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An Interview with

Michail Wladimiroff

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Dutch lawyer Michael Wladimiroff talks about his experience as a defense counsel for Duško Tadić - the first indictee before an international criminal court after the 1946 Nuremberg and Tokyo trials; as well as his participation in the proceedings against the former President of the Federal Republic of Yugoslavia and Serbia Slobodan Milošević in the capacity of Amicus Curiae.

MW: Being the first lawyer in the first trial before the ICTY was indeed a challenge. In those days I didn't know anything about humanitarian law. I had some experience in international trials on a national basis, that is, being a Dutchman before an English court, or something like that. Not on a supranational basis. I realized when I accepted that I was sailing uncharted waters. But the others were too. The prosecution had no idea, the judges had no idea for one year. There was no experience. No one knew what's going on. I realized also that it was historical, you were part of history to be in that trial. I found it very attractive, I mean, to develop the law, being a part of a historical phase of the law. Therefore, I said: Yes, I would do it. And I must admit, perhaps confess, vanity also played a role. You realized you would be amidst all that publicity. But that's, you know, an extra benefit.

Access to Crime Scene

MW: The problem at the beginning indeed was to get access to the area. But looking back, nowadays, I think I was in a better position than the prosecution because I was an individual, I could simply slip in, make contact on a private basis and try what I could do. But it doesn't mean that it was a very ideal situation, it doesn't mean that we could do what we really wanted to do. It was the best of nothing. The prosecution had nothing. But on the other hand, in their case most witnesses were living abroad, so they were available to the prosecution. At the end of the day, it was more or less balanced. But I felt very frustrated that I could not do a proper job on location because of the ongoing conflict and because of all the obstacles, bureaucracy, and not being an official person, therefore not recognized.

Negotiating with Simo Drljača, Notorious Prijedor Police Chief

MW: We called him Dracula in those days, which I felt was very fitting for what he did. A horrible man. Anyhow, he was a problem indeed because we were totally dependent on what he allowed us to do. But there were others, as well. I remember the burgermaster (major) of Prijedor, Stakić I think his name was, he also was very problematic. One day he would allow us to go in that area, the other day he wouldn't. One day he would allow us to speak to people working at the town hall, the other day he wouldn't. There were other people, as well. I do remember that at one moment I contacted Karadžić because I felt I can't go on getting "yes" and coming to the spot and then hearing "no". For example, getting access to the Omarska camp. We wanted to see the site, to inspect it. I met with Karadžić. It took some effort before he really promised us to assist. After some time, we got a letter, not signed by him, but by his minister of interior affairs, as far as I remember. That letter was

helpful but really didn't open all doors. To a certain extent it did help, but not much.

Facing the Wall of Non-cooperation

MW: We have to realize that most people in those days who were in power, were or indicted, or secretly indicted, or had reason to believe they would be indicted. So, none of them would be inclined to recognize the Tribunal. In those days, the fashion was not to recognize the Tribunal, not to cooperate with the Tribunal, and therefore logically not to cooperate with me. Because in one or the other way, I was instrumental to these proceedings before the Tribunal, although I was defending someone from their own area. But, by assisting me they would also make it possible to run that trial. And they thought if it can't do its work, the whole thing will collapse and there will be no trial. Very naive, but that's what they thought.

MW: After the Verdict You Assessed That the Trial Was "Not Unfair"

RG: Now, so many years later, I think that was a right observation. If you try to be honest and not simply close your eyes to reality. I could have said if I had only been looking from a one-minded perspective: this is all wrong, this is not a fair trial because you are looking for a better, more ideal trial. Being an experienced lawyer, you know there are no ideal trials. So, it was the best of all possibilities and relatively it was perhaps fair. But, if you put a more objective standard - it wasn't unfair, it wasn't fair, it was just somewhere in between. At later trials, I think, things changed. And there, people were more fit to say it was either fair or unfair, but at very first you simply can't set the norm. It was good enough, but not ideal.

