

Milosevic Judges Face New Challenge

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Appeals chamber's decision to restore accused's right to defend himself will require judges to maintain firm control of the trial.

The Hague tribunal's appeals chamber this week ruled that Slobodan Milosevic does have the right to conduct his own defence - within reason.

At the same time, the judges, in principle, upheld the court's decision to assign a defence counsel to the accused. However, they insisted that the lawyer's role should be limited to that of an aide, stepping in only when Milosevic is physically too weak to present his case in person.

Both supporters and critics of this ruling agreed that it represented a victory for the defiant former Yugoslav president. And ironically, it was Steven Kay - the same court-assigned lawyer who Milosevic has worked so hard to undermine in the past two months - who was responsible for it.

Observers now believe that the trial is likely to carry on well past its envisaged closing date of October 2005, and may once again be prone to long breaks caused by the defendant's worsening health. The key challenge, they say, will be for the judges to manage Milosevic's examination of his witnesses, and prevent him from presenting a purely political defence.

The appeals chamber delivered its verdict on November 1 - less than a week after Milosevic's Kay filed his resignation, saying he was not able to present a proper defence for a client who refuses to instruct him.

Milosevic has consistently declined to cooperate with his counsel, and his witnesses have boycotted the court in the last two months, effectively bringing the trial to a halt.

In mid-October, Kay eloquently backed his client's right to organise his own defence, in an appeals hearing held in front of five senior Hague tribunal judges.

He argued that the trial judges had erred both in forcing a lawyer upon the defendant for health reasons, and in dictating how such a counsel would operate - essentially reducing Milosevic's role to that of an observer.

In September, the judges had ruled that Milosevic would not be allowed to prepare his witnesses anymore and would only be permitted to ask additional questions after the appointed counsel finished the examination in chief.

The appeals judges now agreed with Kay that this was far too severe a restriction, and have overturned the trial chamber's decision.

"These restrictions were grounded on a fundamental error of law," the appeal judges said, warning that a right as fundamental as that to conduct one's own defence should be limited "only to the extent that is necessary to accomplish an objective". In the case of Milosevic, such an objective would be to speed up a trial that was stalling due to the defendant's high blood pressure.

The appeals chamber asked the judges to “craft a working regime that minimises the practical impact of the formal assignment of counsel, except to the extent required by the interests of justice”.

“At a minimum, this regime must be rooted in the default presumption that, when he is physically capable of doing so, Milosevic will take the lead in presenting his case,” the judges said, listing what would this entail: choosing which witnesses to present, questioning them first, giving a closing statement when the defence rests, and making basic strategic decisions about the presentation of his defence.

“In practice, if all goes well, the trial should continue much as it did when Milosevic was healthy,” the chamber ruled.

But at the same time, the judges upheld the trial chamber’s decision in principle, by saying that there was a legitimate basis for the fear that the trial “may last unreasonably long or may not even be concluded properly”, should Milosevic continue to defend himself.

The appeal judges confirmed that poor physical health was a good enough reason to limit this right. They warned that should Milosevic’s physical problems resurface, it would be up to the assigned counsel to make sure the trial continues.

It is not yet clear who would take the latter role. Trial chamber judges are expected to rule on Kay’s tendered resignation next Tuesday, when proceedings resume. Some observers believe that the judges may try to convince him to stay on the case as an aide to the accused. But Milosevic has already said that he will not cooperate with any counsel in any role.

In view of some legal scholars, the appeal chamber’s decision has strengthened the principle of an accused being able to conduct his own defence, although it has at the same time clearly delineated some of its limitations.

“The decision has shown that the right [to one’s own defence] can’t be sacrificed to the wish to speed up a trial,” said William Schabas, a human rights scholar and the author of the book *Slobodan Milosevic on Trial: A Companion*.

Schabas noted that there’s been no progress in the trial over the past two months. “The attempt to speed it up in fact slowed the trial down,” he said. “We’re back where we were in August, only with a major embarrassment behind us.”

He now hopes that the trial, which essentially stopped in October due to lack of defence witnesses, will now proceed. “It will almost certainly drag on, but that is just how it has to be,” he added.

“You have one old man on trial being judged by three not so young judges in a very complex case. It just has to take time.”

But some observers criticised the court for failing to take other factors into consideration – such as the prosecution’s claim that Milosevic has been obstructing the work of the court by manipulating his health and condoning defence witness’ boycott of the tribunal.

“The judges failed to confront Milosevic on the larger issue,” said Judith Armatta, a long-term observer of the trial for the Coalition for International Justice. She added that the appeal chamber “completely ignored” the former Yugoslav president’s defiance of the court as an institution, and his publicly-declared intent to destroy it.

Other analysts fear that the court will now be subjected to a highly-political defence that will last for months.

“Instead of [presenting a] legal defence, Milosevic will try to rewrite the history of the Balkan wars and secure a place in the hearts and minds of Serbian people,” Richard Dickers, head of Human Rights Watch’s International Justice programme, told IWPR.

Some observers, however, think that this is perhaps appropriate for a trial of a former head of state. “There is nothing wrong with a political defence,” Dutch legal journalist Heikelina Verrijn Stuart told IWPR.

“In the flood of irrelevant things, Milosevic will surely at some point start presenting some real evidence in his favour,” she said, adding she expected the judges to be “more than able to differentiate between relevant and irrelevant”.

But in Armatta’s view, the crucial thing for the court will now be for the judges to manage the trial and prevent the court from “drowning” in witness testimonies that don’t answer direct charges.

Milosevic is standing trial on more than 60 charges of war crimes, crimes against humanity and genocide pertaining to the wars fought in Croatia, Bosnia and Kosovo during the Nineties. He is accused of masterminding a plan to carve out Serb-dominated territories in Croatia and Bosnia and join them with Serbia, by killing and forcefully transferring the non-Serbs living there.

“The trial chamber will now have to be vigilant and active and make sure the witnesses would testify on relevant matters and not use the courtroom as a stage for disseminating the same kind of ideas that provoked the war in the first place,” Armatta warned.

Dickers said he believed that the effect of Milosevic’s speeches on the Serbian public is smaller than it is usually thought, but added he was “upset” that the discussion over Milosevic’s defence had obscured the reality of horrors that took place in the Balkan wars.

“Hundreds of thousands of people lost their lives in the Nineties as a result of policies that are widely associated with Milosevic. It is important to establish the true extent of his responsibility for the human sufferings at the time. This is what the trial is all about.”

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