

IMPOSITION OF COUNSEL ON SLOBODAN MILOSEVIC THREATENS THE FUTURE OF INTERNATIONAL LAW AND THE LIFE OF THE DEFENDANT

H.E. Mr. KOFI ANNAN, Secretary General of the United Nations,

H.E. Mr. JULIAN ROBERT HUNTE, President of 58th Session of the UN General Assembly

Russian Presidency of the UN Security Council,

To all members of the UN Security Council, to all members of the UN

Cc: International Criminal Tribunal for the former Yugoslavia

We the undersigned, jurists, law professors, and international criminal lawyers, hereby declare our alarm and concern that the International Criminal Tribunal for the Former Yugoslavia (ICTY) is preparing the imposition of counsel upon an unwilling accused, Slobodan Milosevic.

This apparently punitive measure is contrary to international law, incompatible with the adversarial system of criminal justice adopted by the Security Council in Resolution 808, and ignores the court's obligation to provide adequate medical care and provisional release to the defendant. The ICTY, instead of taking appropriate measures to alleviate Slobodan Milosevic's long-standing medical problems, has compounded them. The ICTY has ignored repeated requests for provisional release, to which everyone presumed innocent is entitled, has imposed unrealistically short preparation periods on the defence, and has permitted the introduction of an inordinate quantity of Prosecution evidence, much of which was bereft of probative value, thereby increasing Mr. Milosevic's level of stress, the principal trigger of his illness. Chamber III has been informed of this by their chosen cardiologist. The defendant has been denied examination by his own physician, a further violation of his rights..

Now, having brought about the very degradation of President Milosevic's health of which it had been warned, the ICTY seeks to impose counsel upon him over his objections, rather than granting him provisional release in order to receive adequate and proper medical care, a reasonable measure reflected in domestic and international law and practice. The envisaged imposition of counsel constitutes an egregious violation of internationally recognized judicial rights, and will serve only to aggravate Mr. Milosevic's life-threatening illness and further discredit these proceedings.

The right to defend oneself against criminal charges is central in both international law and in the very structure of the adversarial system. The fundamental, minimum rights provided to a defendant under the Rome Statute of the International Criminal Court, as well as the under the Statutes of the International Criminal Tribunals for Rwanda and Yugoslavia, include the right to defend oneself in person. The general economy of these provisions all envisage the reality that rights are afforded to an accused, not to a lawyer. The right afforded is to represent oneself against charges brought by the Prosecution and subsidiary to this, to receive the assistance of counsel, if an accused expresses the wish to receive such assistance. However, if, as Slobodan Milosevic, a defendant unequivocally expresses his objection to representation by counsel, his right to represent himself supercedes a court's or prosecutor's preference for assigning defence counsel. As stated by the U.S. Supreme Court, with respect to the Sixth Amendment of the Bill of Rights, which bears a striking similarity to Article 21 of the ICTY Statute:

"It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant - not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists."

Faretta v. California, 422 U.S. 806 (1975)

The ICTY Statute (as well as ICTR and ICC Statutes) similarly grant "defence tools," such as the right to be represented by counsel, or the right for counsel to be provided free of charge, if the accused is indigent. The essence of the right to represent oneself is defeated when the right to counsel becomes an obligation. As stated in *Farretta, supra*:

"An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense."

Id.

Nor would the defence of Slobodan Milosevic be the defence guaranteed him under international law, were he to have counsel imposed upon him against his will.

The ICTY's general structure is that of an adversarial system of criminal justice. Other legal influences have been integrated to the Rules of Procedure and Evidence, but the nature of the proceedings, which involve a prosecutor and defendant, as parties, presenting evidence before a panel whose function is that of arbiter, is unquestionably of an adversarial nature. In the adversarial system, history has eloquently illustrated that imposition of counsel on an unwilling accused is the practice of political courts, and does not have its place in a democratic system of justice, much less before an institution that will generate precedent for a truly legitimate international criminal jurisdiction, whose establishment has been the fruit of half a century of struggle:

"In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying 'political' offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights."

Faretta, Id.

Recently, the ICTY has ordered the Prosecutor, and only the Prosecutor, to provide an opinion with respect to the imposition of counsel in the absence of instructions or cooperation from Mr. Milosevic. The Chamber has repeatedly referred to its obligation to carry out a fair trial, and held, when it acknowledged the right to self-representation in April 2003, that it "has indeed an obligation to ensure that a trial is fair and expeditious; moreover, where the health of the Accused is in issue, that obligation takes on special significance." Article 21 of the

ICTY's Statute states that the Chamber must exercise this obligation "with full respect for the rights of the accused." However, expediency has become, as the defendant is set to present essential and potentially embarrassing evidence, the Chamber's apparently overwhelming concern.