Judge Jorda Says The Tribunal "Owes a Lot" to Tadić

MW: It could have been Mr. Simić or Mr. Janoš or anyone. It's the fate of the first trial that you do things which are important for any trial thereafter. That is inherent to the first trial. I realized that in those days. I was fully aware that I had two obligations that should not conflict. One, to serve the interest of Duško Tadić the best I could, and, on the other hand, to give the Tribunal a chance. Because it is very easy to ruin it. In the first trial to do everything to have the whole thing collapse. I felt that I shouldn't do that because I felt that if I can combine these two interests, I would do it. So, I was very eager to let it work. If possible - let it work. Because, we have to keep in mind, in those days, if it had not worked, Tadić would have been sent back to Germany. He would not have escaped justice but simply, let's say, have the trial falling down. So, I could try to combine these two interests because the alternative would not have been much better for Duško Tadić. In that respect, I think, I realized it's important what we do now because we will make case law jurisprudence which is indicative for any trial thereafter. Indeed, that is exactly what happened.

Was Tadić a "Guinea Pig"?

MW: In those days I felt very strongly that he was a guinea pig, the way to find out how it all would work. Later on, if you look back, you realize that was a fair observation, but inherent of the first trial. Again, it could have been anyone. Everyone who is the first defendant runs a risk that things are tried on him. The Yugoslavia tribunal was the first international tribunal, so people from the former Yugoslavia were right when they said "Why me?" Later on, came the Rwanda tribunal and the Rwandans had no arguments because there was already one. The first run is always something special. When you are

something special you don't like it. The only problem is to get it right, that the special parts of it are as less as possible. We didn't take all the specialties away, so Tadić in a way was a guinea pig. But it didn't turn out to be unfair. Just problematic, but not unfair.

Bargaining with The Registrar

MW: In September-December 1995, I thought we are in trouble here. Because when I started they said it would take me about three months. I thought: Well, let's give it half a year. In the September-December period, it became utterly clear it would take much, much longer. When I started, they offered me a payment of 200 dollars a day, which I could afford for some time, but not for a very long time. I mean, I have to live. I started to complain. Then the message was very clear by Mrs. De Sampayo, the registrar: "Sorry, we don't have the money to pay you, so we can't". Then I made it utterly clear that if money won't be there, I'd stop. And by December the UN put up the money and they improved it up to 110 dollars per hour, which is still the rate, nothing changed.

Building the Defense Team

MW: In the same period of time, I do remember that I explained - but that was August, September, October perhaps of 1995 - I explained I can't do two things at one time. I can't do the appeal in September and in the same do my discovery on location enabling the trial to start somewhere in November. I have got one body, I can't split up myself. So, I asked someone to assist me. I asked Alphons Orie, who now is a judge with the ICTY, and I was allowed to have him assist me. So, he came in. Later, when the trial was emerging, we were traveling up and down many times. Perhaps 13 times we went to the area. It became clear that even Alphonse Orie and myself would not be enough, so I asked for the assistance

of a native speaker, English, a barrister. So, we got an assistant first, Sylvia De Bertodano. She came by December and then Stephen Kay came by March 1996. Then we were in the safe area. And then it went on smoothly.

(In)Equality of Arms

MW: Yes, but we had to face four prosecutors sitting all the time there. And when I started I was just sitting by myself with students around me. That was all I had. Because I couldn't afford anything for 200 dollars a day. And I was facing four professional prosecutors. I felt very uncomfortable.

At the very very beginning, I felt equal to the pros in terms of knowledge of the law. Nowadays there might be a problem, because lawyers come in and lawyers go, and prosecutors stay. So, their knowledge within the Office of the prosecutor accumulates. They have got access to all the case law and all that. Lawyers come in, learn how to do it, do the case and go back home. And the next lawyer starts all over again. That is a problem nowadays. At the very beginning, I felt very unequal to the prosecution in having access to experts. At the very beginning, no expert was inclined to assist the defense because you were defending a war criminal. Being a prosecutor, it was honorees to assist the Tribunal. Nowadays it has changed. Nowadays the defense has more proper access to experts, lawyers, law professors, and so on. So, it's more in balance now. In those days I felt not equal to the prosecution in resources, money. Nowadays I think it's more balanced because it is not much better for the defense, but it is less for the pros, so they went down and therefore it is more balanced. In those days I felt equal to the pros in terms of how to defend my case, to be king in my own kingdom, and do it as I like it. Nowadays pros are in a less

better position because they are guarded by all kinds of policies and they got a prosecutor who is different to any of the other prosecutors before her. Carla Del Ponte is more demanding on issues, where I sometimes have the impression that prosecutors who are in the trials would prefer her not to interfere. And that is a difference. So, in a way, it balanced.

