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HEAR NO EVIL, SEE NO EVIL, SPEAK NO EVIL: THE UNSIGHTLY MILOSEVIC CASE

ABSTRACT. To ignore evil is to cause it to cease to exist, thought the ancients, and so, perhaps, think those who accuse former leaders of now dismembered countries, no longer in existence, of war crimes, and who would prevent those they accuse of raising the aggression which was committed against their country. Can the evil of aggression be willed out of existence if it goes unmentioned, and if international *ad hoc* bodies do not consider it a crime within their jurisdiction? And if the defendant is gagged, if judgments permit him to be removed from the courtroom altogether, will we be free from having to see and hear the evil he persistently identifies, and for which he points out there will be no justice? The Milosevic trial has been underreported to the point where “speaking evil” – that is, expressing criticism of the persistent procedural irregularities that have plagued the proceedings, and indeed the outright erosion of fair trial rights (heralded as “progress” in some quarters) – has become a demanding exercise. It is one we attempt here.

1. INTRODUCTION

For the past 4 years, proceedings (ostensibly) against Slobodan Milosevic, the former president of Yugoslavia, have continued before the International Criminal Tribunal for the Former Yugoslavia, a UN Security Council institution of dubious legality whose mandate is to hear charges of crimes against Humanity, violations of the Geneva Conventions, and genocide.¹ The proceedings were

¹ S.C. Res. 827, U.N. Doc. S/RES/827 (1993). For critiques of the legality of the *International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991*, see Alfred P. Rubin, “An International Criminal Tribunal for Former Yugoslavia?” *Pace International Law Review* 6, no. 1 (Winter 1994) p. 7; Alfred P. Rubin, “Dayton and the Limits of Law,” *The National Interest* no. 46 (Winter 1996–1997) p. 41, and Alfred P. Rubin, this issue. Eugene Kontorovitch makes a powerfully concise argument with respect to the International Criminal Court, and we see nothing to distinguish the ICTY’s legality (or indeed that of the International Criminal Tribunal for Rwanda) from the jurisdictional claim asserted with respect to the ICC: “However, the U.N. Charter only lets the Security Council take measures against threats to ‘international peace,’ that is against aggression *between* nations. Thus, the purview of the Security Council under Chapter VII does not extend to crimes committed by a nation against its citizens or to a wide range of other universal offenses that can be purely domestic. These might be

greeted with excitement as they began, and covered as the “Trial of the Century” by major media (many of which had invested in Mr. Milosevic’s demonization in the first place²). Quickly thereafter, the initial exhilaration of “finally getting Milosevic in the dock” (or similar self-congratulatory formulations) gave way to exasperation – and to a media retreat as surprisingly quick as it was almost total³ – when this trial did not proceed as planned. The Prosecution’s case looked feeble and confused, its witnesses shaken in cross-examination, its methods on occasion unseemly⁴ – when not demonstrably unethical and illegal – and oddly, NATO’s *own* case for its 78-day (and night) bombing campaign against sovereign Yugoslavia, and in defiance of international law, began to look increasingly suspect. Fascinating justifications began to emerge from those very quarters who had expended the greatest determination in seeing that Slobodan Milosevic be brought to the Hague as to why it would now be best – better for the future of international law, better for vaguely designated “victims,” better for reconciliation, better for the future of the Balkans (in the European Union, perhaps) – that Milosevic no longer represent himself. His illness, it was argued, prevented a speedy trial. Others lamented his approach as contemptuous and offering a dangerous precedent for “big fish”

Footnote 1 continued

¹ violations of international law, but not necessarily of international peace. Most crimes within the ICC’s statutory jurisdiction are of the latter variety – they do not require actual or threatened breaches of international peace. Since such conduct is not obviously of the kind given by the Charter to the Security Council to deal with, the sounder view is that the Security Council has not been delegated jurisdiction over such crimes by member states, and thus cannot delegate jurisdiction to the ICC.” Eugene Kontorovitch, “Universal Jurisdiction and the Piracy Analogy,” *Harvard International Law Journal*, Volume 45, (2004) 183, at page 201.

² See Diana Johnstone, *Fools Crusade, Yugoslavia, NATO and Western Delusions* (New York: Monthly Review Press, 2002), chapter 2.

³ Diana Johnstone, “Milosevic à La Haye : plus c’est intéressant, moins on en parle”, (Paris: *Le Manifeste*, August 30th, 2005)

⁴ For an annotated response to a representative example of soul-searching journalism produced after the prosecution had rested, see Edward S. Herman, “Stacey Sullivan on Milosevic and Genocide”, *Foreign Policy in Focus*, May 28th, 2004. Herman provides some of the most salient examples of prosecutorial weaknesses in the Milosevic proceedings, including the Prosecution’s resort to the testimony of Rade Markovic, who poignantly broke down on the stand when he acknowledged his statement had been obtained as a result of threats and torture. See, too, John Laughland, “Let Sloba Speak for Himself”, *The Spectator*, 10 July 2004, which argues that over 300 Prosecution witnesses and 600,000 transcript pages have established little if anything.

defendants to come.⁵ The critics were increasingly pleading that for justice to proceed in an orderly manner, Slobodan Milosevic had to be represented by counsel, whether he wanted one or not.

This aspect of Slobodan Milosevic's defense case – and the unusually passionate advocacy carried out in the Hague and beyond to deprive a defendant (not just any defendant) of a clear right to represent himself, explicitly set out at article 14 of the *International Covenant for Civil and Political Rights* – provide a glimpse of the nature and essential features of *ad hoc* UN Security Council institutions called Tribunals.

2. HEAR NO EVIL: WHY SLOBODAN MILOSEVIC CANNOT BE ALLOWED TO REPRESENT HIMSELF

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,⁶ his response to the ICTY

⁵ Michael Scharf has forcefully argued in several venues that the self-representation afforded to Mr. Milosevic was both a mistake, and would imperil future trials of “rogue leaders” and thwart objectives of “reconciliation”. (We return to the question of whether those objectives are judicial in nature below.) Scharf developed a memo delivered to the judges of the ICTY (one must assume it was an *ex parte* communication) setting out his argument, and had the same memo delivered – via the US Institute for Peace – to Salem Chalabi, President of the Iraq Special Court. This judicial lobbying is presented by Professor Scharf's university (Case Western Reserve) with unabashed enthusiasm: “Case Lawyers Build Legal Case to Stop Saddam Hussein's Self-Representation in Upcoming Trial – Message Heard All the Way to Iraqi Special Tribunal,” Case Western University News Center, August 5th, 2004, <http://www.case.edu/news/2004/8-04/saddamhussein.htm>. Case University's News Center inexplicably boasts that the “Scharf memo” (a summary of a forthcoming article, apparently yet unpublished) “is influencing the outcome of the Saddam Hussein and Slobodan Milosevic trials.” It is alarming, to say the least, to note academia's support for such influence over judicial outcomes by individuals and entities who are not a party to a trial. The time-honored notion of *audi alteram partem* which, perhaps ironically, has centuries old roots as a matter of administrative law, in universities (see H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 7th edition, Oxford: Clarendon Press, 1994, p. 496) seems to have been sacrificed where “international” crimes are concerned, and shockingly, even by academia.

