

June 14, 1996

**TO THE MUNICIPAL JUDGE
COUNTY COURT IN ZAGREB
CROATIA
RE: INDICTMENT PROPOSAL NO. KT-8848/96**

**BRIEF OF THE COMMITTEE TO PROTECT JOURNALISTS
IN SUPPORT OF DEFENDANTS
VIKTOR IVANCIC AND MARINKO CULIC**

Preliminary Statement

The Committee to Protect Journalists (CPJ), represented by James C. Goodale, Esq., a member of the CPJ Board and its former Chairman, presents this brief in support of the defendants, Viktor Ivancic and Marinko Culic of the weekly newspaper *Feral Tribune*. CPJ is a private, nonpartisan organization based in the United States and devoted to the defense of the professional rights of working journalists around the world.

All criminal libel statutes are pernicious, and CPJ condemns their use anywhere, at any time. Seditious libel statutes are especially pernicious, because they are used exclusively to silence dissent against the governing regime. Croatia's new amendments to its Penal Code, Articles 71 and 72, constitute seditious libel statutes because they shield only high government officials from criticism. Such laws have no place in any

country, and are especially to be condemned in a self-proclaimed democracy such as Croatia.

Democratic societies do not criminalize critical reporting -- they tolerate and protect it. The right to speak freely without fear of government reprisal is at the very heart of democracy. Freedom of speech rests upon political dialogue, not upon a monologue of orthodoxy.

Through this prosecution, Croatia -- a country aspiring to join the community of Western democracies -- flouts this tradition. No journalist in any Western democracy is in prison as a result of a conviction of seditious libel. The European Court of Human Rights and the United States Supreme Court have crowned freedom of the press regarding political officials as the most powerful of the rights of free expression.

First, we respectfully urge the court to dismiss the indictment proposals against Mr. Ivancic and Mr. Culic, because this prosecution represents a grave threat to freedom of the press in Croatia. Second, we appeal to the executive and legislative leaders of Croatia to repeal the statutes in question, as well as any other law that sanctions the use of seditious libel doctrine to muzzle free expression.

CPJ is gravely concerned about freedom of the press in Croatia.

We repeatedly have expressed our concerns to President Franjo Tudjman and other officials regarding the Penal Code, the use of these statutes against *Feral Tribune*, and other harassment of the independent press. In a meeting last month with CPJ board chairman Kati Marton, President Tudjman himself raised *Feral Tribune's* coverage as an example of what, in his view, was a misuse of the rights of the press. President Tudjman showed Ms. Marton a copy of *Feral Tribune* with a cover featuring a caricature of himself, and asked: "Would any other world leaders put up with this?" Ms. Marton replied: "All leaders in democracies."

Statement of Facts

On April 29, 1996, *Feral Tribune* published an article entitled "Bones in the Blender" and a photo montage, "Jasenovac -- The Biggest Croatian Underground City." These pieces commented upon President Franjo Tudjman's plans to create a single monument in the former concentration camp of Jasenovac that would put the bones of Croatian Fascists alongside those of the Jews and Serbs they massacred during World War II. The montage depicted the Fascist dictator Ante Pavelic handing Tudjman a miniature version of the Jasenovac monument. An accompanying text entitled the "Other Side of Satire" drew a satirical parallel between Tudjman and the late Generalissimo Francisco Franco of

Spain.

The government now intends to prosecute Mr. Ivancic and Mr. Culic under its newly amended criminal libel statute, threatening them with a maximum penalty of three years in jail for allegedly injuring the President's honor and his personal integrity.

This prosecution is only the latest in a disturbing series of governmental attacks upon Croatia's free press. The government also has instigated civil libel suits, shut down newspaper offices, and levied punitive taxes against prominent independent newspapers critical of the Tadjman regime.

Argument

Croatia's attempt to impose criminal penalties directed against journalists who criticize political leaders is completely at odds with norms of democracy and Western practice. These prosecutions of Mr. Ivancic and Mr. Culic for their publication of satirical commentary on President Tadjman's controversial plan to commingle the remains of Croatian Fascists and World War II concentration camp victims represents an unacceptable intrusion into the freedom of expression that is guaranteed by international and European law.