Risks of a Witness Protection

MW: One of the continuing problems during the Tadić trial - and I think that problem is yet a realistic one at all on-going trials - is the position of a witness. We have to realize in these trials if the defendant is of one ethnic or national group, then witnesses are always from the other group. Consequently, you are always facing the problem of adversary witnesses, witnesses who may have an interest to tell what is good for their group, and not good for the defendant. There is this instrument of witness protection, which I accept because it is realistic, but there are a lot of dangers. At this first case, no one really knew how these dangers would be. We all realized there would be dangers, but no one was able to label them. Then we were very critical to do our homework and find out who the witnesses were. For that very reason, we were scrutinizing witnesses we did not trust. Witness L was one of them. Luckily enough, we were able to find out he was not what he said he was. Then witness L was the pilot case for future trials to realize what the dangers are. And it also showed that the system is vulnerable if protection goes too far, if you deny the other party, be it the defense or the pros, the details of the witness at the late stage. Because then you cannot do your research on the witness and you run a substantial risk that someone is telling the court a pack of lies. And it was very unfortunate that it happened in the Tadić case, but on the other hand, it was very fortunate it happened, because

everyone since then understands: you have to take care, there is a risk. So, it was helpful for future trials.

Demasking of the Witness L

MW: When we felt that witness L was unreliable, funny enough, the chief investigator Bob Reed was the first one to recognize that. And the pros did not want to believe it, they couldn't believe it, so they said: "No, no, that is not true". The logic of what happened was this - we were involved in the case not only on a legal basis but also on a factual basis. We had been there. Bob Reed had been there. So, he was more equal when we were talking about facts than the prosecutors who only dealt with the law. And in their theoretical mind, it couldn't happen. And Bob Reed, who knew what happened in reality, well understood what we said and recognized it could happen. It took us one week and then the pros accepted that what we said was true and witness L was damasked.

Evolution of The Tribunal

MW: A lot has changed since, say, April 1995 up to now. Firsts of all, what struck me is the way these trials are run. In those days these trials were typical party-driven trials. Judges did not interfere in the trial, it was driven by the parties. It looked very much like an English or American trial. Nowadays, it has changed a lot because it is more top-down, the judges are more putting their power in the trial and controlling the parties. So, it is no longer purely a party-driven system, it is a mixed system with a bigger involvement of judges to control what happens. The advantage of it is that at the very beginning the rules of evidence were totally dependent on how the parties would bring in the information and how you would bring it in was giving the answer on how it would come out.

Now, thanks to judges taking more control of the trial, you see that the rules of evidence have changed. A very good example for it is that we've got actually two levels of evidence nowadays. In those days it was one level, as I am used to at home and perhaps you as well. But now we've got two levels. One level of the evidence is dealing with the crime base. The Standard is less high. The second level of evidence deals with criminal responsibility. There, the level is as high as it always has been. Why did it happen? Because at the very beginning there were defendants who had been killed by their bare hands. Nowadays you only see people who are responsible for what others did. So, the build-up of cases has changed over time. In those days you would see witnesses and defendants who witnessed what they did. Here we have a crime base of what happened in all those villages everywhere and then silence, and then a defendant. So, you've got witnesses dealing with what happened on the ground, lower level of evidence, and witnesses dealing with what the responsible person, what his involvement was, giving orders, command responsibility, high level of evidence.

And that is a very interesting development because it is typical for these international trials. You won't see it at home. I do a lot of cases in my own jurisdictions where I deal with captains of industry who are responsible for what happened in their companies. Still, there is one set of evidence. Here you see over the time two sets.