⁶ Marjorie Cohn, “The Deportation of Slobodan Milosevic”, *Jurist Legal Intelligence*, <http://jurist.law.pitt.edu/forum/forumnew25.htm>.

Chamber was not the typical “Not guilty.” Milosevic instead said: “That’s your problem.”⁷

And, indeed, the ICTY’s problem it became. When the prosecution rested its case after the resignation of the Trial Chamber’s President, Richard May, in the spring of 2004, many in the media bemoaned the failure to prove genocide,⁸ 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.

2.1. *Zeroing in*

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 1999⁹ – the ICTY’s most prestigious supporters zeroed in on the upcoming defense, arguing that Milosevic’s right to represent himself had been granted to him “long enough.”

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

⁷ *Prosecutor vs. Milosevic*, IT-02-54, initial appearance, Trial transcripts, p. 2, line 18, July 3rd, 2001.

⁸ Interestingly, instead of blaming the Prosecution’s inability to establish that Milosevic had committed genocide on a lack of evidence, or the Prosecutor, some blamed *genocide* itself. A classic in the genre deplores the stringent burden of proof required by law, “genocide’s high bar”: Stacy Sullivan, “Milosevic And Genocide: Has The Prosecution Made The Case?” *Foreign Policy In Focus* (Silver City, NM & Washington, DC: February 19, 2004).

⁹ *Prosecutor vs. Milosevic*, IT-02-54, opening argument, Trial transcripts, p. 35158, line 9, August 31st, 2004. See also transcripts of September 1st, 2004.

The offensive appeared to be triggered by fear, and not only challenged the internationally mandated right to self-representation¹⁰ (and the resulting freedom to present a true defense), but seemed further calculated to prevent Milosevic from demonstrating the ICTY's illegality, and functions. 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

¹⁰ The fundamental, minimum rights provided to a defendant under the Rome Statute of the International Criminal Court, as well as under the Statutes of the International Criminal Tribunals for Rwanda (Article 20), adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), and Yugoslavia, Article 21, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), as well as Article 14 of the *International Covenant for Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 include the right to defend oneself in person. The general economy of these provisions all envisage the reality that rights are afforded to an accused, and not to a lawyer. The right afforded is to represent oneself against charges brought by the Prosecution and subsidiary to this, to receive the assistance of counsel, if an accused expresses the wish to receive such assistance. However, if, like Slobodan Milosevic, a defendant unequivocally expresses his objection to representation by counsel, his right to represent himself supercedes a court's or prosecutor's preference for assigning defense counsel. As stated by the U.S. Supreme Court, with respect to the Sixth Amendment of the Bill of Rights, which bears a striking similarity to Article 21 of the ICTY Statute:

"It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists." *Faretta vs. California*, 422 U.S. 806 (1975)

The ICTY Statute (as well as ICTR and ICC Statutes) similarly grant "defense tools," such as the right to be represented by counsel, or the right for counsel to be provided free of charge, if the accused is indigent. The essence of the right to represent oneself is obviously defeated when the right to obtain counsel if desired becomes an obligation for a competent defendant who is representing himself, to have counsel imposed upon him, against his will. As stated in *Farretta, supra*:

"An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Id.*

health, but to his deleterious impact on the “Court’s reputation,” “credibility,” and “legitimacy.”¹¹

Public lobbying of the ICTY supporting the imposition of counsel on Slobodan Milosevic, although undertaken by many, was most powerfully expressed by two of its stalwart supporters: David Scheffer and Michael Scharf. Their claims – perhaps inadvertently – betray the political nature of the institution.

2.2. *The Judge as Lion-Tamer; the Defendant as Dog*

Writing in the pages of *International Herald Tribune* in July 2004,¹² David Scheffer, former Ambassador at Large for War Crimes Issues under US Secretary of State Albright, dehumanized Milosevic, and urged the ICTY to reassert its “authority” over him. Wrote 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 theatre 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 the defendant 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 U.S. foreign policy, 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:

¹¹ Bruce Wallace, “Prosecution in Milosevic Trial Rests Case Early” *Los Angeles Times*, February 26th, 2004; Stacy Sullivan, “Milosevic and Genocide: Has the Prosecution Made the Case?” *supra* note 8; Judith Armatta, *Justice, not Political Platform for Milosevic*, *International Herald Tribune*, October 7th, 2004.

¹² David Scheffer, “Enough of Milosevic’s Antics,” *International Herald Tribune*, July 13, 2004.

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.”¹³ 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 reality *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,¹⁴ i.e., itself. Hence, its authority “must be asserted.” The very process, which *is* an abuse,¹⁵ 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

¹³ *Op. cit.*, note 12.

¹⁴ *Prosecutor vs. Dusko Tadic*, IT-94-1, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, October 2nd, 1995 (Appeals Chamber).

¹⁵ Edward S. Herman, “The Milosevic Trial (Part 2): Media And New Humanitarian Normalization Of Victor’s Justice”, *ZMag*, http://www.zmag.org/balkan-watch/herman_milosovec-trial.htm.

investigations, trials, and appeals before a Security Council-mandated deadline – known as the “completion strategy” – in 2010.¹⁶ 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.”¹⁷

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.”¹⁸

2.3. *Politics, What Politics?*

Michael Scharf, visiting professor of law at Case Western Reserve University, and instrumental in the creation of the ICTY,¹⁹ followed Scheffer’s opening salvo in the *Washington Post*, and, with bone-chilling clarity, made the case for imposition, employing

¹⁶ S/RES/1503 (2003); S/RES/1534 (2004). See, also, P. Dominic Raab, “Evaluating the ICTY and its Completion Strategy-Efforts to Achieve Accountability for War Crimes and their Tribunals” *Journal of International Criminal Justice* 2005 3(1): 82–102.

¹⁷ David Scheffer, *supra*, note 12.

¹⁸ *Id.*

¹⁹ Professor Scharf has presented himself as having been instrumental in the creation of the ICTY (in 1993 he was Attorney-Advisor for United Nations Affairs, for the US State Department) in his *Balkan Justice: The Story Behind the First International War Crimes Tribunal Since Nuremberg*, (Durham, North Carolina: Carolina Academic Press, 1997), p. xiv. He is described, in his author’s presentation as having “played a leading role in the creation of the International Criminal Tribunal for the Former Yugoslavia” in “Key Lessons the Iraqi Special Tribunal Can Learn” (apparently unpublished, but available at http://www.law.case.edu/saddamtrial/documents/Scharf_Article_on_the_IST.pdf). Interestingly, when Slobodan Milosevic, on an imposed counsel-led appeal of imposition of counsel, raised both Prof. Scharf’s Op Ed and the fact that the latter had been a “drafter” of the ICTY’s Statute, Theodor Meron, President of the ICTY, curtly dismissed Mr. Milosevic’s suggestion that Prof. Scharf, who Mr. Meron “knows” (unsurprisingly, as both were Counsel in the US State Department) was a drafter of the ICTY’s Statute. That incongruous correction may have something to do with the fact that Prof. Scharf, as we shall see, *infra*, makes an impressive case for the political, rather than judicial nature of the institution presided over by Theodor Meron.

strikingly political arguments.²⁰ Drawing on the now-familiar refrain that Slobodan Milosevic is “playing for the home audience,” Scharf expresses outrage at 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 ilk 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% of Serbs do not feel that Milosevic is getting a fair trial, and 67% 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.”²¹

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.”²² Scharf’s stated 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

²⁰ Michael Scharf, “Making a Spectacle of Himself: Milosevic Wants a Stage, Not the Right to Provide His Own Defense” *Washington Post* August 29th, 2004, p. B2.

