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.
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 Slobo 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.