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The Hague Tribunal: “That Is The Nature Of The Beast”:

Why The Hague ICTY Cannot Afford Slobodan Milosevic’s Right to Self-Representation

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When Slobodan Milosevic was asked to plead to the indictment filed against him, after being whisked off to The Hague as a result of a transfer whose legality bore more resemblance to kidnapping for ransom than to extradition, his response to the ICTY Chamber was not the typical “Not guilty.” Milosevic instead said: “That is not my problem, that is your problem.”

And, indeed, the ICTY’s problem it has become. When the prosecution rested its case after the resignation of the Trial Chamber’s President, Richard May, last spring, many in the media bemoaned the failure to prove genocide, and others were unimpressed by the picture of confusion left by weak witnesses, deflated in cross-examination by a defendant who consistently stated the ICTY was not a legal, or judicial, institution. Voices rose to express increasingly strident concern that the trial was going off the rails. Expectations appeared not to have been met.

As the defense approached, and Milosevic announced that he would secure the attendance of 1600 witnesses to support the case he announced he would make from the beginning—namely that the “Balkan Wars” had in fact been one war, against Yugoslavia, planned and carried out by Western powers, whose gruesome apotheosis was NATO’s 78-day bombing campaign in 1999—the ICTY’s most prestigious supporters zeroed in on the upcoming defense, arguing that Milosevic’s right to represent himself had been granted “long enough.”

The media onslaught was, and remains, significant and raises an obvious question: what is it about the present stage of the hearings that requires such collective effort to defeat?

The latest offensive is apparently triggered by fear, and not only challenges the internationally mandated right to self-representation (and the resulting freedom to present a true defense), but is further calculated to prevent Milosevic from demonstrating the ICTY’s illegality, and functions. President Milosevic has indeed consistently argued that the ICTY serves up apologia for the destruction of Yugoslavia, provides justification for aggression, and rewrites history. Hence, the seemingly endless references, not to Milosevic’s health, but to his deleterious impact on the “Court’s reputation”, “credibility” and “legitimacy.”

Public lobbying of the ICTY supporting the imposition of counsel on Slobodan Milosevic has been undertaken by a trio of its stalwart supporters: David Scheffer, Michael Scharf, and Judith Armatta. Their claims—perhaps inadvertently—betray the political nature of the institution.

Writing in the pages of *International Herald Tribune* ("Enough of Milosevic's Antics" July 13, 2004), David Scheffer, former Ambassador at Large for War Crimes Issues under Secretary of State Albright, dehumanizes Milosevic, and urges the ICTY to reassert its "authority" over him. Writes Scheffer: "When he was the presiding judge, the late Richard May deftly handled Milosevic's exercise of his right to self-representation by giving him enough leash every day to speak his mind and then jerking that leash when he overstepped his bounds." The metaphor of "leash jerking" is powerfully deployed here in light of the painfully recent Abu Ghraib prison atrocities in Iraq, immortalized by the infamous photograph of Pfc. Lynndie England holding a naked human being on a leash. Is Scheffer urging the ICTY to become more like Abu Ghraib, but in the judicial, rather than military theater of operations? Whatever his intent, in one important respect there is hardly any difference between the physical and metaphorical leash jerking: they are both firmly grounded in the most primitive racist or reifying attitudes toward their targets. And who exactly is the target of David Scheffer's comments? It would appear to be only Mr. Milosevic who is thus rendered inhuman, but there is another, even more crucial objective: the ICTY's judges and prosecutor are implicitly reminded here that they are mere tools (*res*) of the Empire, so they had better deliver.

