believe would play out precisely the way it did. Mr. Kay made the following submission to the Appeals Chamber, which could be interpreted as blaming President Milosevic for the predictable consequences of imposition, and of the "substantial disruption" of proceedings caused as a result: "… in terms of a solution, it may be that he undertakes his own consequences rather than us wasting resources believing, and people kidding themselves, making believe that what is happening here is a proper defense."

Who's to blame?

From the very first day of the court-appointed defense, it was made clear who was to be blamed for the dysfunction: Slobodan Milosevic. On September 7th, when the first witness was called by Mr. Kay, he told the court that he'd failed in his attempts to obtain instructions from his "client". Patrick Robinson, who presides these proceedings, took pains to have the record reflect that President Milosevic was responsible for the non-cooperation. And reminded all that counsel had been imposed because Mr. Milosevic was unfit to represent

himself, and unfit to question witnesses before assigned counsel. How, then, could he be expected to be "fit" enough to instruct imposed counsel?

When the defendant, on the first day of what should have been his defense, which he had been waiting to make since his dubious "transfer" to The Hague, demanded that his right to self-representation be restored, Mr. Robinson responded that he didn't want to hear the "tired refrain". How "tired" could it have been on the very first day of the defense?

There is a simple explanation for the fatigue, and it is that this defense must come to an end before it begins. Could it be that for this purpose a two-part strategy was designed? First, impose counsel and let the measure inevitably "backfire", then feign the re-establishment of the right to self-representation in a decision permitting the Trial Chamber to proceed in absentia, for part, or the remainder, of the defense case.

It is important to note that despite a subsequent denial from Washington, US media recently published comments by Undersecretary for arms control John Bolton, stating that the last Bush administration was dissatisfied with proceedings at the ICTY, and wished to see its "completion strategy" accelerated. In other words, close it down, transfer cases back to domestic courts, and even grant amnesty. Last June, the ICTY adopted an amendment to its rules of procedure and evidence permitting just such deferrals. Undersecretary Bolton and other senior State Department officials are said to believe that the "ICTY has degenerated into a politicized tribunal", but their complaints are aimed solely at Carla Del Ponte, and not at any of the other equally politicized organs of the institution. Yet the players in Washington know full that the ICTY is a political body, as they created it as such. Indeed it has been stated without irony by those closest to its establishment, such as Professor Michael Scharf, that the institution was established to "educate Serbs", "pin responsibility on Milosevic", and "promote catharsis" by permitting "newly-elected" leaders to distance themselves from the policies of Milosevic. But, in order to accelerate the completion strategy, someone else must be faulted for the politicization of the ICTY, and who better than the Prosecutor who was perhaps carefully chosen so that her demise would satisfy everybody: her employers and detractors as well. Washington also clearly stated its frustration with the pace of the Milosevic case, which has as of yet failed to produce a conviction. From Bolton's comments, it is obvious that President Milosevic would not be a suitable candidate for transfer to the jurisdiction of Serbia and Montenegro, unlike, for example, Operation Storm's Ante Gotovina, whose indictment– described as "bogus"– could conveniently be deferred to Croatia. Mere days after this article was published in the Washington Times, ICTY President Theodor Meron traveled to Zagreb, to discuss the "completion strategy" with the Croatian government, according to an ICTY press release. This, coincidentally, while the Appeals Chamber was deliberating on the appeal launched against imposition of counsel.

Despite the clear direction this case is taking, the Appeals Chamber of the ICTY has attempted — and perhaps succeeded to some extent– in giving the appearance of having overturned an unfair decision as a legitimate Appeals Chamber and a judicial institution.

It has further attempted to appear to provide excessive fairness to the accused to portray the ICTY as embattled underdog. The fairness afforded is an illusion, and the decision will serve to prevent Slobodan Milosevic from presenting his defense.

"Substantial disruption"

The Appeals Chamber decision is signed only by ICTY President Theodor Meron. In the course of arguments before the appellate body, President Milosevic argued that he could not present a meaningful defense while represented by counsel, since this political prosecution, before a political body, requires a political defense. The ICTY Code of conduct for defense lawyers indeed forbids counsel from " diminish(ing) public confidence in the International Tribunal (...) or otherwise bring(ing) the International Tribunal into disrepute." It is thus inconceivable that a defense lawyer could argue the ICTY's illegality or illegitimacy– a cornerstone of Mr. Milosevic's defense– without breaching the body's ethical rules. President Meron responded to Mr. Milosevic's arguments with the following statement: "I really believe, and I believe that all my colleagues very strongly believe that this trial is not a political trial. It is a legal trial under human rights and due process to determine, under international law and the Statute, whether —to determine whether you are guilty beyond a reasonable doubt or you are not. And we would not have been conducting those proceedings this way if we were not convinced that this is really not only a legal trial, but I believe it is a model of a fair trial."

