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# Book Review, *Twilight of Impunity* by Judith Armatta

Maya Karwande\*

## I. INTRODUCTION

Over the past two decades, international criminal law has expanded its reach to include the prosecution of heads of state. The trial of Slobodan Milošević, the former president of Serbia, marked the beginning of a new era of accountability. After retaining power through years of war in the Balkans, on June 28, 2001, Serbian officials finally handed Milošević over to The Hague where he faced an indictment by the International Criminal Tribunal for the former Yugoslavia (ICTY) for war crimes, crimes against humanity, and genocide. His trial started a year later. Four years later, before a final judgment was rendered, he died. While the Milošević trial was a crucial step forward for international justice, it has been criticized for its cost and length, the problematic nature of the accused's self-representation, and the ultimately inconclusive ending.

In her book, *Twilight of Impunity: The War Crimes Trial of Slobodan Milošević*, Judith Armatta documents and unpacks many of the common criticisms surrounding this historic trial to extract important lessons for improving international war crimes prosecutions. As a court monitor for the International Coalition for Justice, Armatta was in the courtroom every day. This experience enabled her to provide illuminating detail about the witnesses, the evidence presented, and the court record. Armatta uses her wealth of knowledge to illustrate how Milošević attempted to undermine the successful completion of his trial by delaying the proceedings, purposefully manipulating his health, and using the trial to promote his political agenda.

## II. SUMMARY

*Twilight of Impunity* generally follows the chronology of the trial, which

was divided into three parts: Kosova<sup>1</sup>, Croatia, and Bosnia. Although Armatta follows this structure, she also organizes the book around unifying themes such as the type of witness or crime charged. For example, she groups together types of witnesses such as victims and former military officers. She also dedicates a chapter to the charge of genocide. Further, she organizes some of her analysis by the type of evidence provided, such as research reports about conflict and military records of the Yugoslavia People's Army (JNA). Using this structure, Armatta distills important lessons from the trial that are applicable to future war crimes prosecutions.

#### *A. The War in Kosova*

The ICTY gave the prosecution four and a half months to present evidence of Milošević's crimes in Kosova. With the evidence, the Prosecution intended to prove that Milošević was responsible for Serbian forces' war crimes and crimes against humanity through his planning, ordering, or aiding and abetting of their commission by virtue of his superior position to the perpetrators. To prove its case, the Prosecution called victims, journalists, foreign diplomats, generals, researchers, experts, Serbian generals and politicians, and Kosovar politicians.

The trial began with the testimony of a series of victims from Kosova, who explained how their families had been killed and how Serbian police had surrounded their homes and forced them to leave. Commentators have criticized the victims' testimony as a "disappointment" to the public, who were expecting well-known political leaders and other "big names" to start the trial.<sup>2</sup> Armatta rightly questions these reactions to the victim testimony, pointing out that this testimony was both necessary to prove the charges and also supplied the stories and substance at the heart of the trial.

Time constraints limited the Prosecution's ability to present victim testimony. As a result, the Prosecution submitted the majority of victim testimony as written testimony, which the court allowed so long as it did not directly concern Milošević's actions and as long as the accused had the opportunity to cross-examine the witnesses in court. This allowance largely defeated the benefit that written testimony provided in saving time because Milošević insisted on personally cross-examining almost every witness. It also had the unfortunate effect of generally denying the victims' ability to tell their story through direct examination.

In addition to the lack of oral victim testimony, the Kosova-centered part of the trial introduced a difficulty that would plague the rest of the trial—

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1. I follow Armatta's decision to use the Albanian "Kosova" instead of the Serbian spelling, "Kosovo" because of her respect for its status as an independent state.

2. JUDITH ARMATTA, TWILIGHT OF IMPUNITY: THE WAR CRIMES TRIAL OF SLOBODAN MILOŠEVIĆ 25-26 (2010).

Milošević's *pro se* representation. Although Armatta acknowledges the allowances the court should make for *pro se* defendants, she uses the first few chapters of *Twilight of Impunity* to convincingly detail the problems created by Milošević's *pro se* defense. Milošević employed sarcasm to ridicule witnesses and often substituted commentary for genuine questions. Moreover, he used intentional distortions to attempt to discredit witnesses. Although advised several times on the rules of cross-examination, Milošević ignored any directions on proper examination conduct and acted disrespectfully toward both the Tribunal and witnesses. Armatta argues that Milošević simply was not trying to defend himself, did not believe in the legitimacy of the Tribunal, found no reason to follow its rules, and used the trial as an opportunity to speak whenever possible. Further, within the first few weeks of the trial, Milošević required time off for health issues, an indicator of the many delays his medical condition would cause the trial. The Tribunal frequently responded to the delays caused by Milošević's health and his abuse of the trial process by making threats to appoint counsel or to cut off his privileges, but the Tribunal never followed through with these threats. These issues occurred time and again throughout the trial.

