

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T
CASE No. IT-02-54-T

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 19 January 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

THE PROSECUTOR

v.

SLOBODAN MILOSEVIC

Public

MOTION FOR ACCESS TO EX PARTE FILINGS
IN THE *SLOBODAN MILOSEVIC* CASE RELATING TO
SREBRENICA INTERCEPTED CONVERSATIONS

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadzic

1. On 5 June 2009, the Trial Chamber authorized Dr. Karadzic to have access to the *inter partes* confidential filings in the *Slobodan Milosevic* case.¹ Dr. Karadzic now moves the Trial Chamber, pursuant to Rule 75, for an order granting him access to those *ex parte* filings in the *Milosevic* case dealing with the requests of the prosecution for a binding order against the United States to obtain intercepted conversations relating to Srebrenica.

2. In a recent article in the *London Review of Books*, Sir Geoffrey Nice, the lead prosecutor in the *Milosevic* trial, stated that a great deal of publicly available material existed which indicated that the United States intercepted telephone conversations related to the July 1995 events in Srebrenica, including conversations between Milosevic and General Mladic and material that Vice President Al Gore read at a meeting of senior officials.²

3. Sir Geoffrey indicated in the article that during the *Milosevic* trial, the prosecution team has made an application to obtain these intercepted conversations and that the prosecution was very close to receiving a final order from the Court. He further indicates that the application was withdrawn at the request of Prosecutor Carla del Ponte, on the "instructions" of a third party.³

4. Dr. Karadzic intends to make a motion for binding order requesting that the Trial Chamber order the United States to produce intercepted conversations related to Srebrenica. As early as 2 June 2009, he has requested from the United States intercepted conversations relating to his own communications during the events in Srebrenica.⁴ The United States has not agreed to produce the requested documents.

5. Dr. Karadzic wishes to include in a forthcoming binding order motion directed to the United States other categories of intercepted conversations relating to Srebrenica which will shed light on the events there and who was responsible for them. In order to frame that request with as much specificity as possible, it is necessary to have access to the prosecution's applications for this material, which of necessity would have included

¹ *Decision on Motion for Access to Confidential Materials in Completed Cases* (5 June 2009)

² Geoffrey Nice, 'Del Ponte's Deal' (16 December 2010), Vol 32 *London Review of Books*. A copy of this article is attached as Annex "A" to this motion.

³ *Ibid.*

⁴ *Motion for Binding Order: United States of America* (11 September 2009) at paras. 31-32, Annex A, item 10

factual representations concerning the existence of the intercepted conversations and their likely participants.

6. Dr. Karadzic's legal advisor has searched through the confidential *inter partes* material from the *Milosevic* case made available pursuant to the Trial Chamber's order. However, no information was found that was related to any application to the Chamber for an order to have the United States provide records of intercepted conversations to the prosecution.

7. The jurisprudence of this Tribunal holds that a party is entitled to seek confidential material from another case before the Tribunal. The test for granting access to *inter partes* material is whether the party seeking access has identified or described it by general nature and has established that it may be of material assistance to its case or that there is at least a good chance that it would – namely, whether a legitimate forensic purpose for such access has been shown.⁵ The Trial Chamber has already determined that Dr. Karadzic has met this requirement with respect to Bosnia-related material from the *Milosevic* case.⁶

8. The jurisprudence of this Tribunal holds that to obtain access to *ex parte* material, a slightly higher standard applies. It is necessary that Dr Karadzic establish a particularised showing of legitimate forensic purpose greater than simply a geographical and temporal overlap between the two cases.⁷ In paragraphs 5 and 6, above, Dr. Karadzic has established the need for the material beyond the simple geographical and temporal overlap between his case and that of President Milosevic.

9. Therefore, it is respectfully requested that the Trial Chamber order that Dr. Karadzic should have access to all *ex parte* filings in the *Slobodan Milosevic* case related to prosecution's requests for a binding order against the United States to obtain intercepted conversations relating to Srebrenica.

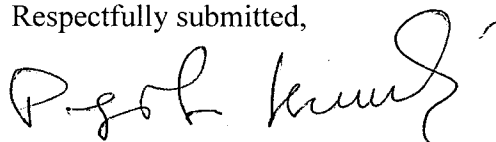
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⁵ *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 214; *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Motion of Boskoski Defence for Access to Registry Minutes of a Meeting Between the Chamber and the Office of the Prosecutor on 10 September 2002 in Case No. IT-02-55-MISC-6* (1 October 2007) at para. 4

⁶ *Decision on Motion for Access to Confidential Materials in Completed Cases* (5 June 2009) at para. 22

⁷ *Prosecutor v Simic*, No. IT-95-9-A, *Decision on Defence Motion by Franko Simatovic for Access to Transcripts, Exhibits, Documentary Evidence and Motions filed by the Parties in the Simic et al Case* (12 April 2005) at page 4.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', with a stylized flourish at the end.