Imposition of counsel, even "standby counsel", as appears to be presently envisaged by the ICTY, will not alleviate any of the difficulties facing the process: it will not treat, much less cure, Slobodan Milosevic's malignant hypertension; it will not provide the defendant with the time and conditions to prepare his case; it will not redress the gross imbalance in the resources accorded the Prosecutor and the defence, a redress required by the principle of equality of arms, which the Court professes to recognize. If counsel is imposed, Slobodan Milosevic's basic right to represent himself will be violated, and he will still have only 150 days to present his defence, only half of the time allotted to the Prosecution.

It is presently unclear what role an imposed counsel would play. Whatever it may be, it is certain that there is no benefit to be gained from going forward with this unprecedented measure. The ICTY Statute provides the minimum right to be present for one's trial. If Slobodan Milosevic's medical condition does not permit him to attend the proceedings, and he does not waive his right to be present, the ICTY does not have the jurisdiction to hold hearings in his absence. Adjournments will continue as long as measures are not taken to treat Mr. Milosevic's malignant hypertension, a condition that cannot be treated by further violating his rights, threatening to remove him from the process, or by transferring his defence to a complete stranger.

The ICTY assigned three counsel to act as *amicus curiae*, and whose stated role is to ensure, *inter alia*, a fair trial. It is doubtful an imposed counsel, even a "standby counsel" could provide any additional assistance, without hijacking President Milosevic's defence, or simply silencing him. Furthermore, any reference to precedent with respect to the imposition of standby counsel is inapposite. In the case of Dr Seselj, "standby counsel" has been imposed, before the beginning of a trial, and to prevent "disruption" of the proceedings.

President Slobodan Milosevic does not recognize the ICTY. He asserts his innocence, and steadfastly criticizes the ICTY and NATO. He is innocent until proven otherwise, and has every right to oppose the legitimacy of this institution. By imposing counsel, the ICTY would not only violate his right to self-representation, but his right to present relevant evidence demonstrating the repeated violations of Yugoslavia's sovereignty over a decade. These violations led to NATO's illegal war of aggression against and bombing of Yugoslavia – at the very height of which an indictment against Slobodan Milosevic was confirmed by the ICTY – in a transparent bid to deprive the Yugoslav people of a voice to negotiate peace and in order to justify the continuation of that war of aggression.

The trial of Slobodan Milosevic before the ICTY has been adjourned until August 31st, 2004. The Prosecutor has presented 295 witnesses in as many days, all of which have been cross-examined by the defendant in person, as he does not recognize the ICTY as a judicial body, and signals this non-recognition by refusing to assign counsel. Slobodan Milosevic is a law school graduate, was three times elected to the highest state offices of Serbia and Yugoslavia, and has by all accounts ably contested the Prosecution's case. There is no question as to his mental fitness and ability to waive his right to counsel. The ICTY may not enjoy President Milosevic's criticism. Nonetheless, the public benefits of respecting his right to self-representation far outweigh whatever embarrassment might be visited upon the ICTY. Justice demands that Slobodan Milosevic be given the right to demonstrate that the Security Council

institution detaining him is a political weapon against the sovereignty and self-determination of the people of Serbia and all the peoples of Yugoslavia.

Nelson Mandela represented himself during the infamous Rivonia trials of the 1960s. Mandela mounted a political defence against apartheid, yet even the South African judiciary did not impose counsel to silence him. The ICTY is poised to threaten the future of international law by doing what even apartheid-era judges dared not do - gag a defendant and impair his ability to respond to a case. A case, we note, made unwieldy, unintelligible and inexplicably lengthy by the Prosecutor, with the Chamber's assent, and not by Slobodan Milosevic. Indeed, most observers of the process have noted that the Prosecutor failed to present compelling evidence to support any of their charges; rather than stay the proceedings, the ICTY permitted the Prosecutor to present additional witnesses, in apparent desperation to make something stick.

The right to defend oneself in person is at the heart of the International Covenant for Civil and Political Rights. The United Nations should not tolerate these continuing violations of international law in the name of expediency. Using a detained person's inappropriately treated illness as an excuse to infringe upon his rights and silence him, and embark upon a "radical reform" of the proceedings-- as the Chamber is now considering, by changing the rules in mid-trial, and to the defendant's detriment-- is a perversion of both the letter and spirit of international law.

As jurists, we are deeply concerned that the planned imposition of counsel constitutes an irrevocable precedent, and potentially deprives any accused person of the right to present a meaningful defence in the future. In the case of Slobodan Milosevic, this measure will only increase his hypertension and place his life at risk.

The ICTY and Security Council will be held responsible for the tragically predictable consequences of their actions.