²¹ *Id.*

²² *Id.*

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.²³ 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.²⁴ Perhaps this reality and the ever-present reminders of NATO's bombing in the streets of Belgrade (and throughout the country) have had some influence on the public perception of the ICTY's "fairness".

Scharf's assault on 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."²⁵

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 "brow-beating" of witnesses, that is to a certain extent, whether we like it

²³ Sriram Gopal and Nicole Deller, *Precision Bombing, Widespread Harm: Two Case Studies of Bombings at Industrial Facilities at Pancevo and Kragujevac During Operation Allied Force, Yugoslavia, 1999*, Tacoma Park, Maryland: Institute for Energy and Environmental Research, November 2002. On the web at www.ieer.org/reports/bombing/index.html.

²⁴ *Id.* See also Arjun Makhijani, "Depleted Uranium Munitions" *Science for Democratic Action*, number 24, (Tacoma Park, Maryland), February 2003, p. 4.

²⁵ Scharf, *op.cit.*, note 21.

or not, part of the art of cross-examination.²⁶ But Scharf's emphasis is placed not so much on these complaints as on his wild claims about 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.

Sidebar #1: *The ICTY's Objectives are Strictly Political.* The above quote presents any careful reader with a serious puzzle that appears to require the possibility of "time travel" in order to be comprehended. The puzzle is the following. According to Scharf: "In creating the Yugoslavia tribunal statute," in 1993,²⁷ "the U.N. Security Council set three objectives," among which was "to promote political catharsis while enabling Serbia's newly elected leaders to distance themselves from the repressive policies of the past." Who were the "newly elected leaders" in 1993?

It seems that the only rational way to examine the problem posed by Scharf is to either (a) look at all three objectives from the standpoint of 1993, in accordance with a plain reading of his statement "In creating the Yugoslavia tribunal statute, the U.N. Security Council set three objectives," and assume that the statement was made in good faith or, (b) read the three objectives as a retrospective – in 2004 – *ex post facto* justification to advocate imposition of counsel. Any other approach would require time travel back and forth, and a bouncing around across parallel universes.

²⁶ Edward A. Greenspan, "This is a Lynching" *National Post* (Toronto, Canada), March 13th, 2002, p. A-20.

²⁷ The ICTY was established by S/RES/827 (1993). See, also U.N. SCOR, 48th Sess., 3217th mtg.

Approach (b) would be easy, and tempting. In 2004, Scharf, using his insider status to buttress his credibility, and having established his knowledge of the minutiae of UN Security Council objectives, simply claims, that the ICTY's objectives (in 1993) were those which would be defeated if Milosevic were to represent himself *now*. So he would simply be "remembering," and applying that memory to a current situation. But the problem again is of time travel, because it is impossible to "remember" how in 1993, one could *predict* that in 2000, DOS (the "Democratic Opposition of Serbia," and not yet in existence in 1993²⁸) would attain political power, and *a fortiori*, how in 1993, the objective would be to "enable" DOS to "distance themselves" with the "past". That "past," in 1993, is the present, as well as the future. The exercise is mind-bending. The only way to solve this resulting difficulty is to simply posit that Professor Scharf was either inventing *ex post facto*, or engaging in a process we could charitably call "good faith magic memory". The "good faith magic memory" aims to support his main argument: that Milosevic is making huge political mileage in Serbia and Montenegro by representing himself, and in so doing is defeating these three "objectives" that Scharf produces in 2004, in particular that political one which could *not possibly have been predicted in 1993*. However, as a political reality in Serbia and Montenegro, this overwrought concern is greatly exaggerated. The Socialist Party of Serbia, presided by Slobodan Milosevic, has performed dismally in opinion polls.²⁹ However, the impunity with which embellished and downright false claims seem to be effectively employed is somewhat a feature of contemporary politics, and in some instances, of international law. (Iraqi "weapons of mass destruction" provide an excellent example.) In the present case,

²⁸ For a history and analysis of DOS, an amalgamation of 18 entities (not all of which were actual political parties or groupings) formed in February 2000, see Milan Brdar, "DOS, Between Revolution and Reform", *International Journal for the Semiotics of Law* 15-2, June 2002, pp. 185–201.

²⁹ This reality was acknowledged in what appeared to be a slight disagreement in approach between ICTY supporters, expressed via dueling op eds in the summer of 2004. Bogdan Ivanisevic, a researcher for Human Rights Watch, took issue with claims made by "many Western critics" (presumably Professor Scharf was among them) that Milosevic's popularity was on the rise, pointing to the humble score of 7.6% of the votes received by the SPS in previous elections. See Bogdan Ivanisevic, "The Milosevic Trial is Doing its Job", *International Herald Tribune* August 31st, 2004. On the web at <http://hrw.org/english/docs/2004/08/31/serbia9281.htm>.

we note that Slobodan Milosevic constitutes enough of a threat that a distinguished professor such as Michael Scharf would write an important op ed in the *Washington Post* seeking to have him gagged. But the *stated threat*, Milosevic's political influence in Serbia and Montenegro, is inconsequential, and, therefore, cannot be of sincere concern to Scharf. What, then, would constitute an actual threat?

A speculative hypothesis (a) would produce the following. In 1993, Professor Scharf as State Department attorney (and his superiors such as Secretary of State Madeleine Albright and Richard Holbrooke) really did formulate the three political objectives as enunciated by Professor Scharf. They had a detailed plan, (could it mischievously be termed a "joint criminal enterprise"?), to: (i) Persuade Serbs that they *were going to be* misled by "propaganda" about Milosevic's war crimes and crimes against humanity; (ii) they were *going to* "pin prime responsibility" on Milosevic, and his regime, *in advance*, for whatever happened (then conveniently revert to (i) to disallow any refutation as "propaganda"); and (iii) employ any means, from increasingly debilitating sanctions to aggression, including aerial bombing, to ensure that a new leadership emerged, a cherry-picked "opposition" who would be assisted in – and in fact, necessarily obligated to – "distance themselves" from the previous "repressive policies". That would have insured control over the future of Yugoslavia, and "control of the future of Yugoslavia," looking back from a 2004 perspective, *meant its destruction as a nation*.

If this is correct, what greater aggression is possible? By and through the United Nations Security Council, in violation of the UN Charter's fundamental *raison d'être*, a member state is annihilated, through the creation of an *ad hoc* Tribunal, whose function will be to justify the *republicide*, and blame its victims.

