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The Deposition Will not be Televised: Wesley Clark's Testimony in the Milosevic Trial

Tiphaine Dickson

The right to a fair and public trial, the cornerstone of criminal justice, has been under attack since September 11th, 2001. The protean war on terrorism has led to a growing culture of judicial opacity and has had the effect of increasing the public's tolerance of closed proceedings, in the name of State security and national interests.

Yet not only in the US-- or at Guantanamo Bay-- have the courthouse doors been slamming shut, and the workings of justice shielded from public view. At the International Criminal Tribunal for the former Yugoslavia (ICTY), the public and the media are often invited to step out of the public gallery for confidential portions of proceedings. The defendant's right to a public trial^[1]-- and the public's right to measure whether justice is truly carried out independently and impartially-- is infringed upon by security considerations with alarming frequency, particularly in the case of Slobodan Milosevic. To exclude the public from even a fraction of such a historically important trial, before a Tribunal created by the Security Council of the United Nations^[2]-- ostensibly to establish truth^[3], reconciliation^[4] and peace^[5]-- would seem to defeat the purpose. How can a UN body disregard UN human rights instruments and General Assembly resolutions which elevate the right to a public trial to the gold standard in the protection of human rights? The fact that the ICTY was created for political considerations provides some insight into the

question. Madeleine Albright was described as "the mother of the Tribunal" by its past President[6], and Madam Secretary also lent her name to the so-called "humanitarian" war in Kosovo[7].

Political Trial, Political Testimony, Political Pressure

Any doubt as to the political nature of the ICTY has been put to rest following the imposition by the US government of bafflingly stringent conditions for the upcoming testimony, on December 15th and 16th, of US presidential candidate Wesley Clark for the Prosecution in the Milosevic case[8]. The American government has succeeded in requiring that General Clark's testimony be held in the absence of the public or press, and has obtained the right to delay the transmission of the testimony for 48 hours, in what the ICTY had called a "temporary closed session." The delayed transmission is designed to permit the US government to "review the transcript and make representations as to whether evidence given in open session (sic) should be redacted in order to protect the national interests of the US". This process will engender a further delay, as the Chamber considers US requests for censorship of the public record, in keeping with the legally nebulous concept of US "national interests".

But what could General Clark have to tell the Security Council Tribunal that he hasn't said in an interview, written in an op-ed, or detailed in one of his two self-congratulatory tomes on the art of war? More importantly, what could he possibly say against the interests of President Slobodan Milosevic that would require the imposition by the US of stringent conditions to protect its "legitimate national interests"?

Could it be that Wesley Clark is a vulnerable witness? In the context of the ongoing-- and apparently endless-- "war on terrorism", might the US government wish to prevent questions being asked about General Clark's role[9]-- and that of his government[10]-- in providing military, financial and political support to the KLA[11], whose well-documented links to Al-Qaeda[12] now threaten to throw intolerable light on the effects of US foreign policy in the Balkans?

The ICTY has already agreed that seven paragraphs of Clark's full statement will be placed under seal, inaccessible to the public. The US government, which has obtained the right to have two representatives present in the courtroom for General Clark's testimony--in contrast to the public, who are entitled to no representative whatsoever-- may request that further evidence be given in private session.

Public Trial?

In other words, while Wesley Clark--a public figure, US presidential candidate and former Supreme Commander of NATO during its bombing of Yugoslavia-- testifies at the trial of Slobodan Milosevic--the trial of the century-- the public and media will be shut out. For 48 hours, the public will wait for the US government to decide what it believes the media can be trusted to report, and what must be cut from the public record, in the name of "national interests". During the invasion of Iraq, embedded journalists obtained information in a timelier manner. And upon what basis will the Chamber decide whether or not to grant US requests to cut evidence from the public record? Isn't the concept of "national interest" a somewhat subjective, political notion, making the adjudication of its content and

applicability next to impossible? A foreign government-- the sole superpower-- imposes conditions on the testimony of a retired general and presidential candidate against the former president of the nation bombed under the orders of the witness. The conditions of the testimony violate internationally recognized rights to public trials. The conditions violate the rights of the accused, the media, and the public. That a court of law -- much less an international tribunal purportedly designed to uphold human rights and bring an end to the culture of impunity-- would accept such outrageous conditions is unthinkable, unless this is a political, rather than judicial process.

