

**IN THE APPEALS CHAMBER**

**Before:**

**Judge Theodor Meron, President  
Judge Fausto Pocar  
Judge Mehmet Guney  
Judge Ines Weinberg de Roca  
Judge Florence Mumba**

**Registrar:**

**Mr. Hans Holthuis**

**Date filed:**

**29 September 2004**

**THE PROSECUTOR**

**v.**

**SLOBODAN MILOSEVIC**

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**APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON ASSIGNMENT OF DEFENCE  
COUNSEL**

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**Public Document**

**Office of the Prosecutor:**

**Ms. Carla Del Ponte  
Mr. Geoffrey Nice QC  
Ms. Hildegard Uertz-Retzlaff  
Mr. Dermot Groome**

**The Accused:**

**Mr. Slobodan Milosevic**

**Assigned Counsel**

**Mr. Steven Kay QC  
Ms. Gillian Higgins**

**Amicus Curiae**

**Prof. Timothy McCormack**

## Procedural Background from the Close of the Prosecution's Case

1. On 25 February 2004, the Prosecution filed "*Prosecution Notification of the Completion of its Case and Motion for the Admission of Evidence in Written Form*" in which the Prosecution sought to close its case. On the same date, the Trial Chamber confirmed the closure of the Prosecution's Case<sup>1</sup> and acknowledging that the Accused was ill at that time, set a timetable for the pre-defence conference to take place on 17 May 2004 and the defence case to commence on 8 June 2004.<sup>2</sup>
2. On 5 May 2004, the Trial Chamber vacated the dates set for the pre-defence conference and start of the defence case on the basis that (i) the translation of the Accused's Rule 65ter materials, filed on 13 April 2004 in BCS had not been received by the Trial Chamber and (ii) the Accused had been and was currently ill, having been advised by the doctors to rest. The Trial Chamber ordered the pre-defence conference to take place on 9 June 2004 and the defence case to commence on 22 June 2004.<sup>3</sup>
3. On 27 May 2004, due to the "*continued ill health of the Accused, and the advice of the treating cardiologist that the Accused rest for a period, after which he may resume work initially for three days per week*", the Trial Chamber rescheduled the date of the pre-defence conference to 17 June 2004 and the start of the defence case to 5 July 2004.<sup>4</sup>
4. On 17 June 2004, pursuant to the pre-defence conference, the Trial Chamber issued its Omnibus Order concerning matters which had been dealt with at the conference.<sup>5</sup> In this Order, the Trial Chamber required "*the Registrar, within seven days, to provide to the Trial Chamber a report on the number of working days lost by the Accused due to illness and the occasions on which the Accused's legal associates were prevented from visiting him on account of his illness. On the basis of this report, the Trial Chamber will determine if flexibility is needed in relation to any difficulties experienced by the Accused in the presentation of his case.*"
5. On 25 June 2004, the Registrar issued a confidential report pursuant to the Trial Chamber's Omnibus Order in which it summarised the amount of preparation time lost due to the Accused's ill health. The confidential report summarised the periods of illness from 26 February 2004 - 17 June 2004 and concluded that during this period, on a "*five-day-per-week analysis*", there were 51 "*days of illness and doctor-directed rest*". On a "*three-day-per-week analysis*", there were 31 "*days of illness and doctor directed rest.*" Of the 51 (31) days identified, the Accused "*apparently performed some work to prepare his defence*" during the "*equivalent of 11 eight-hour work days.*"
6. On 1 July 2004, Dr. Falke's medical report stated that due to "*extremely high blood pressure...Mr Milosevic needs to rest at least until 9-7- 2004.*"<sup>6</sup>
7. On 2 July 2004, the Trial Chamber ordered Dr. van Dijkman to indicate "(1 ) *Whether the Accused is unfit to participate in court proceedings on 5 July 2004 (a) to deal with administrative matters, including by video-link from the United Nations Detention Unit; or (b) to present his case and (2) If the Accused is unfit, to explain what are the features of his high blood pressure or any other aspects of his health that render him so unfit.*"<sup>7</sup>
8. On 2 July 2004, Dr van Dijkman's medical report concluded the following: "*I do not consider it sensible to introduce stressful moments again during the trial next week, but I do not think there are any objections to discussing the administrative sides of the case.*"
9. On 5 July 2004, a court hearing was held during which the Accused made a request to be given at least one additional month before being required to present his case. During this hearing, the Amici Curiae raised (i) the Accused's fitness to present his defence at this time and (ii) his fitness to stand trial at all.<sup>8</sup> The Trial Chamber considered at that stage that there was no evidence that the Accused was not fit to stand trial,<sup>9</sup> but that there was evidence to suggest that

the Accused may not be fit to continue representing himself. The Trial Chamber stated that it would *“carry out a radical review of the trial process and the continuation of the trial in light of the health problems of the Accused, which are clearly chronic and recurrent based on the most recent report from the doctor.”*<sup>10</sup>

10. On 6 July 2004, noting *“in particular, the latest medical report from Dr. van Dijkman, dated 2 July 2004, which indicates that the Accused requires rest until at least 9 July 2004 and has a health problem which Dr. van Dijkman expects to recur”*, the Trial Chamber issued an order<sup>11</sup> (i) adjourning the trial until 14 July 2004 *“at which time, subject to the medical condition of the Accused, it will recommence”*, (ii) adjourning the trial thereafter on 21 July 2004 until 31 August 2004, allowing the Accused additional time in which to prepare for the presentation of his case and (iii) directing the Registrar to identify a cardiologist, with no prior involvement in the treatment of the Accused, to examine the Accused and consider all relevant information pertaining to his health in the context that he represents himself and report *quam primum* to the Trial Chamber on the fitness of the Accused to continue to represent himself and the likely impact on the trial schedule should he continue to do so.

11 On 12 July 2004, the Trial Chamber issued a scheduling order<sup>12</sup> vacating the trial start date of 14 July and adjourning proceedings on the basis of a medical report by Dr. Sedney, dated 12 July 2004, in which she referred to the Accused’s high blood pressure values and advised that the Accused should rest. The Trial Chamber ordered the Registrar to *“obtain a report from the treating cardiologist by the end of Friday, 16 July 2004 indicating whether the Accused is fit to participate in court proceedings from Monday, 19 July 2004 to Wednesday 21 July 2004”*. The Trial was then adjourned until 19 July 2004.

12. On 16 July 2004, Dr. Sedney advised that on the basis of the blood pressure values of the Accused, he should not attend the hearing set for Monday 19 July 2004.<sup>13</sup>

13. On 16 July,<sup>14</sup> considering Dr. Sedney’s medical report, the Trial Chamber adjourned the proceedings until 31 August 2004, pursuant to Articles 20 and 21 of the Statute of the International Tribunal and Rule 54 of the Rules of Procedure and Evidence.

14. On 19 July 2004, the Trial Chamber ordered the Prosecution to file submissions on the role of assigned counsel *“in ensuring the fair presentation of the defence case, in particular in the absence of instructions to, or cooperation with, counsel by the Accused.”*<sup>15</sup>

15. On 21 July 2004, the Trial Chamber invited written submissions with a view to giving further consideration to the conclusion of the trial in a fair and expeditious manner, including the possibility of severing one or more of the indictments.<sup>16</sup> Having considered the written submissions from both the Prosecution and the Amici Curiae opposing the severance of one or more indictments,<sup>17</sup> the Trial Chamber decided not to give further consideration to the matter at this stage in the proceedings.<sup>18</sup>

16. Pursuant to the Trial Chamber’s order on 6 July 2004<sup>19</sup>, a medical report dated 24 July 2004 was submitted by Dr. Tavernier, a cardiologist from Belgium,<sup>20</sup> who had had no prior involvement in the treatment of the Accused. Dr Tavernier examined the Accused on 21 and 22 July 2004 and concluded that *“based upon his present clinical condition, his present lifestyle and his poor adherence to the proposed therapeutic plan at this moment, Mr. Milosevic is in my opinion not fit to represent himself.”*<sup>21</sup> An accompanying toxicology report by Dr. Touw was provided to the Judges, but not disclosed to the parties.