The question as to what threat Milosevic actually poses in representing himself suddenly emerges with increased clarity. The problem is not that votes may be cast for Socialists in Pozarevac, or Novi Sad, or anywhere else, but rather, the problem is that Milosevic continues to maintain that the institution itself is an instrument of a foreign policy that sought and achieved the destruction of Yugoslavia. *That* is intolerable.

2.4. *Counsel, Imposed*

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 it cannot reasonably be expected that these aims be 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, 2004, 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.³⁰ 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 British barristers, 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 was healthy) does not deter those who defend the ICTY’s decision to strip Milosevic of the right to call his witnesses, and present his defense. And *his* defense is the

³⁰ Counsel was imposed by oral decision on September 2nd, 2004, with “reasons to follow”. Order and Reason for Assignment of Defense Counsel, *Prosecutor vs. Milosevic*, Case No. IT-02-54, September 22, 2004. See Tiphaine Dickson, “Star Chamber it Is!” Global Research, <http://globalresearch.ca/articles/DIC409A.html>.

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 from the time of their imposition in early September 2004–November 1st 2004,³¹ 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, and the ability to enforce their decisions, *even* when they are in the interest of defendants.

2.5. *Rule of Law*

There were ICTY advocates who even attempted to chastise Milosevic – and more importantly, his witnesses – claiming that their lack of cooperation was undermining the “Rule of Law”.³² The formulation certainly appears solemn enough, and who would wish to appear to be opposed to such a fundamental, indeed crucial, legal cornerstone? However, the Rule of Law, when properly defined (it is, after all, a legal concept, and not an empty slogan), may not provide much assistance to a body such as the ICTY. 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.³³

Slobodan Milosevic is by no means being tried “in the ordinary legal manner before the ordinary courts of the land.” The ICTY was

³¹ *Prosecutor vs. Milosevic*, IT-02-54, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004, Appeals Chamber. The decision upheld the Trial Chamber’s imposition of counsel (see discussion, *infra*) but overturned the modalities of imposition, which had included overseeing the defense strategy and questioning witnesses. See Order and Reason for Assignment of Defense Counsel, *op. cit.*, note 30.

³² Judith Armatta, *Justice, not Political Platform for Milosevic*, *op. cit.*, note 11.

³³ A.V. Dicey, *Law of the Constitution*, 8th Edition (London: Macmillan and Co., 1915), pp. 183–184.

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 the Yugoslav constitution and of international law.³⁴ The concept of “joint criminal enterprise,” which does not require the prosecution to establish genocidal intent in some instances, is a recent jurisprudential development.³⁵ Not all would consider this case law 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 vs. Akayesu*,³⁶ referred to this as *dolus specialis*. Most, however, would argue that the relaxed requirements are, though perhaps “illegal,” nonetheless “good”.³⁷

Sidebar #2: *On the Notion of Joint Criminal Enterprise.*

**JOINT CRIMINAL ENTERPRISE: NOT LEGAL “CUSTOM,”
BUT “CUSTOM-MADE” TO CONVICT**

Joint Criminal Enterprise, as it is presently framed by the ICTY, is both a very *recent* and *unique* legal concept. As such, it is contrary to the *principle of legality* and is *without legal authority*. Its purpose is to *facilitate convictions* before the institution, as it significantly reduces the prosecutorial burden of proof, and permits the conviction of the morally – and objectively – innocent. JCE is only necessary for cases where there is, in fact, *no evidence* – or insufficient evidence, from the standpoint of the criminal burden of proof – of genocidal intent. In other words, its purpose can be said to be to convict the innocent.

³⁴ See Marjorie Cohn, *op. cit.*, note 6. Federal Constitutional Court (Yugoslavia) Decisions 150/01 and 152/01, 6 November 2001 (Rendered on June 28th, 2001), in Michael Mandel, *How America Gets Away With Murder*, Pluto Press: London, 2004, at note 18, p. 278.

³⁵ Allison Marston Danners and Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law” 93 *California Law Review*, 75 (2005), at p. 110. At note 401, see a polite yet formidable (under) statement: “one is struck by the lack of precedent for the current form of JCE.”

³⁶ *Prosecutor vs. Akayesu*, ICTR 96-4-T, Trial Chamber Judgment, September 2nd 1998, p. 146.

³⁷ Much like the remarkable acknowledgement by former ICTY President Antonio Cassese of the illegality of NATO’s bombing of Yugoslavia was “in no way intended as criticism; he meant it to establish that, as a result of Kosovo, a rupture with the prior legality had occurred so that a legal principle might emerge.” Michael Mandel, *op. cit.*, note 34, p. 102.

Recent as the ICTY's Statute does not – and did not at the institution's creation – include this “prosecutorial tool” as a mode of participation in a criminal offence; indeed, Article 7 of the Statute sets out traditional modes of participation, which require evidence of *both* a criminal act (either a direct act, or as an alternate, but traditionally known mode of participation, such as aiding and abetting, or a common agreement, plan or design) *as well as* criminal intent.

The *recent* nature of JCE as a mode of participation violates the internationally recognized *principle of legality*, and the universally accepted idea that there can be no prosecutions for acts that were not crimes at the time of their commission.³⁸ Criminal law cannot be a beast, which evolves and modifies its requirements in order to convict the innocent. International law is similarly not intended to be modified, without the participation of states, exercising their national sovereignty, in order to criminalize leadership and legitimate political action in the course of the defense against a war of aggression as well as the protection of public order and the civilian population.

JCE is Unique as a mode of participation, as it requires no evidence of actual participation in an offence, nor *intent* that the actual offence – in the case of genocide – be committed.³⁹ This

³⁸ *Rome Statute*, art. 25; *Universal Declaration of Human Rights* art. 11, par. 2; *International Covenant on Civil and Political Rights*, art. 7, par. 2; *European Convention on Human Rights*, art. 16. It is also a constitutional requirement in the US, Canada, and Western Europe.

³⁹ *Prosecutor vs. Brdjanin*, IT-99-36-A, “Decision on Interlocutory Appeal”, 19 March 2004, par 1: “The third category of joint criminal enterprise liability refers to criminal liability of an accused for crimes which fall outside of an agreed upon criminal enterprise, but which crimes are nonetheless natural and foreseeable consequences of that agreed upon enterprise.”

(...)