### *B. The War in Croatia*

As the Prosecution switched its focus to Milošević's crimes in Croatia, it warned the court of two major obstacles before it in prosecuting the former head of state. The first was the Serbian government's lack of cooperation in producing documents. The second was the risk posed to witnesses by the continued presence of Milošević's powerful and sometimes violent supporters and allies in the Balkans. The danger posed by these supporters meant that many witnesses, including key insider witnesses, would have to testify in closed sessions with additional protective measures.

After several months of foiled efforts, the Prosecution requested the Tribunal's help in obtaining documents from the Serbian government. In its petition to the Tribunal, the Prosecution described the Serbian government's minimal cooperation: the government only delivered documents that the Prosecution could identify with sufficient specificity so as to preclude denial of their existence. Even in these situations, the Prosecution had to continually press the government to produce the documents. However, the Serbian government's resistance seemed to hinder only the Prosecution. At trial, Milošević often produced documents that the Prosecution had been requesting for months. Armatta highlights this occurrence in the cross-examination of Ante Marković, the former President of the Former Yugoslavia. Milošević surprised both the witness and the Prosecution by producing Marković's daily appointment calendar from the latter half of 1991: a document both the witness and the Prosecution had been seeking for years. Despite these incidents, when the Prosecution made an appeal for intervention, the Tribunal nevertheless granted Serbia two more months to produce documents before making a decision on the matter. Be-

cause documents had to be introduced through the correct witnesses, the Tribunal's decision effectively allowed the Serbian government to wait until the very end of the Prosecution's case to surrender documents, at which point it was too late to introduce them into evidence.

In addition to the lack of state cooperation, the Prosecution had to take imperative measures to protect witnesses, many of whom already had been threatened. The Tribunal used closed sessions, voice and face distortions, and pseudonyms. Despite these measures, the Tribunal still had to remain particularly wary of Milošević, who often attempted to disclose identifying information for protected witnesses during the trial. For example, in an open session with a witness who was testifying under several protective measures, Milošević attempted to reveal the identity of the witness through cross-examination. The witness was a former member of the Arkan Tigers, a paramilitary force that was known for being particularly brutal. Despite warnings from the Prosecution, it was not until the witness himself warned the court he could no longer answer without identifying himself that the court closed the session.

As in the Kosova portion of the trial, the court again faced serious time constraints when trying Milošević's action in Croatia. The court struggled to balance the rights of the accused with the Prosecution's initiatives to submit more evidence. The court generally allowed the increased volume of written evidence; however, the court also allowed the defense the right to cross-examine witnesses on written evidence. Following a pattern of behavior established in the early part of the trial, Milošević used his right to cross-examine written evidence frequently, ultimately decreasing the time the Prosecution had attempted to save.

### *C. The War in Bosnia*

After an extension of one hundred days, more than half of which were attributable to Milošević's illnesses, the Prosecution began its Bosnia case. This phase of the trial brought new legal issues in addition to the continued difficulties of Milošević's *pro se* defense and poor health. Unlike the crimes in Kosova and Croatia, the Bosnian case included charges of genocide. To frame the charges, Armatta provides a useful discussion of genocide jurisprudence, advocating for a broader conception of responsibility in general. She notes that in the *Milošević* case, the Trial Chamber dismissed the *amici's* motion to acquit on genocide and found there was sufficient evidence to support the genocide charge. In the decision, the Trial Chamber followed a recent ICTY Appeals Chamber decision and expanded liability for genocide to include actors who may not have genocidal intent but know that their action or inaction was necessary for the resulting genocide. Armatta points out that the Trial Chamber took an expansive view of genocide, indicating that the Chamber, if given the opportunity to make a final ruling on genocide, would have probably favored a broader conception of responsibility for genocide.

