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Milan Markovic

Texas A&M University School of Law, mmarkovic@law.tamu.edu

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In the Interests of Justice?: A Critique of the ICTY Trial Court's Decision to Assign Counsel to Slobodan Milosevic

MILAN MARKOVIC*

INTRODUCTION

On February 12, 2002, Slobodan Milosevic became the first head of state to be brought before an international criminal tribunal.¹ The Milosevic trial was hailed as a momentous event for both the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and international justice as a whole.² As one former ICTY official said at the start of the trial, "Milosevic's transfer to the Hague is the capstone of the tribunal's somewhat improbable rise from the margins of the international arena to that of a serious international institution."³

Unfortunately, the trial appears to have been more than the ICTY bargained for. The prosecution's case took over two years to complete.⁴ The Presiding Judge, Richard May, resigned for health reasons and was replaced.⁵ Throughout the proceedings, Milosevic berated witnesses and launched scathing attacks against the legitimacy of the tribunal.⁶ His tactics have had some resonance back home as Milosevic's approval ratings have doubled,⁷ and he has gone from the most reviled individual in Serbia to number four on the list of most admired Serbs.⁸

The most significant challenge facing the court, however, has undoubtedly been Milosevic's insistence on carrying out his own defense despite his ill health. Because of Milosevic's elevated blood pressure and hypertension, the court cut the number of trial days per week from five to three.⁹ The trial has been shut

* J.D., Georgetown University Law Center (expected May 2006); M.A., New York University (2003); B.A., Columbia University (2001). The author would like to thank Professor Jane Stromseth of Georgetown University Law Center and Professor Joel Rosenthal of New York University.

1. Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 915 (2003).

2. David Tolbert, *The International Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, FLETCHER FORUM OF WORLD AFFAIRS, Fall 2002, 5, 5.

3. *Id.*

4. CNN, *Case Against Milosevic Ends Early* (Feb. 25, 2004), at <http://www.cnn.com/2004/WORLD/europe/02/25/hague.judge/index.html>.

5. *Id.*

6. See Michael P. Scharf, *Making a Spectacle of Himself*, WASH. POST, Aug. 29, 2004, at B2.

7. Scharf, *supra* note 1, at 930.

8. *Id.* at 931.

9. *Id.* at 917.

down for entire weeks so as to allow him to rest.¹⁰

In light of Milosevic's poor health and the court's duty to ensure that the trial is "fair and expeditious,"¹¹ on September 2, 2004, counsel was assigned to Milosevic pursuant to a previous prosecution motion.¹² On September 3, the ICTY Registrar appointed Steven Kay and Gillian Higgins, who had been involved in Milosevic's defense as *Amici Curiae*, as defense counsel.¹³ Not surprisingly, Milosevic refused to cooperate, calling into question the adequacy of the defense being offered.¹⁴ Kay and Higgins have attempted to resign from their post, but the court has forced them to stay.¹⁵

In Part I of this Note, I will argue that the trial court's decision to assign counsel to Slobodan Milosevic violates both the ICTY statute and international law. Milosevic's ill health does not justify extinguishing his right to represent himself. The decision sets a dangerous precedent for future international criminal proceedings by favoring expediency over justice.

In Part II, I will argue that even if the trial court's decision was not a clear violation of the ICTY statute and international law, the judges could have chosen a different way to expedite the trial. The purpose of the ICTY is not only to try perpetrators but also to contribute to the "restoration and maintenance of peace."¹⁶ Assigning counsel to Milosevic only confirms the perception in Serbia that the trial is "victor's justice" and will not bring about the "political catharsis"¹⁷ the ICTY founders envisioned.

I. THE COURT'S REASONING

To justify its decision to impose counsel, the court relied on Articles 20 and 21 of the ICTY statute with particular emphasis on Article 21(4)(d), which provides that an accused has a right to

be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any

10. *Id.*

11. Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg. at 6, art. 20 (1993) *amended by* Res. 1166 (1998); Res. 1329 (2000), Res. 1411 (2002), Res. 1431 (2002), Res. 1481 (2003), *available at* <http://www.un.org/icty> (last visited Feb. 1, 2005) [hereinafter ICTY Statute].

