

PEACE AND PUNISHMENT

The secret wars between international politics and international justice

by Florence Hartmann

Flammarion, Paris, September 2007, 320 p.

On 27 August 2008, the ICTY issued a public "Order in lieu of an Indictment on Contempt" whereby Ms Hartmann was charged with two counts of contempt of the Tribunal

The first count is related to pages 120-122 of "Peace and Punishment"

(The second count is related to another Ms Hartmann's publication: "Vital genocide documents concealed", an article in English published by the London based *Bosnian Institute* on January 21, 2008. See http://www.bosnia.org.uk/news/news_body.cfm?newsid=2341)

Page 116

To prove the indirect involvement of the Serbian State and its leader in the war and the crimes in Bosnia, it was crucial for the Prosecution to produce these documents [the archives of the Supreme Defense Council - SDC] at trial. Seized by the Prosecution, the judges renewed their order on 30 July 2003 for Belgrade to disclose the minutes. Immediately, Belgrade objected to the decision and in mid-October managed to have protective measures for the documents imposed, during an ex parte and head-to-head hearing between the judges and Serbian state representatives, conducted in the absence of the parties to the trial. Plainly, in order to prevent the unsettling truths from being exposed, Serbia convinced the chamber of judges hearing the Milosevic case to grant it authorization to restrict the use of these documents to the Milosevic trial only and to forbid the disclosure of the most compromising passages, not only to the public but also to any judicial body other than the ICTY. The judges could thus rely on all of the documents provided to establish Milosevic's guilt, but would not be able to cite the excerpts which remained confidential in the public version of their judgement.

Belgrade was successful in arguing that the "vital national interests" of the Serbian state were at stake. According to the Rules, however, such a measure can be granted only to protect information that could compromise a country's national security. Under those conditions, Carla Del Ponte no longer felt bound by the written promise she made in May: the Prosecution decided to challenge the decision and requested to be heard by the judges. To no avail. In the autumn of 2003, the Prosecution was unaware of all of the Serbian arguments and the reasons for the Chamber's decision, which remained confidential at Belgrade's request. The Prosecution learned of them only in January 2004 after it attempted to call one of the participants in the SDC meetings to testify.

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Page 119

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The Prosecution did not understand how the ICTY judges could assist a State in concealing evidence from the ICJ, another international judicial body of the United Nations, so as to prevent it from considering the merits of the

case and from entering a potential conviction. This was especially so since nothing in the ICTY's Rules of Procedure allows the judges to grant protective measures for the sole purpose of concealing the responsibility of a State from another court. Even the United Nations Security Council, in paragraph 7 of resolution 827 of 1993 setting up the Tribunal, took care to emphasize clearly that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law". The Prosecution was amazed that a criminal court such as the ICTY would accept a State's political demands and limit the use of evidence submitted to it because that evidence raised questions about the responsibility of individuals or institutions in crimes for

Page 120

which the victims would be legally entitled not only to request but also to obtain reparations, before any court with jurisdiction in this area. And it observed: "The argument is clearly inept, all the more since Belgrade has invoked the massive sums that it would be required to pay for these reparations." But the ICTY chamber of judges hearing the Milosevic case ignored it, letting Belgrade convince it that an ICJ conviction would affect the State's international position and cause irreparable harm to a country whose economy was already ruined. They accepted Belgrade's argument that the disclosure of all of the archives would prevent peace from being restored and kept, and in so doing acknowledged the significance of these documents. The judges, including Briton Richard May, Jamaican Patrick Robinson and South Korean O-Gon Kwon, preferred the presumed stability of a country over the interests of justice and the truth, yielding to the watchword of international relations. In so doing they became accomplices to a lie, pretending to ignore that the "vital national interest" was an argument that had already been used to justify the offences that they were to judge. They refused to ask for further opinions and to compare the arguments of the Serbian authorities to those made by the Prosecution or Defence. Like prosecutors, the judges had the primary duty to identify, to the extent possible, the facts which would shed light on the worst atrocities committed in the former Yugoslavia. The SDC documents were part of this priority and should not have been given preferential treatment when protective measures were granted.

