The Imposition of Defense Counsel and the Right to a Fair Trial in the Milosevic Case

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by Judith Armatta
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Introduction

I am here tonight to frame an issue of critical importance to those who value a regime of international legal accountability for grave crimes that offend our sense of common humanity, embodied in this instance by the International Criminal Tribunal for the Former Yugoslavia (ICTY).

While we are in the infancy of international humanitarian and human rights law, one hopes we are also in the twilight of impunity. That is not a comfortable place to be. Infants toddle and fall, try and fail. They are in the process of developing. They are not the end product. To become capable adults they need patience, guidance, nurture and assistance. At the same time, the old order of impunity does not concede its place easily. Power never does. To put it behind us requires intelligence, clarity, consistency, strength, perseverance and optimism.

During this time of transition—I hope it is a transition—we can expect difficulties, even apparently insurmountable ones. But we must resist the urge to throw up our hands at every obstacle and say "international justice can't work." "It's imperfect! Get rid of it!" Surely, those of us who care about ending impunity are creative enough, intelligent enough to find ways around those obstacles. If we're committed and understand the transition we're in—from impunity to accountability—we should welcome the challenge.

Impasse in Milosevic Trial

All of you who are familiar with the trial of Slobodan Milosevic know why I'm making these introductory remarks. That trial, in its third year, is facing a crisis. It has reached a stand-off between the will of the UN-established Tribunal and the will of one individual, the accused.

From the outset, Mr. Milosevic has refused to accept the authority of the UN War Crimes Tribunal to put him on trial. Consequently, he refused to defend himself against the 66 counts of war crimes, crimes against humanity and genocide with which he has been charged. But he does not wish to remain silent.

As he also told the court from the beginning, he will use any opportunity to make his political case to the public. For this reason, he refuses to be represented by counsel, who would provide him with a legal rather than a political defense.

Since ICTY rules allow an accused to represent himself, Mr. Milosevic has used that procedure to secure a platform from which to denounce those who have called him to account. He is not interested in answering the legal charges, but in bringing political charges of his own.

Adding to the problem is Mr. Milosevic's severe hypertension, exacerbated by stress and, at times, his refusal to comply with his treatment regime, which caused the trial to be interrupted twelve times for a loss of 66 days during the prosecution case alone. The court reduced its normal five-day schedule to three half days a week. Despite this and after a six month hiatus following the close of the prosecution's case, medical specialists concluded the accused's health had deteriorated to such a degree he was no longer fit to conduct his own defense.

After a thorough review of the trial and Mr. Milosevic's health, the court decided the accused required the assistance of counsel for the trial to go forward in a fair and expeditious manner. When Mr. Milosevic refused to appoint counsel of his choosing, the court appointed the two friends of the court (amici curiae) who, at the court's request, had been raising issues supportive of the defense throughout the trial.

The court's decision brought it into direct conflict with the accused. He strongly objected to presenting his case through appointed counsel and refused to cooperate. According to Mr. Milosevic's associates, at least two hundred sixty-five witnesses declared they would only testify if the court allows the accused to "defend" himself. Mr. Milosevic's witnesses thus appear to have joined him in defying the court's authority.

Challenge to Legitimacy and Authority of Court

While public debate focuses on the right to defend oneself, the real issue is, as Mr. Milosevic has said from the beginning, the legitimacy of the Tribunal. If one accepts, as has been established in the Tadic case, that the Tribunal is a duly constituted legal institution, then its rules and the orders of its judges must be followed. As with any court, its rules provide the method to challenge judicial decisions, i.e. by appeal to a higher court. While the issue of imposed counsel is being appealed, there is no reason to expect that the accused and his witnesses will abide by the appeals' court decision unless it is decided his way.

What it comes down to is that Mr. Milosevic will have his forum on his terms or he will not participate. It is not the right to defend himself that he champions. That would require an acknowledgment of the Tribunal's legitimacy. While the Tribunal cannot force him to participate, they can refuse to be his instrument for advancing his political agenda and undermining their authority.