The Appeals Chamber, reviewing the decision to impose counsel on an obviously competent law school graduate, made in the course of this "model of a fair trial"– a move unprecedented since the Star Chamber, and not even attempted by the Apartheid judiciary against Mandela, nor Nazi Germany against Dimitrov– held, without relying on any authority whatsoever, that "substantial disruption of the proceedings" for the purposes of stripping an accused of the right to be tried in his presence, as well as the right to self representation, does not require any proof that the accused had the intention of disrupting the proceedings. Ill health suffices to violate an accused person's most fundamental right, a position contrary to international law and domestic practice. Illness warrants provisional release, or an end of the proceedings, not a supplementary violation of rights. The justification set out by Mr. Meron is the following: "But it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety. " Not a single case is cited. This argument states "it cannot be", therefore "it should be". Here, then, is the acknowledgement that this measure is not only contrary to practice, and in violation of the International Covenant for Civil and Political Rights, but predicated on the idea of "illegal but good", or rather "illegal, but expedient" (and "discretionary").

Unprecedented assault against fair trial rights

The Appeals Chamber has further committed an unprecedented assault on internationally recognized human rights. The right to self-representation–described by Mr. Meron himself as "indispensable cornerstone of justice", "placed on a structural par" with the other rights set out at article 21 of the Statute (and article 14 of the International Covenant for Civil and Political Rights)– become mere "presumptive rights" that the ICTY Trial Chambers can apply in a discretionary manner:

"As the Appeals Chamber has previously noted, a Trial Chamber exercises its discretion in "many different situations – such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure." A Trial Chamber's assignment of counsel fits squarely within this last category of decisions. It draws on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and requires a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial

proceedings."

So the respect of that right–and, one might conceive, of the other rights "placed at a structural par" with it, those enumerated in Article 20, paragraph 4 of the Statute– are no longer "entitlements", to be "enjoyed in full equality", as set out by Article 20 of the Statute, but a matter of discretion for the Trial Chamber. Those entitlements constitute the minimum fundamental fair trial rights under international law, and guarantee the following to a defendant in a criminal trial: the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; the right to be tried without undue delay; the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; the right to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal; the right not to be compelled to testify against himself or to confess guilt.

This remarkable perspective on basic fair trial rights invites discretionary "adjustments" or "balancing" of the other enumerated rights, since they are at a "structural par" with the right to self-representation. In other words, if all these rights have the same value, what prevents a Trial Chamber from violating them equally, as they have done with the right to self-representation, which the Appeals Chamber has upheld? This "discretion" will further be employed to severely curtail the duration, scope and subject matter of questions, as well as the very possibility of calling certain witnesses altogether.

Since the Trial Chamber has been granted the "wise discretion" to deal with the "myriad health-related difficulties that may arise in the future", and the power to craft "an appropriate set of responses to every possible eventuality", it is entirely plausible, and in fact highly likely that non-intentional "disruption" will be found to exist, whether for health reasons or "non-cooperation". Then, this partial "self-representation", and even presence at the hearings, will be dispensed with. Considering the record of the Trial Chamber, in particular judges Robinson and Bonomy, and their impatient attitude (calling the Mr. Milosevic "petulant" and "puerile"), the Appeals Chamber decision can be interpreted as an invitation to remove the President entirely from the proceedings.

If the ICTY were not a political construct, it could and would simply restore President Milosevic's right to self-representation. Judicial institutions are independent bodies who suffer no interference from the executive branch; they do not rewrite their own rules in mid-trial, they do not emerge from the ether, survive for a few years, then hurry to shut down their operations. Criminal courts are committed to an unwavering respect for the Rule of law, which in adversary proceedings means that people can only be tried "in an ordinary manner, before the ordinary courts of the land". Courts do not engage in public relations activities, "outreach programs", nor do they attempt to influence the policies of foreign governments.

And as Mr. Kay compellingly argues that no lawyer can meaningfully represent President

Milosevic as assigned counsel, or even as “stand-by counsel” without violating professional ethics, we see that there can be no defense at all unless the right to self-representation is restored.

The Appeals Chamber did not restore Slobodan Milosevic’s right to self-representation, but rather provided the Trial Chamber with the tools it requires to see to it that Washington’s completion strategy is carried out swiftly. In the process, it has dealt a blow to the fundamental fair trial rights guaranteed by the International Covenant for Civil and Political Rights. The ICTY’s endgame, as illustrated by the strategy designed to prevent Slobodan Milosevic from further exposing the institution’s political nature, provides a valuable lesson: there is nothing to be gained by establishing ad hoc political courts, be they in Europe, Africa, or anywhere else. When justice is used as an instrument to justify the crime of aggression, and when ad hoc bodies do not even consider aggression within their jurisdiction, there is no point in calling what emerges from the exercise “international law.” The sole superpower does not agree to be submitted to the International Criminal Court’s jurisdiction yet lays a gruesome siege on Fallujah. And the sole superpower wishes Slobodan Milosevic’s microphone switched off, once and for all. It is imperative we at least attempt to ponder why that is.

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