12. *See generally* Prosecutor v. Milosevic, Case No. IT-02-54 (Order and Reason for Assignment of Defense Counsel) (Sept. 22, 2004), *available at* <http://www.un.org/icty> [hereinafter Order for Defense Counsel].

13. *Id.*

14. *See* Marlise Simons, *Milosevic Finds Ways to Thwart War Crimes Court*, S.F. CHRON., Sept. 19, 2004, at A22.

15. ABC News, *Court Orders Milosevic Defense Lawyers to Continue*, Dec. 7, 2004, at <http://abcnews.go.com/International/wireStory?id=308816>.

16. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993).

17. Scharf, *supra* note 1, at 916.

case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.¹⁸

The court reasoned that the rights enumerated in Article 21 provide the accused with an effective defense.¹⁹ However, defense “in person” or “through counsel” must be understood in light of Article 20’s stipulation that a trial be “fair and expeditious.”²⁰ Thus, the court concluded that where self-representation poses a risk of unfairness, a court need not respect the defendant’s wish to conduct his own defense.²¹ In Milosevic’s case, his ill health was slowing the pace of the trial, which was affecting its fundamental fairness: “[s]hould a trial not be conducted expeditiously, *i.e.*, without undue delay, the risk of unfairness will arise . . . The right to represent oneself must yield when it is necessary to ensure that the trial is fair.”²²

Although noting that there was no precedent for imposing counsel on an ill defendant who wishes to represent himself, the court held that the right to self-representation, as detailed in the statute, is not unqualified and can be forfeited.²³ In *Prosecutor v. Seselj*²⁴ and *Prosecutor v. Barayagwiza*,²⁵ which were before the ICTY and International Criminal Tribunal for Rwanda (“ICTR”) respectively, the court noted that the defendants lost the right to defend themselves by disrupting the progress of their trials. The court cited *Faretta v. California*,²⁶ before the United States Supreme Court, and *Croissant v. Germany*,²⁷ before the European Court for Human Rights, to illustrate that courts can and often do impose counsel on unwilling defendants.²⁸ Having determined that the fundamental fairness of the trial was at stake on account of Milosevic’s ill health, the court held it had both the right and duty to assign counsel.

The court’s decision was not only incorrect as a matter of law, it was unwise as a matter of policy. Milosevic should have been given the opportunity to present the defense of his choice. Accommodations could have been made for Milosevic’s health, short of imposing counsel on him. The verdict in this case will be suspect because of the court’s decision to choose expediency over justice.

18. ICTY Statute, *supra* note 11, at art. 21(4)(d).

19. Order for Defense Counsel, *supra* note 12, para. 32.

20. *Id.*

21. *Id.*

22. *Id.* paras. 33, 34.

23. Order for Defense Counsel, *supra* note 12, para. 45.

24. *Prosecutor v. Seselj*, Case No. IT-03-67, Initial Indictment, May 9, 2003.

25. *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19, Initial Indictment, Apr. 14, 2000.

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

27. *Croissant v. Germany*, 16 Eur. Ct. H.R. 135 (1993).

28. Order for Defense Counsel, *supra* note 12, para 43 and 45.

II. LEGAL CONSIDERATIONS

A. THE COURT MISREAD THE TEXT OF THE STATUTE

The text of Article 21(4)(d) states that Milosevic is entitled to defend himself “in person or through legal assistance of his own choosing.”²⁹ In denying a previous prosecution motion to assign counsel to Milosevic, Judge May interpreted the above phrase to mean: “[t]he accused has a right to have counsel, but he also has a right not to have counsel.”³⁰ Nowhere in the text of Article 21(4)(d) is there any reference to imposing counsel on an unwilling defendant. A plain reading of the statute does not substantiate the proposition that counsel can be assigned to Milosevic against his will.³¹