17. On 26 July 2004, the Prosecution filed submissions on the issue of assigned counsel, as requested by the Trial Chamber.<sup>22</sup>

18. On 6 August 2004, the Trial Chamber requested submissions on the issue of assignment of

counsel from the Amici Curiae.<sup>23</sup> On the same date, the Prosecution issued an addendum to the filing submitted on 26 July 2004.<sup>24</sup>

19. On 13 August, the Amici Curiae filed submissions on the issue of assignment of counsel to the Accused.<sup>25</sup> The Prosecution responded to these submissions on 19 August 2004.<sup>26</sup>

20. On 18 August 2004, Dr van Dijkman, the treating cardiologist, concluded in his medical report that the Accused was “*not fit enough to defend himself*.”<sup>27</sup> Dr. van Dijkman’s last examination of the Accused for the purposes of this report was on 26 July 2004.

21. On 24 August 2004, the Trial Chamber issued an order<sup>28</sup> to the Registrar to obtain additional medical reports from both Dr. Tavernier and Dr. van Dijkman in order to explain further the conclusions contained within the reports, and for each to comment upon the other’s report.

22. On 25 August the Trial Chamber issued a “*Scheduling Order Concerning Recommencement of the Trial*” which ordered the trial to recommence on 31 August 2004.

23. On 26 August 2004, Dr. Dijkman wrote a further medical report<sup>29</sup> in which he concluded that he agreed with Dr. Tavernier about the “*current medical condition of Mr Milosevic*.” He did not carry out any further examination of the Accused at this time.

24. On 27 August 2004, Dr. Tavernier provided a further medical report in which he concluded *inter alia* that:

“(1) *Mr Milosevic has severe essential hypertension.*

(2) *There is significant doubt about the therapy compliance of Mr Milosevic.*

(3) *If Mr Milosevic would strictly adhere to the whole therapeutic plan, a better control of the blood pressure could be obtained.*

(4) *In the present situation, Mr Milosevic is not fit enough to defend himself.*

(5) *If Mr Milosevic would continue to represent himself this will delay the progress of the trial significantly.”*

Dr. Tavernier did not carry out any further examination of the Accused at this time.

25. Both Dr. Tavernier and Dr. van Dijkman concluded that the Accused suffers from “*severe essential hypertension*” and that his condition was such that a hypertensive emergency, a potentially life-threatening condition could develop.

26. On 31 August 2004, the defence phase of the trial commenced with the presentation of an opening statement by the Accused.<sup>30</sup> This statement lasted for two days, concluding on 1 September 2004, pursuant to which the parties were invited to make “*further submissions concerning the content of the medical reports and assignment of defence counsel*”<sup>31</sup>. Oral submissions were presented by the Prosecution, Amici Curiae and the Accused.

27. During the hearing on 1 September 2004, the Accused requested an opportunity to have a further medical report prepared on his behalf by a doctor of his choosing.<sup>32</sup> This request was rejected by a majority decision of the Trial Chamber.<sup>33</sup>

28. On 2 September 2004, during the proceedings, the Trial Chamber ordered that counsel be assigned to the Accused and that the Registrar should endeavour in the first instance to secure

the appointment of Mr. Steven Kay and Ms. Gillian Higgins as the court assigned counsel.<sup>34</sup> The Trial Chamber concluded that it was “*plain from the medical reports that the accused is not fit enough to defend himself and that should he continue to defend himself, there will be further delays in the progress of the trial.*”<sup>35</sup>

29. At the time the order was made, the Accused expressed his opposition to the order and his desire to appeal.<sup>36</sup>

30. By a Decision of the Deputy Registrar issued on 3 September 2004, Mr. Steven Kay QC and Ms. Gillian Higgins were assigned as counsel to the Accused. Following the assignment of counsel, on the same day, the Trial Chamber issued an “*Order on the Modalities to be Followed by Court Assigned Counsel*”. This order set out the following duties of court assigned counsel:

*“(1) It is the duty of court assigned counsel to determine how to present the case for the Accused, and in particular it is their duty to:*

*(a) represent the Accused by preparing and examining those witnesses court assigned counsel deem it appropriate to call;*

*(b) make all submissions on fact and law that they deem it appropriate to make;*

*(c) seek from the Trial Chamber such orders as they consider necessary to enable them to present the Accused’s case properly, including the issuance of subpoenas;*

*(d) discuss with the Accused the conduct of the case, endeavour to obtain his instructions thereon and take account of views expressed by the Accused, while retaining the right to determine what course to follow; and*

*(e) act throughout in the best interests of the Accused;*

*(2) The Accused may, with the leave of the Trial Chamber, continue to participate actively in the conduct of his case, including, where appropriate, examining witnesses, following examination by court assigned counsel;*

*(3) The Accused has the right, at any time, to make a reasonable request to the Trial Chamber to consider allowing him to appoint counsel; and*

*(4) Court assigned counsel is authorised to seek from the Trial Chamber such further orders as they deem necessary to enable them to conduct the case for the Accused.”*

31. On 7 and 8 September 2004, the first defence witness on the Accused’s witness list<sup>37</sup>, Miss Smilja Avramov, testified before the Trial Chamber. This witness was examined by Assigned Counsel Steven Kay QC after an application for the Accused to examine the witness first was rejected by the Trial Chamber.

32. Pursuant to the Accused’s oral indication that he wished to appeal against the Trial Chamber’s decision to assign counsel, on 8 September 2004, the Assigned Counsel filed a “*Request for a Certificate Pursuant to Rule 73(B) to Appeal Against the Trial Chamber Order Concerning the Representation of the Accused Dated 2 September 2004.*”

33. On 8 and 9 September 2004, the second defence witness on the Accused’s witness list<sup>38</sup>, Mr. James Jatras, testified before the Trial Chamber. This witness was examined by Steven Kay Q.C.

34. On 10 September 2004, the Prosecution responded to the request for certification, taking



the position that the request was a “*matter for the Trial Chamber*”.<sup>39</sup>

35. On the same day, the Trial Chamber granted the request for a certificate pursuant to Rule 73(B).<sup>40</sup> In its Order, the Trial Chamber conceded that the “*decision...to assign counsel affects fundamentally the conduct of the trial and as such it would be best to have it resolved by the Appeals Chamber at this stage, rather than after the conclusion of the trial.*”<sup>41</sup>

36. On 14 September 2004, a further witness from the Accused’s witness list, Mr. Roland Keith, testified before the Trial Chamber. This witness was examined by Steven Kay Q.C.

37. On 15 September 2004, Assigned Counsel presented submissions in relation to the Trial Chamber’s “*Order on the Modalities to be Followed by Court Assigned Counsel.*” Assigned Counsel submitted *inter alia* (i) that the Trial Chamber should order a further medical report on the fitness of the Accused to represent himself given that 51 days had elapsed since his last examination by Dr. van Dijkman on 26 July 2004 and (ii) that the Accused should be allowed to question the witnesses first in order to ensure that his case was ‘put’ through the witnesses. Both submissions were rejected by the Trial Chamber. The Trial Chamber granted an adjournment of the trial proceedings for a period of four weeks until 12 October 2004 in order to allow time for defence preparations.

38. The Trial Chamber’s written decision outlining its reasons to assign counsel to the Accused was filed on 22 September 2004.

39. This appeal is filed on behalf of the Accused by the Assigned Counsel acting pursuant to their mandate to “*act in the best interests of the Accused.*”<sup>42</sup>

## **The Law**

40. In order to appeal successfully against the decision of a Trial Chamber, a party must demonstrate that the Trial Chamber has erred in the exercise of its discretion or that the decision is invalidated by an error of law.

41. In relation to the exercise of discretion, the party challenging must identify for the Appeals Chamber a “*discernable*” error made by the Trial Chamber.<sup>43</sup> It must be demonstrated that “*the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or*

*sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.*”<sup>44</sup>

42. In challenging the exercise of a Trial Chamber’s discretion, the issue is not whether the decision was correct, “*in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.*”<sup>45</sup> It is “*only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise in the place of the discretion exercised by the Trial Chamber.*”<sup>46</sup>

## **Grounds of Appeal**

43. The grounds of appeal are as follows:

- (1) The Trial Chamber erred in law in its interpretation of Articles 20 and 21 (4)(d) of the Statute by concluding that:

(a) The “overarching right to a fair trial, which includes a right to a defence, may, where appropriate, lead to the assignment of counsel for the Accused to conduct his defence” and;

(b) The need for the trial to continue was of greater importance than the need to respect the rights of the Accused in full.