Radovan Karadzic⁸

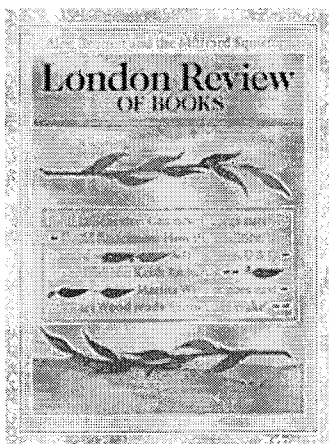
⁸ The assistance of Legal Intern Julia Kretzenbacher of Australia in the research and drafting of this motion is gratefully acknowledged.

ANNEX "A"

London Review of Books

This article can be found online at: <http://www.lrb.co.uk/v32/n24/geoffrey-nice/del-pontes-deal>

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Del Ponte's Deal

Geoffrey Nice

- *Twilight of Impunity: The War Crimes Trial of Slobodan Milosevic* by Judith Armatta
 Duke, 545 pp, £26.99, August 2010, ISBN 978 0 8223 4746 0

Slobodan Milosevic died in March 2006, a few months before his trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague would have ended. The trial, at which I led the prosecuting team, had already lasted just over four years. Although there could be no verdict, the trial left an immense, and at present largely inaccessible, archive of evidence: audio and video recordings of every witness complete with transcripts, together with a mass of contemporary documents, videos and other exhibits. For lawyers, the trial left behind new jurisprudence, together with procedural innovations that are already in use in trials still going on at the ICTY and other international criminal courts.

Only a few journalists followed the proceedings in The Hague on a regular basis. Judith Armatta was one of them, filing regular reports for the Coalition for International Justice from 2003 to 2006. Armatta wanted the tribunal to work. More than that, she, and others like her, were committed to seeing Milosevic and other indictees convicted. But, however understandable it may be to prejudge the guilt of those accused of grave crimes and to wish to see them punished, it does not enhance one's powers of observation.

All court systems that function well do so because they are well supervised: by

governments, parliaments and, most important, by a vigorous press. The international courts established by the UN, and the permanent International Criminal Court (ICC) set up in 2002, are effectively free from these controls. The UN is not a governmental institution willing to analyse critically the work of its courts. Within the UN, criticism is unwelcome. The General Assembly is not a parliament where a member may publicise a particular judicial failing. As for the media, international criminal courts are mainly of interest in the country where the alleged crimes were committed and where the perpetrators and victims lived. Since Milosevic's arrest and trial, little that's gone on in the tribunal has attracted international attention, aside from accounts of Radovan Karadzic's arrest in 2008, after 12 years on the run, and Serbia's continuing failure to deliver General Mladic to The Hague. The world's press – unlike the press in the former Yugoslavia – is largely indifferent. There is a real need for critical, even sceptical journalists to oversee war crimes trials. The presumption of innocence could hardly be more important than when covering the trial of a man who was as inept as Milosevic was at running his own defence and who died before judgment was given.

Armatta dedicates her book to Sir Richard May, an English circuit judge who presided over the trial until just before the end of the prosecution case in February 2004, and died shortly afterwards. Despite this, most of her critical comments are directed at the judges' failure to reform matters of procedure to the extent the prosecution sought, and to discipline Milosevic more firmly in his conduct of his own case. She takes my side in the 'grumpy' encounters I had – more frequent than I had recalled – with Judge Robinson, who took over as presiding judge when May was replaced by Lord Bonyon from Scotland. This is gratifying, but in her generosity to the prosecution she misses an important point. 'Counsel,' May remarked, 'always thinks the judge has got it wrong and the judge always thinks counsel has got it wrong.' Has Armatta really considered the judicial point of view fairly, when she criticises the judges for refusing various procedural and substantive applications I made on the prosecution's behalf? The judges were obliged by the UN to conduct trials according to the (arguably inappropriate) adversarial model used in the UK, the US and many other countries, where constituent elements of the charges may be proved by the prosecution and where the accused tries to block that proof. Judges in an adversarial system are not strictly concerned with establishing 'truth': their task is to supervise a contest of proof and the

fairness of this contest is critical to reaching a successful verdict.

