

Project:

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An Interview with

David Scheffer

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Interviewee: David Scheffer (DS)

Interviewer: Mirko Klarin (MK)

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American jurist and diplomat David Scheffer, the first United States

Ambassador-at-Large for War Crimes Issues in President Bill Clinton's Administration, speaks about his role in establishing the International Criminal Tribunal for the former Yugoslavia and about the circumstances that thwarted his appointment as the judge of the Tribunal in January 2000.

MK: You are considered to be one of the founding fathers of this institution. Could you explain your role in the creation of the ICTY?

DS: Well, I happened to be in a very fortunate position in late 1992 because I was on the campaign for President Clinton to be president. So when he was elected, I was asked to assist Ambassador Madeleine Albright prepare for her confirmation. She was confirmed and I was her first hire. And immediately in early February of 1993 she was at the UN, I was her legal counsel, and we were deeply involved with the Balkans conflict. We were the new team and it hit us broadside. And she wanted to make a difference. So she gathered support within the Security Council to find some means of finding justice. And that led to a resolution in late February of 1993 to create the Tribunal. She asked me to do a lot of the staff work, to take the issue up, and to push it forward. And I did that. And so I immediately became involved in, not only the creation of the Tribunal in that first resolution, but then we had a second resolution in May of 1993 to actually create the Statute and the building.

And from that point forward much of my job was to show American support for this process, to help find the staff, to help fund it, to make sure it had sufficient funds. And that started a long journey with the Yugoslav Tribunal that lasted throughout my eight years with the Clinton administration.

MK: Ms Albright testified here that it was easy to raise hands in 1993 to create the Tribunal because nobody believed it would ever work or have any judges, prosecutors, trials. Was that your feeling too at that moment?

DS: It's important to clarify that statement which I think she would agree. Yes, there were many skeptics at the time but as far as the US government was concerned we had every intention of moving forward and making this work. We were not going to put our name to a process that is a false process. We were committed to find in this justice. I think what she's really saying is that the total votes of the SC were easier to achieve in February of 1993 because maybe some of the permanent representatives felt, 'well this would never happen, so sure, I'll vote for this because it'll just fade away'. But it did not fade away. And part of that was because the US, if I may say so very proudly, hung in there and pressed very hard.

MK: In spite of American support the Tribunal had very difficult first years, a battle for survival... For its survival and success, I define 1997 as a key year, when things started to develop in a positive sense. You became Ambassador-at-Large, Albright became Secretary of State and we had a very important change in Great Britain, where Cook became minister, and there was a change at the Tribunal with Louise Arbour becoming Chief Prosecutor. How do you see those crucial years?

DS: I think in 1997 the stars aligned in support of this Tribunal. One of the reasons that you have mentioned is that Foreign minister Cook of the UK and Madeleine Albright, US Secretary of State, had a very good working relationship. They worked very well together. And they both had the same vision that in the Balkans there needed to be not only justice hoped for but justice achieved. It was in 1997 that, with her leadership in the State Department and with my ambassadorship, we were able to, shall we say, jumpstart, launch a really serious effort at apprehending the indicted war criminals of the Tribunal. We were able to really start that in 1997. 1996 was sort of a lost year for apprehending the indicted war criminals but with Secretary Albright at the State Department, she made it a priority to pursue the indicted war criminals and capture them. I got deeply involved in that process. So I think at times leadership matters, to have the right person at the top of the effort.

And we had a very good relationship with the Yugoslav Tribunal in the sense that when I became Ambassador in September of 1997, Ambassador-at-Large for War Crimes issues, I would come over to The Hague all the time. I would sit with the judges, with the prosecutor, to understand what is it that you need, what do we need to do to help you perform your duties, what sort of staff do you need, should we second staff, should we try to increase the budget of the court. All of these are matters we had to fight for back in New York at the UN, we had to fight for in Washington with some of our Agencies to make sure the US Government was together working in support of the Tribunal and of course, we had to consult constantly with other governments to say, 'are you contributing what you should to the Yugoslav Tribunal?'. You know it was a team effort but you have to have that political support in order to help an institution of this character to work.

MK: Let's go back to 1996, the lost year. Hypothetically, can you imagine how Bosnia and the region would have looked like if Karadžić and Mladić had been arrested in 1996?

DS: I would love to imagine that, because it was the great view or the belief that Ambassador Albright, she was still Ambassador at the UN in 1996, and I certainly as her legal counsel, we pressed very hard in the national SC to launch apprehension efforts in Bosnia. But we were thwarted, mostly by NATO in the sense that NATO was pouring troops into Bosnia and the objective in terms of the Pentagon and our NATO allies in Brussels was force protection, that the big priority must be that we protect our forces; they are there to separate the Bosnian Serb and the Muslim forces, that's their priority. And don't take any unnecessary risk, we don't want any casualties. Just separation of forces. That's our mission. And you protect your force in the separation of the Bosnian and Serb forces. And also remember there were elections coming up in Bosnia in September 1996 I believe it was, and that was a dynamic that politically... policymakers did not want to upset the teapot with arrests that might alienate voters. For example, if Karadžić were to be arrested, how would that impact the September election? Those were factors that came into play at the decision table, at the policy table. So you really did not have an effort, a proactive effort to arrest in 1996. And these were battles we fought over in Washington, and I was bloodied, and Ambassador Albright was bloodied and we lost those battles. But then she became Secretary of State and in 1997 we were able to change the policy, we were able to move forward.