A few prominent commentators have suggested otherwise.³² The claim is that the text of Article 21(4)(d) permits the assignment of counsel on an unwilling defendant where “the interests of justice so require.”³³ This interpretation is problematic, however, and takes the “interests of justice” language out of context. Article 21(4)(d) states that the defendant has a right “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him . . . if he does not have sufficient means to pay for it.”³⁴ The “interests of justice” provision is merely qualifying the defendant’s right to have legal assistance. It does not establish that legal assistance can be assigned whenever “the interests of justice so require,” regardless of the defendant’s wishes. This is why there is a comma separating “to have legal assistance assigned to him” from “in any case where the interests of justice so require.” In addition, the right to counsel is “without payment by him . . . if he does not have sufficient means to pay for it.”³⁵ Article 21(4)(d), therefore, is setting out the parameters of the defendant’s right. To suggest that “the interests of justice” provision allows courts to force counsel upon an unwilling defendant is inconsistent with the purpose of Article 21(4)(d), which is clearly to endow the defendant with a right, not to empower the court.

To circumvent the plain meaning of the statute, the court claims that the rights detailed in Article 21 are elements of the “overarching” requirement of a fair

29. ICTY Statute, *supra* note 11.

30. Prosecutor v. Milosevic, Case No. IT-02-54, Reasons for Order on Prosecution Motion Concerning Assignment of Counsel, para. 52, Sept. 2004, available at: <http://www.un.org/icty> (last visited Feb. 1, 2005).

31. *Id.* at para. 18.

32. See Scharf, *supra* note 6, at B2; see also David Scheffer, *Enough of Milosevic's Antics*, INT'L HERALD TRIB., July 13, 2004, at <http://www.iht.com>. But see *Faretta*, 422 U.S. at 833 (“[I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want.”).

33. ICTY Statute, *supra* note 11.

34. *Id.*

35. *Id.*

trial.³⁶ This reading makes the rights specified in Article 21(4) not rights at all, but procedural formalities that can be overridden when “fairness” dictates. Thus, when the fairness of the trial becomes an issue, the right to represent oneself must yield.³⁷

All the rights in Article 21 are “minimum guarantees,”³⁸ however, which are entitled to “full respect.”³⁹ Nowhere does the text of the statute indicate that these rights are somehow subordinate to the goal of a fair trial.⁴⁰ A better reading of Article 21 is that it *sets out* the requirements of a fair trial. For example, Article 21(1) stipulates that all people are equal before the tribunal and Article 21(3) stipulates that a defendant is innocent until proven guilty.⁴¹ Considering that the previous section of the statute deals with the “conduct of trial proceedings,” it follows that the rights in Article 21 are intended to clarify what constitutes a fair trial. The court’s interpretation of Article 21 (and the rights described therein) makes Article 21 superfluous.

In claiming that Milosevic’s right to represent himself must yield, the court clearly has a different conception of a fair trial than is described in the ICTY statute. Unfortunately, the court’s understanding of fairness is never adequately explained. Throughout its decision, the court seems to equate fairness with expediency.⁴² It notes:

Above all other considerations, the arrangement adopted should be one that ensures not only that the proceedings are conducted fairly but also that a fair trial is concluded. It would be intolerable for any accused to have accusations as serious as those against this Accused left outstanding against him for an unreasonable time⁴³

While an accused does have a right to be tried without “undue delay”⁴⁴ under the ICTY statute, the court never explains how the fact that a trial is long violates this right. In any case, since the rights in Article 21 are afforded full equality,⁴⁵ the court does not have the power to extinguish Milosevic’s right to self-representation simply to hasten the pace of the trial.

The court’s view of fairness takes into account what is fair for Milosevic’s

36. *Order for Defense Counsel*, *supra* note 12, para. 32.

37. Interestingly, the court never states whether other rights detailed in Article 21 must also yield where the fairness of the trial is in jeopardy. Does the court believe, for example, that it would be permissible to do away with the presumption of innocence in Article 21(3) in order that a trial be carried out more expeditiously?

38. *See* ICTY Statute, *supra* note 11, at art. 21(4).

39. *Id.* at art. 20.

40. *See* ICTY Statute, *supra* note 11.

41. *Id.*

42. *Order for Defense Counsel*, *supra* note 12, para. 36.