The public nature of the judicial process is vital to any democracy: public access to open justice ensures fair trials. Only if justice is accessible can the people form an opinion as to whether trials conform to national and international standards[13]. Public access to criminal proceedings protects defendants from malicious, abusive, or political prosecutions, carried out in secret, far from public scrutiny. In the context of the Milosevic trial, these considerations apply with greater urgency still, given the political nature of the Tribunal, the proceedings, as well as the financial and institutional support received by the ICTY from certain governments and individuals[14], whose preoccupations and interests are at odds with the requirements of justice as envisaged by international and domestic standards.

"National interests" trump cross-examination

Slobodan Milosevic's right to cross-examine Wesley Clark has also been severely curtailed-- contrary to the rights set out by the ICTY's Rules of

Procedure and recognized in all adversarial systems of law. He will not be entitled to question General Clark on matters of credibility, an outrageous restriction in light of the fact that Clark, a US presidential candidate, has recently acknowledged that the 78-day bombing campaign against Yugoslavia by NATO-- a campaign for which he was directly responsible-- was carried out in "technical" violation of international law[15].

Questions of credibility inevitably arise with respect to a witness testifying about Mr. Milosevic's intent and good faith as a negotiator. In such a case, the defence would be entitled to question the sincerity of the witness, one who ordered the bombing of the RTS television studios in Belgrade[16], just as a link-up was being established for an interview with Larry King on CNN[17]. One could ask about the bombing of a passenger train, and in particular, about the less than forthright justification provided by the witness, publicly, for that incident of "collateral damage"[18]. In particular, Clark could be asked why he stated to the press that the train's speed was such that the missiles' trajectories could not be altered, using altered videotape footage—shown at three times the normal speed—to support his justification for these civilian deaths. General Clark's incredible explanations for the bombing of the Chinese embassy— one of which was : « I had another call that said, "Whoops. It looks like the embassy was moved »[19] would also constitute appropriate lines of cross-examination. It is presently unknown to the public if Clark will even be questioned with respect to the bombing campaign. If his statement does not cover NATO's attack on Yugoslavia, Slobodan Milosevic will not be entitled to raise it at all, as the conditions obtained by the US government limit questions asked to the content of Clark's statement[20]. The ICTY has allowed Mr

Milosevic to "seek to have the scope of examination expanded by prior agreement of the US government"[21]. This delegation of judicial authority by the Trial Chamber to the US government would be comical if it were not such a striking manifestation of this institution's incapacity to act judicially. Why can't President Milosevic apply to the judges to request a wider scope of cross-examination? When did the US government replace the judges on the bench? No legal explanation or authority is provided by the ICTY's decision to justify such an incredible measure. It is simply an admission that this institution cannot adjudicate the facts or apply the law with the independence and impartiality required by international legal authority as well as its own statute, which provides that "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses"[22].

The Rules of the ICTY also set out that "all proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided."[23] Exceptions to this rule do not include the imposition, by a foreign government, of closed sessions and censorship of the public record, based on "national interests"[24], even when that foreign government is an indispensable financial contributor to the Tribunal.[25]

"National interests"

What are "national interests", anyway? One could be forgiven for concluding that they could mean anything. The law is silent as to the definition of this notion. The concept of "national security" however, has

been studied and defined as a legal concept. In particular, the question of whether and when the public can be deprived of access to information in the name of national security was the object of an important international legal conference held in Johannesburg in 1995, at which the "Johannesburg Principles on National Security, Freedom of Expression and Access to Information", were adopted. The meeting was convened by Article 19, the International Centre Against Censorship, and the Centre for Applied Legal Studies of the University of Witwatersrand, South Africa[26].

A restriction to open justice, on the ground of "national security"--and not "national interest"-- a concept which would appear to protect less urgent concerns--is not, according to Principle 2 of the Johannesburg Principles "legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the threat or use of force, whether from an external source, such as a military threat, or an internal source, such as incitement to overthrow the government."

Did the US government argue that the very existence or territorial integrity of the United States of America would be imperiled by Wesley Clark's public testimony? It is unknown whether they did or not, because the application made by the US government to require these conditions--without which conditions they would not permit Wesley Clark to testify at all-- was confidential. The hearing was confidential. And the confidential decision setting out these conditions--released to the public over two weeks after being handed down--fails to offer any indication of which "national interests" were invoked by the United States government to justify such sweeping measures of secrecy.