The Tribunal's fundamental responsibility is to justice. That requires a fair and expeditious trial for the accused, even if he wants something different. It also requires a fair and expeditious trial for the public and the victims.

If Mr. Milosevic is allowed to co-opt the trial for his purposes, the public and the victims will be denied their rightful forum. Indeed, so will Mr. Milosevic. Legitimate issues in his

defense exist and should be aired. Witnesses who can testify on those issues owe to the accused, the public and the victims to participate in the trial.

The court's assertion of authority and Mr. Milosevic's refusal to abide by it have brought the trial almost to a halt. When appointed defense counsel informed the court that 20 of 23 witnesses they had contacted from the accused's list refused to testify, the court adjourned for four weeks to enable counsel to develop witnesses on its own. In the meantime, defense counsel are appealing the court's decision to appoint them. I don't have any inside knowledge as to what will happen on October 12, when the defense case resumes, but defense counsel advised the appeals chamber in the brief it submitted yesterday that it is considering requesting subpoenas and binding orders to produce witnesses at the trial.

At this moment, however, the trial chamber and the accused appear to be at a standoff. As lead prosecutor Geoffrey Nice cautioned the court, there is danger that a rational, reasonable court when confronted by an irrational, unreasonable accused will believe that it must back down because the unreasonable accused never will. In fact, backing down is exactly the wrong response for the court as it encourages further obstructionism. From the court's recent rulings, I have confidence it will hold onto its mantel of authority and not be cowed by this accused's efforts to hijack the proceedings. I hope the appeals chamber will support it.

While this impasse is relatively new on the stage of international justice, it is a harbinger of what will come as other former state leaders are called to account for violations of international humanitarian law. We can expect that they, too, will not bow to judgment, but will attempt to use the trial as a platform to advance a political agenda. They, too, will question the legitimacy of any institution that seeks to hold them accountable on behalf of powerless victims for crimes that offend our humanity.

It is for these reasons we must understand and be clear about what is really happening in ICTY Courtroom #1. And it is for these reasons, we should support the Tribunal and help others to, as well.

Charges, Legal Defenses and Political Charges

Let's look at the real issues in the case for a moment.

In the Bosnia and Croatia indictments, Mr. Milosevic is accused of participating with named others in an enterprise, the purpose of which as well as the means to achieve it were criminal. The purpose was the forced removal of a majority of non-Serbs from significant territory in Bosnia and Croatia. The means included killing, rape, destruction of villages and homes, and mass deportation, among other crimes against the civilian population and prisoners of war. According to the indictment, the fact that genocide was committed in Bosnia by some members of the joint criminal enterprise was, at a minimum, foreseeable by the accused and may have been countenanced by him.

For Kosovo, Mr. Milosevic is charged for his participation in a criminal enterprise to

remove a substantial part of the Albanian population to ensure Serbian control over the province. In the Kosovo indictment, he was also charged as an individual with command responsibility for ordering the Yugoslav Army, Serbian police and paramilitaries to commit crimes—like forcible deportation, murder and property destruction—against the Kosovo Albanian population, or for failing to prevent or punish crimes committed by those subordinate to him. These are the charges Mr. Milosevic is called upon to answer.

Mr. Milosevic is charged as an individual for his own acts and omissions. Indeed, that is the purpose of the ICTY—to judge individual responsibility, to individualize guilt that otherwise would be collectivized, thus perpetuating and contributing to the nationalism used to ignite the wars. Those familiar with the Milosevic trial know that he set out to undermine this purpose, to shift examination of his personal guilt to examination of the guilt of Serbia and the Serbs. The Prosecutor has not indicted the Serbs. By maintaining that the Serbs require a defense, Mr. Milosevic has.

A legal defense for the accused might include that he, as president of Serbia, had nothing to do with crimes committed in the Croatian and Bosnian conflicts, or that crimes did not occur, or if they did, they were punished, or, if they were not punished, that he lacked power to do so. As for genocide, it is open to the accused to deny it occurred in municipalities other than Srebrenica and, if it did, that he had anything to do with it.