And what were the goods to be delivered by the ICTY? The process is staggeringly costly, so it follows that a conviction is necessary, and that "justice" mandates the gagging of Milosevic, who is: "charged with crimes of enormous gravity in the Balkans: genocide, crimes against humanity and war crimes. They scream out for accountability. The United Nations and its member states are expending large sums of money on these trials for the purpose of justice, not political diatribes and meandering defenses." It is unclear whether this is a legal or political argument. It may be that Scheffer's position—promoting a novel legal approach—is that since Milosevic has been charged with the most serious crimes of all, and that they "scream out for accountability," this very fact *ipso facto* constitutes proof beyond reasonable doubt of his actual guilt. For who could imagine that the ICTY might bring frivolous charges and indict a sitting President in the midst of a war of aggression against his country? Alternatively, Scheffer's words might be expressing a direct political claim: "We paid for this, and we certainly did not pay for this man to jerk us around."

Scheffer advocates the imposition of counsel, to: "ensure the integrity of the process, which may be nearing a breaking point with the international community." The impatience expressed on behalf of the phantom "international community" might in fact be just Scheffer's own and those of his ilk, well connected to the establishment of the ICTY. In any event, the point is that the ICTY has no legal authority beyond the powers granted by the Security Council, and deemed legally valid by its own appeals chamber, i.e., itself. Hence, its authority "must be asserted." The very process, which *is* an abuse, must be protected from "a crippling abuse," that is, from denunciation by Milosevic, and in particular his witnesses: "A massive criminal enterprise of this character deserves a long, carefully developed trial that inevitably will experience delays. That is the nature of the beast. But the time has arrived to reassert the court's mandated authority and prevent a crippling abuse of the process by the likes of Slobodan Milosevic." "Nature of the beast", indeed. It is urgent that this be accomplished since the ICTY, as opposed to judicial bodies the world over, is a "limited engagement," and is attempting to complete investigations, trials, and appeals before a Security Council-mandated deadline—known as the "completion strategy"—in 2010. A conviction must be secured before then. Just as performances must end before the circus can leave town.

Also urgent is that "Serbs," specifically, "respect the court's authority," and presumably this transformation can only take place if Milosevic is gagged, and the illegality of the body never mentioned again: "Perhaps if the discipline of a competent counsel is brought into the courtroom, Milosevic's Serb supporters would learn to respect the authority of this tribunal."

In his conclusion Scheffer fittingly returns to his tired leash metaphor to reinforce his point that Milosevic must be silenced "permanently" since he is inhuman: "Milosevic has jerked the court around long enough. It is time to permanently pull in Judge May's well-worn leash."

Michael Scharf, visiting professor of law at Case Western Reserve University, and instrumental in the creation of the ICTY, followed Scheffer's opening salvo in the *Washington Post*, and, with bone-chilling clarity, made the case for imposition, employing strikingly political arguments. ("Making a Spectacle of Himself: Milosevic Wants a Stage, Not the Right to Provide His Own Defense", August 29th, 2004) Drawing on the now-familiar refrain that Slobodan Milosevic is "playing for the home audience", Scharf is outraged by the idea that the unrepresented defendant would somehow make use of a show trial to gain support in Serbia and Montenegro, when the ICTY was created, he deadpans, precisely to remove Milosevic from politics, and "educate" Serbs, so that he and his like would be put out of commission forever. That his own argument confirms the political nature of the ICTY and candidly clarifies its objectives as non-judicial does not deter Scharf from the description of the process as an "international war crimes trial" and the institution as a "court of law."

According to Scharf: "Milosevic's caustic defense strategy is unlikely to win him acquittal, but it isn't aimed at the court of law in The Hague. His audience is the court of public opinion back home in Serbia, where the trial is a top-rated TV show and Milosevic's standing continues to rise. Opinion polls have reported that 75 percent of Serbs do not feel that Milosevic is getting a fair trial, and 67 percent think that he is not responsible for any war crimes. 'Slobo Hero!' graffiti is omnipresent on Belgrade buses and buildings. Last December, he easily won a seat in the Serbian parliament in a national election."