43. *Id.*

44. ICTY Statute, *supra* note 11, at art. 21(4)(c).

45. *Id.* at art. 21(4).

victims.⁴⁶ While concern for Milosevic's victims is laudable, the ICTY statute is unequivocal that a fair trial is an entitlement of the accused;⁴⁷ as Article 21(2) reads, "[i]n the determination of the charges against him, the accused shall be entitled to a fair and public hearing."⁴⁸ Milosevic has maintained his desire to represent himself from the beginning of the trial,⁴⁹ and at no point has he expressed frustration with the pace of the trial. As an English scholar expressed with regard to the Star Chamber: "There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence."⁵⁰

Stripping Milosevic of the right to conduct his own defense does not make the proceedings any fairer to him, and as I have attempted to show, this is the conception of fairness that the drafters of the ICTY statute had in mind. The court simply does not have adequate support in the text of the statute for the proposition that the accused's right to self-representation can be abrogated as part of the court's mandate to ensure that the trial is fair and expeditious.

B. THE COURT MISINTERPRETED INTERNATIONAL LAW

The right to self-representation is protected by customary international law. As the court concedes, most common law countries recognize a defendant's right to represent himself at trial.⁵¹ The right to defend oneself in person has been codified by Article 6(3)(c) of the European Convention on Human Rights⁵² as well as Article 14(3)(d) of the International Covenant on Civil and Political Rights.⁵³

Under the court's interpretation of international law, however, the right to self-representation is not absolute and counsel can be assigned to unwilling defendants like Milosevic.⁵⁴ The court cites *Faretta v. California* for the proposition that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his

46. See *Prosecutor v. Milosevic*, Case No. IT-02-54, Defense Appeal Against Decision on Assignment of Counsel, para. 67, Sept. 2004, available at: <http://www.un.org/icty> [hereinafter Defense Appeal].

47. *Id.*

48. ICTY Statute, *supra* note 11, at art. 21(2).

49. Order for Defense Counsel, *supra* note 12, para. 3.

50. *Faretta v. California*, 422 U.S. 806, 823 (1975).

51. This is not true for civil law countries. However, ICTY proceedings are adversarial like those of common law countries which is presumably why Article 21(d)(4) provided for the right to self-representation. See generally Prosecution Motion, *supra* note 31, paras. 21-24.

52. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

53. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

54. Order for Defense Counsel, *supra* note 12, para. 45.

own lawyer.”⁵⁵ This interpretation of *Faretta* is problematic, as anyone familiar with American constitutional law can attest. *Faretta* establishes that a defendant’s right to self-representation can only be curtailed when he/she has “abused the dignity of the courtroom”⁵⁶ or otherwise engaged in “obstructionist misconduct.”⁵⁷ Milosevic may have displayed a great deal of bluster in the courtroom, but his behavior falls far short of obstruction.⁵⁸ Therefore, efficiency considerations cannot trump his right to self-representation. As the *Faretta* court held:

To force a lawyer on a defendant can only lead him to believe that the law contrives against him . . . [a]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.⁵⁹

The court’s citations to *Prosecutor v. Barayagwiza*, *Prosecutor v. Seselj*, and *Croissant v. Germany* also do not substantiate the claim that an accused’s right to self-representation can be abolished absent obstructionist acts. The accused in *Barayagwiza* never asserted a right to self-representation and had been boycotting the trial, leaving the court no choice but to appoint counsel.⁶⁰ In *Seselj*, the accused was in need of legal assistance and was increasingly using the right to represent himself to cause disruptions.⁶¹ While *Croissant* is used by the court to stand for the very general proposition that counsel can be assigned to a defendant against his will,⁶² the right to self-representation was never implicated in the case. Rather, in *Croissant*, the accused had selected two lawyers but was not permitted to dismiss a third who had been appointed by the court.⁶³

Milosevic asserted his right to self-representation from the beginning of the trial.⁶⁴ He was actively and competently⁶⁵ pursuing his defense and although his health may have slowed the pace of trial,⁶⁶ there is no evidence that Milosevic was purposely obstructing it. There is simply no precedent for the proposition that one forfeits the right to self-representation merely on the basis of ill health. If the court was so concerned about Milosevic, it should have considered the issue

55. *Id.*

56. *Faretta v. California*, 422 U.S. 806, 834 (1975).

