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Milosevic Counsel Explains Appointment Appeal

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Lawyer sets out arguments against imposing counsel on defendant.

The lawyer assigned by Hague tribunal judges to represent Slobodan Milosevic in court, Stephen Kay, has issued a detailed explanation of his reasons for appealing his own appointment, arguing that imposing counsel on the defiant Milosevic jeopardises his right to a fair trial.

Kay also effectively accused the judges - who are under pressure to wrap up the case by 2010, the deadline laid down in the court's "completion strategy" - of sacrificing Milosevic's rights in their hurry to see his trial concluded.

In the appeal, released on September 29, Kay argues that the tribunal's decision to impose counsel on the ailing accused, despite his expressed desire to continue choreographing his own defence, hinges on a fundamental misreading of the court's statute, which enshrines the right to self-representation as one of the minimum guarantees for a fair trial.

This same right, he argues, is also enshrined in the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

He also says the judges failed to fully consider all the relevant factors and explore all the options open to them before making their decision.

And he reiterates his earlier submission that if the accused is to be forced to take on representation, he should at least be allowed a more active role in working alongside his counsel.

"It is crucial that justice must not only be done but also seen to be done," he says, suggesting that the current arrangement threatens to undermine this.

Following a series of delays caused by Milosevic's high blood pressure and heart problems, and reports by court-appointed doctors that he was unfit to conduct his own defence, tribunal judges on September 2 announced their decision to impose counsel on the accused and allow him only a secondary role in questioning witnesses in court.

Kay, a former amicus, was assigned to the case. But Milosevic has since refused to communicate with him and he has been forced to proceed with little time to prepare and little information to go on.

On September 8, in an attempt to act on what he supposed to be his client's wishes, Kay submitted an appeal against his own appointment. A week later, after a series of witnesses for the defence refused to appear in court in protest at the imposition of counsel on Milosevic, he secured a four-week adjournment to give him time to try and pull a case together.

Kay's appeal against the decision to impose counsel comes a week after judges released their justification of that move. They essentially argued that the right to self-defence is part of an overarching right to a fair trial, and does not hold in this particular case because allowing Milosevic to conduct his own defence under the circumstances would undermine this fairness.

In his appeal, Kay argues that the judges erred when making this argument and were wrong to presume the right to a fair trial to be “superior” to the right to self-defence. In fact, he says, the right to self-defence is a necessary element of a fair trial and is defined in the court’s statutes as a “minimum guarantee” which, “by definition, cannot be interfered with or compromised”.

The debate over the nature of the right to self-defence stems in part from the hybrid nature of the Hague tribunal, which combines elements of common law, as practised in Britain, the US and a limited number of other countries, with those of civil law, used in Continental Europe and elsewhere.

Under common law, the prosecution and defence are effectively pitted against one another in the presence of a judge, whose role is relatively passive. In contrast, civil law puts an emphasis on the role of judges, who are tasked with considering all the available evidence and attempting to come to the truth of the matter.

Kay acknowledges that the judges were right in pointing out that defence counsel is often imposed under the civil law system. But he claims that the adversarial proceedings of the Hague tribunal are essentially more akin to those used in common law, where the right to represent oneself in court is a fundamental principle, watered down in only a very few cases.

He suggests that the judges are effectively sidelining the rights of the accused in an effort to avoid further delays.

The judges had suggested that repetitive disruptions of a trial, “whatever the circumstances, may give rise to the risk of miscarriage of justice”.

They said that, in the event of there being a real prospect of a trial being disrupted and its integrity undermined by the risk that it wouldn’t be conducted fairly, they have a “duty to put in place a regime which will avoid that”.

Kay claims that under this analysis the accused’s right to defend himself in court “is diminished by the prioritisation of [the judges’] wish to conclude this trial”.

Having argued that the imposition of counsel violates Milosevic’s statutory rights, Kay goes on to say the judges also failed to properly take into account various important considerations when making their decision, including the question of whether Milosevic is fit to stand trial.

“In circumstances where the accused has been found physically unfit to represent himself,” he says, “a live issue arises as to whether he is physically fit to exercise his right to testify within the trial over a prolonged period, and consequently fit to stand trial at all.”

He also said the judges had not given enough consideration to alternative regimes – presumably involving a reduced timetable to ease the pressure on Milosevic – under which the accused might be considered fit to defend himself.

In an apparent last ditch attempt to bring an end to the current awkward stalemate at any cost, Kay submits that if Milosevic is to be forced to continue to accept representation, he should at least be allowed a more active role in examining witnesses in court.

At the moment, Milosevic can only question witnesses after his lawyer has done so – and he has so far scornfully declined to take up this offer.

“If the trial chamber had allowed the accused to handle and question the witness first, with the assigned counsel in ‘standby mode’,” Kay says, “such a regime may have lended itself to greater cooperation from the accused.”

Bringing his appeal to an end, Kay requests an opportunity for Milosevic to address the appeals chamber himself.

He also reveals that the defence team is currently considering requesting subpoenas in an effort to force unwilling witnesses to attend court, should the situation remain unchanged when the trial resumes on October 12. Over 200 witnesses have refused to appear in court in protest against the judges’ ruling to assign Milosevic a counsel.

Mike Farquhar is IWPR’s Hague Tribunal Reporter.

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