The Johannesburg Principles also set out what would not constitute a legitimate restriction to a public trial on the basis of national security:

"In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."[\[27\]](#)

Clearly, the fact that the ICTY would accept the imposition by the US of conditions which egregiously violate one of the most fundamental principles of international law--public trials-- without a public case ever having being made to justify such an unprecedented restriction, should thoroughly dispell any myths about the fairness of these proceedings.

Consider, in addition, that Wesley Clark is very much a public figure, he is running for President of the United States, and accordingly, his testimony should be subject to public scrutiny. And note that General Clark, retired, testifies against Slobodan Milosevic in interviews almost every day-- and frequently engages in derisive imitations of him which mock his Slavic-accented English[\[28\]](#). Could it be that the ICTY is protecting the US "national interest" in the public and media by not hearing Slobodan Milosevic effectively cross-examine Wesley Clark?

The US government has succeeded in insulating Clark's testimony from public scrutiny in the name of "national interests". But why stop at General Clark? And why would other NATO countries fail to seize this opportunity to testify as accusers without having to bear the consequences of a transparent process? This precedent will no doubt be invoked to protect

other American officials[29] from the strains of public trials, and in turn, serve to further secure US impunity under international law. US impunity is already well-established, considering the American government's refusal to submit to the jurisdiction of the International Criminal Court for fear of "political prosecutions"[30]. Such a concern, when viewed in light of the massive US contribution to both ad hoc Security Council tribunals, the ICTY and ICTR-- from which one may presume that the US has culled evidence of unfounded, politically-motivated prosecutions[31]--elevates disingenuity to dizzying heights.

Conflict of interest?

The right to a fair and public trial is the right to a fair and public trial before an independent and impartial tribunal. Every international legal instrument recognizes this basic principle[32].

Wesley Clark will presumably be testifying about his role as NATO Supreme Commander. The US is a NATO country--arguably the NATO country. As Wesley Clark put it: "we're the leaders of NATO, we set up NATO, it's our organization." [33] The ICTY is in a difficult position to act as an independent judicial body, because NATO has stated that "it is one" with the Tribunal. NATO spokesman Jamie Shea, on May 16th 1999, told the press that when "Justice Arbour starts her investigation, she will because we allow her to. (...) NATO countries are those who have provided the finance to set up the Tribunal, we are amongst the majority financiers (...)so let me assure that we and the Tribunal are all one on this, we want to see war criminals brought to justice and I am certain that when Justice Arbour

goes to Kosovo and looks at the facts she will be indicting people of Yugoslav nationality(...)"[34]

It is difficult to imagine a more damning admission. By stating that its constituent countries are the Tribunal's major financiers, NATO is in essence claiming to pay the salaries of the judges and prosecutor of the ICTY. And that statement is somewhat inconsistent with the requirements of institutional independence and impartiality for a criminal trial. And when NATO's former Supreme Commander,-- a board member of George Soros' International Crisis Group, alongside Canadian Supreme Court Justice Louise Arbour[35] -- is given an opportunity to testify in the absence of the press because this is a condition imposed by the United States -- any appearance of justice, beyond the cosmetic trappings of judges' robes, and the ritual incantations "all rise" and "be seated" (although who will be there to rise and be seated?) vanish in a puff of smoke.

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[1] Article 14 of the International Covenant on Civil and Political Rights states:

"In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and

public hearing by a competent, independent and impartial tribunal established by law..."

Paragraph 106 of the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),(S/25704), recognized the application of international legal safeguards to the ICTY:

"It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights."

[2] United Nations Security Council Resolution 827 (1993).

[3] "Speaking during the debate on the resolution that committed the U.N. Security Council to the creation of the ICTY, Secretary of State Madeleine Albright asserted that "[t]his will be no victor's tribunal. The only victor that will prevail in this endeavour is the truth.", Remarks of ICTY President Theodor Meron, October 7th, 2003, before the Commission on Security and Cooperation in Europe, (CSCE), Washington,http://www.csce.gov/witness.cfm?briefing_id=269&testimony_id=437

[4] "The role of the Tribunal cannot be over emphasized. Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace." First Annual Report of the ICTY, (A/49/342 - S/1994/1007) submitted by former ICTY President Judge Gabrielle Kirk McDonald.