On several occasions, the Prosecution tried to have the decision quashed, but the judges denied each of the requests for appeal. In late September 2005, a new opportunity presented itself. Belgrade, which continued to request protective measures for all of the documents establishing that the Serbian State had authority over its accomplices in Bosnia, had just received authorization from the Appeals Chamber not to disclose to the public certain passages of the personal military files of several high-ranking officers of the Bosnian Serb army, including that of Ratko Mladic,

Page 121

which confirmed, in light of his promotions, that during the war the Bosnian Serb military leader was indeed subordinated to the supreme command in Belgrade. For it was not Karadzic, the political leader of the Bosnian Serbs, but Lilic, the president of Serbia and Montenegro who, by decree of 16 June 1994 and following a decision by the SDC, granted Ratko Mladic an additional general's star. The five Appeals Chamber judges considered that the "vital national interest" argued by Serbia to shield itself from an ICJ conviction for genocide was not admissible, and that the chamber in charge of the Milosevic case erred in 2003 by lumping that interest into the same category as the country's "national security" issues in order to justify the granting of protective measures for the SDC archives. However, rather than remedying the error that it had just discovered and unsealing all of

these documents, the Appeals Chamber in the process noted that the granting of such measures two years earlier had given rise to a "legitimate expectation" from Belgrade that all of its subsequent motions would be granted on the same grounds. In so doing, the five Appeals Chamber judges became willing accomplices in the manipulation organized by the Belgrade government with the sole purpose of encouraging another jurisdiction, the ICJ, to cause a miscarriage of justice due to a lack of access to the documents.

Shocked by this decision, Carla Del Ponte, the Milosevic team and the Prosecution's principal legal advisers met on 21 September 2005 to decide the way forward. They agreed to seize the judges in the Milošević case to submit that the "vital national interest" argument be invalidated, in order to request that the confidentiality of the SDC archives be lifted immediately. On 6 December 2005, Judge Iain Bonomy, who had replaced Richard May, and Judge Robinson agreed, in spite of Judge Kwon's objection, to lift the protective measures in force since 2003, understanding that Belgrade was not attempting to protect its national security but instead to obstruct justice in its search for the truth. Belgrade immediately appealed the decision and obtained a temporary stay, thereby preventing Bosnia from submitting the SDC archives

Page 122

to the ICJ prior to the late February 2006 opening of the hearings of its complaint. On 6 April 2006, after reviewing the Prosecution's arguments, the five judges of the Appeals Chamber, still presided by the Italian Fausto Pocar, decided to quash the decision of 6 December 2005. Information directly implicating the Serbian State in the war in Bosnia and the Srebrenica massacres thus remained inaccessible to the ICJ and the public. The Prosecution was not in a position to publicly denounce the scandal, since the judges had rendered each of their decisions marked "confidential".

In October 2003, Goran Svilanovic and his team of lawyers, who had come to argue the case of the Serbian State before the ICTY, were so surprised by their victory that they feared a review of the decision, which was challenged by the Prosecution. By late 2003, just a few weeks before the close of the Prosecution's case, the minutes of the Supreme Defence Council had still not been transmitted to the ICTY. The Prosecution had to make do with a few excerpts gathered by its experts, who were once again authorized in August 2003 to consult the transcripts and minutes of the meetings on-site in Belgrade. For everything else, it made do with the insiders, that is witnesses who had participated in the criminal enterprise, to illustrate the chain of command, the methods of financing and the direct participation of special units, which had come from Serbia, in the campaign of ethnic cleansing. Using the delay in the transmission of the SDC archives as a pretext, on 15 December 2003 Geoffrey Nice revealed to Del Ponte: "If the defence files a motion for dismissal I will not object to the withdrawal of the count of genocide".

The minutes of the Supreme Defence Council arrived in 2004, after the close of the Prosecution case. The judges admitted them into evidence in 2004, however the Prosecution only had the opportunity to expose a tiny portion of them at trial. In March 2006, that is two years later, Geoffrey Nice sought to take advantage of the arrival of Momir Bulatovic, one of the last defence witnesses on Milosevic's list, to present larger excerpts of the transcripts in cross-examination.