MK: That was too late because Karadžić and Mladić disappeared. But would the region and Bosnia look different today if there was much more courage in the international

community, the US, NATO and other countries to give troops...?

DS: And these were arguments we made internally in 1996. We said if Karadžić remains at large, he has too much influence still in Bosnia. We need to deny him that influence. But the objective, in the end, was to ensure that he would not stand for election in September, that he would, as we say in the law, he would be lustrated out, lustration which means remove Karadžić from politics. That was the objective in 1996 as opposed to arresting him. Now, it was our preference, Ambassador Albright and myself, that he'd be arrested, but we lost that battle internally in 1996.

MK: Let's go to the end of 2000. You were nominated to replace judge Wald at the ICTY. What happened? Do you think that your strong support for the Tribunal and arrests, and your role in the Rome negotiations for the ICC had anything to do with what happened with your nomination?

DS: I don't think a journalist has ever asked me that question before. So you are the first. Because all of this happened sort of behind the scenes. Yes, President Clinton nominated me to be a judge at the International Criminal Tribunal for the former Yugoslavia because the US judge Patricia Wald was retiring. And so it arose as a special election to fill that seat. Secretary of State Albright recommended me to the President for this position and the President then agreed and sent my name to the United Nations. That was in the first week of January 2001. And then a few days before January 20, which was the switchover from Clinton to George W. Bush as president, the Security Council decided that it would reopen the nominations for the Yugoslav Tribunal because they wanted to have a few more names on the list, in other words, have a more fulsome list. I don't know

how many names they had but sometimes they make a decision, "well instead of seeing 15 names we'd like to see 20 or 25 names to decide among". And the US name was not the issue. It was other issues, you know. So the Security Council decided to reopen the nomination list which had been closed. Now, they decided to reopen it until January 31. But what happens on January 20 - there was a change of administration in Washington. And I had signed the Rome Statute for the ICC for the US on December 31, 2000, just a couple of weeks earlier. This was not a move that our Republican friends liked. So when the George W. Bush Administration took office on January 20 I was no friend of the George W. Bush administration. I was the person who had signed the Rome Statute. Therefore, as I understand it, there was a decision made within the White House to . . . , since the nomination list had been reopened, to switch out the nomination. And I was called on the morning of January 31, the last day of the listing, and informed by the Chief of Staff of Secretary of State Colin Powell, the new Secretary of State, thanking me for my service to the US government, that my name was being removed in New York and that someone else's name was being forwarded by the US for election to the judgeship. So that was it, I was gone.

MK: Someone else was?

DS: Was Ted Meron.

MK: I will not ask you a hypothetical question about how do you think the ICTY would look today if you were elected...

DS: Oh... I would just say, I think the main issue that I would present is . . . I just believe that in the realm of international criminal law, which is what is practiced in this

Tribunal, that the character of atrocity crimes, of genocide, crimes against humanity, serious war crimes, the character of those crimes, the context within which they're committed, the types of decisions that are made that unleash atrocity crimes, with so many thousands of victims, that any judge has to be very conscious of that context of atrocity crimes. We are not talking about the common murder on the back street in Detroit. That's not what we're talking about here. We're talking about a different methodology of killing and of creating great repression on people and great harm and injury to them and to property. And I think any judge has to understand that context to be a truly effective and realistic judge on a war crimes Tribunal of this character.

MK: We discussed the years of survival, the years of success, and came to the years of decline, which in my analysis started with the death of Milošević. His trial was the peak of the Tribunal's influence, power and reputation. How big a blow was his death? Do you think that the turnaround in 2012, 2013 would have been possible if we had had a judgment in his case, the first judgment of the first head of state at an international criminal tribunal?

DS: The death of Milošević was a huge disappointment because so many people had labored so long to bring that trial to judgment against him. It had occupied much of my life as Ambassador for War Crimes issues because Louise Arbour was always asking me to accelerate the provision of US evidence that could be used in a trial against Milošević. And I was constantly working with our intelligence agencies and others to make sure that we were getting as much information as we could fast enough to the Tribunal. Sometimes we were too slow for Louise Arbour. She's tough, she wants it tomorrow. But it was many, many years of efforts. Particularly on the part of the prosecutor etc here. So, that was a huge

disappointment. But I think it's very important to emphasize that his death is not a failure of this Tribunal and it should never be seen as a failure. Defendants die during trial. It happens all the time. For the last five years, I've been the Secretary General's special expert on UN assistance to the Khmer Rouge trials in Pnom Penh for the Pol Pot regime. Right in the middle of trial number two, one of the very top officials of Pol Pot, Mr. Ieng Sary, dies. We'd been spending years building the case against Ieng Sary and we lost it, I mean it was gone because he was dead, we did not reach judgment against him. So it does happen and it's not the fault of the court that it happens. I think, at least for historians, the record of the Milošević trial will always stand as a very important set of information that can still be debated, because there was no judgment on it, but it's important, it assisted a stock of record. There's no question that without a judgment it probably did impact how the prosecutor could pursue further cases down the road because it would have been useful to have had a judgment against Mr. Milošević. Nonetheless, my main point is that, yes, we have to move on, it's just that it's not a failure of this court.