(2) In the alternative, the Trial Chamber’s exercise of its discretion to assign counsel to the Accused against his will was unreasonable in circumstances where :

(a) The Trial Chamber failed to have regard to the preliminary issue of whether the Accused is fit enough to stand trial, having been declared unfit to represent himself.

(b) The Trial Chamber did not allow the Accused to challenge the finding of unfitness to represent himself, by obtaining his own medical report.

(c) The Trial Chamber permitted the Accused to prepare and present his opening statement from 31 August 2004 to 1 September 2004 without causing any disruption to the proceedings and thereby gave him a reasonable expectation that he would be able to present his case. The Trial Chamber thereafter exercised its discretion to assign counsel notwithstanding the fact that it did not have updated medical opinion confirming that the Accused was unfit at that stage in the proceedings.

(d) Having regard to (c), the Trial Chamber did not seek medical opinion as to whether there was *any* revised working regime within which the Accused could have continued to represent himself at this stage in the proceedings.

(e) The Trial Chamber failed to give sufficient weight to the considerations raised by the Amici Curiae in relation to the problems caused by assigning counsel to an accused against his will. <sup>47</sup>

(f) The Trial Chamber failed to give sufficient weight to the possibility of assigning stand-by counsel to *assist* the Accused in representing himself.

3. The Trial Chamber erred in the exercise of its discretion as to the manner in which it requires Assigned Counsel to act, i.e. by requiring Assigned Counsel to examine the witnesses first, it being discretionary as to whether the Accused can then examine his witnesses thereafter. <sup>48</sup>

## Submissions

### Ground (1)(a) and (b)

44. The Trial Chamber erred as a matter of law in its interpretation of Articles 20 and 21(4)(d) of the ICTY Statute. The Chamber’s interpretation can be cited and/or summarised as follows:

(i) “*The minimum guarantees set out in Article 21(4) of the Statute are elements of the overarching requirement of a fair trial.*”

(ii) Whether by way of self-representation or legal assistance, the purpose of Article 21(4)(d) is to secure for an accused the right to a defence, which is a prerequisite for a fair trial.

(iii) The right to represent oneself must *yield* when it is necessary to ensure that the

trial is fair.

(iv) An accused may lose his right to represent himself if the effect of its exercise is to obstruct the achievement of the object and purpose of Article 20, namely securing for an accused his right to a defence and a fair trial.

(v) *"If at any stage of a trial there is a real prospect that it will be disrupted and the integrity of the trial undermined with the risk that it will not be conducted fairly, then the Trial Chamber has a duty to put in place a regime which will avoid that. Should self-representation have that impact, we conclude that it is open to the Trial Chamber to assign counsel to conduct the defence case, if the Accused will not appoint his own counsel."*

45. The right of self-representation constitutes a fundamental principle protected by both European and International Convention law.<sup>49</sup> This right is expressly protected in Article 21 of the Statute of the ICTY.

46. Article 21 of the Statute states that an accused *"shall be entitled to a fair and public hearing"* and sets out the explicit rights of the accused, designating them as *"minimum guarantees in full equality"*:

*"4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:*

*(d) 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 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."*

47. Article 20 of the Statute sets out the Trial Chamber's duties in the conduct of the trial proceedings and requires the Trial Chamber to carry out its duties with *"full respect for the rights of the accused"*:

*"1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."* [Emphasis added.]

48. It is submitted that the Trial Chamber misinterprets the minimum guarantees set out in Article 21 of the Statute as *"elements of the overarching requirement of a fair trial."* [Emphasis added]. This interpretation frames the requirement of a fair trial as 'superior' to the minimum guarantees set out in Article 21 and thereby fails to take into account the nature of the guarantees as the constitutive elements which make a fair trial possible. The minimum guarantees are the very substance of the fair trial, and not inferior to it. They are to be protected in *"full equality"*.

49. The Trial Chamber's interpretation of Article 20 and 21 whereby the right to represent oneself must *"yield"* when it is necessary to ensure that the trial is fair, fails to take account of the nature of the Accused's rights as *"minimum guarantees"*. It is submitted that such minimum guarantees by definition, cannot be interfered with or compromised.

50. According to the reasoning of the Trial Chamber, not only might the right to self-representation have to *'yield'*, in order to secure a fair trial, but an accused may have to lose this right altogether, if the effect of its exercise is to obstruct the achievement by the Trial Chamber of the object and purpose of Article 20, namely securing for an accused a trial which it



determines is a fair trial. This interpretation ignores the weighing of competing interests which has already been carried out by the drafters of the Statute who determined that the right to represent oneself must be guaranteed in order to secure a fair trial. To enshrine individual rights is meaningless unless the court is willing “to give up whatever marginal benefit [it] would receive from overriding these rights when they prove inconvenient.”<sup>50</sup>

51. The Trial Chamber concludes that it is not obliged to “*indulge the wish of an accused to conduct his defence where his capacity to do so is impaired that, were he to continue to do so, there would be a material risk that he would not receive a fair trial*”. [Emphasis added]. It is submitted that in this instance, the Trial Chamber trivialises its own recognition of the right to self-representation set out in Article 21(4)(d) as a minimum guarantee thereby disregarding its obligation to respect this right.

52. The Trial Chamber states that “*If at any stage of a trial there is a real prospect that it will be disrupted and the integrity of the trial undermined with the risk that it will not be conducted fairly, then the Trial Chamber has a duty to put in place a regime which will avoid that. Should self-representation have that impact, we conclude that it is open to the Trial Chamber to assign counsel to conduct the defence case, if the Accused will not appoint his own counsel.*” In the Trial Chamber’s analysis, the Accused’s right to represent himself is diminished by the prioritisation of their wish to conclude this trial. However, this prioritisation replaces the risk of not concluding the trial with the risk that the Accused’s defence case will not be accurately presented. As HHJ May concluded at the outset of this trial, “*The Accused has a right counsel, but he also has a right not to have counsel.*”<sup>51</sup>

53. In support of its analysis, the Trial Chamber argues that “*It is widely recognised in domestic jurisdictions that, where an accused who represents himself disrupts his trial by misbehaviour, he may be removed from the court and counsel appointed to conduct his defence. That step is necessary to secure the integrity of the proceedings with a view to ensuring that the trial as a whole is fair. There is no difference in principle between deliberate misconduct which disrupts the proceedings and any other circumstance which so disrupts the proceedings as to threaten the integrity of the trial.*”

54. It is submitted that the appointment of counsel to an accused who is engaging in deliberate misconduct i.e. in the case of *The Prosecutor v. Seselj* is quite distinct from the situation where an accused is engaging in the legitimate exercise of his right to self-representation and would be allowed to continue but for a finding of medical unfitness. In the former instance, an accused may be said to have forfeited his right to represent himself by his own voluntary conduct. In the latter, the Accused is still asserting his right, despite a finding of unfitness. In such circumstances, it is submitted that a correct interpretation of the Trial Chamber’s duty under Article 20 to ensure a fair trial requires it to enforce the Accused’s Article 21 rights as minimum guarantees rather than take one of these rights away.

55. Notwithstanding the jurisprudence of the ICTR and the ICTY Trial Chambers on the interpretation of Article 21 of the Statute as an “*enabling provision*” for the assignment of stand-by counsel,<sup>52</sup> it is submitted that the correct interpretation of Article 21 does not provide a power to impose counsel upon an unwilling defendant. The right to have “*assigned*” counsel pursuant to Article 21(4)(d) relates to a situation where the Accused has insufficient means to bear the costs of counsel. To interpret the entitlement to the assignment of legal assistance as a power to impose counsel on an Accused who has the will and means to represent himself is to contravene his right to self-representation as a minimum guarantee. Furthermore, the provisions within the Statute do not provide for the withdrawal of those rights, nor do they indicate a ranking of those rights.

56. The Trial Chamber concedes that “*extensive research has not led to the identification of any case in any jurisdiction where counsel has been assigned to an accused person because he was unfit to conduct his case as the result of impaired physical health.*” The case law cited by the Trial Chamber supports the general principle that the right to self-representation is a

qualified as opposed to an absolute right. However, crucially, there is no authority to support the proposition that the right can or should be qualified in the particular circumstances of this case.

57. The Trial Chamber refers to case law from three international tribunals. However, the circumstances in which counsel have been assigned to an unwilling defendant at the ICTY and ICTR have been limited to circumscribed situations, largely concerning obstructionist behaviour by Defendants. This is not the case in the present situation, where the sole possible justification for considering the imposition of counsel relates to the health of the Accused, who has consistently asserted his right to represent himself, from the time he was transferred into the custody of the ICTY.