As the trial continued, the Prosecution encountered further evidentiary problems. The Prosecution often confronted clearly fraudulent documents that were anonymously delivered to its offices. The Prosecution had to report these documents to Milošević, regardless of their authenticity, and Milošević frequently used them in cross-examination. The court allowed the use of these documents, reasoning that they would be considered for “what they are worth.”<sup>3</sup> Armatta is critical of this lax admission policy, suggesting that it undermined the truth-seeking function of the Tribunal as well as the Tribunal’s credibility. Armatta argues that although allowing looser standards for a *pro se* defendant may promote legitimacy by inducing participation in the proceedings and reducing the chance of a “show trial,” the Tribunal also risks sacrificing legitimacy if the public perceives that the Tribunal enables the defendant to defraud and manipulate the suit. Finding this equilibrium is difficult in a war crimes trial, but the rights of the accused must be balanced with the interests of the public.

Milošević’s health problems continued throughout this portion of the trial, and rumors circulated with increasing frequency that he was purposefully manipulating his medications in an effort to derail his health. After one physical and mental examination, Milošević’s doctor suggested limiting the trial to three days a week, which slowed the its pace considerably. Despite these problems, the Tribunal remained resistant to the appointment of counsel or even less drastic measures, such as limiting the time it allowed Milošević for cross-examination. Despite many obvious efficiency issues, the Tribunal feared infringing on the defendant’s rights. By the close of the Prosecution’s case, it was clear that Milošević’s tactics had significantly inhibited its presentation of evidence. Because of time constraints and Milošević’s manipulations, the Prosecution was unable to fully present evidence on the crimes in Sarajevo. Additionally, much of the important genocide testimony was written and unavailable to the public. As the Prosecution’s case came to a close, the problems presented by Milošević’s *pro se* defense were clear: it had sacrificed efficiency, the legitimacy of the proceedings, and public access to material presented in trial.

#### *D. Milošević’s Defense*

After two years, the Prosecution rested its case and the Defense’s case began. Initially, the Defense faced numerous setbacks. The presiding judge on the case fell ill, resigned, and died. After the Tribunal appointed a replacement judge, Milošević’s continuing health problems further delayed the trial. Finally, in September 2004, the court ordered the appointment of counsel for Milošević. As a result, Milošević stopped all cooperation with the court and organized a witness boycott. The Trial Chamber appointed two *amici curiae* as his defense counsel, but Milošević refused to communicate with them. Defense counsel was

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3. Armatta, *supra* note 2, at 238.

left to defend Milošević without the cooperation of the accused and with only a few witnesses who actually agreed to come to the Tribunal. The Appeals Chamber eventually overruled the *amici curiae* defense system, which effectively put Milošević back in control and left the appointed defense counsel standing by in case his health deteriorated.

At the time of this Appeals Chamber decision, the law on self-representation remained unsettled. Armatta points out that the Appeals Chamber, like the Trial Chamber, focused exclusively on the impact of Milošević's health on the trial when deciding whether or not to appoint counsel. However, Armatta argues that the court should have also considered additional factors, such as the integrity of the Tribunal. She reasons that Milošević's health problems, combined with his disrespect for the Tribunal, apparent manipulation of medication, and obstructionism presented a sufficiently strong case for the appointment of counsel.

Milošević's defense continued to ignore court rules and focus on purely political defenses. Armatta demonstrates how Milošević's defense not only wasted time, but it was also ineffective. Points that could have been part of a legitimate legal defense were buried within attempts to characterize the proceedings as a political trial meant to prosecute the Serbian people. Even amidst the convoluted nature of Milošević's presentation, Armatta identifies some potentially viable defense theories from his statements: (i) Kosovars were forced to leave and often killed by NATO bombings, which were also responsible for property damage to mosques, private homes, and cultural heritage sites; (ii) Milošević did not have control over the Bosnian Serbs and Croats and had nothing to do with any crimes committed by those groups; and, (iii) all supplies Milošević gave to the Bosnian Serb armed forces constituted humanitarian aid and, as such, he is not responsible for the acts of "madmen." These potential defenses remained unsupported as Milošević continued to introduce fabricated evidence, a parade of military officers who simply agreed with all of his statements, and other witnesses who lacked credibility.

