

VIEW FROM THE HAGUE

THE RIGHT TO SELF-DEFENCE IS NOT ABSOLUTE

On 2 September 2004, the Hague Tribunal's Trial Chamber appointed defence counsel for Mr. Milošević due to his ill-health. This decision was immediately followed by a heated debate between those who believe that Mr. Milošević's fundamental rights have been violated with this decision and those who believe that it was about time the court appointed counsel and prevented Mr. Milošević from using the courtroom as his political pulpit.

It is a very interesting debate that will probably outlast the proceedings against Milošević and the Tribunal itself. This is the case with many other debates on the finer points of the law raised by various decisions and judgements of this rather unique judicial institution.

But, let us turn to the facts for a moment.

The Tribunal was established to bring to justice those proved to be the most responsible for the atrocities committed in the former SFRY since 1991. By doing so, it would bring justice to the victims of those horrendous crimes. Slobodan Milošević is one of 149 individuals who have been indicted by the Tribunal since its establishment. He is one of 103 who have appeared before the ICTY so far, and he is one of two who have chosen to defend themselves.

In allowing the accused to exercise his right to defend himself, the Judges examined the issues from every angle. The Prosecution, the *amici curiae* and the accused himself expressed their opinions on the matter and in April 2003, the Trial Chamber rendered a decision by which it clearly stated that, although it did not deem necessary to appoint counsel for Mr. Milošević at that time, the right of an accused to defend himself is not absolute. It pointed out that Rule 80 of the Tribunal's Rules of Procedure and Evidence allows the Chamber to remove an accused from the courtroom and continue the proceedings in his absence if the accused has persisted in disruptive conduct following a warning that such conduct may warrant his removal from the courtroom. Such a situation would clearly make it impossible for the accused to defend himself. The Chamber also stated that it retains the right to change its position if that becomes necessary and that is exactly what it did at the beginning of September - it changed its decision due to the deterioration of health of the accused.

In his oral decision, Judge Robinson explained that "the fundamental duty of the Trial Chamber is to ensure that the trial is fair and expeditious. The concern of the Chamber is that, based on medical reports, there is a real danger that this trial might either last for an unreasonably long time or, worse yet, might not be concluded should the accused continue to represent himself without the assistance of counsel. If counsel is assigned, measures can be devised to ensure that the trial continues in a manner that is both fair and expeditious."

Since assigning counsel, the Judges urged Mr. Milošević to work with his appointed counsel and even question his witnesses in court after the examination by the counsel. So far, this arrangement has not been offered to any other accused and shows that the Judges are going out of their way to ensure the fairness and expeditiousness of this trial.

However, Mr. Milošević still refuses to accept these arrangements and makes it even more difficult for the Judges to perform the very complex task of balancing the rights of the accused and the interests of justice.

Robinson summarised the situation last week:

"It is not possible to overemphasise the willingness of the Trial Chamber to adopt a flexible approach to the presentation of the Defence case so as to ensure that all relevant issues which the accused wishes to explore are dealt with. To that end, we have stated on a number of occasions that we will consider permitting the accused to examine and re-examine witnesses in addition to the examination and re-examination carried out by assigned counsel. Those counsels have made determined efforts to discuss the presentation of his defence with the accused, but so far he has refused to engage in any discussion whatsoever. The Chamber encourages all witnesses on the accused's witness list to make themselves available to counsel and the Chamber to ensure that the Defence case is fully presented. Should the failure of the accused to cooperate with counsel result in material which is

actually relevant to his case not being presented to the Trial Chamber, then he must bear responsibility for that. If the opportunity for the accused to participate in the presentation of his defence is not grasped by him, the trial will nonetheless proceed and none can say there was injustice."

Ultimately, we all bear responsibility for our own actions.

Outreach Programme

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