58. In *The Prosecutor v. Barayagwiza*,<sup>53</sup> the Defendant chose not to attend his trial and, crucially did not assert his right to self-representation. The issue was whether the Trial Chamber would allow defence counsel to withdraw from the case in circumstances where the Accused had instructed defence counsel not to represent him in any respect during the trial. The Trial Chamber held that the Accused was boycotting the trial, that his actions were obstructing the course of justice, and that defence counsel should not withdraw. The non-assertion of the right to self-representation by Barayagwiza distinguishes it from the circumstances of the present case.

59. In the case of *The Prosecutor v. Seselj*,<sup>54</sup> the main reason for the imposition of standby counsel upon the unwilling Accused was that he was “*increasingly demonstrating a tendency to act in an obstructionist fashion, while at the same time revealing a need for legal assistance.*” In this instance, the Accused, by virtue of his obstructionist behaviour waives his right to represent himself. The subsequent actions of the Trial Chamber to appoint standby counsel cannot therefore be interpreted as trampling over his rights. The classification of this case within the obstructionist/boycotting category of cases, once again distinguishes it from the present situation, where the sole basis for assigning counsel to the Accused is by reason of his ill-health.

60. In *The Prosecutor v. Norman*,<sup>55</sup> the Accused informed the Court that he wished to dispense with his counsel and represent himself on the date which had been set for the start of his trial. The Court specifically distinguished the situation from that faced by Mr. Milosevic, stating the following:

*“The distinction between these two cases is that whilst Milosevic is being tried separately and alone, Hinga Norman is being tried with two accused persons. In addition to this, whilst Milosevic indicated his option for self-representation from the outset as soon as he was transferred to the custody of the ICTY, Hinga Norman did this only on the 3rd June 2004, in fact, on the date which had, with his consent, been fixed for the commencement of his trial, to invoke and exercise this same statutory right.”* SEmpphasis addedC.

61. This case is distinguishable from the present case, on the basis that (i) the Accused, Hinga Norman was being jointly tried with two others, (ii) the “*limited time span*” of the Special Court created a “*serious case for concern*” in relation to “*further disruption to the Court’s timetable*” which may have been caused if the Accused were to be allowed to dispense with counsel at the outset of the trial proceedings and (iii) the the Accused attempted to exercise the right to self-representation only at the outset of trial, after more than a year in pre-trial detention with a defence team having prepared his case for trial. The Special Court qualified the Accused’s right to self-representation, but did not take that right away, choosing to assign stand-by counsel to “*assist*” the Accused in the exercise of that right.

62. The Trial Chamber also refers to the case of *Croissant v. Germany*<sup>56</sup> before the European Court of Human Rights. Although this case does provide support for the proposition that the right to self-representation is “*not an absolute right*” the Court issued a warning that while restriction “*of the right may be justified, as here, by the need to protect the rights of another person (i.e. the complainer), it must only be to the minimum extent necessary.*”<sup>57</sup> Importantly,

this case was not concerned with the crucial issue of an Accused wishing to represent himself, but rather with a situation where an accused was objecting to additional counsel being appointed by the court. Mr Croissant objected to the court's appointment of a third lawyer when he had already designated two lawyers of his own choosing, and to the political orientation of the particular lawyer the court selected. Moreover, his objection was partially motivated by the court's requirement that he pay the court-imposed lawyer.<sup>58</sup> It is submitted that this case does not and cannot provide any guidance in the particular circumstances of the present case, particularly given that it concerns litigation within an inquisitorial system, as opposed to one which is party-driven.

63. In its Decision, the Trial Chamber acknowledges that common law jurisdictions, *"in which proceedings are adversarial, typically recognise an accused's right to represent himself at trial."* This right constitutes a fundamental tenet of the common law system. In England and Wales, subject to certain statutory restrictions on cross-examination by defendants in person in sex offence cases, a defendant has the right to conduct his own defence, without the services of a lawyer.<sup>59</sup> Where an Accused *"expresses a desire to conduct his own defence, he should be allowed to do so and counsel should not be assigned to him against his will."*<sup>60</sup> In the United States of America, it has been stated at the Supreme Court level in *Faretta v. California*<sup>61</sup>, that *"to force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the Defendant might in fact present his case more effectively by conducting his own defense...It is the Defendant, therefore who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defence ultimately to his own detriment, his choice must be honoured out of 'that respect for the individual which is the lifeblood of the law"*<sup>62</sup>

64. Limitations to the right to self-representation within adversarial systems are narrow in scope and primarily relate to sexual offence cases where the *"rationale for this type of legislation has been the need to protect a complainant."*<sup>63</sup> Other jurisdictions confirm that restrictions on the right to self-representation should be limited and many only contemplate the assigning of an intermediary to assist with cross-examination on sensitive matters, rather than imposing counsel for all purposes.<sup>64</sup> England<sup>65</sup>, Scotland<sup>66</sup> and Australia<sup>67</sup> have been reluctant to extend these restrictions any further for the precise reasons noted by the Amici Curiae in their submissions dated 13 August 2004.<sup>68</sup>

65. In its Decision, the Trial Chamber refers to a number of civil law systems where representation by counsel is often mandatory in serious criminal cases.<sup>69</sup> The Trial Chamber relies on these civil law systems as providing examples of *"circumstances where assignment of counsel is authorised and occurs in practice."* However, it is submitted that such reliance sets a dangerous precedent for application within the Tribunal, where the proceedings are adversarial in nature. In general, the importance of the lawyers in civil system criminal trials is diminished by the greater activity of the judge and the inquisitorial trial itself is *"very often restricted to discussing the value of the data in the files compiled long beforehand. Witnesses are not called to testify unless special circumstances make their actual presence desirable ... and the general practice if witnesses are called is that the judge, rather than the parties questions them."*<sup>70</sup> Importantly, in civil law systems such as Germany<sup>71</sup> and the FRY<sup>72</sup>, the assignment of defence counsel cannot silence the Accused, who still has a right to address the court. The assignment does not withdraw or abrogate the Accused's ability to represent himself.

66. However, the transposition of the principle of assignment of counsel from the civil law tradition to the adversarial proceedings of the ICTY creates a plethora of fair trial issues. In particular, the imposition of counsel upon an accused who wishes to assert his right to self-representation in adversarial proceedings *"would effectively deprive that accused of the possibility of putting forward a defence"*.<sup>73</sup> In the absence of instructions from the Accused, an imposed lawyer would not be in a position to positively advance a defence or contest evidence during the trial, i.e. put the Accused's case without instructions that reveal a positive defence. It

is inevitable that the defence put forward will not fully represent the Accused's actual defence were he to present it. In essence, "*A fair trial is not possible by imposing counsel upon an Accused when the advocate has no instructions and has no communication from him as to how to conduct his case.*"<sup>74</sup> This proposition has been accepted and upheld by the Trial Chamber on a number of previous occasions.<sup>75</sup> In circumstances where a Trial Chamber has asked the Accused whether he wishes to assign his own lawyer to assist him and the Accused has refused, if he chooses to continue exercising that right in circumstances where his health is at risk, then the responsibility for any deterioration of his health is his. It cannot be said in those circumstances that the trial was unfair. Where however, a Trial Chamber assigns counsel to an accused, in the knowledge that the accused has never had any intention of co-operating with counsel, the Trial Chamber embarks upon a course which substitutes one risk, which is that the Accused's health will prevent him for protracted periods from acting in his own defence, with another risk, i.e that his defence will be incorrectly put. The question then arises as to whether such an outcome can ever be described as a fair trial.

67. The Trial Chamber's Decision concludes that the assignment of counsel is necessary to guarantee the right of the Accused to a fair trial. However, the Decision contains no argument to support the proposition that the delays to the trial due to the ill health of the Accused in any way impair the fairness of the trial to *him*. In the absence of assignment of counsel, the trial may indeed take longer to reach its ultimate conclusion, and may be subjected to further delay and considered unfair to the process, or the concerned public or Mr Milosevic's alleged victims. However, ultimately, the only type of unfairness contemplated by the Statute is unfairness to the Accused, which is not satisfactorily reflected in the Trial Chamber's Decision. Furthermore, the Trial Chamber's concern for expedition within the trial process will not necessarily guarantee or provide a fairer hearing for the Accused.