And, for Kosovo, he might raise a defense that he, as commander in chief, ordered the Yugoslav Army to stop an illegal insurrection by the Kosovo Liberation Army (KLA). He could legitimately argue that any crimes committed by Serb forces were punished, but most death, destruction and flight of the population was caused by NATO bombing or fighting between government forces and the KLA. Of course, this is not to say that any of the above is true or false; merely, that it could provide part of a legal defense if he can produce the evidence to support it.

While the accused touched on these potential legal defenses during cross-examination of the prosecution's witnesses, his main focus was on politics. Very generally, his political case is to defend Serbia, which he sees as the victim of a Western conspiracy. He argues that the European Community, in particular Germany and the Vatican, together with the United States, formed a "joint criminal enterprise" (borrowing a phrase from the indictment against him) to bring a New World Order into being, an order based on global capitalism which required the break-up of the Soviet Union and Yugoslavia. In Mr. Milosevic's view, Yugoslavia, in particular, was singled out because it presented an alternative to Capitalism that could not be tolerated. Serbia was alone in standing against the New World Order. At the same time, Serbia was called upon to fight (on behalf of the West and so-called Christian nations) a rising tide of militant Islamic fundamentalism in Bosnia and again in Kosovo.

Whatever truth there is in his political theories, they are simply irrelevant as a response to the charges against him. As we have seen, he is charged for his participation in a group with a criminal purpose that it sought to achieve through criminal means.

Right of Self-Representation is a Limited Right

Though I maintain that the right to represent oneself is not the issue, I will say a few words about it since it is under consideration by the appeals chamber. Jurisprudence in the International Criminal Tribunals for Yugoslavia and Rwanda and the Special Court for Sierra Leone, as well as in national and regional jurisdictions, generally holds that the right of self-representation is a qualified right. In civil law, which predominates in Europe and governs the former Yugoslav states, an accused is required to be represented by counsel for serious offenses. He or she has no choice. The Milosevic court found the reason for mandatory counsel in such cases compelling: "[I]n cases where the personal liberty of an accused is at stake, the right to a fair trial, which includes the right to an adequate and effective defense, actually imposes a duty on the State to ensure that the accused is represented by professional counsel whose task is to ensure that the interests of the accused are fully protected throughout the proceedings."

The court went on to explain the right to self-representation as well as the right to be represented by counsel are methods by which a more important right may be achieved. That more important right is the right to a fair trial, which is an essential element of justice. The court is the arbiter of what is required to make a trial fair. Courts have held that an accused's representation by counsel can generally be expected to make a trial fairer than when he or she is left to his or her own devices.

Nevertheless, the right to represent oneself is an important right. In the United States it is enshrined in the federal constitution. Even then, the U.S. Supreme Court has held it is not absolute. As that court wrote in the Martinez case, where it held there was no right to self-representation on appeal, "Even at the trial level,…the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."

In another U.S. case—this from the 9th Circuit U.S. Court of Appeals, Judge Reinhardt, in a concurring opinion, explained the underlying interests: "It is…not only the defendant, who 'suffers the consequences' when a fair trial is denied, but the justice system itself. Put another way, the state has a compelling interest, related to its own political legitimacy, in ensuring both fair procedures and reliable outcomes in criminal trials, both of which objectives may be thwarted when a *pro se* defendant…seeks to offer his 'more glorious kind of defense.'"

While not expressing the view of the court majority, the judge went so far as to say that the right to proceed on one's own "deprives the defendant of due process of law by defeating the ability of judges to ensure basic fairness and justice in a criminal trial…." As the prosecution argued in the Milosevic case, "Permitting self representation regardless of consequences threatens to divert criminal trials from their clearly defined purpose of providing a fair and reliable determination of guilt or innocence." From this, we might conclude that a trial is a trial, not a game or a debating society or a forum for propaganda, or a continuation of war by other means. According to Judge Reinhardt, a defendant cannot waive his right to a fair trial. That right implicates not only the accused but the institutional interests of the judicial system.