The Hague court found itself dealing with the largest trial to date of a former head of state, and in particular with Milosevic's conduct in three wars waged over a period of eight years. It's no wonder that the court was cautious. Its decisions on the admissibility of evidence, on the timetable, and on Milosevic's desire to represent himself were all appealed to the ICTY's own appeals chamber in the course of the trial. The careful – if belated – decision to impose professional counsel on Milosevic was effectively reversed by that chamber, which made it look as though Milosevic had triumphed over the judges. The verdict, had there been one, would inevitably have been appealed – probably by both sides for different reasons – to an appeals chamber that seemed incapable of agreeing with the decisions reached by the trial judges it oversaw.

With all this in mind, the judges had to be careful. Milosevic had, surely, been allowed enough procedural leeway. By the end of the trial he would have been given every opportunity to conduct his defence as he wanted within a liberal but reasonable construction of procedural rules that the judges could not change. That they did not, for example, allow the 'Skorpions video' (of which more in a moment) into evidence, or let me cross-examine my own witnesses in a way that would have pleased both Armatta and me, is not to the point. They wanted to make sure that the trial would not be vulnerable to appeal on grounds of being procedurally unfair.

Armatta ascribes characteristics to Lord Bonython based on her sense of his reputation in Scotland, but her findings are at odds with my understanding that he was firm but absolutely fair with any defendant, however incredible his defence might seem: qualities entirely appropriate to the Milosevic trial, it might be thought. She tends to take all witnesses and evidence adverse to Milosevic pretty much at face value. Her account of what happened at Srebrenica – or, to be more accurate, her account of the account the trial produced of what happened at Srebrenica – is less convincing as a result. She also supplements her account of the evidence with material that was not given in evidence. She relies, for example, on what Carl Bildt says in his book *Peace Journey* about Milosevic's role at Srebrenica, although this was never tested in the courtroom.

The evidence of General Wesley Clark presented peculiar difficulties. He gave

evidence under the auspices of the US government as a result of arrangements made years earlier with the Prosecutor's Office (OTP). Although he had written a book that discussed nearly everything we wanted him to give evidence about, he was unable to give it without American consent, or so it was argued. His evidence was initially taken in private and not released to the public until it had been 'crawled over' in Washington for passages that were to be excluded on security grounds. Every other witness who was concerned about security relied on the 30-minute delay between the evidence being given in court and its transmission by video, which allowed their lawyers to have anything sensitive redacted. The unique 'privilege' Clark enjoyed may not have been his choice, but it showed the power certain governments held over the court.

Clark had one crucial piece of evidence. He'd had a conversation with Milosevic in which Milosevic said he had tried to hold General Mladic back at Srebrenica: 'I warned Mladic not to do this, but he didn't listen to me,' Clark says Milosevic told him. Clark interprets 'this' as a reference to the massacre of some 8000 men and boys in Srebrenica, not merely to the taking of the town. Armatta had to wait for the US to allow the court to release a videotape of Clark's evidence before she could find out what he said or the way he said it. She was not able to see the examination and cross-examination of Clark in court – as we did – and perhaps can't be criticised for failing to consider other interpretations of the words Clark quoted. (Milosevic denied saying them at all.) Armatta doesn't make anything of the unusual circumstances surrounding Clark's evidence – including a last-minute character reference faxed by President Clinton – which could have worried the judges more than the video evidence would have revealed. Armatta sees Clinton's fax as evidence of Clark's integrity, but those of us inside the 'fishbowl' of the court – with its dramatic but probably unnecessary bulletproof-glass wall separating us from the public and journalists – were better able to judge the atmosphere in the court. How much difference would it have made had Clark given evidence in the way everyone else did?

Armatta also gives an inaccurate account of the attempt to produce in court the records of Serbia's Supreme Defence Council (SDC), which covered eight years of meetings between Milosevic and others, and showed, inter alia, the scale of Serbia's military and paramilitary involvement in Bosnia. The records were critical to the case and there was no national security interest at stake to

justify their not being produced in full and in public: in fact, as a member of the UN, Serbia had a duty to hand them over. Yet my attempts to get the documents from Serbia by consent were unsuccessful. A court process aimed at ordering them to be handed over followed. That process was very close to a conclusion when Carla del Ponte, then the chief prosecutor of the ICTY, unnecessarily and contrary to my written advice, made a deal by letter with the Serbian minister of foreign affairs, Goran Svilanovic, promising that she would not object if the Serbian authorities requested that certain parts of the documents be granted 'protective measures' that would shield them from public view – the judges would be able to see them in full. Armatta accepts that del Ponte wanted the documents produced in full in public even though she never tried to achieve this. Armatta does not reveal the source of her information and did not contact me to check on my recollection of events. Had she done so, I would have told her that my team tried every procedural means to have the restriction lifted and correct del Ponte's mistake.