57. *Id.*, at 834 n.46 (citing *Illinois v. Allen*, 397 U.S. 337, 343 (1970)).

58. The court’s decision notes that Milosevic’s illness delayed the trial. *See Order for Defense Counsel*, *supra* note 12, para. 11.

59. *Faretta*, 422 U.S. at 834.

60. Defense Appeal, *supra* note 46, para. 58; *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19, Initial Indictment, Apr. 14, 2000.

61. Defense Appeal, *supra* note 46, para. 59; *Prosecutor v. Seselj* (ICTY May 9, 2003) (No. IT-03-67).

62. Order for Defense Counsel, *supra* note 12, para. 43; *Croissant v. Germany*, 16 Eur. Ct. H.R. 135 (1993).

63. Defense Appeal, *supra* note 46, para. 62.

64. Order for Defense Counsel, *supra* note 12, para. 3.

65. Milosevic graduated near the top of his class from the University of Belgrade’s Law School. *See Scharf*, *supra* note 1, at 917.

66. Order for Defense Counsel, *supra* note 12, para. 11.

of whether he was fit to stand trial at all instead of merely focusing on his ability to represent himself.⁶⁷

This is not to say that the court had an easy decision before it. It would be highly controversial if Milosevic were to die before a verdict could be reached and even worse if he were to succumb in the courtroom. The court might well have believed it was acting in Milosevic's best interests by assigning counsel to him, not only by protecting his health, but also by giving him the means to put forward a stronger defense.

The problem with this is that the right to self-representation is supposed to serve as a bulwark against such paternalism. As the United States Supreme Court stated: "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage."⁶⁸ No matter how benign the court's intent in this case, its decision is paternalistic and politically problematic. Milosevic's response to the court's decision is not surprising: He refused to cooperate with assigned counsel.⁶⁹ Several of his witnesses have refused to appear if his right to self-representation is not restored.⁷⁰ Instead of making the Milosevic trial any more fair or expeditious, the court's decision to impose counsel has deprived Milosevic of the fundamental right to put forward the defense of his choosing.

III. PRAGMATIC CONSIDERATIONS

Even if the ICTY's decision to assign counsel to Milosevic can somehow be justified under the ICTY statute and customary international law, this does not mean that the court should have proceeded to assign counsel. For the ICTY to be an effective institution, its rulings must be viewed as legitimate by all parties to the Yugoslav conflict.⁷¹ Imposing counsel on Milosevic only exacerbates Serbian suspicions of the tribunal and is counter-productive to the goal of "restoration and maintenance of peace."⁷²

Even before this decision, only a quarter of Serbs believed that their former President was receiving a fair trial.⁷³ In this Section, I explore some of the other problems with the Milosevic trial that make the court's decision to impose counsel all the more unfortunate. In preventing Milosevic from presenting his case, the court is inadvertently fueling long-standing suspicions that the court is

67. Defense Appeal, *supra* note 46, para. 74.

68. *Faretta v. California*, 422 U.S. 806, 834 (1975).

69. See Simons, *supra* note 14.

70. Peter Ford, *Milosevic Puts War Court on Trial*, CHRISTIAN SCIENCE MONITOR, Sept. 16, 2004.

71. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993).