Par. 6: “Where that different crime [which falls outside the agreed crimes] is the crime of genocide, the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4 (2) [murder, causing serious bodily or mental harm, etc.] would be committed and that it would be committed with genocidal intent.” Approved by majority of Chamber in *Prosecutor vs. Milosevic*, IT-02-54, “Decision on Motion for Judgement of Acquittal”, June 16th, 2004, at par. 290: “The essence of this category of joint criminal enterprise is that an accused person who enters into such an enterprise to commit a particular crime is liable for the commission of *another crime outside the object* of the joint criminal enterprise, if it was reasonably foreseeable to him that as a consequence of the commission of that particular *crime the other crime would be committed by other participants* in the joint criminal enterprise.” (emphasis added).

stands in stark contrast to the evolution of criminal jurisprudence in most adversarial (common law) national jurisdictions – which have sought to protect against wrongful convictions by establishing more, rather than less, of a burden on the prosecutor to establish that a defendant possessed required intent before courts will consider a conviction. The Rome Statute for the International Criminal Court does not integrate JCE, as presently framed by the ICTY, and on the contrary, *actual intent is a requirement* for alternate forms of criminal participation.⁴⁰

JCE now permits conviction for genocide without it being necessary to establish intent to commit genocide. Conviction of the morally innocent is in contradiction with the most basic principles and values of criminal law,⁴¹ in addition, with

⁴⁰ Article 25, paragraph 3, Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, *entered into force* July 1, 2002: 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime, which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

⁴¹ See Allison Marston Danners and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law", *op. cit.*, note 35, p. 132: "Joint criminal enterprise provides an example of an international criminal doctrine where certain aspects of the human rights and transitional justice influences are in danger of overpowering the restraining force of the criminal law tradition. As currently formulated, the doctrine has the potential to stretch criminal liability to a point where the legitimacy of international criminal law will be threatened – thereby undermining not only the criminal law aims, but also the human rights and transitional justice goals of international criminal law."

respect to the crime of genocide, it was held to be the gravest offence, the “crime of crimes,” therefore requiring the highest form of specific criminal intent – *dolus specialis* – in the first judgment rendered on genocide by a Security Council *ad hoc* Tribunal.⁴² Presently, not only are the requirements for the Prosecutor to establish the offence reduced, but through JCE, jurisprudence is entirely disregarded, and its most fundamental tenets – no conviction without specific intention – discarded.

The question to be posed with respect to JCE is the following: *Why is it necessary?* The Prosecution – and Chamber’s – reliance on this *recent* and *unique* concept could in fact be argued to constitute an *acknowledgement* of the Prosecution’s failure to otherwise prove culpability. Only *absence or insufficiency of evidence, and absence or insufficiency of evidence of genocidal intent* justifies the resort to the JCE construct. In other words, when there is positive evidence of genocidal acts and genocidal intent, *JCE is not necessary, and of no assistance to the Prosecution*. The use of such a tool is only of assistance in cases where prosecutorial evidence is insufficient, and would not otherwise establish culpability.

Concretely, JCE, as articulated by the Appeals Chamber in *Brdjanin*, permits the conviction for genocide, the “crime of crimes” of a person who (a) *did not* actually commit the offence; (b) *did not* agree with others, aid or abet, etc, others to commit it; and (c) *did not* intend that genocide be committed. Such a person, who could be convicted under the ICTY’s (3rd category) JCE doctrine would be *innocent of the offence of genocide*, but could nonetheless be convicted of having committed it.

Third category JCE permits the conviction for genocide of an innocent individual for crimes committed by other parties, if the individual could “reasonably foresee” that genocide would take place as a result of an agreement to enter upon a joint criminal enterprise – which did not include genocide – and acts of genocide were indeed committed by third parties in the JCE.⁴³

⁴² *Prosecutor vs. Akayesu*, *op. cit.*, note 36.

⁴³ *Prosecutor vs. Milosevic*, IT-02-54, “Decision on Motion for Judgement of Acquittal,” *op. cit.*, note 39: “[A] Trial Chamber could be satisfied beyond reasonable doubt that the Accused was a participant in a joint criminal enterprise to commit other crimes than genocide and it was reasonably foreseeable to him that, as a consequence of the commission of those crimes, genocide of a part of the Bosnian Muslims as a group would be committed by other participants in the joint criminal enterprise, and it was committed.”

“Reasonable foreseeability” that crimes could be committed by third parties is not intention to commit a crime, and it certainly does not constitute the specific intent required by international precedent.

Third category JCE essentially criminalizes individuals who accept the sacrifices of public duty. If “reasonable foreseeability” of the commission of acts of genocide – *which were not planned nor intended* – is all that is required, then all wartime leaders – despite the fact that wars of aggression have been instigated and waged on their territory, in violation of international law – are liable for crimes committed by others, the commission of which they did not intend. All NATO leaders in 1999 would certainly thus be liable.

The sound reasoning of Louise Arbour, then Justice of the Ontario Court of Appeal in the Canadian case of *R. vs. Finta*,⁴⁴ is evidently inapposite to genocide before the institution she later served as Prosecutor:

“To convict someone of an offence when it has not been established beyond a reasonable doubt that he or she was aware of conditions that would bring to his or her actions that requisite added dimension of cruelty and barbarism violates the principles of fundamental justice. The degree of moral turpitude that attaches to crimes against humanity and war crimes must exceed that of the domestic offences of manslaughter or robbery. It follows that the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence.”⁴⁵

Rule of Law is also defined by Dicey as a system that adheres to equality before the law.⁴⁶ 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 1999.⁴⁷ Then again, the Prosecutor of the ICTY has no jurisdiction over crimes against the peace, nor

⁴⁴ *R. vs. Finta*, (1989), 69 OR (2d) 557 (OCA), affirmed by the Supreme Court of Canada, (1994) 1 SCR 701.

⁴⁵ *Id.*, p. 818 (SCR).

⁴⁶ Dicey, *op. cit.*, note 33.

⁴⁷ See Mandel, *op. cit.*, note 35, Chapter 6.

over the crime of aggression, described by the Nuremberg Tribunal as the “supreme international crime”.⁴⁸

2.6. *What does Aggression Have to Do With it?*

Crimes against the peace, though they were the lynchpin of the case against the Nazis at Nuremberg – as they constitute aggression, the “supreme international crime” – are now inexplicably trivialized, and reduced to the status of legal-historical trivia, a throwback to curiously unmentionable bygone days. A typically dismissive formulation is offered by William Schabas, professor of Human Rights law, and what one could call an “activist-scholar,” in particular with respect to the events in Rwanda:⁴⁹ “Although somewhat marginalized in contemporary humanitarian law, the crime of aggression was punished by war crimes tribunals in the 1940s, when it was known as ‘crimes against the peace.’”⁵⁰

Pronouncements like this one, however common they have become among Western legal scholars and policy makers, are nevertheless *extremely puzzling*. What could be behind the practice of

⁴⁸ International Military Tribunal, Judgement, in *Trial of the Major War Criminals Before the International Military Tribunal, Yearbook of the International Law Commission* (1950) Vol. II, pp. 374–378.

⁴⁹ “Activist-scholar” is the term used by Amnesty International to describe a panel including Prof. Schabas at its 2002 Annual General Assembly. See <http://www.amnestyusa.org/events/agm/agm2002/panels.html>. Prof. Schabas was a member of the *International Commission of Inquiry*, which presented the “Report of the International Commission of Inquiry into human rights violations in Rwanda since October 1, 1990”. The report in effect overlooked the invasion of Rwanda – on the very date selected for its title – by Uganda, a crime of aggression. Startlingly, according to Schabas (and another Commission member): “[The] Commission was in fact indifferent about the identity of the aggressor, because international law is not concerned about that question.” *La Presse*, September 14, 1994, B3, in Robin Philpot, *Rwanda 1994: Colonialism Dies Hard*, at Taylor Report, http://www.taylor-report.com/Rwanda_1994/ch4.php. The French version is published as *Ça ne s'est pas passé comme ça à Kigali*, (Montréal Éditions Les Intouchables, 2003), p. 73.