68. The Trial Chamber's conclusion that if counsel were not assigned to the Accused, the trial would be "*disrupted and the integrity of the trial undermined*" is speculative and unsupported and as such cannot be used to justify overriding a right protected by the Statute as a "*minimum guarantee*".

69. In the circumstances of this case, where there has been a finding that the Accused is "*at the current time*" unfit to represent himself, a Trial Chamber cannot simply disregard the Accused's minimum guarantees or advocate that they must yield. In fulfilling its duty to respect that right and ensure a fair and expeditious trial, a Trial Chamber must exhaust all possible regimes in which that right could still be respected. Such regimes may entail (i) obtaining medical advice as to the circumstances in which the particular accused could still continue to represent himself (i.e. by shorter court sessions; alternate sitting and preparation days) or (ii) an adjournment of the proceedings until such time as the Accused is fit enough to represent himself.

70. In these circumstances, it is submitted that to yield or withdraw a constitutive fair trial right such as the right to self-representation undermines the integrity of the notion of a fair trial and cannot therefore be justified in the circumstances of this case.

71. In essence, it is submitted that the Trial Chamber has erred in law by interpreting Articles 20 and 21 of the Statute in such a way as to permit the assignment of counsel to the Accused. In the absence of any precedent for the qualification of the right to self-representation in the particular circumstances of this case, it is submitted that the assignment of counsel to this Accused sanctions the erosion of his fair trial rights and opens the floodgates to further abrogation of minimum guarantees in the future. In its Decision, the Trial Chamber has concluded that the need to finish this trial without further interruption due to the ill-health of the Accused, is of greater importance than the protection of the Accused's fair trial rights. Having made that decision, the Trial Chamber then proceeded to create conditions which it believes will satisfy the requirements of a fair trial albeit at the expense of the minimum guaranteed right of the Accused to represent himself. This replaces one risk with an even greater risk of unfairness.



## Ground (2)(a)

72. In the alternative, even if it accepted that the right to self- representation can be qualified to allow for the assignment of counsel in the circumstances of this case, it is submitted that the Trial Chamber abused its discretion by failing to have regard to the preliminary issue of whether the Accused is fit enough to stand trial, having been declared unfit to represent himself. The Trial Chamber was unreasonable in failing to evaluate whether the Accused is fit enough to exercise his express and implied rights, including his right to testify over an extended period of time before making the discretionary decision to assign counsel.

73. The Amici Curiae submitted both orally and in writing that a medical assessment on fitness to stand trial should have been conducted prior to any decision by the Trial Chamber on the assignment of counsel. The Appeals Chamber is directed to these submissions for the purposes of this appeal.

74. Prior to the Amici Curiae's written submissions, the Trial Chamber took the position that *"there is no evidence that the Accused is not fit to stand trial at all"*<sup>76</sup>. The Trial Chamber failed to reconsider this issue following written submissions by the Amici Curiae on 13 August 2004.

75. It is submitted that in circumstances where the Accused has been found physically unfit to represent himself, a live issue<sup>77</sup> 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, in accordance with the test recently formulated in *The Prosecutor v. Strugar*.<sup>78</sup>

76. In *Strugar*, the Trial Chamber determined that the appropriate test in assessing fitness to stand trial is to:

*"Evaluate the capacity of the accused to exercise his express and implied rights.... This will give full effect to the Statute, and the result will not be out of keeping with the widely prevailing position in national jurisdictions. These capacities identified may be stated shortly as:*

- to plead,
- to understand the nature of the charges,
- to understand the course of the proceedings,
- to understand the details of the evidence,
- to instruct counsel,
- to understand the consequences of the proceedings, and
- to testify."<sup>79</sup>

77. Furthermore, the Trial Chamber in *Strugar* stated that:

*"It would be entirely inappropriate, and unjustified, and antithetical to the application of international criminal law, to require that each of these capacities must be present at their notionally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity. Rather, as the jurisprudence of many nations has identified, in the application of criminal law what is required is a minimum standard of overall capacity below which an accused cannot be tried without unfairness and injustice."*

78. Although the Trial Chamber did not refer expressly to the right to self- representation in its



Decision, it is submitted that this right falls within the category of “ *express rights*” which an Accused must have the capacity to exercise in order to ensure that he is tried “*without unfairness and injustice*.” Therefore, arguably, if an accused does not have the minimum standard of overall capacity to exercise his right to represent himself, e.g. due to ill-health, then he is not fit enough to stand trial.

79. Given the importance of this issue, it is submitted that it was an error in the exercise of the Trial Chamber’s discretion to assign counsel without first having resolved this live issue.

## **Ground (2)(b)**

80. The Trial Chamber’s exercise of its discretion to assign counsel to the Accused against his will depriving him of a fundamental right was unreasonable in circumstances where the Chamber did not first allow the Accused to challenge the finding of unfitness to represent himself, by obtaining his own medical report. The Trial Chamber failed to place before itself all relevant information before exercising its discretion to assign counsel.

81. At the hearing on 1 September 2004, the Accused challenged the medical finding and requested that he be allowed to obtain further medical reports on this issue, before a decision on assignment of counsel was made by the Trial Chamber.<sup>80</sup>

82. The Accused explained that it was only upon the assessment of Dr. Tavernier from Belgium – whom the Trial Chamber appointed expressly to address the question of unfitness – that such a finding was made. Dr. van Dijkman agreed with this finding after examining the Accused on 26 July 2004. Mr Milosevic expressed his view that the finding of unfitness was a “*manipulation aimed at depriving*” him of his “*right to speak*.”

83. The Prosecution objected to the Accused’s application on the basis that he and/or his Associates must have been aware of the possibility of challenging the medical finding at an earlier stage in the proceedings and that the application at this stage was too late. The Amici Curiae asked the Trial Chamber to consider the Accused’s application despite its lateness due to the fact that it was an “*important matter*”. The Amici Curiae also clarified the position that there had never been an order requiring the Accused to posit an alternative medical report in the event that he challenged the findings. Neither had any of the examining doctors previously raised the issue of the Accused’s unfitness to represent himself.

84. The Accused stated that it had not crossed his mind that counsel may be imposed upon him, and thereby proffered a reason as to why he had not challenged the medical opinion at an earlier stage.

85. In light of (i) the Accused’s oral application on 1 September 2004 for further medical opinion on the issue of fitness, (ii) the fact that the last medical examination of the Accused in relation to fitness by either Dr. Tavernier or Dr. Dijkman was on 26 July 2004 and (iii) the crucial relevance of the issue of the Accused’s fitness to represent himself to the decision as to whether or not to assign counsel, it is submitted that the Trial Chamber erred in the exercise of its discretion to assign counsel to the Accused. The Trial Chamber erred by failing to place before itself all relevant information before making the discretionary decision to assign counsel.

## **Ground (2)(c)**

86. The Trial Chamber’s exercise of its discretion to assign counsel at that particular stage in the proceedings was unreasonable in circumstances where having permitted the Accused to present his opening statement for two days without interruption to the proceedings, or evident deterioration to his health, the Trial Chamber did not then obtain updated medical opinion confirming the Accused’s alleged unfitness at that stage in the proceedings. Given the Trial Chamber’s stated concern in relation to the impact of defence work upon the Accused’s health, its failure to obtain updated medical opinion was irrational.

87. The medical findings of unfitness by Dr. Tavernier and Dr. Dijkman referred to the “*present clinical condition*”<sup>81</sup> of the Accused, who was last medically examined by Dr. Dijkman on 26 July 2004. Both doctors also refer to the fact that the Accused’s condition is subject to stabilisation<sup>82</sup>, and even the Prosecution has recognised that the Accused’s health condition is not “*permanent*” but rather “*periodical*.”<sup>83</sup>

88. Since his last medical examination for the purposes of fitness on 26 July 2004, the Accused has been preparing his defence case and proofing witnesses. Prior to 26 July 2004, the Accused had filed his witness and exhibit list as required by the Trial Chamber, by 13 April 2004.

89. Given the consistent diagnosis of the Accused’s condition as periodical as opposed to permanent, and the Accused’s successful presentation of his lengthy opening statement, it is submitted that it was incumbent upon the Trial Chamber to obtain an updated assessment of his current fitness. The Trial Chamber’s actions in allowing the Accused to open his case, in the absence of any intervening act, gave the Accused a reasonable and legitimate expectation that his rights would be protected and respected. In the absence of a relapse or an updated medical opinion, the decision to assign counsel was premature and inappropriate.