Milošević's health deteriorated during this time, largely due to his intentional manipulation of prescribed medicine and use of smuggled, unauthorized drugs that raised his blood pressure. As his health worsened, he attempted to get an extension for his defense case and to arrange for a provisional release to a clinic in Moscow for treatment and testing. The court denied both proposals, and a month later, on March 11, 2005, Milošević was found dead in his cell. Medical reports indicated that he died of a heart attack caused at least in part by his refusal to take prescribed medicine and his use of contraband medication designed to counteract the effects of his prescribed medicine. He was able to sneak the non-prescribed medication in through "privileged" visitors who met with him in a private office space, an extra allowance given to him as a *pro se* defendant. Armatta's claim is that Milošević's final manipulation of his *pro se* status confirmed too late that the Trial Chamber had correctly imposed counsel, and that

the Appeals Chamber should not have reversed that decision. Armatta clarifies that although it appears that the Appeals Chamber facilitated Milošević's actions by allowing his *pro se* representation to continue, it was ultimately Milošević who decided to put his own life and health at risk in an attempt to compel a release to Moscow.

### III. ANALYSIS

Armatta effectively illustrates the unique challenges of prosecuting a head of state. In terms of evidence, one difficulty lies in proving a direct connection between the accused and the crimes committed. Such proof requires massive amounts of evidence documenting the actual crimes, knowledge of the crimes, and the level of control or influence over perpetrators. When the accused's former government controls these documents, it may be difficult for the prosecution to gain access to evidence. Further, despite confinement, the accused may continue to exert influence and intimidation, precipitating a need for advanced witness protection and preventative measures to combat contradictory statements made by insider witnesses. These challenges multiply when the defendant chooses to represent himself, as illustrated by both *Milošević* and the more recent case of Radovan Karadžić, the former President of the Serbian Democratic Party (SDS).<sup>4</sup>

The cost, pace, and frequent legitimacy problems faced in Milošević's trial seem traceable to the decision to allow a *pro se* defense. Armatta convincingly challenges criticisms that the Prosecution should have narrowed its case and demonstrates that rather than prosecutorial error, Milošević's tactics, and the Tribunal's resulting failure to circumscribe his actions, fundamentally slowed the trial's pace. In making the case for increased control over Milošević, Armatta suggests that in a war crimes trial, the tribunal must balance the interests of the defendant against those of the victims and the legitimacy of the tribunal. Although a war crimes trial focuses primarily on the deeds of the individual, its procedure and outcome profoundly impact victims, serving as an acknowledgement of their suffering and setting precedent for similar trials in the future.

Although Armatta touches on the impact war crimes trials have on victims, more attention to the topic would strengthen her analysis. She readily points out potential benefits the trial may have for victims—especially those who testified—but she does not fully address how or whether these benefits might reach the majority of victims who never had an opportunity to confront Milošević in The Hague. While Armatta discusses the importance of a public record, the impact of various procedures on the creation of a public record, and, in particular,

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4. *Prosecutor v. Karadžić*, Case No. IT-95-5/18, Transcript of Initial Appearance, Lines 11-18 (Int'l Crim. Trib. For the Former Yugoslavia July 31, 2008).



the use of written evidence and closed sessions, she does not explain how such a public record ought to be made accessible to victims.

Therefore, although sensitive to the interests of victims, Armatta could better explain victims' receptions of trials, identify outreach efforts made by the ICTY, and demonstrate how victims were able to watch the trial and follow it in a meaningful way. More information from the victims' perspectives would serve as a useful complement to the convincing explanation of the importance of considering the interests of the victims in a war crimes trial.

#### IV.

#### CONCLUSION

Armatta's *Twilight of Impunity* provides an excellent account of Milošević's trial while both highlighting the challenges of prosecuting a head of state and unpacking the typical "lessons learned" commentaries that have emerged from Milošević's trial. As Armatta indicates, although the trial suffered debilitating setbacks, it in no way forecasts the end of international justice. Indeed, the trial has become increasingly relevant as efforts to improve international accountability have multiplied. For example, the International Criminal Court issued an arrest warrant for Omar al-Bashir, the current President of Sudan, and had opened an investigation into the actions of President Muammar Qaddafi in Libya prior to his death. In this context, Armatta's book is a useful contribution to a growing body of literature that explicitly addresses the prosecution of heads of states. Armatta recognizes the special difficulties of prosecuting these officials and offers a nuanced analysis of the decisions made by the Prosecution and judges in one case. In addition to procedural elements, such as *pro se* representation, Armatta highlights the practical difficulties of prosecuting someone who once exercised complete power and still retains great influence in his home country.