⁵⁰ William A. Schabas, “Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?” *New Eng. L. Rev.* 35 (2001), p. 287. Reading this quote, one may wonder what could the difficulty in naming Nuremberg and Tokyo Tribunals possibly be for a scholar in international law? More alarmingly, perhaps, if aggression “used to be” known as “crimes against the peace” – in the bafflingly euphemistic “1940s” – then what *is it* known as, *if anything*, at present? Has the offence – Nuremberg’s supreme international crime, no less – merely been airbrushed from customary international law by consent (and if so, *by whose consent?*), or rather by sheer hegemonic force, along with the Hegemon’s willing academic accomplices?

simultaneously marginalizing crimes against peace while emphasizing lesser (“and included”) crimes, such as crimes against humanity, violations of the Geneva Conventions, and even genocide? Is it perhaps the determination of some power to continue its practice of committing crimes against the peace while “pinning prime responsibility” for the alleged (resulting) lesser crimes on its political opponents and victims? Academic efforts by authors such as William Schabas certainly appear to want to facilitate such a course of history. And indeed, these efforts are well rewarded.

The International Criminal Court, though it includes aggression as a crime subject to its jurisdiction, has subjected its enactment, as an offence, to an agreement by Rome Statute contracting parties as to its definition.⁵¹ As of the writing of this article, the crime of aggression remains undefined, and therefore, *not an offence under the jurisdiction of the ICC*. The United States, represented by Theodor Meron (before he was named as a judge, then President of the ICTY), displayed an uncharacteristic – in light of its support for the *ad hoc* ICTY and ICTR, as well as their somewhat *ex post facto* jurisprudence⁵² – concern that the crime of aggression might contravene the customary prohibition against *nullum crimen* and the principle of legality. Meron added, perhaps surprisingly, when contrasted to the US government’s ultimate disengagement from the ICC for glaringly political reasons (and unwavering support for *ad hoc* bodies, based on similarly political, and indeed *geopolitical* considerations) that customary law – which in the US contention, would have been *modified* by the inclusion of aggression, as it was understood by the Nuremberg Tribunal, that is, as a crime against the peace, rather than simply *acknowledged* – “must be not ideology but a reflection of both widespread practice and the general *opinio juris* of states.”⁵³ In other words, it is *ideology* when aggression is a crime against the peace, and vice-versa, but it is not ideology, or a result of ideology, when the Security Council establishes bodies to prosecute offences under international law *with the exception* of the “supreme international crime, aggression,” which, according to the

⁵¹ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, *entered into force* July 1, 2002, Article 5 (2).

⁵² In *Akayesu*, *op.cit.*, note 37, the defendant learned that the act of rape was included in the offence of genocide, not at the time of the alleged commission of the offence (or before), not when he was indicted for genocide, but rather the day he was *sentenced to life imprisonment for genocide, including rape as genocide*.

⁵³ Available on the U.S. Department of State website at www.state.gov/documents/organization/6578.doc.

Nuremberg Tribunal, “contains within it the accumulated evil of all other war crimes.”⁵⁴ It is presumably also not ideologically driven to disregard sovereignty to carry out *ad hoc* procedures, arrests, and “transfer” of citizens from one country to another, in violation of the constitutions of their countries of origin. Ideology is assumed, too, to be absent from the decision of an entity such as NATO, disregarding the explicit requirements of international law, (and indeed the very prohibition of aggression, and the UN’s creation as an instrument to prevent the violation of national sovereignty and war) to mercilessly bomb Yugoslavia for 78 days, whilst a judicial body – albeit limited in its life-expectancy and territorial jurisdiction – brings an indictment for war crimes, midway through the aggression, against the duly-elected President of that country, and its Prosecutor opines that he – Slobodan Milosevic – can no longer be a credible interlocutor in peace negotiations as a result.⁵⁵

But the United States’ aversion for things ideological causes it to oppose a definition of “aggression” that would include crimes against the peace, and cause it to oppose, at this point, the International Criminal Court, yet fully support *ad hoc* bodies whose politicization is one of the most poorly-kept secrets in the annals of law. By expressing concern that a prosecutor could arrest American citizens on legally slender and political grounds,⁵⁶ was President Bush not in fact acknowledging that this is precisely what *has been done*

⁵⁴ *Op. cit.*, note 48.

⁵⁵ On May 27th, 1999, mid-way through NATO’s bombing campaign against Yugoslavia, an indictment was filed by (then) ICTY Prosecutor Louise Arbour, against President Milosevic (and other government members) charging him with Crimes against Humanity for events related to Kosovo. She stated, in a press release: “the evidence upon which this indictment was confirmed raises serious questions about their suitability to be the guarantors of any deal, let alone a peace agreement. They have not been rendered less suitable by the indictment. The indictment has simply exposed their unsuitability.” *Statement by Justice Louise Arbour, Prosecutor, ICTY*, Press Release, L/PIU/404-E, May 27th, 1999.

⁵⁶ Presidential debate, September 30th, 2004: “And that is, I wouldn’t join the International Criminal Court. It’s a body based in The Hague where unaccountable judges and prosecutors can pull our troops or diplomats up for trial. And I wouldn’t join it. And I understand that in certain capitals around the world that that wasn’t a popular move. But it’s the right move not to join a foreign court that could – where our people could be prosecuted. My opponent is for joining the International Criminal Court. I just think trying to be popular, kind of, in the global sense, if it’s not in our best interest makes no sense.” Presidential Candidates’ Debate, Sponsored By The Miccosukee Tribe Of Indians Of Florida, University Of Miami, Coral Gables, Florida, Commission on Presidential Debates, on the web at: <http://www.debates.org/pages/trans2004a.html>.

by international prosecutors in the course of their *ad hoc* mandates, but that when it is done to *foreigners* in judicial arenas with which the US is comfortable, it is expedient, and therefore legally acceptable? In contrast, the idea that politically motivated prosecutions could be carried out against Americans becomes intolerable, “ideological,” and legally unsound. These claims, though not necessarily inconsistent – they are consistent *if, and only if*, the litmus test is solely the furtherance of “US national interests”⁵⁷ – cannot coexist in any conception of judicial activity respectful of the Rule of Law. The US position with respect to aggression, albeit unintentionally, provides significant insight into the essential functions of *ad hoc* bodies. Even those who forcefully argue the legality and legitimacy of *ad hoc* bodies, demonstrate that their functions are so far removed from any act of a judicial nature, that by virtue of what *they do* (or what it is hoped that they will achieve), they can hardly be deemed legal bodies, since they carry out *political* duties.

For instance, 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 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.

2.7. “A Model of a Fair Trial,” Really?

On October 21st, 2004, 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,⁵⁸ and pointed to Scharf’s statement

⁵⁷ These “national interests” – although unheard of as a matter of law – were successfully invoked by the United States government to shield General Wesley Clark’s testimony from public scrutiny in the Milosevic trial, and to request the right to edit its contents, “Decision on Prosecution’s Application for a Witness Pursuant to Rule 70 (B)”, *Prosecutor vs. Milosevic*, IT-02-54-T, 30 October 2003, (initially confidential, and released November 16th, 2003). See Tiphaine Dickson, “The Milosevic Trial: What Does it Portend For Saddam?” *Counterpunch*, Special Print Issue, December 2003.