MK: It's not the failure of this court, but the consequences have been harsh for this court. It looked like Milošević was a kind of glue that kept them together and all started to fall apart when he died, in the OTP, between the prosecutors and the judges... My question is would the judgment to Milošević have obliged the judges?

DS: You mean if there had been a judgment....I think it probably would have been very helpful but we take the world as it is. It just draws at available.

MK: The Tribunal had a second chance with the arrest of Karadžić and Mladić. Then suddenly it looked as if somebody concluded that the Tribunal went too far in establishing

high accountability standards for political and military leaders. Those standards were acceptable when implemented in marginal Balkan countries, but could establish dangerous precedents for more powerful countries. First in the case of Gotovina and shelling of populated areas. Then we had the Perišić case which established a dangerous precedent for supporting rebel forces in third countries and then Stanišić/Simatović case, a secret service organizing arms and support for paramilitary units in third countries. What is your opinion of this clearing of the minefield of such dangerous precedents?

DS: First, I don't have any personal knowledge that it's say cleaning of the minefield but I know there has been a lot of speculation about that. I just won't comment on the speculation but I will say that I have written myself and published criticism, my own criticism of the judgments in Gotovina, in Perišić, and Stanišić. And I find that in all of those judgments, two at the Appeals Chamber level and one was at the Trial Chamber and is now pushed back by the Appeals Chamber, a differently constituted Appeals Chamber, I found great problems in the majority views expressed in all three of those cases. I thought that the dissenting views were very powerful and I think it's extremely fortunate that later Appeals Chambers, in later cases before this Tribunal, whether be Popović or Karadžić or otherwise, that they rejected the analysis, particularly that one finds in the Perišić case. So, I just think on matters of substantive law and the analysis of the law that those were very unfortunate and mistaken judgments and that I think you see the Tribunal, other judges in this Tribunal, pushing back against that now and I hope creating a legacy that in the end is the right legacy, the good legacy for this court, even though we've had these few judgments that were so unfortunate. I wrote recently that what we don't want to see as the legacy of this Tribunal is that those who aid and abet atrocity crimes at the mid and low level of

responsibility get convicted but those who aid and abet atrocity crimes at the highest level of responsibility somehow walk free. And I think that's the issue we need to focus on in terms of assessing those judgments.

MK: There's a feeling that the weakest link of this Tribunal and in international criminal justice are judges, the way they are selected. There are very few with courtroom experience, there are a lot of diplomats, professors and the biggest problem is that they are not accountable. The only way they are accountable is when they violate the vanity of other judges, as we saw in the judge Harhoff case. But everything else is part of their independence. We had a judge who spent some 12 years here and everybody said he was not in the best mental health, but nobody could do anything about that.

DS: This is an issue that occupies a lot of discussion in academia. Law professors love to sit around talking about this issue. Because it's a good hard issue of... you always want the highest standards for judges. You want to make sure that even after they take the bench that they're continuously upgrading their knowledge and that they're sometimes taking some training courses just to improve their performance and make sure that they're conscious of developments in other courts that they should be aware of as judges. So it's a constant source of discussion and it also bleeds over into discussion about how the judges for the ICC, the permanent court, had been selected. Same issue. Same issue. And so all I can say is that it's very much there. It's a hard one to turn around because of the way these statutes are structured judges are nominated by governments and once you have governments nominating judges then all sorts of factors come into play in terms of who is selected. And I may not be the best person to speak about it because you know after all

Clinton government nominated me and so there was a process of nominating me. But I would just say that there is a need for a little bit of mixture here, just a little bit. Because you want to have people on the bench who have run criminal trials, who are great criminal trial bench judges, absolutely you want all of that. You also want to make sure you've got something coming into the courtroom and the decision making of the judges that is very cognisant of international criminal law, of international law generally because these are international tribunals. So it's an interesting sort of mix that you want. But I would perfectly agree that you want a predominantly talented group of judges who know how to run criminal trials. But you want to make sure that they do so in an international context. Now, I just say briefly, because it's just kind of an interesting point, not on this Tribunal but on the ICC - the crime of aggression may soon be activated for the ICC as a new crime that they can prosecute over there. If you start looking at how to prosecute the crime of aggression you actually want some judges who are very expert in the use of military force and the rules around the use of military force. And that's not necessarily criminal trial judges, those are people who understand the deep history of the law of war. So it's an interesting process that's unfolding, particularly at the ICC.