What any of these concerns and political trivia could possibly have to do with international law—if considered as an activity of a judicial nature—is unclear. If, however, playing to an uninformed Western public, the idea is to suggest that by granting basic internationally recognized human rights to the man who was the West's principal interlocutor in Balkan peace negotiations for over half a decade, the ICTY is failing in its mission to "educate" the Serbs, then the point is well taken. Scharf deplores the fact that opinion polls show that "75% of Serbs do not feel Milosevic is getting a fair trial." Scharf's disappointment in this expression of popular distrust—which may well be directed to the institution as a whole—assumes that public opinion in Serbia and Montenegro is misguided, and that it fails to appreciate the "fairness" of the proceedings. But if, as Scharf claims, ICTY hearings are "top rated" TV shows, then public opinion was formed by actually observing the proceedings; in which case the problem might not be collective delusion abroad, but rather Western ignorance of the ICTY's day to day workings. The latter are largely inconsistent with the widely held Western belief—based, perhaps, on faith or missionary zeal—that proceedings in The Hague are inherently fair.

Scharf's preoccupation with graffiti adorning the buses and buildings of Belgrade is perhaps an expression of concern for the environment. However, any threat posed by "Slobo Hero!" pales in comparison to the effects of NATO's bombing, and in particular, with the presence of depleted uranium in the soil and groundwater of Serbia and Montenegro. It may be that

"Serb" public opinion has not yet been sufficiently educated by the "court of law" to lose sight of this disturbing reality, which will remain with it for decades, and possibly centuries. Perhaps this reality and the ever-present reminders of NATO's bombing in the streets of Belgrade have had some influence on the public perception of the ICTY's "fairness."

Scharf's assault on Mr. Milosevic's right to self-representation, while in line with Scheffer's demand that the "leash be pulled in permanently," presents one significant difference in approach. Where Scheffer depicted the late judge May as an uncompromising animal-tamer of sorts, Scharf presents him as a misguided fool. Rather than invoke his capacity for discipline, he accuses him—in an eloquent demonstration of the reification of the ICTY's functionaries, in particular the deceased—of having been lax and in error by having granted the right to self-representation to Milosevic in the first place. He writes: "Virtually everything that has gone wrong with the Milosevic trial can be traced back to that erroneous ruling."

And what has "gone wrong" is that Milosevic made "disparaging remarks about the court" and "browbeat" witnesses. He doesn't recognize the ICTY, and he has said so. As for the "browbeating" of witnesses, that is to a certain extent, whether we like it or not, part of the art of cross-examination. But Scharf's emphasis is placed not so much on these complaints as on his wild claims about Mr. Milosevic's growing popularity in Serbia and Montenegro.

Scharf makes plain that the ICTY was created for political reasons, yet advocates imposing counsel on Slobodan Milosevic to prevent him from making precisely the same point. The only difference is that Milosevic is "disparaging," while Scharf argues that the ICTY's evident political objectives are somehow valid:

> "In creating the Yugoslavia tribunal statute, the U.N. Security Council set three objectives: first, to educate the Serbian people, who were long misled by Milosevic's propaganda, about the acts of aggression, war crimes and crimes against humanity committed by his regime; second, to facilitate national reconciliation by pinning prime responsibility on Milosevic and other top leaders and disclosing the ways in which the Milosevic regime had induced ordinary Serbs to commit atrocities; and third, to promote political catharsis while enabling Serbia's newly elected leaders to distance themselves from the repressive policies of the past. May's decision to allow Milosevic to represent himself has seriously undercut these aims."

The idea that affording the right of self-representation to Milosevic had "seriously undercut" the "aims" of the ICTY's very establishment strains credulity. However, if those aims were, and continue to be, "to pin" responsibility on Slobodan Milosevic, and to "educate" Serbs about how bad he was—or, ultimately, how bad Yugoslavia was—then these aims are assuredly not shared by the defendant. Indeed, Milosevic has no intention of assisting the ICTY in "convincing Serbs" that acts of aggression committed against Yugoslavia were justified. Furthermore, whether or not the political aims set out by Scharf are valid, morally correct, or politically expedient, they cannot make legal what is illegal, they cannot make legitimate what is illegitimate, and they cannot, most crucially, turn a political body into a court.