⁵⁸ See Tiphaine Dickson, “Star Chamber It Is”, *op. cit.*, note 30.

that the ICTY's objectives were transparently political, not judicial, in nature.⁵⁹ Hence, Milosevic stated that given the fact the process was political, he required a political defense, which could only be achieved through self-representation.⁶⁰

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.⁶¹

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 David Scheffer and Michael Scharf, 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.

⁵⁹ *Prosecutor vs. Milosevic*, IT-02-54, Appeals Proceedings, October 21st, 2004, pp. 37–39.

⁶⁰ *Id.*, p. 53, lines 1–15, Slobodan Milosevic: “... no lawyer, Mr. Kay or any other lawyer, is able to replace me in this job. It is simply because of the nature of these charges. This is a political trial. What is at issue here is not at all whether I committed a crime. What is at issue is that certain intentions are ascribed to me from which consequences are later derived that are beyond the expertise of any conceivable lawyer. The point here is that the truth about the events in the former Yugoslavia has to be told here. It is that which is at issue, not the procedural questions, because I'm not sitting here because I was accused of a specific crime. I'm sitting here because I am accused of conducting a policy against the interests of this or another party. The nature of the proceedings here is such that a lawyer cannot deal with it. In fact, even that is not the issue. The issue is whether I have the right to represent myself under the Statute, and the Statute says I do.”

⁶¹ *Id.*, p. 53.

3. TOWARDS *In Absentia*: “SUBSTANTIAL DISRUPTION” OF THE RIGHT TO A FAIR TRIAL

In an appellate decision which appears to have been painstakingly devised to convince public opinion that Milosevic's rights have been restored – or even, as stated by some, exaggerated in the favor of the defendant⁶² – the ICTY has opened the door to *in absentia* trials before international bodies, and reduced fundamental trial rights into mere “presumptions,” matters of discretion.⁶³

The decision handed down by the ICTY's former President, Theodor Meron, who also acts as President of the Appeals Chamber, as well as a Trial Chamber judge, permits Slobodan Milosevic's 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.

3.1. “Substantial Disruption”

The Appeals Chamber decision is signed only by ICTY President, Theodor Meron.⁶⁴ On appeal lodged by imposed counsel, Slobodan 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.⁶⁵ The ICTY's *Directive on the Assignment of Counsel* only deems lawyers eligible to act as defense counsel if they have not engaged in conduct, professionally or “otherwise” that is “likely diminish to public confidence in the International Tribunal (...) or otherwise bring the International

⁶² Michael P. Scharf, “ICTY Appeals Chamber Decision on Slobodan Milosevic's Right to Self-Representation”, American Society of International Law, *Insight*, November 2004, <http://www.asil.org/insights/2004/11/insight041111.html>; Ana Uzelać, “Milosevic Judges Face New Challenge”, Institute for War and Peace Reporting, TU No 380, 05-Nov-04, on the web at: http://www.iwpr.net/index.pl?archive/tri/tri_380_1_eng.txt.

⁶³ *Milosevic vs. Prosecutor*, IT-02-54, “Decision on the Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel”, Appeals Chamber, November 1st, 2004.

⁶⁴ *Id.*

⁶⁵ *Op. cit.*, note 61.

Tribunal into disrepute.”⁶⁶ It is thus unlikely that a defense lawyer could argue the ICTY’s illegality or illegitimacy, the cornerstone of Mr. Milosevic’s defense.

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”⁶⁷ – a move unprecedented since the Star Chamber – 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.⁶⁸ 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

⁶⁶ *Directive on the Assignment of Defense Counsel*, Directive 1/94, Article 14, (A) vii.

⁶⁷ Appeals Hearing, October 21st, 2004, President Meron, *op. cit.*, note 60, p. 59.

⁶⁸ *Id.*, p. 39, Mr. Milosevic: In relation to this idea of denying me my right, taking away my right, about 100 prominent legal scholars, professors, experts in international and criminal law from Serbia, Russia, Greece, Italy, Ireland, Germany, the United States, Canada, India, Belgium, Denmark, Bulgaria, Hungary, Netherlands, Czechoslovakia, Great Britain, France, submitted a petition to the General Secretary and to the United Nations Security Council. You probably did not pay attention to this, but many arguments were stated there against this decision, which was adopted by the Trial Chamber. They say that this imposition of counsel, “[In English] This apparently punitive measure is contrary to international law, incompatible with the adversarial system of criminal justice adopted by the Security Council in Resolution 808, and ignores the Court’s obligation to provide adequate medical care and provisional release to the defendant. ... The ICTY has ignored repeated requests for provisional release, to which everyone presumed innocent is entitled, has imposed unrealistically short preparation periods.”(...) p. 40, line 11: In the petition, it says: “[In English] The envisaged imposition of counsel constitutes an egregious violation of internationally recognised judicial rights, and will serve to only aggravate Mr. Milosevic’s life-threatening illness and will further discredit these proceedings”. The full text of the “Lawyers Petition” is on the web at: <http://www.icdsm.org/Lawappeal.htm>.

practice, and in violation of the *International Covenant for Civil and Political Rights*,⁶⁹ but predicated on the idea of “illegal but good,” or rather “illegal, but expedient” (and “discretionary”).

3.2. *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.⁷⁰

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;

⁶⁹ See Milan Markovic, “In the Interests of Justice?: A Critique of the ICTY Trial Court’s Decision to Assign Counsel to Slobodan Milosevic”, 18 *Geo. J. Legal Ethics* 947, (2005).

⁷⁰ *Prosecutor vs. Milosevic*, IT-02-54, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, *op. cit.*, note 31, paragraph 9.

- 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, can be dispensed with.⁷¹

⁷¹ On April 19th, 2005, while defense witness Kosta Bulatovic was to be cross-examined by the Prosecutor, the Trial Chamber decided to proceed in the absence of Mr. Milosevic, who was ill. Mr. Bulatovic refused to testify in absence of the accused, and stated that proceeding in Mr. Milosevic’s absence would be “illegal.” He was cited for contempt of the ICTY, found guilty and given a four-month sentence of imprisonment, suspended for 2 years. The conviction was upheld by the Appeals Chamber. *Prosecutor vs. Milosevic*, IT-02-54/R-77.4, Decision on Interlocutory Appeal on Kosta Bulatovic Contempt Proceedings, 29 August 2005.

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, and crucially, it has dealt a blow to the fundamental fair trial rights guaranteed by the *International Covenant for Civil and Political Rights*.

4. CONCLUSION

The ICTY's endgame, as illustrated by the strategy designed to prevent Slobodan Milosevic – and other defendants, elsewhere,⁷² in future trials – 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, when these bodies devise tools to silence defendants who would have the audacity to raise that supreme international crime, then, surely, there is no point in calling what emerges from the exercise “international law.”