#### **Ground (2)(d)**

90. The Trial Chamber’s exercise of its discretion to assign counsel to the Accused was unreasonable in circumstances where it did not seek updated medical opinion as to whether there was *any* revised working regime within which the Accused could have continued to represent himself at this stage in the proceedings.

91. A working regime of three court days per week (Tues, Wed, Thurs) has been in place since September 2003. This regime has not been recently re-assessed by the Trial Chamber. No medical opinion on the current working capacity of the Accused has been requested and it is unclear as to whether or not an improved regime could have been formulated to protect the interests of the Accused while fulfilling the duty to ensure a fair and expeditious trial.<sup>84</sup>

92. It is submitted that the Trial Chamber has a duty to review and reassess the working regime and physical capabilities of the Accused on a regular basis. Failure to seek medical opinion on the Accused’s current ability to carry out defence preparations and consider alternative working regimes at this stage in the proceedings represents a failure by the Trial Chamber to exhaust all possible avenues in the exercise of its duty to ensure a fair and expeditious trial. The duty to have full respect for the rights of the Accused and the nature of the rights as minimum guarantees requires the Trial Chamber to consider all possible ways in which those rights can be maintained within a workable trial regime. In essence, the Trial Chamber failed to place before itself all relevant information before making its decision on assignment of counsel and therefore the exercise of its discretion was unreasonable.

#### **Ground (2)(e)**

93. In exercising its discretion to assign counsel, the Trial Chamber gave insufficient weight to the considerations raised by the Amici Curiae in relation to the problems associated with assigning counsel to an accused against his will.<sup>85</sup> These problems have been recently outlined in the Amici Curiae submissions dated 13 August 2004 and can be summarised as follows:

(i) The defence put forward by counsel will not represent the Accused’s actual defence in the absence of cooperation and instructions from the Accused.

(ii) There is a likelihood that a significant number of defence witnesses will not cooperate with assigned counsel.

(iii) The Accused may refuse to testify as a witness in a trial where the defence case is presented by assigned counsel. Any antagonism between counsel and the Accused would prevent a relationship of confidence which is an integral part of the examination-in-chief of an accused by his counsel.

(iv) The defective way in which the defence may be conducted by an assigned counsel may constitute grounds of appeal.

(v) The imposition of unwanted counsel upon an unwilling Defendant who refuses to cooperate may in fact lead to increased stress for a Defendant who continues to assert his right to self-representation.

(vi) It is unrealistic to assume that assigned counsel would not require an adjournment in order to prepare the defence case and an overall defence strategy. Assigned counsel would not have access to the preparatory work completed by the Accused and would have to undertake the task of proofing witnesses and preparing exhibit materials from the start. This task in a case of this magnitude would be considerable. Assignment of counsel would thereby entail a further delay in the continuation of the trial proceedings.

### **Ground (2)(f)**

94. Once the Trial Chamber had decided to assign counsel, the exercise of its discretion to do so was unreasonable in circumstances where it failed to give sufficient consideration to the possibility of assigning stand-by counsel to *assist* the Accused to represent himself.<sup>86</sup> The Trial Chamber did not even address this recognised alternative of stand-by counsel in its Reasoned Decision.

95. In the case of *Seselj* and *Norman*, both defendants had asserted that they wished to represent themselves. In both cases, although for different reasons, stand-by counsel was assigned to assist the Accused in the exercise of their right to represent themselves. In neither case has counsel been required to “*represent the Accused*” or prepare and examine those witnesses that counsel deems it appropriate to call. The rights of both *Seselj* and *Norman* have been respected and assisted, as opposed to usurped and replaced.

96. The assignment of stand-by counsel could have enabled the Accused to continue to represent himself, having assistance available where appropriate. It would also have enabled the Accused to examine witnesses, put his own defence and present his argument to the Trial Chamber.

97. If the Accused were to fall ill during the course of the trial, the Trial Chamber would then have to consider whether it was appropriate for stand-by counsel to continue with the proceedings in the absence of the Accused.

98. In the circumstances of this case, the Trial Chamber’s decision to assign counsel to “*represent*” the Accused, as opposed to merely “*assist*” him with his right to represent himself, creates an unworkable situation in circumstances where instructions have not been provided to counsel and there is no cooperation between the parties.

### **Ground (3)**

99. The Trial Chamber erred in the further exercise of its discretion in relation to the manner in which it requires Assigned Counsel to act i.e. by requiring Assigned Counsel to examine the witnesses first, it being discretionary as to whether the Accused can then examine his witnesses thereafter.<sup>87</sup>

100. The Trial Chamber issued the “*Order on the Modalities to be Followed by Court Assigned*

*Counsel*” on 3 September 2004. The modalities are set out above at paragraph 30 herein. By requiring the Assigned Counsel to question the witnesses first, the Trial Chamber has placed the burden of the presentation of the defence case and the questioning of witnesses upon the Assigned Counsel. To allow the Accused to merely ask additional questions at the discretion of the Trial Chamber, infringes the Accused’s right to examine his witnesses, in circumstances where the examination conducted by the Assigned Counsel, without instructions from the Accused, can never accurately reflect his case. If the Trial Chamber had allowed the Accused to handle and question the witnesses first, with the Assigned Counsel in ‘standby mode’, such a regime may have lent itself to greater cooperation from the Accused, whilst ensuring that his defence case had been accurately presented.

101. It is submitted that in order to safeguard the rights of the Accused, the Trial Chamber should have allowed the Accused to question his witnesses first, should he wish to do so. This error in the exercise of its discretion in the way in which it assigned counsel to the Accused has led to a complete breakdown of the Accused’s cooperation within the trial process.

102. It is crucial that justice must not only be done but also seen to be done. The realities of the situation created by the assignment of counsel to represent the Accused call into question whether the Accused can ever be said to have been properly represented and whether the defence presented can ever truly be said to have been his.

### **Current Position**

103. Pursuant to the Trial Chamber’s decision to assign counsel to the Accused, the Assigned Counsel called the first three witnesses from the Accused’s prioritised witness list filed on 30 August 2004. Before the commencement of the testimony of the first witness, Steven Kay QC made an application before the Trial Chamber requesting that the Accused be allowed to examine the witness first. This application was refused. Consequently, the witnesses have been examined by the Assigned Counsel. Thereafter, the Trial Chamber has invited Mr Milosevic to pose additional questions. Mr Milosevic has refused to question the witnesses and asks that his rights be returned to him. <sup>88</sup>

104. The Accused refuses to communicate with the Assigned Counsel. On 15 September 2004, Assigned Counsel made an application for (i) an adjournment of the proceedings pending the outcome of this appeal, (ii) that the Accused be medically examined given that the last examination in relation to his fitness was over 51 days ago and (iii) that he be allowed to question the witnesses first. All applications were refused by the Trial Chamber. The Chamber was informed about the lack of witnesses for the forthcoming weeks. Thereafter, an adjournment of four weeks was granted for Assigned Counsel to prepare its case.

105. At the present time, the Assigned Counsel have encountered wholesale refusals to testify by witnesses on the Accused’s witness list. Consideration is now being given to requests for subpoenas and binding orders.

### **Expedited Hearing**

106. The Assigned Counsel request an expedited oral appeal hearing to enable the Accused to make oral representations to the Appeals Chamber given (i) that the Accused has not filed written submissions throughout the course of the trial, (ii) the fundamental importance of the issue at stake and (iii) its impact upon the current trial proceedings.

### **Relief Sought**

107. It is respectfully requested that the Appeals Chamber:

- (1) Order that the Accused be permitted to represent himself in accordance with his rights to self-representation protected by Article 21(4)(d) of the Statute.

Alternatively that the Appeals Chamber:

(2) Substitute the Trial Chamber's assignment of counsel to represent the Accused with stand-by counsel to assist the Accused in representing himself;

or

(3) Order the Trial Chamber to reconsider its decision to assign counsel and the modalities of that assignment in light of the Appeals Chamber's findings and observations.