As was perhaps inevitable, the ICTY did impose counsel. On September 2nd, two of the former *amici curiae* were "assigned"—the Trial Chamber pointedly insisted on the use of this term, instead of the apparently indelicate "imposed"—to represent Slobodan Milosevic, and given full responsibility over his defense, including the formation of his strategy and choice

of witnesses. The prerogatives granted to imposed counsel were far more intrusive than what had been expected; even, apparently, by the prosecution's senior trial attorney who had appeared during the hearings to envisage a "standby counsel" prepared to step in should Milosevic's health prevent him from acting. Instead, the defense was handed over to strangers, who in addition to receiving no instructions from their "client" happened to have acted as another party in these proceedings, as "friends" of a "court" the defendant does not recognize.

That this imposition of counsel constitutes a conflict of interest, that it violates the *International Covenant for Civil and Political Rights*, that neither the South African Apartheid regime nor Nazi Germany imposed counsel against Mandela or Dimitrov, respectively, and that imposition has actually caused more delay of the proceedings (while Milosevic is healthy) does not deter those who defend the ICTY's decision to strip President Milosevic of the right to call his witnesses, and present his defense. And *his* defense is the problem, as it is candidly presented as a *political defense, before a political body.*

Imposed counsel struggled in vain to present more than five witnesses since early September, and were confronted with the refusal of experts, diplomats, officers and dozens of others to participate in a defense that was not the defense they had agreed to support. (Of note, here, is that before a normal judiciary, witnesses have no say in whether or not they wish to participate in the workings of justice. The etymology of the word "*subpoena*"—"under penalty"—makes clear that legal courts also have legal authority) This latest crisis before the ICTY prompted new intervention in the media, for the sake of the ICTY's credibility. But the political nature of the claims has had the opposite effect.

Judith Armatta, a lawyer acting as trial observer for the US-based Coalition for International Justice (*Justice, not Political Platform for Milosevic*, IHT, October 7th), much like her predecessors, Scheffer and Scharf, betrays the true reason for imposition of counsel on Slobodan Milosevic. Clearly neither Armatta nor the ICTY appreciates his "political defense". Armatta implies that Milosevic—and others before the *ad hoc* Security Council bodies, such as the ICTR in Arusha, Tanzania—are simply capricious accused who refuse to respect established court procedure, while these embattled courts struggle to provide fair trials in the face of obstructionism from "unreasonable" defendants. This is a mischaracterization both of Slobodan Milosevic's position (and that of Rwandan accused at the ICTR) and of the *ad hoc* tribunals' legitimacy.

Armatta writes that the "trial of Slobodan Milosevic before the International Criminal Tribunal for the Former Yugoslavia has reached a standoff, where the will of the UN-established court is pitted against the will of one individual, the accused."

This depiction of the Milosevic case as a battle of wills is peculiar, to say the least, as it falsely presents ICTY as an underdog in this "standoff" requiring some assistance and encouragement. What could possibly disadvantage the ICTY—which enjoys the full support of the only super power—in its "test of wills" with Milosevic? The message sent by ICTY supporters, such as Armatta, is that the ICTY's handicap is its tendency to go overboard with fairness. Trying to be as fair as possible creates difficulties for the forces of justice. Thus calls on ICTY like this one: "It is incumbent on this tribunal to stand up to Milosevic, assert its authority and bring the world one step closer to the rule of law." But is accomplishing fairness the ICTY's central concern? And how does "standing up" to Milosevic bring anybody any closer to the Rule of law, in particular when international human rights instruments are violated in the process?