Differences

The second development is that the role of the prosecutors has changed. At the very beginning, the prosecutors were more involved in collecting the evidence. I said with witness L that they dealt with the law and that investigators dealt with the facts. But in

those days in a way they dealt more with the facts, they knew more about the facts. Nowadays you see prosecutors who have less knowledge about what happened, they are more lawyers, less practitioners of what happened on the ground.

They know all about criminal responsibility and all the elements that would make up the law of criminal responsibility. And they know less about what really happened on location.

The third difference that I noticed is that the type of defendants had changed. I said so. At the very beginning, we had people who had done it themselves, now we see the people who are responsible for what others have done.

Another development, that is not a change but more the development is that at the very beginning one of the complaints was that most defendants were Serbs. Now it's not really balanced but it is in a better balance than it ever was. But there is some logic to it, as well.

At the very beginning, proper Yugoslavia and Republika Srpska did not recognize the Tribunal. Croatia and Bosnia and Herzegovina did. So, guess who gave their files to the prosecutor! Of course, these two countries, not Yugoslavia, nor RS. So, logically, the defendants were of the other party. Therefore, obviously, you see more Serbs. That's one explanation. Another explanation is a different one, a more political one. So, I am hesitant to say it. But, lots of people say that there are perhaps, even if you separated the issue of files, more people who have committed crimes under the jurisdiction of the Tribunal from Serb nations than from Croat or Bosnian nations. Maybe it's true, I don't know. But, that may be a factor as well.

The Position of Defense Lawyers

MW: At the very beginning, defense lawyers were less bound by rules, less controlled by the Registry, and were more free in the way they organized their own affairs. If they said: I'd like to go to Bosnia-Herzegovina to do my discovery on the location, no one bothered and when you came back you set the bill. That was fine and that was good. There were no barriers to do what you wanted to do. The downside of it is that the more lawyers you get, statistically, the more chance there is that one would do it wrong. And, indeed, those lawyers appeared. And there were lawyers who did it wrong and who were not honest on money and all that. So, rules came in. And problem nowadays is the balance between how many rules you need to be sure that everything is all right and, on the other hand, not to frustrate lawyers in what they should do, should be able to do. And that seems to be a problem nowadays.

The Quantity of Evidence

MW: There are two issues if we talk about the quantity of evidence and talk about these long trials that take so much time. On one hand is the length of the indictment, on the other is the standard of proof. If I would prosecute a junkie, in my own jurisdiction, who breaks open cars and steals auto-radios, I wouldn't even think about prosecuting all possible radios he stole. I pick out one here, one there, one there. And I tell the judge there were hundreds of others, I am not going to prove it. If he denies that – fine. He will be sentenced for three. If I think it is not enough – five. But I am not going for a hundred.

The problem before the Yugoslavia tribunal is that, and that's where I think Carla Del Ponte should not interfere, they are issuing indictments which are much too long. It is like

rewriting history. Dealing with every village, every community, every house, every person. List of names and so on. You should not do that. You pick out the most, let's say, standard cases which are exemplary for what happened in that area. That is enough. You cut it down to a shorter trial.

If it comes to the standard of proof, I explained that nowadays, in my appreciation, the rules of evidence developed into two layers - proof of your responsibility and proof of what happened in all those villages, the crime base. If you limit the crime base, you can limit the proof of that. Takes much less evidence. If you focus on command responsibility, you have only to focus on command responsibility on the headlines. It doesn't matter if someone caused what happened in six villages or in a hundred villages. The issue is what did he caused. Did he cause his troops were able to do what they did? And it doesn't matter how many times they did it. So, you could slim down the evidence as well. And that is what is going on. And I think in the Milošević trial, which is a very good example, they are learning on the job – so far, Milošević is a guinea pig - that you shouldn't touch on everything and slim it down. Slim it down. They are doing it now. Too late, but they are doing it.