72. *Id.*

73. Scharf, *supra* note 1, at 930.

biased against Milosevic and Serbs in general.⁷⁴

A. THE SUSPICIOUS CIRCUMSTANCES OF MILOSEVIC'S INDICTMENT AND EXTRADITION

Milosevic's journey to the Hague was not without controversy. The indictment against him was issued during the Kosovo War at a time when there were growing fears about the collateral damage NATO was causing.⁷⁵ The prosecutor who indicted Milosevic resigned soon after to take a seat on the Canadian Supreme Court.⁷⁶ To transfer Milosevic to the Hague, Serbian Prime Minister Zoran Djindjic had to violate a federal court ruling and order police to put Milosevic on a plane.⁷⁷ Djindjic made it clear that the transfer was motivated by a desire to elicit over a billion dollars in aid from the United States and its allies, not justice.⁷⁸ This effectively made Milosevic an "export commodity."⁷⁹

The treatment of Milosevic is in direct contrast to that of two other players in the Yugoslav tragedy: Franjo Tudjman and Alija Izetbegovic. Bosnian President Alija Izetbegovic died in 2003 while under investigation for war crimes by the ICTY.⁸⁰ His funeral was attended by 100,000 people and several foreign dignitaries.⁸¹ As for Croatian President Tudjman, the prosecutor was preparing to indict him when he died from cancer.⁸² Despite the fact he was widely suspected of war crimes at the time, Tudjman was allowed to receive medical treatment at Walter Reed Hospital in Washington, D.C. prior to his death.⁸³ Unlike Slobodan Milosevic, these men were permitted to die without facing justice. Considering this history, the ICTY should have handled the indictment and extradition more delicately. The decision to impose counsel, like the failure to indict Tudjman and Izetbegovic, is bound to be viewed as an example of the court's politicization. The court could have found alternative means to hasten the pace of the trial.

B. MILOSEVIC AS LAWYER AND MARTYR

In *Faretta*, the U.S. Supreme Court noted: "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense."⁸⁴ Milosevic might be one such defendant. The U.S.

74. See generally *id.*

75. *Id.* at 923.

76. *Id.* at 924.

77. *Id.*

78. *Id.* at 925.

79. *Id.*

80. BBC News, *Bosnia Leader Was War Crimes Suspect* (Oct. 10, 2003), at <http://news.bbc.co.uk>.

81. *Id.*

82. Scharf, *supra* note 1, at 927.

83. *Id.* at 926.

84. *Faretta v. California*, 422 U.S. 806, 834 (1975).

government pays to have the Milosevic trial broadcast throughout Serbia, and many Serbs are following the trial on television.⁸⁵ They have seen their former leader functioning reasonably well as his own attorney.⁸⁶ One former employee of the ICTY has stated: “[y]ou can’t help falling under his spell He’s very sharp and he’s funny. It’s sick, I know what he’s there for, but he’s so cynical and quick that he’s had the courtroom in fits of laughter.”⁸⁷ When lead prosecution attorney Geoffrey Nice showed photos of victims of Serbian atrocities during his opening argument, Milosevic responded by displaying a Hollywood-quality video and slide-show of Serbian victims of NATO’s bombing campaign.⁸⁸ This led the *New Yorker* to quip, “Horror for horror, [Nice] was outdone by Milosevic.”⁸⁹

People from the former Yugoslavia have always mistrusted the ICTY because proceedings are conducted in unfamiliar languages and employ procedures and laws not well understood in Serbia and the region as a whole.⁹⁰ The ICTY established an outreach office in 1999, which tried to inform the people of the region—starting with local legal professionals—about its work.⁹¹ Unfortunately, in the crucial phase where the Tribunal was beginning operations, its work was subject to “gross distortions and disinformation” in many parts of the former Yugoslavia.⁹² Considering the lack of knowledge and general distrust of the ICTY,⁹³ all of its decisions are bound to be viewed with some skepticism. Because of Milosevic’s surprisingly strong performance, the court’s decision to assign counsel will be cynically interpreted by most Serbs as nothing more than an effort to silence him. No matter the court’s ultimate verdict, the decision to impose counsel has made Milosevic an all the more convincing martyr.

C. THE PROSECUTION’S FAILURE TO MAKE THE CASE

The prosecution sought to have counsel assigned to Milosevic before his health ever became an issue.⁹⁴ Perhaps the court’s decision to assign counsel would not be as problematic if the case against Milosevic were more impressive. Unfortunately, the case against Milosevic is hardly air-tight. The prosecution’s apparent star witness, former Serbian Secret Police Chief Rade Markovic, was

85. Scharf, *supra* note 1, at 930.

86. See Jon Silverman, *Milosevic Shines as Lawyer*, BBC NEWS, Feb. 19, 2002, at <http://news.bbc.co.uk/1/hi/world/europe/1830203.stm>.