[5] "the Security Council stated in Resolution 808 (1993) that it was convinced that in the particular circumstances of the former Yugoslavia, the

establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace." Paragraph 26 of the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Presented 3 May 1993 (S/25704). Security Council Resolution 827 adopted this reasoning as a justification to establish the ICTY.

[6] Judge Gabrielle Kirk McDonald, first President of the ICTY, made this statement at an awards ceremony held at the U.S. Supreme Court on April 5th, 1999: "[W]e benefited from the strong support of concerned governments and dedicated individuals such as Secretary Albright. As the permanent representative to the United Nations, she had worked with unceasing resolve to establish the Tribunal. Indeed, we often refer to her as the 'Mother of the Tribunal.'" Quoted in Prosecute NATO, George Szamuely, New York Press,

http://www.balkanpeace.org/library/fa_2000/jan/fa250100.html.

[7] See Online Newshour, June 10th 1999:

JIM LEHRER: Does it bother you when people called it Madeleine's war?

MADELEINE ALBRIGHT: Well, I had... it had never occurred to me that anybody would call a war after me, but it doesn't bother me at all that people know that I believed, as did President Clinton, that this was a situation that could not go on.

http://www.pbs.org/newshour/bb/europe/jan-june99/albright_6-10.html

[8] "Decision on Prosecution's Application for a Witness Pursuant to Rule 70 (B)", Prosecutor v. Milosevic, IT-02-54-T, 30 October 2003, Confidential, released November 16th, 2003.

[9] As military aide to Richard Holbrooke during the 1995 Dayton Peace Accords, as Director for Strategic Plans and Policy within the Joint Chiefs of Staff from 1994 to 1997, and as Supreme Allied Commander of NATO from 1997 to 2000.

[10] Brendan O'Neill, "How We Trained Al-Qa'eda", The Spectator, November 22nd, 2003, <http://www.spectator.co.uk/article.php3?2003-09-13&id=3499#articletop>.

[11] Id., Craig Pyesjosh Meyer and William C. Rempe, "Terrorists Use Bosnia as Base and Sanctuary", Los Angeles Times, October 7, 2001; Michel Chossudovsky, "Regime Rotation in America: Wesley Clark, Osama bin Laden and the 2004 Presidential Elections", Center for Research on Globalization, October 22nd, 2003, <http://globalresearch.ca/articles/CHO310B.html>.

[12] Cliff Kincaid, "Wesley Clark's Ties To Muslim Terrorists", Accuracy in Media, September 17, 2003; Brendan O'Neill, "How We Trained Al-Qa'eda", The Spectator, November 22nd, 2003, <http://www.spectator.co.uk/article.php3?2003-09-13&id=3499#articletop>; Craig Pyesjosh Meyer and William C. Rempe, "Terrorists Use Bosnia as Base and Sanctuary", Los Angeles Times, October

7, 2001; Michel Chossudovsky, "Regime Rotation in America: Wesley Clark, Osama bin Laden and the 2004 Presidential Elections", Center for Research on Globalization, October 22nd, 2003, <http://globalresearch.ca/articles/CHO310B.html>; Nikolaos Stavrou, "Balkan Branches of the Terror Network?", Washington Times, October 21, 2001; George Szamuely, "Home-Grown Terrorism", New York Press, December 28, 1999.

[13] Amnesty International, Fair Trials Manual, http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm#14

[14] Although the ICTY's Statute provides that the Tribunal is to be financed by the regular budget of the UN, which constitutes a safeguard against the violation of judicial independence, the Tribunal has received donations from governments, including the US, as well as private foundations, such as the Rockefeller Foundation. See paragraph 16 of the First Annual Report by the President of the ICTY, <http://www.un.org/icty/rappannu-e/1994/index.htm>. The ICTY has also received donations from George Soros as well as corporations. Of interest is the "private" financing of exhumations, for the Office of the Prosecutor: "Funding for mass grave exhumations in the former Yugoslavia is not part of the Tribunal's regular budget but comes primarily from PHR (Physicians for Human Rights-ed.). That organisation acts as a conduit for funding from IGOs and NGOs to the Tribunals for the former Yugoslavia and Rwanda. To date, a number of foundations, including the US-based John Merck, Rockefeller and Soros (Open Society

Institute) Foundations, and the Dutch organisation Novib, have made donations of cash, equipment and personnel."

See <http://www.un.org/icty/BL/o8art1e.htm>.

