

FRY v. ICTY Case Goes to the Security Council

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The ever-tense relations between the Tribunal and Yugoslavia erupted this week into open conflict, as Belgrade sought to deny the court jurisdiction in Kosovo.

Relations between the Federal Republic of Yugoslavia (FRY) and The Hague Tribunal have never been very cordial, but they sank to an all-time low in early November. Last week FRY entered into open conflict not so much with the Tribunal itself as with the law and will of the international community, whose supreme protectors ought to be the Security Council of the UN.

The Tribunal lived up to the challenge in the first round of the conflict, having demonstrated enviable determination in the defence of not only its mission and jurisdiction, but of the international legal order as a whole. It remains to be seen whether the UN Security Council will show equal determination in the defence of its creation (the Tribunal) and the laws and will of the international community when it decides on the case.

The conflict has been smouldering for a long time (See Updates 97 and 98). At issue is the jurisdiction of the Tribunal in Kosovo. President of the Tribunal Gabrielle Kirk McDonald and Chief Prosecutor Louise Arbour reacted strongly to this autumn's Milosevic-Holbrooke agreement. This removed the immediate threat of NATO air strikes against FRY but contained no explicit provisions to ensure FRY's compliance with the Tribunal's Kosovo investigation launched last summer by The Hague investigators of the Office of the Prosecutor (OTP).

In a letter she sent to President Milosevic on 15 October, Louise Arbour announced that she would personally head the new investigative team for Kosovo, requesting his "assurance that visas will be forthcoming to enable my investigation to continue forthwith." A week later, the OTP announced that Arbour was intending to travel to FRY on 5 November to take part, together with President McDonald, in the Conference on War Crimes Trials in Belgrade (organised by a local NGO, the Humanitarian Law Centre). After this she intended to go on to Kosovo with her investigative team and continue the new criminal investigation there.

On the last weekend of October Belgrade made its first official reply to the Tribunal's Kosovo initiatives. FRY Justice Minister, Zoran Knezevic, sent a message to McDonald and Arbour stating that the Tribunal had no business in Kosovo "as there is nothing about it in the Milosevic-Holbrooke agreement."

There followed a diabolical game, typical of Milosevic, that aimed to demonstrate that Belgrade was cooperative, but only as cooperative as was necessary. At the beginning of the week, a Yugoslav visa was issued to McDonald. McDonald planned to travel to Belgrade early on 5 November, where she would meet with Yugoslav officials and participate in the weekend conference. A day before the planned trip, the FRY embassy in The Hague informed the Tribunal that the visas for Arbour, her deputy Graham Blewitt and ten investigators were "still being processed." Finally, on the evening of 4 November, Arbour was informed that she would be granted a single entry, seven day visa, along with the Deputy Prosecutor, two members of her staff and two security officers, to attend a conference in Belgrade and to meet with government officials. Any investigation was clearly out of question. The letter sent to Arbour added: "As you have already been informed, FRY does not accept any investigation of the International Criminal Tribunal for the former Yugoslavia in Kosovo and Metohija generally, nor during your stay in FRY." In addition, the two UN guards permitted to escort Arbour on her visit to Belgrade would have to be disarmed.

The people behind this strategy knew that Chief Prosecutor Arbour would not accept a visa granted under such humiliating conditions, but they reckoned that as President McDonald was practically on her way they would have her in Belgrade and show her off to the world as a proof of their "cooperativeness". They would let her take part in the academic gathering on War Crimes Trials, and she would be able, if she wished, to hold a press conference and freely criticise the conduct of the Yugoslav government towards the Tribunal. There would, of course, be no one to publish her criticism as all independent media in Serbia have been largely stifled.

Milosevic's perfidious ploy did not work with the Tribunal's Judge McDonald and Justice Arbour, however. On the night of 4 November, McDonald cancelled her visit to Belgrade and readily accepted Arbour's formal request to inform the Security Council of the UN urgently about the latest challenge issued by Belgrade to the laws and will of the international community.

The three densely-written pages of the letter which Arbour sent to McDonald, who then sent them on to the Security Council, represent a catalogue of grave violations of international law. This time Milosevic was

caught red handed. He had ignored numerous articles of the Statute of the Tribunal adopted under Chapter Seven of the UN Charter, making the court represent the highest rank of international law, and enforcing obedience to its word. And he had openly violated the last three resolutions of the Security Council on Kosovo, also adopted under Chapter Seven. In the first of those resolutions (1160 adopted on 31 March, 1998), the Security Council not only explicitly invites, but also "URGES" (Security Council emphasis) "the Office of the Prosecutor of the ICTY to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction, and NOTES that the authorities of FRY have an obligation to cooperate with the Tribunal." In the second (1199 of 23 September 1998) the Security Council "CALLS UPON the authorities of the FRY...to cooperate fully with the Prosecutor of the ICTY in the investigation of possible violations within the jurisdiction of the Tribunal..." Finally, in its Resolution 1203 (24 October 1998), the Security Council "CALLS for prompt and complete investigation...of all atrocities committed against civilians, and (for) full cooperation with the ICTY, including compliance with its orders, requests for information and investigations..."