The Special Court for Sierra Leone recently applied this reasoning in the case of

Augustine Gbao, who sought to have his counsel withdrawn for the reason that he did not recognize the legitimacy of the court. The Sierra Leone Court refused, holding that an accused cannot waive his right to a fair and expeditious trial. Defense counsel safeguards his rights and the integrity of the process.

The latter phrase is important. Defense counsel serves the interests of his or her client, but also the interest of justice. That is why it is often said that counsel—whether defense or prosecution—are officers of the court. They owe a professional duty to uphold the integrity of the process. They cannot, as a self-represented accused might well, do anything that might obstruct justice. They cannot put forward a defense they know to be illegitimate, for example. They cannot call a witness who they know will lie. They cannot knowingly present false evidence. While counsel owe a duty of loyalty to their clients, they owe a greater duty to justice.

In the U.S., some of my colleagues point to the ethical rule that requires us to zealously represent our clients, without also pointing out the qualifying phrase, "within the bounds of the law." Admittedly, counsel sometimes push or step over the line between forceful advocacy and impermissible obfuscation and manipulation of facts. That, however, is a matter for discipline, not a reason for dispensing with professional responsibilities that are an essential part of realizing justice.

The duty defense counsel, as well as the prosecutor, owes to uphold the integrity of the law and the legal process is an important guarantor of a fair trial, one that the public, victims and accused can all rely on. When an accused insists on representing himself this guarantee is potentially lost—more certainly when he clearly states his disdain for the process and his intention to abuse it.

The ICTY has also held that the right to defend oneself, though provided for in its Statute, is a qualified right. The trial chamber in the Seselj case ruled that the ICTY statute's right to self-representation is a starting point, but it is not absolute. It may be limited if the "interests of justice" so require. The interests of justice include the right to a fair trial, the court declared, "which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy."

Like Mr. Milosevic, Mr. Seselj does not recognize the legitimacy of the Tribunal. Unlike Mr. Milosevic, he submits written motions—mountains of them—that do not conform to ICTY rules and have included racist and derogatory remarks. He has also refused to accept materials provided to him in the language of the Tribunal that is called BCS for Bosnian, Croatian and Serbian, stating that he only understands Serbian, when in fact, BCS does not encompass separate languages, despite minor variations among them.

Recognizing his tendency to behave in an obstructionist fashion, the court appointed standby counsel who could take over should the accused's behavior endanger the proceedings. In doing so, the chamber wrote, "The Trial Chamber notes that although the Accused states expressly that he will use 'legal arguments and hard facts' to 'defeat' the Tribunal, and that it would be premature to make any assessment as to his possible intention to harm or 'destroy' the Tribunal, good cause for concern has been shown following his declared intention to attempt to

use the Tribunal as a vehicle for the furtherance of his political beliefs and aspirations. If this tactic were resorted to, it would not only result in an abuse of the valuable judicial resources of the Tribunal but also hinder an expeditious trial." [emphasis added]

Where Mr. Milosevic has not only declared openly and repeatedly that he intends to use his trial "as a vehicle for the furtherance of his political beliefs and aspirations," but has proceeded to do so throughout the prosecution's case, under the Seselj Court's decision, it is "an abuse of the valuable judicial resources of the Tribunal," as well as a hindrance to an expeditious trial.

Of course, one trial chamber's views of the law do not bind another trial chamber. That is a matter for the appellate body. In a somewhat different case, the ICTY's appeals chamber upheld a trial chamber's ruling that Vidoje Blagojevic could not dismiss his counsel though he claimed to have lost trust in them and refused to communicate with them for more than a year. The appeals chamber made it clear that the right to a fair and expeditious trial supersedes a defendant's preference, where the court could find no legitimate reason for withdrawal of counsel.

In reaching its decision, the higher court endorsed the views of the trial chamber: "An accused does not have the right to unilaterally destroy the trust between himself and his counsel. Similarly, an accused does not have the right to claim a breakdown in communication through unilateral actions, including refusals to meet with or receive documents from his counsel, in the hope that such actions will result in the withdrawal of his counsel by Registrar." In other words, any apparent unfairness in the lack of communication between Mr. Blagojevic and his counsel is the fault of Mr. Blagojevic. Counsel continued their efforts to communicate.