Signed

Steven Kay Q.C.  
Gillian Higgins

29 September 2004  
London

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1. The Prosecutor v. Milosevic, "*Decision on Notification of the Completion of Prosecution Case and Motion for the Admission of Evidence in Written Form*" dated 25 February 2004.
  2. The Prosecutor v. Milosevic, "*Order Rescheduling and Setting the Time Available to Present the Defence Case*", dated 25 February 2004. On 17 September 2003, the Trial Chamber ruled that the "*trial will be adjourned for three months between the close of the Prosecution and the commencement of the Defence case to facilitate the Accused in the preparation of his case*": The Prosecutor v. Milosevic, "*Order Concerning the Preparation and Presentation of the Defence Case*", 17 September 2003, p.3. The appeal against this decision submitted by the Amici Curiae, in which further preparation time for the Accused was requested, was dismissed by the Appeals Chamber on 20 January 2004 : The Prosecutor v. Milosevic, "*Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of The Defence Case*" dated 20 January 2004.
  3. The Prosecutor v. Milosevic, "*Order Rescheduling the Pre-Defence Conference and the Commencement of the Defence Case*" dated 5 May 2004.
  4. The Prosecutor v. Milosevic, "*Further Order Rescheduling the Pre-Defence Conference and Commencement of the Defence Case*" dated 27 May 2004.
  5. The Prosecutor v. Milosevic, "*Omnibus Order on Matters Dealt With At the Pre-Defence Conference*" dated 17 June 2004.
  6. The contents of this medical report were read by HHJ Robinson, in open session, on 5.7.04.
  7. The Prosecutor v. Milosevic, "*Order to Registrar Concerning Medical Report*" dated 2 July 2004.
  8. Trial Transcript, 5 July 2004, p. 32143.
  9. The Prosecutor v. Milosevic, "*Order on Future Conduct of the Trial*", 6 July 2004, p.4: "*there is no evidence that the Accused is not fit to stand trial at all, but there is evidence that the health of the Accused is such that he may not be fit to continue to represent himself, and that his continuing to represent himself could adversely affect the fair and expeditious conduct of the trial.*"
  10. Transcript dated 5 July 2004, at p.32153-32154.
  11. The Prosecutor v. Milosevic, "*Order on Future Conduct of the Trial*", dated 6 July 2004.
  12. The Prosecutor v. Milosevic, "*Scheduling Order and Order to Registrar Concerning Medical Report*" dated 12 July 2004.
  13. Medical report by Dr. Sedney dated 16 July 2004.
  14. The Prosecutor v. Milosevic, "*Further Scheduling Order on Commencement of Defence Case*" dated 16 July 2004.
  15. The Prosecutor v. Milosevic, "*Further Order on Future Conduct of the Trial*" dated 19 July 2004.
  16. The Prosecutor v. Milosevic, "*Further Order on Future Conduct of the Trial Relating to Severance of One of More Indictments*", dated 21 July 2004.
  17. The Prosecutor v. Milosevic, "*Prosecution Submission in Response to the Trial Chamber's 21 July 2004 'Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments'*", 27 July 2004; "*Amici Curiae Submissions on the Trial Chamber's Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments dated 21 July 2004*", 27 July 2004; "*Addendum to Prosecution Submission in Response to the Trial Chamber's 19 July 2004 'Further Order on Future Conduct of the Trial' and also to 'Prosecution Submission in Response to the Trial Chamber's 21 July 2004 'Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments'*", 6 August 2004.
  18. The Prosecutor v. Milosevic, "*Scheduling Order Concerning Recommencement of the Trial*", 25 August 2004.
  19. See footnote 11 above.



20. The Registry date of receipt of the report is 29 July 2004.

21. See medical report of Prof. Tavernier dated 24 July 2004 at paras.2 and 3.

22. The Prosecutor v. Milosevic, "Prosecution Submissions in Response to the Trial Chamber's 19 July 2004 "Further Order on Future Conduct of the Trial" dated 26 July 2004.

23. The Prosecutor v. Milosevic, "Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel", dated 6 August 2004.

24. The Prosecutor v. Milosevic "Addendum to "Prosecution Submission in Response to the Trial Chamber's 19 July 2004 "Further Order on Future Conduct of the Trial" And Also To "Prosecution Submission in Response to the Trial Chamber's 21 July 2004 "Further Order on Future Conduct of the Trial Relating to Severance of One of More Indictments" dated 6 August 2004.

25. The Prosecutor v. Milosevic, "Amici Curiae Submission in Response to the Trial Chamber's "Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel" dated 6 August 2004.

26. The Prosecutor v. Milosevic, "Prosecution Reply to "Amici Curiae Submissions in Response to the Trial Chamber's "Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel " dated 6 August 2004" dated 19 August 2004.

27. The Registry date for receipt of this report is 20 August 2004.

28. The Prosecutor v. Milosevic, "Order to Registrar Concerning Additional Medical Reports" dated 24 August 2004.

29. The Registry date for receipt of this report is 30 August 2004.

30. For the Accused's opening statement, see Transcript of proceedings for 31 August 2004, from Transcript p.32157-32260 and on 1 September 2004, from Transcript p.32261-32298.

31. The Prosecutor v. Milosevic, "Scheduling Order Concerning Recommencement of the Trial" dated 25 August 2004.

32. Transcript dated 2 September 2004 at p.32348-9. The Accused asked for the opportunity to have doctors from Russia, Serbia and Greece carry out a further medical examination.

33. HHJ Robinson dissented and stated the following at Transcript p.32356: "My own view is the lateness of the application, a procedural deficiency should not prevent the accused from challenging the medical evidence on an issue as substantive, as fundamental as his right to defend himself."

34. Transcript dated 2 September 2004 at p.32391. For ruling see Transcript at p.32357.

35. Transcript dated 2 September 2004 at p.32358.

36. Transcript dated 2 September 2004 at p.32360.

37. Witness Schedule No.5, filed on 30 August 2004.

38. Ibid.

39. The Prosecutor v. Milosevic, "Prosecution's Response to Assigned Counsel's "Request For a Certificate Pursuant to Rule 3(B) to Appeal Against the Trial Chamber Order Concerning the Representation of the Accused Dated 2 September 2004" Filed 8 September 2004", filed on 10 September 2004.

40. The Prosecutor v. Milosevic, "Order on Request for Certification to Appeal the Decision of the Trial Chamber on Court Assigned Counsel", 10 September 2004.

41. Ibid. at p.4.

42. The Prosecutor v. Milosevic, "Order on the Modalities to be Followed by Court Assigned Counsel", 3 September 2004.

43. The Prosecutor v. Tadic, Case No : IT-94-I-T, "Judgment in Sentencing Appeal" dated 26 January 2000, para. 22.

44. See The Prosecutor v. Milosevic, Appeals Chamber, "Reasons For Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder", dated 18 April 2002, para.5. See Tadic Sentencing Appeal, para.22; Prosecutor v. Aleksovski, IT-95-14/1-A, Judgment, 24 March 2000, para.187; Prosecutor v. Furundzija, IT-95-17/1-A, Judgment, 21 July 2000, para.239; Prosecutor v. Delalic et al, IT-96-21-A, Judgment, 20 February 2001, para. 725; Prosecutor v. Kupreskic et al, IT-96-16-A, Appeal Judgment, 23 October 2001, para.408.

45. Ibid. at para.4.

46. Ibid.

47. The Prosecutor v. Milosevic, "Amici Curiae Submissions in Response to the Trial Chamber's "Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel" dated 6 August 2004 ", dated 13 August 2004, paragraph 16(v)-(xi)

48. The Prosecutor v. Milosevic, "Order on the Modalities to be Followed by Court Assigned Counsel" dated 3 September 2004.

49..Article 6(3) of the European Convention on Human Rights states that an Accused has the right: "to defend himself in person or through legal assistance of his own choosing..." Article 14(d) of the International Covenant on Civil and Political Rights provides that: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) 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 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." Article 67(1)(d) of the Statute of the International Criminal Court ("ICC Statute ") provides that an Accused has the right: "to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosingS...C" (This right is subject to Article 63(2), which deals with disruptive conduct by the accused in the courtroom.) Article 8(2)(d) of the American Convention on Human Right ("ACHR") provides that every person is entitled, with full equality, to the following minimum guarantees: "the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing." See also the Constitution of the International Military Tribunal (Nurnberg Tribunal) in Article 16(d): "SaC Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel."