Signed:

Tiphaine Dickson, Lawyer, Montreal, Quebec, Canada

Christopher Black, Lawyer, Toronto, Canada

Professor Smilja Avramov (Former President, International Law Association), Belgrade, Serbia and Montenegro

Sergei Baburin, Doctor of Law, Professor, (Vice-President, State Duma of the Federal Assembly of the Russian Federation), Moscow, Russian Federation

Nicole Bergevin, Lawyer, Montreal, Quebec

Professor Aldo Bernardini, International Law, University of Teramo, Italy

Professor Erich Buchholz, Lawyer, Berlin, Germany

Professor Kosta Cavoski, University of Belgrade, Belgrade, Serbia and Montenegro

Professor Panayotis G. Charitos, LL.D., International Law, Supreme Court Attorney, Greece

Ramsey Clark, Former US Attorney General, New York, USA

Goran Cvetic, Lawyer, Belgrade, Serbia and Montenegro

Trendafil Danailov, Lawyer, (Former President, Sofia District Court), Sofia, Bulgaria

Bjørn Elmquist, Lawyer, (Former MP), Copenhagen, Denmark

Professor Peter Erlinder, (past-President, National Lawyers Guild, NYC), William Mitchell College of Law, St. Paul, MN, USA

Armin Fiand, Lawyer, Hamburg, Germany

Jeff Frazier, Lawyer, Houston, Texas, USA

Dr Mikhail Fomichenko, (Head, Center for Human Rights and Legal Protection), Moscow, Russian Federation

Sergei Glotov, Doctor of Law, Professor, (Deputy President, Commission on Administrative and Organizational Issues of the State Duma), Moscow, Russian Federation

Dr Heinrich Hannover, Lawyer, Worpswede, Germany

Professor Yuri Ilyin, Lawyer, Moscow, Russian Federation

Viktor Ilyuchin, State Counselor of Justice of II Order, (Deputy President, Commission for Security of the State Duma), Moscow, Russian Federation

Strahinja Kastratovic, Lawyer, (Former President, Lawyers' Chamber of Belgrade), Belgrade, Serbia and Montenegro

Professor Mikhail Kuznecov, Lawyer, (President, Tribunal for NATO Crimes in Yugoslavia), Moscow, Russian Federation

Jennie Lusk, J.D., Lawyer, Albuquerque, New Mexico, USA

Mikhail Menev, Lawyer, (Former President, Sofia City Court), Sofia, Bulgaria

Dr Alexander Mezyaev, International Law, (Deputy Head, Department of Constitutional and International Law, Academy of Business, Kazan'; Member, Russian International Law Association; Member, Experts' Council of the Ombudsman of the Republic of Tatarstan), Kazan', Tatarstan, Russian Federation

Professor Dimitar Mikhailov, Criminal Law, (Former Member, UN Committee Against Torture), Sofia, Bulgaria

Oksana Mikhalkina, Lawyer (President, Moscow Lawyers' Association), Moscow, Russian Federation

Oleg Mironov, Doctor of Law, Professor, (Director, Institute for Human Rights), Moscow, Russian Federation

Professor Claudio Moffa, Ordinario, University of Teramo, Italy

E. Olof, Lawyer, Zeist, Netherlands

H.E. Schmitt-Lermann, Lawyer, Munich, Germany

Professor Norman Paech, University for Economy and Politics, Hamburg, Germany

Dmitrij Potockij, Lawyer, Moscow, Russian Federation

Professor Enyo Savov, International Law, Sofia, Bulgaria

Dr Heinz Juergen Schneider, Lawyer, Hamburg, Germany

Elena Semenovna, Lawyer, Moscow, Russian Federation

David K. Sergi, Lawyer, San Marcos, Texas, USA

Jitendra Sharma, Senior Advocate, Supreme Court of India (President, International Association of Democratic Lawyers)

Dr Taras Shamba, Moscow, Russian Federation

Sergei Shtin, Lawyer, Moscow, Russian Federation

Valentina Shtraus, Lawyer, Rostov, Russian Federation

Professor Bhim Singh, Advocate, Supreme Court of India (President, National Panthers Party)

N.M.P. Steijnen, Lawyer, Zeist, Netherlands

L.P.H. Stibru, Lawyer, Zeist, Netherlands

Dr Milan Tepavac, International Law, Belgrade, Serbia and Montenegro

Professor Andre Tremblay, Lawyer, Montreal, Quebec, Canada

Professor Velko Valkanov, (President, Bulgarian Committee for Human Rights, Former MP), Sofia, Bulgaria

Jacques Verges, Advocate at the Court of Appeal, Paris, France

Dr Friedrich Wolff, Lawyer, Berlin, Germany

Professor Ivan Yatsenko (Vice-President, European Peace Forum), Moscow, Russian Federation