Buffer between the Court and the Accused

MW: If you are dealing with a problem of an accused who doesn't play the game – either he doesn't recognize the court or he doesn't recognize the judges or he doesn't recognize the rules, whatever, he is not playing it along the rules – what to do? This is not a new problem. We got some experience in the 1970s with the Rote Armee Fraction, which is the Red Army in Germany. In those days, those defendants did not recognize the court

either and so on. So, there was some case law developing from there showing what the dangers were if you would choose that direction, and you could read what the dangers were if you'd choose that direction – and learning from that, reading your history. And, as a law professor, one of the dissertations written in my time was a Dutch lawyer writing on this issue. So, I had a very good idea of what it could do. Debating these kinds of issues – actually, you can't opt for a solution which has a tie with the accused. Either you give him a lawyer he doesn't want, and you can't act as a lawyer if you don't have the trust of your client. Either you give the accused a lawyer who will not play it along the rules, and therefore the lawyer who will be sanctioned, because he is bound to do it by the rules. So, there is no solution. Anything tied to a defendant is not a solution. So, forget about lawyers, in terms of defense lawyers.

So, the only solution is to build a kind of buffer between the court and the accused who is not responsible to the accused, not tied to the accused, not accountable to the accused, but only accountable to the court. And that's inherent to this system. If you are a judge and you think: "He has no lawyer, so let my ear better listen to him", you are not an independent and impartial judge anymore. You are biased to help the defendant, so you should avoid that.

So, put in someone between you and the defendant who can give the defendant his ear, but not be instructed, so he can pass independently what he thinks the judge should hear without losing his impartiality. That is exactly what an amicus is doing. So, the solution that the court applied was a perfect solution and I still think: May has it right, Schomburg has it wrong. Because Schomburg in another case, the Šešelj case, appointed a kind of

stand-by lawyer. The problem with that lawyer is that he will not be instructed by Šešelj, so what can he do – he can do nothing. I think that will be a dead-born child.

"Amicus Curiae" in the Milošević Case

MW: Being amicus with two others for the first time we faced the problem we had faced in the Tadić trial: What does it mean? How to function? There was no precedent, so we had to start from nothing. The court instructed us to a certain extent what to do. I felt, if you read the instructions, the instruction will put us more in the direction of Milošević, that is, put us more as kind of advisers. And I felt from the very beginning that the amici should not do that. Because once you would start relations with Milošević, he would be demanding, and we would be accountable, and therefore we would no longer be independent. And I prefer to be totally independent. So, we set out on an independent route.

What we felt we could do, and I still think the remaining amici do so, is be hesitant in cross-examination. The court wanted us to do so but I felt that you shouldn't. Because in cross-examination you've got two functions – one is to test the reliability of the witness, and I felt these are experienced, professional judges and there is hardly any reason to do a proper job, since Milošević showed to be able to do it himself. So, stay out of it. It is not necessary.

The second function of cross-examination is to put your own case, to ask the witness questions that will help your own defense. Now, here the problem starts, because as long as we don't know what - and one doesn't know yet, because he hasn't told anyone - what the defense of Milošević will be, what his defense case would be, you are in a tricky area. If Milošević decides not to ask something deliberately because it suit his defense and you,

stupid amicus, not knowing what he is looking for, you ask it. So, stay out of it. We always stayed out of it. There was some difference between the three amici. One of the amici felt he should, Stephen Kay, and I felt we should not.

If it comes to procedural issues, we always felt we should tell the court straight away what we think is right, but in an objective way. It wouldn't make sense to tell the court the perspective of Milošević as Milošević feels it because that would be an echo of what Milošević had already told the court, it would add nothing. So, you would add anything if he said A and we said: Well, from an objective point of view it would be A-accent, or B, but not C as a process, you see? And that was what we felt and I think they still do it so, in this way.

Contacts with Milošević

MW: I make a separation, a distinction – there is no contact with Mr. Milošević, there was no contact and I think there will be no contact. But, of course, there is courtroom etiquette. In the courtroom, of course, you are sitting there for hours in the same room, you look at each other so you may exchange some words. That is what's happening because we are all human. But, there is no contacts outside of the courtroom whatsoever, none.