The prosecution today of journalists for the dissemination of

political views in Europe is a rare and startling event. No journalist is in prison today in any Western democratic nation as a result of a conviction on charges of seditious libel based on published criticism of a political figure. Croatia's law is particularly egregious because it targets only critics of five top government officials, and therefore has no legitimate basis in the protection of private reputations.

As the European Court of Human Rights has recognized, the press has a unique responsibility in democratic societies to impart information enabling the electorate to "discover[] and form[] an opinion of the ideas and attitudes of political leaders."¹ To enable the press to fulfill this critical responsibility, democratic nations afford especially stringent protection to speech concerning political issues and to the expression of value judgments and opinions. The Croatian law does not merely fail to respect democratic principles and international norms; it inverts them by threatening the unprecedented sanction of imprisonment as punishment for the exercise of the most important form of free speech: political opinion regarding a ruling official.

A. *International, U.S., And European Law Recognize That Freedom Of Political Debate Lies At The Core Of Democracy*

Freedom of expression and opinion are guaranteed under the U.N.

Declaration of Human Rights,² the International Covenant on Civil and Political Rights,³ to which Croatia has acceded, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴ Moreover, these universal principles have passed into customary international law.⁵ As the European Court of Human Rights has acknowledged, acceptance of these principles requires the toleration even of speech which is shocking or offensive.⁶

The Court has further indicated that the prosecution of journalists who criticize politicians or government officials is an interference with free expression that is never "justified in a democratic society."⁷ The Court has held that "freedom of expression is an essential element for the formulation of political opinion."⁸ For this reason, the Court has afforded a particularly high degree of protection to speech of a political character and has held that the appropriate response of the criticized government is to engage its opponent in further debate rather than to impose criminal sanctions.⁹

The United States Supreme Court similarly has acknowledged that political debate lies at the very heart of the protection of free speech. In the landmark case of New York Times v. Sullivan, the Supreme Court reversed a jury finding that the *New York Times* had libeled a state official, holding that in order to obtain libel damages for publication of a defamatory falsehood, a public official

must meet the heavy burden of proving that the defamatory statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false.¹⁰ The Court reiterated the words of James Madison: the power to prosecute libel of public officials "ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication of the people thereon, which has ever been justly deemed the only effectual guardian of every other right."¹¹ Later, in a case striking down a criminal libel statute, the Court stressed that speech concerning public affairs is "more than self-expression; it is the essence of government."¹²

Feral Tribune's satires fall squarely within the tradition of rigorous protection for political speech. The European Court of Human Rights has recognized that politicians -- particularly those who are presently in office, as President Tudjman is -- must tolerate more criticism than a private individual.¹³ The President's Jasenovac proposal aroused national and international debate. By commenting on that proposal, *Feral Tribune* exercised "the very function of the press in a democratic society, to participate in the political process by checking on the development of the debate of public issues carried on by political office-holders."¹⁴ Criminal prosecution of Mr. Ivancic and Mr. Culic for fulfilling this critical function violates international law and contravenes democratic principles.

***B. Expressions of Opinion and Value Judgments Also Merit
The Highest Legal Protections***

Mr. Ivancic and Mr. Culic are facing prosecution for the expression of a value judgment regarding President Tudjman's proposal. The European Court of Human Rights has noted that "a careful distinction has to be made between facts and value judgments" and has prohibited a state from requiring a libel defendant to prove the truth of his opinions.¹⁵ Such a requirement is impossible to meet, and therefore "infringes freedom of expression to a degree incompatible with the fundamental principles of a democratic society."¹⁶ In a case closely analogous to this one, the Court held that the prosecution of a journalist who had drawn a parallel between the position of an Austrian Liberal Party official and the platform of the Nazi party violated the journalist's right to "express clear value judgments."¹⁷ The Court of Human Rights has recognized that expressions of value judgments can never present legitimate grounds for a libel prosecution, because they cannot be either true or false: "the truth of value-judgments is not susceptible of proof."¹⁸

American constitutional law similarly embraces the principle that statements of opinion, having no provably false factual connotation, should be accorded the full protection of the law.¹⁹ In the line of cases most relevant to the

Feral Tribune trial, the U.S. Supreme Court has jealously guarded the right of a satirical publication to engage in political or social commentary of a biting or harsh nature. The Court has noted that public officials in a democracy must tolerate "vehement, caustic, and sometimes unpleasantly sharp attacks."²⁰ In various cases the U.S. Supreme Court has held that "rhetorical hyperbole," "vigorous epithet" or "lusty and imaginative expression[s] of contempt" used in a "loose, figurative sense" are not libelous because they can never be objectively false.²¹ Protection of such speech "provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our nation."²²