The consequences of del Ponte's actions became clear in February 2007, when Bosnia-Herzegovina effectively lost its genocide case against Serbia at the International Court of Justice (ICJ), after that court decided not to ask Serbia for the full records, contenting itself instead with the 'blacked out' versions made available for public consumption by the ICTY.

In an endnote, Armatta suggests that the recent debate about the 'protection' of these documents has been 'vitriolic'. I have no idea where this comes from: everything that has been written on the subject starts with a factual account of the written agreement between del Ponte and the Serbs. Svilanovic admitted that the documents had been blacked out in order to keep information from the judges at the ICJ. In an article published in the *New York Times* on 9 April 2007, del Ponte acknowledged that she had written to him but claimed that 'we' decided to allow protective measures to be taken. I made it clear that she had acted despite my specific advice to the contrary. After her role in the censoring of these documents had been exposed, del Ponte, who at the time was still the chief prosecutor, tried unsuccessfully to have the judges' decisions about the protection of documents made public, perhaps in an effort to shift responsibility onto the judges. Del Ponte's former spokeswoman, Florence Hartmann, then published details of these decisions in her memoirs, which led to her being tried by the tribunal, convicted and fined for contempt of court despite much relevant material being available in the public domain.

Armatta should have left the episode out if she was unable to investigate it thoroughly.

She makes a further serious error when in the same endnote she claims that 'all three people' – two others and myself – 'agree that the SDC minutes established Serbia's involvement in planning the attack on Srebrenica and the massacre that followed'. I agreed no such thing. I repeat what I said in an interview in March 2010:

These documents, significant as they are, do not constitute a single body of evidence that will explain once and for all what happened [at Srebrenica] and who was culpable. They do provide a much fuller context and provide some very valuable testimonials of things that were said by Milosevic and others. In their unredacted form they would point all who are interested (not just governments and lawyers) to other documents that have never been provided and that might well be more candid than the words of those at the SD Council meetings who knew they were being recorded by a stenographer.

Armatta deals uncritically with the way we handled, or rather mishandled, the best piece of evidence in the whole case: a video revealing that Milosevic established the paramilitary Red Berets as early as May 1991 to fight in other states of the former Yugoslavia. The witness we called, Kapetan Dragan, a paramilitary leader, had conned lawyers and investigators into thinking he could be relied on to 'produce' the video of an event that proved Milosevic's involvement and at which he himself was present. He ratted on us, however. In evidence he denied his signed statement, and, in the trial's most tragicomic scene, tried to recant everything he had said that was damaging to Milosevic. Armatta's enthusiasm for any evidence against Milosevic – and this video was extremely damaging – leads her to overlook the enormous error made by the Prosecutor's Office: how could our team have been so easily deceived by a witness? But we are all exonerated by Armatta. Should we be? Kapetan Dragan was not the only witness through whom we could have tendered this damning evidence.

A second video, about another paramilitary group, the Skorpions, was our best piece of 'non-evidence'. It showed the killing of six young men or boys during the Srebrenica massacre. The video was immensely valuable since it made it clear that killings were carried out in Bosnia by a group unequivocally

run from Belgrade. I played a few excerpts from it in my cross-examination of a defence witness, Police General Obrad Stevanovic. (That same evening the video was played in full on Serbian television: the effect, it's said, was to change the minds of a majority of Serbs, who had previously believed the Srebrenica massacre was propaganda spread by their political rivals and by the West.) Armatta correctly criticises the judges for refusing to admit this video as evidence on the grounds that it came to light too late in the trial. The evidence was simply too important to exclude. Unfortunately, however, she gives an inaccurate account of how the tape came into the hands of the prosecution, repeating the story that it was handed over by Natasa Kandic, a human rights activist from Belgrade. The true account of how we acquired the video can't be given. Lawyers – like journalists – have a duty to protect their sources.

At another point Armatta claims that the OTP received

information about the existence of intercepted telephone conversations between Milosevic and Mladic that allegedly showed Milosevic's responsibility for Srebrenica. Apparently the United States had control over the intercepts as del Ponte maintains that she wrote to Washington requesting them. Nice sought the court's assistance, though he says he is still not sure the intercepts exist.