Such conduct by the FRY government, Arbour concludes in her formal letter to the President of the Tribunal, "is a direct challenge to the authority of the Security Council," and "undermines the ability of the Tribunal to fulfil its mandate and prevents the Tribunal from investigating crimes within its jurisdiction in an independent and impartial manner, as required by international standards."

Accepting Arbour's initiative without hesitation, McDonald described the case in her public statement of 5 November as "a further example of FRY's utter disregard for the norms of the international community." Essentially, McDonald concludes, the FRY "has become a rogue state, one that holds the international rule of law in contempt." Leaving the Security Council in little doubt, McDonald said explicitly that the Yugoslav authorities' conduct "is not only an affront to the International Tribunal as an institution", but also "a direct challenge to the authority of the Security Council." McDonald is not asking the Security Council to protect the Tribunal, but "to vindicate its (the Security Council) authority." It is now time, McDonald concludes, "for the international community to take strong action to prevent obstruction of the mandate that it gave the International Tribunal."

However, it remains to be seen, whether the Security Council will also conclude that "it is now time", or, the confrontation with Milosevic will be put off for some other occasion. They may decide that they have some other, more important "unfinished business" with him first, such as the deployment of 2,000 "verifiers" in Kosovo and getting Milosevic and Rugova, the leader of ethnic Albanians, to sign the draft peace agreement prepared by US mediator Christopher Hill. All in the Security Council are, naturally, in favour of justice in principle, but some would put it off until tomorrow, and deal with today's "more important business" first.

Yet what the Western politicians and diplomats involved in putting out the Balkan fires refuse to understand or admit is that by delaying the confrontation over a "subsidiary" question of justice, they themselves contribute to the current problems related to the Kosovo investigation. If they had demonstrated three or four years ago that they were serious when it comes to the prosecution of war crimes and criminals, and if they had forced Milosevic to surrender the accused, the Kosovo investigation might not have been necessary and the crimes in Kosovo might never have happened.

It is interesting to compare the Tribunal's situation with that of NATO. Until recently NATO generals could visit Belgrade without visas whenever they felt like it and walk between the Presidential Palace and the General Headquarters, escorted by their armed adjutants and bodyguards. They could flaunt their smart bombs and cruise missiles before President Milosevic and his generals. By contrast, the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, created by the Security Council under Chapter Seven of the UN Charter, cannot travel to Kosovo, the scene of the alleged atrocities under her jurisdiction, even with a visa. She applied for this visa as a matter of courtesy, since, as a high representative of the UN she does not need it (hardly the case for NATO generals).

This comparison does not suggest that Milosevic, who is said to "understand only the language of force", fears NATO generals and their threats, and does not fear the Tribunal, which has no power of enforcement, however. In fact, the opposite is true. NATO generals and their threats have helped Milosevic further strengthen his personal power, giving him a pretext to stifle the few remaining independent media that challenged his totalitarian grip over Serbia. That is why they are always welcome guests. This, however, does not apply to the Tribunal. Its investigation at the recent sites of fire and still fresh graves in Kosovo, as well as its repeated insistence on the surrender of three officers of the former Yugoslav Army (JNA) accused of the massacre in Vukovar in November 1991 cannot do Milosevic any good.

UN Secretary General, Kofi Annan, wrote about the recently discovered "appalling atrocities in Kosovo" in a report to the Security Council on 5 October, and concluded: "It is clear beyond any reasonable doubt that the great majority of such acts have been committed by the security forces in Kosovo, acting under the authority of the Federal Republic of Yugoslavia." It was after this statement that FRY authorities, who had not previously obstructed the Kosovo investigation, decided that the investigation violated Serbia's "territorial integrity" and prohibited further investigation.

Serbia's refusal to allow the extradition of the accused JNA officers, who also acted under Milosevic's

authority in November 1991 in Vukovar, is equally unsurprising. As soon as the first officer is extradited people will begin to wonder who the second one will be and the fortress, built of immunity and impunity, and reinforced over the past seven years, will begin to crumble from within. This, clearly, cannot be allowed.

All things considered, Milosevic's perfidious ploy with the visas and his rejection of the Tribunal's jurisdiction in Kosovo is a sign of his frantic fear of the Tribunal, its investigation and its arrest warrants. For Milosevic's regime, the Tribunal is like room 101 described in George Orwell's novel "1984" as the place where everybody faces their biggest fears, where everybody's worst nightmares become a reality. For Milosevic, the Tribunal is not the side-show some Western diplomats and politicians think it is.

The question is, can the Security Council allow itself the luxury of postponement this time? If it does so it will fatally undermine not only the institution of the Tribunal, but its own authority, brought into question by the challenge, as Judge McDonald put it, of one "rogue state."

Location: Balkans
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