The Impression That Amici Supported Every Milošević's Request

MW: I say that's not a fair representation that the amici always, as a Pavlov reaction, supported all the requests, submissions of Milošević. The majority of requests, when they were reasonable, may have been supported. But there were a lot, really a lot of requests we were totally silent on. We were not in a position to tell the court: "You shouldn't do it". You either be silent, or you support it. If I say: "support it", you may have noticed that the

support was limited to either an adoption of the argumentation or simply adding argumentation to what Milošević says. So, if there was some merit in what he argued, we would say: "Yes, that is true, we support it". Or: "Yes, it is true, and moreover because of bla, bla, bla..." And that is exactly what we had to do and I think they still do it.

"Amici" of the Court and/or the Accused

MW: Once we are getting more close to the defense case, the court felt that the accused should have a possibility to tell the amici what he is looking for. He doesn't allow anyone in the courtroom to represent him, he doesn't want the amici to represent him – of course not. But the court felt that Milošević is looking for a channel to give more quality of what he is looking for. So, they asked the amici to open their ears for that, and if there is some merit in it, let's say, make it better and tell the court. And a very good example of what you say is the appeals that have been filed for time extension between the prosecution case and the defense case. Because otherwise Milošević had to do that, and Milošević would not have been able to do it in a proper way, so the court well understood if he wanted any benefit from the Appeals chamber you should qualified in one or the other way, so they instructed the amici: "Open your ear if there is anything that he wants, try to translate it in such a way that it is an objective, qualified request". And that is exactly what they did.

Can "Amici" Become a Defense Lawyer?

MW: No, none of the amici, I can assure you, will be appointed as a defense lawyer for Milošević, for two reasons. The very obvious reason is that Milošević doesn't want a person to represent him. That was the case in the former Yugoslavia and that is still the case here in The Hague.

And the other reason is that the amici, seeing their role in the past, couldn't and shouldn't change horses, step down and be a defense lawyer. So, that won't happen.

Milošević as a Lawyer

MW: Let me put it this way. Since Milošević sees himself not as a friend of me, what he does is improving over time because he is learning. He doesn't meet the standard of a proper defense lawyer. It looks good if you segment your observation, if you focus on the cross-examination of one witness, it is fine. But if you judge it in the sequence of what is at stake, it is not fine, it doesn't help him much. I think it's good for the people at home because there is a lot of politics in what he does, which is fine because it's his perspective. But here were are dealing with a trial where the judges have to see whether the evidence has been met and there I think is the weakest of what he does. But, it is his choice to do it as he likes to do it.

Using The Tribunal as a Political Platform

MW: There is no alternative. It would be much more meaningful not to videotape this trial when all the trials are videotaped, not to release the tapes where all tapes of any trial are released. So, what is the choice? You have got the right to defend yourself. It would be highly unfair to say: Shut up, you are a defendant, you can't say anything. So, you have to give him the floor. And it is for the presiding judge to manage what is going on. In my view, judge May is the only judge who is able to master him.

You can't be successful in silencing Milošević, and one shouldn't. It is inherent to a trial that the prosecuted party has got all opportunity to respond to the allegations and the

problem is what is a response to the allegation, what is relevant to that, and what is not. If he got a defense lawyer, you would not allow any step in any grey area because the defense lawyer knows. If it is a defendant who is defending himself, who is not a defense lawyer, you'd allow a much bigger area because he is not an expert. You have to do that. It is fair enough.

It's his position as a defendant, defending himself, you give him more grey area on the relevancy test. Where he is prosecuted for criminal responsibility, with a political factor in it, we cannot deny it, you give him extra time as well. Because, you know, if you are going to limit that, you fight for that, the time of your fight would take the same time as you would allow him. That has been tested at the very beginning. I remember a conversation between Milošević and May which, at the end of the day, took us as much time as he was denied. So, in the end, let's not waste time fighting this. You've got one hour and then you give him one-quarter extra, and then it's over.

Any Regrets Because of Early Exit from the Trial? / Žalite li zbog preranog napuštanja suđenja?

MW: No. On one hand, it was interesting work. It took much more time again than what I anticipated, the same as what happened in the Tadić case. I still follow it from the nearby. And if I am talking frankly, when I am talking to my wife, I'd say I am glad to be out of the madhouse.