APPENDIX: POSTMORTEM

Following the writing, but before the publication of this article, the ICTY announced that Slobodan Milosevic had been found

⁷² The “Special Trials” being held in Iraq will not – as a recent legislative development provides – allow defendants, including – and perhaps, in particular – Saddam Hussein, to represent themselves. See Henry Weinstein and Richard Boudreaux, *Los Angeles Times*, “Hussein Will Not Be Allowed to Represent Himself at Trial,” September 21st, 2005. But under revised rules, adopted without fanfare by the transitional Iraqi National Assembly on Aug. 11, Hussein only has the right “to procure legal counsel of his choosing.” The article quotes the ubiquitous Professor Scharf, who claimed, with respect to the abrogation of a right under the *International Covenant for Civil and Political Rights* that “it would help alleviate the kind of problems that had arisen in the lengthy war crimes trial of former Yugoslav President Slobodan Milosevic at The Hague.” Scharf said that Milosevic's ability to represent himself had enabled him “to transform the trial into a stage for his national propaganda.” According to the Case University website, Professor Scharf had a memo, arguing against the right to self-representation, delivered to Salem Chalabi, Special Court President, in August 2004, *op. cit.*, note 5.

dead in his cell on the morning of March 11th, 2006.⁷³ The eve of his death, a petition had been filed before the UN Security Council and ICTY Appeals Chamber requesting President Milosevic be transferred to the Bakoulev Center for Cardiovascular Surgery in Moscow, for further testing and possible treatment for a life threatening cardiovascular condition.⁷⁴ Several practitioners and professors of international law signed the appeal, which informed the two bodies that Slobodan Milosevic had been found to be in critical condition by a Moscow angiologist, yet his state of health continued to be overlooked – particularly by a recent Trial Chamber decision denying a request to be treated at the Bakoulev, despite security guarantees offered by Russia⁷⁵ – and in violation of the *International Covenant on Civil and Political Rights* which does guarantee that detainees have the right to adequate medical care.

The document – filed less than a day before the death of a defendant (who, the same day, March 10th, 2006, wrote to Sergei Lavrov, Russian Minister of Foreign Affairs, to urgently request aid from Russia and stated that “willful steps were taken to destroy my health”⁷⁶) – further set out:

The Trial Chamber’s reliance in denying President Milosevic needed medical care, on the proceedings being in “its latter stages ... at the end of which ... he may face the possibility of life imprisonment” is irrational at best. Does it mean under such circumstances, a prisoner may just have to die? Is it too late for urgently needed medical treatment? Does it mean “the possibility of life imprisonment” is greater in the latter stages of a trial than in the beginning? Then it is commenting on the weight of the evidence which it will judge. Would a defendant who believes he would be convicted and sentenced to life in prison wait until the latter stages of proceedings to seek a means of escape? Would an impartial Court obligated to hear all the evidence before reaching a decision believe in the latter stages of a trial it was hearing that the defendant was more likely to flee than he was at the beginning, unless the Court believed the evidence supported a severe sentence? Has the Court revealed its bias by its bizarre reliance on a presumed fear of a life sentence by the accused in the latter stages of these proceedings?

⁷³ “Slobodan Milosevic Found Dead in His Cell at the Detention Unit” (CC/MOW/1050ef), Press Release, March 11, 2006, ICTY Registry, available at: <http://www.un.org/icty/pressreal/2006/p1050-e.htm>.

⁷⁴ The full text of the letter can be consulted at <http://slobodan.info/blog/letter-to-un/>

⁷⁵ February 23rd, 2006, *Prosecutor vs. Milosevic*, “Decision on Assigned Counsel Request for Provisional Release”, Trial Chamber, ICTY, <http://www.un.org/icty/milosevic/trialc/decision-e/060224.htm>.

⁷⁶ *Global Research*, “Was Milosevic Poisoned? Text of a handwritten letter dated March 8, 2006 by Milosevic to Russia asking for help”: <http://www.globalresearch.ca/index.php?context=viewArticle&code=20060314&articleId=2102>

The decision of the Trial Chamber is unsupportable in fact and in law. It exposes the Court's strategy of feeble excuses to support its prejudice and reveals its own failures to protect the health of this prisoner.

The decision is so unreasonable and plainly unjust as to demonstrate the appearance and the fact of judicial prejudice.

The Court has determined that President Milosevic must face the possibility of death because it sees the possibility of a life sentence as the cause for his seeking emergency medical care.

The decision alone, affirmed by the Appeals Chamber, will do great injury to the ICTY and international humanitarian law. The death, or serious impairment of President Milosevic for want of medical care will impose the same sentence on the ICTY and international law as a means to peace.

The torrent of posthumous commentary unleashed⁷⁷ after the unnecessary and shameful death in custody of Slobodan Milosevic, while demonstrating a renewal of interest in the proceedings, nonetheless staggeringly conveyed outrage that a guilty man somehow "got off", cheating "justice through death."⁷⁸

While this article characterized the proceedings as "unsightly," it now seems tragically clear that this expression of ours was a euphemism: from start to finish, the exercise was nothing less than an utter disgrace, justifiable only if the objectives of *ad hoc* bodies are

⁷⁷ Edward S. Herman and David Peterson, *infra*, note 78, provide a representative sample of media coverage following the death of Milosevic. Of particular note, however, in the genre of mind-boggling posthumous dehumanization, is the following excerpt of Richard Holbrooke's discussion of the successful Milosevic-brokered Dayton Peace Accords, on CNN Saturday Morning News, 11:00 Am EST, Transcript # 031105cn.V28:

"That agreement has held for over 10 years. No one has started a war. No one has been killed. Not one NATO or American soldier has been killed since. And the American troops, which were originally 20,000, are down to 100.

So that's the short story of Dayton.

But I think today's story is that this man, this monster, this war criminal who wrecked southeastern Europe in the latter part of the 20th century, is gone from the scene once and for all."

⁷⁸ For an informed critique of the ideologically driven reaction to the death of Slobodan Milosevic, and his posthumous (re) demonization, see: "Milosevic's Death in the Propaganda System," Edward S. Herman and David Peterson, *ElectricPolitics.com*, May 14, 2006, at: http://www.electricpolitics.com/2006/05/milosevics_death_in_the_propag.html; See, too Alexander Cockburn, "Did Milosevic or his Accusers 'Cheat Justice'? The Show Trial That Went Wrong", *Counterpunch*, March 14th, 2006, at: <http://www.globalresearch.ca/index.php?context=viewArticle&code=COC20060314&articleId=2101>.

to decriminalize aggression and to demonize those who would identify this objective, even in death (and perhaps particularly so) and even if that death was caused by the institution itself.

Whatever happened between June 28th, 2001 and March 11th, 2006, it bore only the most fleeting, cosmetic resemblance to justice. It imitated justice, only to better mock and pervert it. Any serious defense of the UN Charter's *raison d'être*, that is the agreement that disputes between state parties should be resolved without the recourse to force, must consider that Security Council bodies do not further this objective, but indeed have shown to seriously undermine it. If there are lessons to be learned from these disgraceful proceedings, we express our hope that this will be the first among them.

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