The problem is what Milosevic has to say. That the ICTY pointedly imposed counsel for "health reasons" is a secondary consideration for Armatta, as it might well have been for the Chamber who disregarded the fact that Slobodan Milosevic has defended himself quite ably for the past three years, and suffered from hypertension for ten. In fact, since counsel was imposed, the health reasons that justified the measure have gradually been replaced by suggestions that Milosevic lacks sufficient "respect for the court."

Armatta's criticism of Slobodan Milosevic's behavior suggests she has privileged access to his mind. She not only chastises him for not cooperating with the ongoing violation of his rights, but reveals why he embarks on such a baffling course: "the accused refuses to communicate with counsel or assist in selecting and securing witnesses or developing a defense strategy, since he seeks not to defend himself but to use the trial as a platform to advance his political agenda. "

Were it acceptable to apply such psychoanalysis to the ICTY, instead of Milosevic, the inquiry could address the wholly predictable consequences of imposition of counsel. Armatta describes the situation in the following manner: "Nearly half the witnesses initially scheduled to testify on his behalf have followed his example by refusing to appear in court if Milosevic is not allowed to represent himself." If we wanted to speculate, we could posit that the reason for imposition of counsel had nothing to do with his health or fairness. On the contrary, the reason might be that the ICTY wanted to prevent the appearance of most of his witnesses, as they would expose the illegal nature of ICTY. So, while in the realm of speculation, one could imagine that they correctly predicted that by imposing counsel on Milosevic they would bring about a boycott by those witnesses and bring the proceedings to a quick conclusion without most of them ever appearing.

But this type of speculation is deemed improper. And it is inconsistent with Armatta's depiction of the current situation as a battle of the wills, which provides absolute clarity as to where the good and the bad wills lie. And what better way to expose the unsavory intent of the one deemed to have bad will than to point to his consistent opposition to the process that is assumed to be inherently fair? Armatta states, as if this established his bad faith, that Mr. Milosevic: "has consistently maintained, he does not recognize the legitimacy of the tribunal but will use whatever opportunity is provided to make his political case to the public."

It should be obvious by now that if Slobodan Milosevic maintains that the ICTY is illegal, he will naturally take every opportunity he gets to let the world know about that fact. Is Armatta suggesting that those who contend, relying on reasonable legal arguments, that the institution is illegal should nonetheless quietly succumb to it and personally contribute to the illegal activities undertaken against them? Armatta—as well as Scheffer and Scharf—express concern about the deleterious effects of self-representation in other cases. Scharf fears Saddam Hussein could use "the unique opportunity of self-representation to launch daily attacks against the legitimacy of the proceedings and the U.S. invasion of Iraq." Is it then that all targets of aggression are to be denied the right to self-representation? Or does the very creation of the ICTY, by the Security Council, (who then proceeded to establish the ICTR, a body without jurisdiction to consider the invasion of Rwanda by US-supported "rebels", which aggression sparked that country's tragic war) send another message? Could it be that there is no right of self-defense when the US, or their clients, are the aggressors?

The essence of Armatta's complaint against Milosevic, whose will must not be allowed to

prevail over the will of the ICTY, comes from a flawed view of the ICTY and its process. She states:

> "As a legitimate court, it is charged with seeing justice done for the heinous crimes, including genocide, committed throughout the territory of the former Yugoslavia during the 1990s. Its fundamental responsibility, as that of all courts, is to justice."

It is probably no accident the court is here described as "legitimate." Since the institution's legality is dubious, the goal is to portray it as "legitimate" instead. This is the same well known gambit employed by Antonio Cassese, the former President of the ICTY, whose unequivocal assertion that the US war against Yugoslavia (by means of NATO) in 1999 was illegal, but a good ("legitimate"?) thing since it *might* lead to the emergence of a new legal principle. Could it be that even Armatta agrees with Milosevic on the illegality of the ICTY? This minor problem of illegality can be totally overlooked, however, since "the court's fundamental responsibility is to justice". The picture emerges of an illegal but legitimate court dispensing justice! If one finds it baffling that an illegal court could be legitimate, it is all the more challenging to conclude that the ICTY dispenses justice. For how can a court dispense justice without observing due process?