[15] "Meet the Press", November 16th, 2003, <http://www.msnbc.com/news/994273.asp>; Peter J. Boyer, "General Clark's Battles", The New Yorker, November 17th, 2003.

[16] Reporters sans frontières, November 2000 Report, "Serbian Broadcasting: Chronicle of Martyrdom Foretold", http://www.rsfs.org/rsf/uk/html/europe/rapport/serbie_rts.html. Both Amnesty International and Human Rights Watch have concluded that the bombing of RTS-- which killed 16 people-- was carried out in violation of international law, id.

[17] Robert Fisk, "Taken In By the NATO Line," The Independent, July 2, 1999.

[18] "NATO used speeded-up film to excuse civilian deaths in Kosovo: newspaper", AFP, January 6, 2001: " (...) US General Wesley Clark, shortly afterwards showed two videotapes of the train appearing to be traveling fast on the bridge, and said it had then been impossible to alter the missiles' trajectories. The Frankfurt newspaper said the two videotapes were both shown at three times normal speed. A spokesman for NATO'S military command in Mons, Belgium, acknowledged in a telephone interview with AFP that those images had been altered by "a technical problem." The footage, recorded by a camera installed in the warhead of one of the missiles that destroyed the bridge and train were altered during the process of being copied for screening, said the spokesman. He said NATO was

aware of the problem since last October but did not consider it "useful" to disclose it."

[19] "About five in the morning, I had another call that said, "Whoops. It looks like the embassy was moved." Interview, General Wesley Clark, Frontline,

PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/clark.html>

[20] ICTY Decision, *supra*.

[21] *Id.*

[22] ICTY Statute, Article 20, paragraph 1.

[23] *Id.*, paragraph 4.

[24] Rules 70 and 79 of the ICTY Rules of Procedure and Evidence exhaustively set out permissible exceptions to the requirement of public hearings.

[25] The President of the ICTY, Judge Theodor Meron, stated the following, last October 7th, before the Commission on Security and Cooperation in Europe (CSCE) in Washington: "As you know, the United States took a leading role in the creation of the ICTY and remains a staunch supporter. The U.S.'s financial contribution accounts for approximately a quarter of the Tribunal's annual budget of approximately \$ 120 million." http://www.csce.gov/witness.cfm?briefing_id=269&testimony_id=437

[26] <http://www.derechos.org/nizkor/excep/johannesburg.html>

[27] Johannesburg Principles, Principle 2 (B).

[28] N.R. Kleinfield, "General Clark on the Hustings: Complexity and Contradiction", New York Times, November 23rd, 2003, <http://www.nytimes.com/2003/11/23/politics/campaigns/23CLAR.html>; Seth Rogovoy, "A General for President?", September 13th, 2003, The Atlantic Monthly, Tom Junod, "The General", August 2003, Esquire.

[29] Christopher Marquis, "US Seeks Safeguards on Diplomats Testifying at Milosevic Trial", New York Times, June 13th, 2002 Global Policy Forum-International Justice, <http://www.globalpolicy.org/intljustice/tribunals/2002/0613mil.htm>

[30] US Department of State, International Information Programs, "U.S. Restates Objections to International Criminal Court U.S. statement to General Assembly Sixth Committee", October 14th, 2002:

"In a speech to the General Assembly's sixth committee, which deals with legal matters, Nicholas Rostow explained the U.S. position on the court. "The United States is concerned about the danger of politically motivated prosecutions," Rostow said. "Examples of investigations or prosecutions based on political agenda, not evidence and neutral prosecutorial judgement abound. The structure of the ICC makes such unacceptable proceedings possible."

<http://usinfo.state.gov/topical/pol/usandun/02101615.htm>

[31] Id.

[32] Universal Declaration of Human Rights, Article 10; International Covenant on Civil and Political Rights, Article 14; European Convention on

Human Rights, Article 6; African Charter of Rights, Articles 7 (d) and 26; American Convention, Article 8(1); Basic Principles on the Independence of the Judiciary. According to the UN Human Rights Committee, the right to be tried before an independent tribunal "is an absolute right that may suffer no exception": *González del Río v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, paragraph 20.

[33] June 20, 2001, Uncommon Knowledge, Transcript 606: Waging Modern War, www.uncommonknowledge.org/01-02/606.html

[34] Press Conference, 16 May 1999. www.nato.int/kosovo/press/p990516b.htm

[35] <http://www.intl-crisis-group.org/home/index.cfm?id=1139&l=1>