Though the facts differ, the reasoning is applicable to the present situation in the Milosevic case. The appeals chamber rested its decision on the fundamental right to a fair and expeditious trial—which would be undermined were the accused permitted to fire his counsel.

In the Milosevic case, as the trial chamber held, the fundamental right to a fair and expeditious trial will be undermined if Mr. Milosevic continues to represent himself. While the court rested its conclusion on Mr. Milosevic's recurring and deteriorating illness, it is equally, if not more true that he undermines the fundamental rights of a fair and expeditious trial by using the trial as his political platform and by obstructing its completion when it is not conducted on his terms.

The prosecutor in the Milosevic trial summarized the state of the developing law on the right of self-representation in international criminal tribunals, as follows: "[T]he jurisprudence indicates that where an accused's request to refuse to accept counsel or to withdraw counsel can be characterized as a refusal to recognize the legitimacy of the court, that request will be denied, but where an accused makes a clear election to defend himself or herself and it is clear that the accused intends to participate in the proceedings, counsel will be appointed to assist the accused and if necessary take-over the task from him." This is an important distinction to keep in mind.

Other Interests: Victims' Rights

As noted by the courts, while we focus on the accused and his rights at trial, other interests are involved, not least of which are those of the public in seeing justice done and those of people who have been victimized by the crimes Mr. Milosevic is alleged to have perpetrated. The court is also charged with protecting those interests. This is true in a regular domestic trial, but even more so in a trial for crimes, like genocide and crimes against humanity, which offend the conscience of the world.

As Kenneth Roth, Director of Human Rights Watch, wrote, "When a crime is so heinous that it is deemed to be committed not just against its victims but against all of humanity, then all of humanity has an interest—indeed, a duty—to see it remedied." [Introduction to "Crimes Against Humanity: The Struggle for Global Justice," by Lord Geoffrey Robertson, QC.]

I note that defense counsel in their appeals brief filed yesterday argue that the fair trial right belongs solely to accused. I disagree.

Though they are most often absent from Courtroom I in The Hague at Mr. Milosevic's trial, people who have been victimized by the crimes with which he is charged have a vital interest in the trial. Too frequently in all courtrooms, domestic and international, victim interests are overlooked. This has led to a movement in the U.S. and elsewhere to recognize and protect victims' rights in the legal system. I have been both an advocate of victims' rights and publicly critical of efforts in the victims' rights movement to enhance victim rights by taking away those of defendants. Both should exist in a system that aims to do justice.

In the Milosevic trial, victims' voices are muted. In part, because of the nature of a leadership case where the physical crimes were carried out by others. In part, because of time constraints which required the prosecution to reduce the number of crime sites and to enter substantial victim evidence in written form.

Victims' voices are also muted because victims live thousands of miles away from the site of the trial and are, therefore, unable to attend. I often wonder if the trial would focus less on Mr. Milosevic and his rights, if the gallery were filled with those who have suffered because of the policies and plans he is alleged to have pursued.

In a trial of leadership responsibility, it is important to remember—and when possible, give voice to—the victims. I recently came across the words of Zlata Filipovic, who many will recognize from the book made from her diary as a young girl living through the siege of Sarajevo. In a recent Foreword to Vidosav Stevanovic's biography of Slobodan Milosevic, she writes:

> *"When Slobodan Milosevic went on trial, I felt I might finally be able to draw a line under a part of my life I wish I had never lived. I felt I might be able to bring some sort of closure to a trauma that has lasted over a decade, a trauma that began as war rolled into my native Sarajevo. I am still waiting.*