Nonetheless, Armatta, reacting to the boycott of the proceedings by many of Slobodan Milosevic's witnesses, argues that they have some kind of duty towards the process: "Witnesses who can testify on those issues owe it to the accused, the public and the victims to participate in the trial." But if the trial is essentially unfair, and the court is illegal, there is no one to whom the witnesses owe anything.

The need to preserve the Rule of law is advocated by Armatta in support of her contention that the ICTY is correct in refusing to be "highjacked" or "blackmailed" by President Milosevic. But the "Rule of law" means something quite different from the process Armatta seeks to legitimate. A.V. Dicey, the celebrated British constitutional scholar, offers the classic definition:

> "We mean, in the first place, that no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."

Slobodan Milosevic is by no means being tried "in the ordinary legal manner before the ordinary courts of the land." The ICTY was not established by treaty or by a vote of the UN General Assembly. The Constitutional court of Yugoslavia found that Milosevic had been "transferred" to The Hague in violation of Yugoslav and international law. The concept of "joint criminal enterprise", which does not require the prosecution to establish genocidal intent in some instances, is a recent jurisprudential development. (Not all would consider this caselaw consistent with the idea that the requisite intent for genocide must reflect the gravity of the crime, and that it must therefore be special. The first judgment of an *ad hoc* court defining genocide, *Prosecutor* v. *Akayesu,* called this *dolus specialis.* Most, however, would argue that the relaxed requirements are "good". Again, perhaps a manifestation of "illegal but good.") Dicey also defines Rule of Law as a system that adheres to equality before the law. The ICTY's Prosecutor (an actual "organ" of the body, as per its Statute) did not consider it necessary to bring a single charge as a result of the myriad breaches of

international law alleged as a result of NATO's 78-day bombing campaign against Yugoslavia in 1999.

Michael Scharf argues that the ICTY's aims are to "educate" the Serbian people, and to promote "reconciliation" in the Balkans. But these are not judicial functions, and Slobodan Milosevic should have the right to point out what the ICTY's creators—Scharf is considered to have been instrumental in the adoption of Security Council Resolution 827, which adopted the ICTY's Statute—unhesitatingly state themselves.

To argue that the ICTY is not violating fundamental rights and international law, but is rather protecting the "Rule of Law" is not only false, but debases the very idea.

On October 21st, the ICTY's Appeals Chamber heard the parties on assigned counsels' appeal against the Trial Chamber's decision to impose them as Milosevic's lawyers. Slobodan Milosevic argued that imposition of counsel and the violation of the right to defend oneself in person is the province of political courts, such as the 17th century Star Chamber, and pointed to Scharf's statement that the ICTY's objectives were transparently political, not judicial, in nature. Hence, Milosevic stated that given the fact the process was political, he required a political defense, which could only be achieved through self-representation. (Indeed, recent amendments to the ICTY's Code of Conduct for defense lawyers state that lawyers:

> "must not have engaged in conduct, whether in pursuit of his profession or otherwise (…) likely to diminish public confidence in the International Tribunal (…) or otherwise bring the International Tribunal into disrepute.")

The ICTY's President, Theodor Meron, responded by saying:

> "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."

While we note that President Meron's remarks constitute an implicit disavowal of Scharf's conception of the ICTY's aims, the fact remains that the ICTY did not clearly indicate that it would not tolerate such claims. For who and what endangers the ICTY's credibility? President Milosevic, who is prevented from arguing that the ICTY is a political body, or people like Scheffer, Scharf and Armatta, who make plain that it is? Could it simply be that the ICTY *is* in fact a political body, whose creation, as well as its conclusion—in other words, whose birth and death—are the result of political decisions?

That political reality eloquently reveals "the nature of the beast." And the fact that not everyone is entitled to make that very point only reinforces Slobodan Milosevic's arguments, even if he is stripped of the right to articulate them.

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