50. Ronald Dworkin, *Taking Rights Seriously*, p.193. (1978)
51. Status Conference, 30 August 2001, Transcript p.15-18.
52. The Prosecutor v. Jean-Bosco Barayagwiza, ICTR, "*Decision on Defence Counsel Motion to Withdraw, Concurring and Separate Opinion of Judge Gunawardana*", 2 November 2000. See also The Prosecutor v. Vojislav Seselj, "*Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj With His Defence*", 9 May 2003.
53. The Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, "*Decision on Defence Counsel Motion to Withdraw*", 2 November 2000.
54. The Prosecutor v. Seselj, Case No. IT-03-67-PT, "*Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence*", 9 May 2003.
55. The Prosecutor v. Norman et al., Case No. SCSL-04-14-T, "*Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court*", 8 June 2004.
56. *Croissant v. Germany*, ECHR 62/1991/314/385 (28 Aug. 1992), paras. 7-9.
57. Scottish Executive, *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials: A Pre-Legislative Consultation Document* (Scottish Executive, 2000) Shereinafter "*Scottish Executive 2000*"C, para. 48 (emphasis added).
58. See Footnote 56 herein at para. 14.
59. Ernest Isaac Woodward (1948) Cr.App.R.159.
60. Ibid. Furthermore, in the Milosevic trial, the Trial Chamber has recognised on several occasions that "*In adversarial proceedings, the imposition of defence counsel against an Accused's will is not normally appropriate*": Trial Transcript on 18 December 2002 at p.14574. See also The Prosecutor v. Milosevic, "*Reasons For Decision on the Prosecution Motion Concerning Assignment of Counsel*" dated 4 April 2003, at para.21: "*As the Amici Curiae have correctly observed, the imposition of a defence counsel upon an accused who does not want one is a feature of inquisitorial systems, but not of adversarial systems.*"
61. *Faretta v. California*, 422 U.S. 806.
62. Ibid, citing "*Illinois v. Allen*, 397 U.S.337, 350-351 (Brennan J., concurring.)
63. See The Prosecutor v. Milosevic, "*Prosecution Reply to 'Amici Curiae Submissions in Response to the Trial Chamber's 'Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel' Dated 6 August 2004'*" dated 19 August 2004, at footnote 18. Abuses of the right to cross-examine alleged victims by litigants in person had occurred in a number of cases, which in turn led to a review of the law in this area.
64. Evidence Act 1977 (Queensland), s. 21P (the appointed representative "is the Saccused'sC legal representative *for the purposes only of the cross-examination*") (emphasis added); Youth Justice and Criminal Evidence Act (England) 1999, s. 38 (the appointment of a legal representative to assist the accused is limited to the cross-examination of a particular witness ); Evidence Act 1908 (New Zealand), s. 23F (this rule applies only to the examination of child witnesses, and contemplates nothing further than the assignment of an intermediary to direct questions to such witnesses); Canadian Criminal Code, RS 1985, s. 486 (2.3) (this provision is also limited to the cross-examination of witnesses in sexual offence cases; moreover, it acknowledges that the "proper administration of justice " might require the accused to personally conduct the cross-examination).
65. Youth and Criminal Evidence Act 1999, s.36-38.
66. Scottish Executive, *Redressing the Balance: Cross-examination in Rape and Sexual Offence Trials: A Pre-Legislative Consultation Document* (Scottish Executive, 2000), para.48.
67. The Prosecutor v. Milosevic, "*Prosecution Reply to 'Amici Curiae Submissions in Response to the Trial Chamber's 'Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel' Dated 6 August 2004'*" dated 19 August 2004, at footnote 44: "*It should be noted the NSW parliament did not reflect the NSWLRC recommendation that a legal representative be appointed to conduct cross-examination on the basis that: 'Legal practitioners may well be reluctant to become involved in proceedings that could make them vulnerable to complaint.'*" Extract from speech given by Me Debus, Attorney General on second reading of the Criminal Procedure Amendment (Sexual Offence Evidence ) Bill, NSW Hansard, 15 September 2003."
68. The Prosecutor v. Milosevic, "*Amici Curiae Submissions in Response to the Trial Chamber's 'Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel'*" dated 6 August 2004.
69. The Prosecutor v. Milosevic, "*Reasons For Decision on Assignment of Defence Counsel*" at p.20, para.49.
70. *Supranational Criminal Law: a System Sui Generis*, by Roelof Haveman, Olga Kavran, Julian Nichols, at p.256.
71. German Code of Criminal Procedure, Article 240 requires the Presiding Judge to permit the accused to question any witness directly.
72. FRY Criminal Procedure Act, Article 318 permits the accused to question witnesses. This generally occurs through the Presiding Judge, however, Article 331 allows an accused to question witnesses directly with the authorisation of the Presiding Judge.
73. The Trial Chamber upheld the Accused's right to defend himself in a recent decision: "*Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel.*" Filed 4 April 2003. See paras. 24 and 25.
74. The Prosecutor v. Milosevic, "*Amici Curiae Submissions in Response to the Order of the Trial Chamber Concerning the Implications of the Accused's Health Dated 24 September 2003*" dated 27 September 2003.
75. Transcript p.27041 on 30 September 2003, HHJ May: "*the difficulty is how much further do we get by a standby counsel who is without instructions – and this accused has been adamant that he would not give instructions.*"
76. The Prosecutor v. Milosevic, "*Order on the Future Conduct of the Trial*", 6 July 2004, p.4.
77. It is submitted that the Accused's fitness to stand trial is a live issue even if the Accused as a litigant in person, did not raise it himself, there being many possible explanations for his silence.
78. The Prosecutor v. Pavle Strugar, "*Decision re the Defence Motion to Terminate Proceedings*", 26 May 2004.
79. Ibid. at para.36.
80. Transcript 32248-9 on 1 September 2004: "*Please bear in mind the following: For three years, the same*

doctors have considered me fit from the point of view of health to function, and you yourselves have been able to see that. Even Mr Nice, in support of his motion that I be given as little time as possible, put forward the argument that I have been functioning very efficiently. So for three years the same doctors have considered me fit to function. Then an independent doctor turns up from Belgium, the country which is the seat of the NATO pact, and he says I'm unfit and then the doctors here agree with him. Allow me to bring into question this kind of deduction of medical evidence. Please consider my motion and let the experts evaluate the situation, but I ask for an expert from Russia, from Serbia, from Greece, and then you can add two of your own, if you like, whom you will appoint, to see what this is about. Things are being mystified here when in fact they are very simple. I see this as a manipulation aimed at depriving me of my right to speak here and to speak the truth. That is the essence of it all."

81. Medical report of Dr. Tavernier dated 24.7.04 (Registry date 29.7.04): "Based upon his present clinical condition, his present lifestyle and his poor adherence to the proposed therapeutic plan at this moment, Mr Milosevic is in my opinion not fit to represent himself." Medical report of Dr. Dijkman dated 26.8.04 (Registry date 30.8.04): "Having read through Profesor Tavernier's report, I conclude that we both agree on the current medical condition of Mr Milosevic." Emphasis added.

82. Medical report of Dr. Dijkman dated 18 August 2004 (Registry date 20.8.04): "I remain of the opinion that Mr Milosevic should adhere to his regime of medication in order to obtain acceptable blood pressure values It has been shown in the past that this is indeed possible." Medical report of Dr. Tavernier dated 27.8.04 (Registry date 27.8.04): "( 3) If Mr Milosevic would strictly adhere to the whole therapeutic plan, a better control of the blood pressure could be obtained."

83. Transcript on 30 September 2004 at p.27029: "We do not suggest at all that the accused is unfit by any permanent condition, but he has shown himself by the history to be periodically, but now somewhat regularly unfit."

84. For example, medical opinion should have been sought in relation to the Accused's capability to assert his right within different working regimes, i.e.(i) shorter court sessions, (ii) alternate court and preparation days, maintaining three court days per week or (iii) alternate court and preparation weeks.

85. The Prosecutor v. Milosevic, "*Amici Curiae Submissions in Response to the Trial Chamber's "Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel"*" dated 6 August 2004 ", dated 13 August 2004, paragraph 16(v)-(xi)

86. The possibility of assigning stand -by counsel has been previously suggested by the Prosecution.

87. The Prosecutor v. Milosevic, "*Order on the Modalities to be Followed by Court Assigned Counsel*" dated 3 September 2004.

88. Transcript on 1 September 2004 at p.32348: "*The right to defend myself is a question of principle. I do not accept any decrease of that right or any renouncing of that right altogether. So I insist that you make it possible for me to question my own witnesses, and I am categorical on that point.*"