> *"The story of the war in former Yugoslavia is slowly being forgotten. We have forgotten the buses filled with orphaned babies, tied to their seats leaving Sarajevo, rushing through sniper fire and falling shells. We have forgotten the old people's homes where the elderly died quietly of cold. We have forgotten the hospitals filled with bodies; we have forgotten the Market Place massacre, and the shelling of starving civilians as they queued for bread and water. Images of football fields turned into cemeteries, of broken glass, of devastated buildings, of the barely living, the wounded and the dead have merged with other images of suffering elsewhere in the world, and these in turn are being forgotten too.*
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> *"Only the numbers remain—13 years since the start of the madness, over 250,000 dead, five million displaced, thousands missing, wounded, scarred, widowed or orphaned. For those of us who lived and survived, the war will always be present. It took away my childhood, destroyed my parents' lives and poured suffering into my grandparents' final years. Its legacy—shattered countries, cultures and peoples, and shattered individual lives—lives on and will mark generations to come."*

As Anthony Cassesse has written and others have said as well, "Forgetting means that the victims are murdered twice: first, when they are exterminated physically, and thereafter when they are forgotten."

Where do victims look for justice if not to a court? If the trial is handed over to the accused as his political platform, what becomes of the victims' need for justice? This is not to prejudge Mr. Milosevic as guilty, but to argue that the victims have a right to a fair determination of his guilt for the horrible crimes committed against them.

Court's Efforts to Date

The trial chamber allowed Mr. Milosevic to proceed without counsel for two and a half years, hoping he would come to participate in the process rather than obstruct it. The court's overall concern was and continues to be securing a fair trial. Indeed, the trial chamber has gone out of its way to protect the rights of the accused and has been criticized by some for going too far.

Briefly, actions the court has taken in this regard include: the appointment of three amici curiae to ensure that arguments available to the defense are raised; allowing the Accused great leeway in time and subject matter in cross-examining prosecution witnesses; regularly extending time for cross-examination of the accused's request; ordering amici to file all written motions and arguments on behalf of the accused who refuses to submit anything in writing to a court he does not recognize; ordering the prosecution to condense its case in time and subject matter; appointing three legal assistance of Mr. Milosevic's choice to assist him and extending to them the lawyers' privileges of privacy and confidentiality; providing an office and equipment in the detention unit where he may interview witnesses and prepare his case. The accommodations made show that the court was doing everything in its power to insure the accused received what

was needed for a proper defense.

Despite that, it was obvious throughout the prosecution's case that Mr. Milosevic was not interested in defending himself against the very serious and complex charges in the indictment. Frequently, he used cross-examination to make speeches, intimidate witnesses and ask irrelevant, repetitious questions. While the late Judge Richard May, then presiding, tried to focus him on relevant issues, Mr. Milosevic continued to pursue his political agenda.

Just one example is instructive. Protected witness B-1455 from Bosnia testified about being taken from Zvornik to Dom Kultura with 90 other men and 150 women. In Dom Kultura, the men were beaten by paramilitaries in the presence of Yugoslav Army officers. They were then taken outside and executed. B-1455 was one of three men to survive. His father and three brothers were not so lucky.

Mr. Milosevic, after unsuccessfully asserting that the Yugoslav Army was not involved, turned to questioning him about who started the war, about President Izetbegovic's alleged desire for an Islamic state and other matters the witness had no personal knowledge of.

Judge May finally interjected that this had nothing to do with the witness's evidence. When the accused continued arguing, the judge informed him that the court is not helped by general questions about politics. "Much time has been wasted on political matters," he said. The accused was defiant, reminding the court that his cross-examination has nothing to do with them or their process. "I will ask the questions I feel I need to," he told the court. "It doesn't matter if it assists you. I need to get to the truth." Judge May asserted the court's authority: "If it doesn't assist us, you can't ask it."

This is but one example of what was pretty much a daily occurrence during the prosecution's case. Mr. Milosevic has been consistent throughout that he is using the opportunity the trial affords him to bring his own charges against those he believes have wronged him, Serbia and the Serbs, not to answer the grievous charges against him.