A great deal of publicly available material seems to show that such intercepts existed – see, for example, the journalist Andreas Zumach's website or the Dutch government's report, which records that Al Gore read extracts from them at a meeting of senior officials. My team made every conceivable effort to get hold of them, but we found ourselves blocked at every turn. When we were within a few days of getting a final order from the court, del Ponte was instructed by an outside body to withdraw the application and did as she was told. Armatta says these transcripts are important but that they were not strictly relevant to the trial. I can't agree. If Milosevic was advised by the US to allow or encourage Mladic to take Srebrenica, as is widely asserted, genocidal intent would have been hard or impossible to establish. What he knew about what was going to happen would have been little better than what the West knew, if they were listening in to his phone calls with Mladic. According to the prosecution Milosevic was guilty of genocide because he continued to support the Serbs in Bosnia when the criminal outcome was obvious: it would have

been embarrassing, to say the least, had it been revealed that the knowledge available to Milosevic had also been available to the West. Could the West be equally culpable of the genocide – if in law it was genocide?

Related to that was another problem. I would have had to reveal to the accused, before the trial ended, that an outside entity did not want us to know about the intercepts and had the power to stop us getting at the truth. What advantage might Milosevic have gained from that information? Armatta rarely touches on these issues or on the court's vulnerability to improper pressures from within – maybe because the effort we made to keep them obscured was successful.

As a further example of the realities of life in the Prosecutor's Office, very close to the end of the prosecution case I was instructed together with another British lawyer to keep from Milosevic information to which he was absolutely entitled. We were completely compromised in a way that makes clear the advantages to legal systems of the independent advocate – such as we have in the UK – and the vulnerability to corruption of the institutional prosecution lawyer. Although our duty of disclosure was clear, we also had to obey line management instructions from del Ponte, who said that if we were not prepared to keep silent 'there are plenty of lawyers who would do as they were told.' Del Ponte squared her position with the president of the tribunal, who supported her. The third limb of the tribunal, equal in status to the prosecutor and the 'chambers' of judges, was the registry that administered the court. The two men at the top could do no more than wring their hands. I turned to the senior UK government lawyer for these purposes, the FCO 'legal adviser', and got him on the phone in Tanzania. Could he require the court he had in part created to follow the rule of law? 'You're on your own,' he said.

The Bar Council of England and Wales was more constructive. Its Professional Conduct Committee – there is nothing comparable in the UN system – told me that I must leave the case immediately if things could not be put right, something I already knew. At a meeting between other senior lawyers and del Ponte there was nervous support for my view. But when I walked out of the meeting, none of the others followed me. I then circulated to all the relevant judges at the ICTY a memorandum that set out my position: this broke the log-jam. A filing was made that allowed a token amount of disclosure to Milosevic and left us looking faintly respectable as we abandoned the rest of the prosecution witnesses and 'closed our case', before

revealing in public the information we had now provided to Milosevic. Experiences like this cast doubt on the UN's suitability to conduct criminal trials of individuals.

Another problem Armatta and anyone else writing about the Milosevic trial faces is that there was little that was truly exceptional about the men who landed up in The Hague to be tried for war crimes; nor, however ghastly, were their crimes all that extraordinary. There's no point demonising Milosevic as the 'Butcher of the Balkans': a tabloid description that appears on the back cover of Armatta's book – it adds nothing to our understanding of situations in which politicians can mobilise the worst instincts of their countrymen without seeming to have any sense of their own guilt or responsibility.

Milosevic was a lawyer, banker and former Communist apparatchik. He was clearly clever: he could correct (always in his own interest) the simultaneous English-language transcription of evidence in court and beat up witnesses in cross-examination with some skill. He held no extreme philosophical positions and simply hung onto power once it had been offered to him and he had enjoyed its taste. He operated in part through government machinery which allowed him to remain remote from the crimes being committed by Serb militias – the usual privilege of power. But he also operated secret bilateral relationships that hid from view some, maybe much, of what he did. He might have been able to extricate himself from responsibility – he even perhaps had the chance to be seen as a statesman after the Dayton Accords in 1995 – had his connections to crimes in the earlier wars with Croatia and Bosnia not been provable (as they probably were). He ensured his own destruction by the excesses he clearly authorised in Kosovo in 1998 and 1999.

Will Armatta's book, or others like it, get us any closer to achieving what is arguably the most valuable and probably the most realisable objective of these courts, which would be to lay out a record of evidence that could be used to justify earlier and more decisive political and military action in future conflicts with a similar potential for war crimes? We can hope so. But we need to recognise that there is no evidence that the prospect of punishment deters would-be perpetrators of mass atrocities. As Hannah Arendt pointed out, 'no punishment has ever possessed enough power of deterrence to prevent the commission of crimes. On the contrary, whatever the punishment, once a specific crime has appeared for the first time, its reappearance is more likely than its initial emergence could ever have been.'

Geoffrey Nice was the lead prosecutor in Slobodan Milosevic's trial before the International Criminal Tribunal for the Former Yugoslavia.

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