87. Scharf, *supra* note 1, at 919.

88. *Id.* at 918.

89. *Id.*

90. Tolbert, *supra* note 2, at 11.

91. *Id.*

92. *Id.*

93. *Id.*

94. Order for Defense Counsel, *supra* note 12, para. 3.

expected to testify that Milosevic knew and approved of war crimes in Kosovo.⁹⁵ Instead, he told the tribunal: “[o]ur task was to preserve the life and security of civilians in Kosovo, both Serbs and Albanians.”⁹⁶

Moreover, to demonstrate Milosevic’s command responsibility for war crimes in Bosnia, the prosecution needed to show that Milosevic, and not just Ratko Mladic and Radovan Karadzic, were in charge of Bosnian-Serb troops.⁹⁷ Here too, however, the prosecution has had its difficulties. One prominent prosecution witness testified that Milosevic was “outraged” by the massacre at Srebrenica.⁹⁸ Biljana Plavsic, a former Bosnian-Serb leader who has pled guilty to war crimes, was expected to offer evidence against Milosevic but never testified.⁹⁹ The Bosnian part of the case was so underwhelming that Chief Prosecutor Carla Del Ponte was forced to admit that she did not have a “smoking gun” to link Milosevic to genocide and war crimes in Bosnia.¹⁰⁰

Because of the prosecution’s missteps, the court’s decision to assign counsel is bound to be viewed as an effort to aid the prosecution. Skeptical Serbs can now point to the court’s decision as proof that the court is biased against Milosevic. If the court was hoping to gain legitimacy in the eyes of Serbs, it should have allowed Milosevic to carry out his own defense and trusted the prosecution to discredit it.

CONCLUSION

Under international law and the ICTY statute, a defendant is entitled to represent himself or to receive assistance from counsel of his choosing. In denying Milosevic this right, the trial court divorced him from the strange drama unfolding around him. While the ICTY was right to be concerned with the slow progress of the trial, an expedient trial is not necessarily a fair trial.

The ICTY Appeals Chamber recently reversed the Trial Chamber’s decision.¹⁰¹ The Trial Chamber has been ordered to “[s]teer a careful course between allowing Milosevic to exercise his fundamental right of self-representation and

95. BBC News, *Milosevic ‘Acted Within Law,’* July 26, 2002, at <http://news.bbc.co.uk/1/hi/world/europe/2152747.stm>.

96. *Id.*

97. Alix Kroeger, *Analysis, Milosevic Genocide Charge,* BBC NEWS, Sept. 26, 2002, at <http://news.bbc.co.uk/2/hi/europe/2282326.stm>.

98. Guardian Unlimited, *Srebrenica ‘Outraged Milosevic,’* June 18, 2003, at <http://www.guardian.co.uk/yugo/article/0,2763,979683,00.html>.

99. See BBC News, *Milosevic Trial Enters New Phase,* Feb. 18, 2002, at <http://news.bbc.co.uk/1/hi/world/europe/1826487.stm>.

100. Charles M. Sennott, *Doubt Aired on Genocide Case Against Milosevic,* BOSTON GLOBE, Feb. 26, 2004, at http://www.boston.com/news/world/europe/articles/2004/02/26/doubt_aired_on_genocide_case_against_milosevic/.

101. See generally *Milosevic v. Prosecutor*, Case No. IT-02-54, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, Nov. 1, 2004, available at <http://www.un.org/icty>.

safeguarding the Tribunal's basic interest in a reasonably expeditious resolution."¹⁰² Where Milosevic is physically capable of doing so, he must be allowed to present his case as he sees fit.¹⁰³ While the Appeals Chamber was right to correct the Trial Chamber's decision, one wonders what motivated the court to impose counsel in the first place. As I have attempted to show, its decision made scant sense from either a legal or pragmatic point of view.

102. *Id.* para. 19.

103. *Id.*