Other Former Leaders Challenge International Justice

Others accused of war crimes, crimes against humanity and, in some cases, genocide have challenged the legitimacy of war crimes courts in Rwanda and Sierra Leone. Jean-Bosco Barayagwiza, founder of the radio-television station that incited genocide in Rwanda, sought to withdraw counsel on the eve of his trial and refused to attend the proceedings, contending that the Rwanda Tribunal was dependent on the Kigali Government and, therefore, he could not receive a fair trial. The court denied his motion and directed counsel not to follow their client's instructions to boycott the trial. After counsel sat mute for four days, the court released them and appointed new counsel. The court held it did not violate the accused's rights to conduct the trial in his absence because he had chosen not to be present. The issues arising from this obstructionism are on appeal.

In the Special Court for Sierra Leone, Samuel Hinga Norman, National Coordinator of

the Civil Defence Forces, also refused to come to court after the court refused to let him represent himself. The court based its decision on his lack of legal competence, the excessive time it would take him to prepare and the effect on his two co-accused and their right to an expeditious trial. Instead, the court appointed standby counsel to assist him. The Special Court concluded, "As a matter of law, it is our duty as a chamber at all times, to protect the integrity of the proceedings before us and to ensure that the administration of justice is not brought into disrepute."

International Courts Assert Their Authority

Despite defendant's attempts to obstruct the workings of justice, these courts—and many domestic courts throughout the world—have found ways to assert their authority and to uphold the fairness and integrity of the legal process. In some circumstances, this has required appointing defense counsel over an accused's objections. In others, it has resulted in carrying on a trial while an accused sits stubbornly in his cell, refusing to attend. The courts have fairly uniformly held that defendants must be given the rights and opportunities for a fair defense. It is up to them whether to use these rights and opportunities. It would be wholly extraordinary and self-defeating for a court to bow to an accused's obstructionism. I imagine a judge saying to the accused, "Oh? You refuse to attend trial because we will not allow you to use it to make speeches? Well, then, we cannot go forward and must release you." Or even, "Please, go ahead, make your speeches. We'll set aside our rules and procedures and the purpose for which we brought you here." Obviously, this is ludicrous—but it is what Mr. Milosevic is seeking.

Certainly, he has the right to disagree with the court's decisions. The avenue of protest is by filing an appeal with the appeals chamber, which has been done on his behalf. But the Accused is not content with rights the law has provided. He is now using extra-legal means to thwart the Trial Court's decision—by refusing to cooperate with appointed counsel or to allow his associates to cooperate with them. Though he maintains his proposed witnesses are free to decide for themselves whether to appear before the court and he has done nothing to interfere with their attendance, he has also refused to ask them to cooperate. "It is up to them," he told the court.

At bottom, as Mr. Milosevic has consistently declared, he does not recognize the legitimacy of the Tribunal. Certainly, an accused may challenge the legitimacy of a court that seeks to try him. But the rule of law means that, once its legitimacy is established, the accused is subject to its authority, whether ultimately he agrees with its authority or not.

A court that exercises its authority in trying an accused according to its rules does not thereby become "Stalinist," and the trial a "show trial," as some of Mr. Milosevic's proposed witnesses have declared. A "show trial" means the result is a foregone conclusion and the actors are merely going through the motions of legality. Mr. Milosevic may believe in his own ultimate conviction, others may believe in his guilt or innocence, but I believe this court will judge him fairly. Even where a judge may think a defendant guilty, he or she must be convinced beyond any reasonable doubt—a very high standard—that the prosecution has proved it. Where any reasonable doubt exists, the accused must go free, guilty or not.

As ICTY trial chamber III recently wrote in handing down written reasons for appointing defense counsel over Mr. Milosevic's objections,

> "The impact of taking this course should be seen in its wider context. The Accused remains entitled to the presumption of innocence, and the Prosecution must prove the case against him beyond a reasonable doubt. That has not changed. The Accused is entitled to present all defences open to him. That has not changed. The impact of the Order is restricted to the means by which his defence is presented and, most certainly, is not an adverse impact since it leaves open to the Accused a number of options, whereby he can have the professional assistance of counsel and can also actively participate along with counsel in the preparation and presentation of his case, albeit in a far less strenuous way than has been the case to date."