Likewise, the use of epithets in political debate enjoys strong protection because such language constitutes nothing more than strongly worded views that are neither provably true nor false. The U.S. Supreme Court has been especially vigilant in using constitutional law to shelter strong, even outrageous, political speech. Thus the Court has repeatedly found that the use of political labels (e.g., "blackmail," "traitor," "scab") during spirited debate is not actionable because the allegations are offered in the exchange of public discourse.²³

Recognizing political invective as part of the democratic process, the Court has afforded it strong protection. Public officials do not need the special protections

of the libel laws, because they have "sufficient access to means of counter-argument to be able to expose through discussion the falsehood and fallacies of the defamatory statements."²⁴ As the U.S. Supreme Court has said, in a case that is particularly instructive on the plight of Messrs. Ivancic and Culic: "[T]o use loose language or undefined slogans that are part of the give-and-take in our economic and political controversies--like 'unfair' or 'Fascist'--is not to falsify facts."²⁵

Mr. Ivancic and Mr. Culic have not told lies, they have expressed opinions. Whether one agrees or disagrees with their views -- and CPJ does neither -- their expression of political opinion, far from exposing them to criminal sanction, merits the fullest protection of the law.

Conclusion

The law under which Mr. Ivancic and Mr. Culic face prosecution is an intolerable interference with freedom of expression. It criminalizes exactly the type of political speech that international, European, and U.S. law have recognized to be essential to an informed democracy. Mr. Ivancic and Mr. Culic should not be put at risk of criminal prosecution by the very regime they seek to criticize, simply because they have exercised their responsibility to impart opinions and engage in debate. Under the European Convention, a nation may

regulate free speech only to the extent necessary to a democratic society.²⁶

Croatia cannot possibly meet this standard if it insists on prosecuting these or any journalists for what they publish. Croatia's criminalization of libel based on political opinions is fundamentally antithetical to the values of a democratic society. Because these prosecutions of Mr. Ivancic and Mr. Culic are in flagrant violation of democratic principles, the Municipal Court should dismiss the indictment proposals.

Respectfully submitted,

COMMITTEE TO PROTECT

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1. Lingens v. Austria, Eur. Ct. H.R. (Ser. A., No. 103)(1986) ¶ 42.
 2. G.A. Res. 217 (III 1948), art. 19.
 3. 999 U.N.T.S. 171 (entered into force on March 23, 1976), art. 19.
 4. 213 U.N.T.S. 221 (entered into force on September 3, 1953), art. 10(1).

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5. Karel Vasak, *The International Dimensions of Human Rights* 106 (1982) (emphasizing the authoritative force of the Universal Declaration of Human Rights and stating that "no responsible member of the international community may disregard an appeal to the rights enshrined in it").
 6. Handyside v. United Kingdom, Eur. Ct. H.R. (Ser. A, No. 24) (1976) ¶ 49.
 7. Castells v. Spain, Eur. Ct. H.R. (Ser. A., No. 236) (1992) ¶ 72; Lingens ¶ 1(d).
 8. Castells ¶ 68.
 9. Id. ¶ 68, 72.
 10. 376 U.S. 254 (1964)
 11. Sullivan, 365 U.S. at 274, citing 4 Elliot's Debates.
 12. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
 13. Lingens ¶ 42, Castells ¶ 65.
 14. Oberschlick v. Austria, Eur. Ct. H.R. (Ser. A., No. 204) (1995) ¶ 67.
 15. Lingens ¶ 46.
 16. Id. ¶ 2.
 17. Oberschlick ¶ 70.
 18. Id. ¶ 69.
 19. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
 20. Sullivan, 365 U.S. at 270.
 21. Milkovich, citing Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970) & Old Dominion Letter Carriers v. Austin, 418 U.S. 264

(1974).

22. Milkovich, 497 U.S. at 20.
23. Greenbelt, Letter Carriers, *supra*.
24. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
25. Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293, 295 (1943).
26. The Sunday Times v. United Kingdom, Eur. Ct. H.R. (Ser. A., No. 30 (1979) ¶ 65.