The court's final words were addressed to the accused: "The Trial Chamber is satisfied that assigned counsel will make determined efforts to discuss the presentation of the Accused's defence with him. Should the Accused fail to cooperate with counsel, the trial will nonetheless proceed. If such failure on the part of the Accused results in material which is actually relevant to the Accused's case not being presented, then the Accused must bear responsibility for that and cannot plead injustice."

Tribunal at Critical Juncture

The Tribunal is at a critical juncture. If it bows to Mr. Milosevic's tactics, it is in danger of becoming what Mr. Milosevic claims it is, an institution without legitimacy. Though the ICTY derives its authority from the United Nations, it earns its legitimacy to a certain extent from its performance and the way it is perceived. If it does not take itself seriously, no one else will.

It is incumbent on the Tribunal to uphold its integrity as an international institution that seeks to render justice, even when its actions are unpopular or misunderstood. It is incumbent on those of us who believe in the importance of the Tribunal as an institution that can and must do justice to clear the fog of confusion, intentional or not, that hides the real issues at stake in Mr. Milosevic's defiance of the court. By insisting on his right to self-representation, he is not championing human rights. He seeks to undermine the very structure that was designed to provide a measure of justice to those whose human rights were so grievously violated. This is what must be made clear.

There is a well-known adage quoted by some who maintain Mr. Milosevic's right to defend himself must not be taken away: "Justice must not only be done, but be seen to be done." They worry that the trial will not appear fair if Mr. Milosevic is not allowed to speak as he wishes. The specter of his refusal to attend court, of the trial continuing without his presence is even more worrisome to them. Yet in neither of these circumstances are his rights denied. If he stays away from his trial, it is his choice. What the law prohibits is that those in authority prevent him from attending his trial. If the accused sits silently in court, he is in the same position as any

other defendant. What truly has the appearance of unfairness is Mr. Milosevic receiving special privileges to put the trial to whatever use he wishes.

When witnesses refuse to testify for the defense, does that make the trial unfair? It would if it were the prosecution who had pressured them to stay home. Mr. Milosevic does not believe he is being victimized by the refusal of witnesses to testify. Though he says he has not influenced them to defy the court, he also has not suggested that they cooperate. Indeed, his example of noncooperation seems alone enough to influence them. Does their refusal to cooperate make the trial unfair? If no witnesses will come forward to testify on his behalf, whatever their motivation, does that make the trial unfair? Perhaps they have nothing to say in his defense. If no one has anything to say in his defense, despite being given the opportunity, does that make the trial unfair?

Need for Court to Assert Authority and for States to Actively Support It

The Tribunal must take itself seriously and assert its powers and authority in response to attempts to undermine and obstruct its duty to see justice done. As the trial chamber advised defense counsel in the Milosevic case, it has the power to subpoena recalcitrant witnesses and to make other orders for compliance. It also has the power to hold those who defy its orders in contempt and potentially to fine or imprison them. However, the Tribunal cannot assert its authority alone. Enforcement has been its weakness since its formation. Lacking its own marshals, it must look to individual states to enforce its subpoenas and orders.

It would be useful at this juncture for states to assert their willingness to do so should the Tribunal request assistance in bringing recalcitrant witnesses—at least some of whom were high state officers and public servants—to give evidence before the court. It would be useful if states who created this institution of international justice took this opportunity to strongly reaffirm their commitment to it and its proper functioning.

Conclusion

For the commitment is not just to a court, an institution of international law. It is a commitment that the rule of law will prevail over impunity in human affairs. It is a commitment to all those who suffered and died and continue to suffer from the devastation of war waged against civilians—men, women and children—for ideology and power. It is a commitment that their suffering will not be forgotten. It is a commitment to future generations, as well as people throughout the world that justice is not merely a word but is a living concept, however inadequate in its implementation. The commitment is to insure that the infancy of international justice reaches maturity.

I thank you for your attention and look forward to hearing your comments and questions.