IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Florence Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar:
Mr Hans Holthuis

Decision:
1 November 2004

Slobodan MILOSEVIC

v.

PROSECUTOR

DECISION ON INTERLOCUTORY APPEAL OF THE TRIAL CHAMBER'S DECISION ON THE ASSIGNMENT OF DEFENSE COUNSEL

The Office of the Prosecutor:

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

The Accused

Mr. Slobodan Milosevic

Assigned Counsel

Mr. Steven Kay QC
Ms. Gillian Higgins

Amicus Curiae

Prof. Timothy McCormack

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal" or "ICTY ") is seized of the "Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel (Corrigendum)" filed by Assigned Counsel for Slobodan Milosevic on 29 September 2004.

Background

2. This appeal arises from the trial of Slobodan Milosevic for crimes allegedly committed while he was President of the Republic of Serbia and, subsequently, President of the Federal Republic of Yugoslavia. Milosevic is charged with perpetrating multiple crimes against humanity, grave breaches of the Geneva Conventions of 1949, and a series of violations of the laws or customs of war. The lengthy and complex list of charges against him was originally contained in three separate indictments for each of three geographic regions – Kosovo, Croatia, and Bosnia – but has since been consolidated for a single trial,[1] which began on 12 February 2002.

3. Throughout these proceedings – and well before his actual trial began – Milosevic has insisted on his right to represent himself, rejecting all suggestions that counsel should be appointed to represent him. And since the first Status Conference on 30 August 2001, the Trial Chamber has consistently recognized Milosevic's right to do so, concluding that "the Accused has a right to counsel, but he also has a right not to have counsel."[2] The Trial Chamber has also emphasized its view, however, that "the right to defend oneself in person is not absolute."[3] While starting from the assumption that imposing counsel on an unwilling defendant "is not normally appropriate in adversarial proceedings such as these," the Trial Chamber has made clear its intention to "keep the position under review."[4]

4. Over the course of the trial, Milosevic's health problems have posed steadily growing difficulties for both him and the Trial Chamber. He has long suffered from two chronic cardiovascular conditions: severe essential hypertension and hypertrophic heart disease. Medical reports ordered by the Trial Chamber in July 2002 revealed that the stress of the trial had so badly exacerbated these two conditions that careful monitoring by a cardiologist would be necessary throughout the proceedings.[5] Based on the medical advice of the examining physicians, the trial thereafter proceeded on the understanding that, when Milosevic's blood pressure elevated to unacceptable levels, an adjournment would be necessary until his condition returned to normal. And adjourned it frequently was. During the two-year presentation of the Prosecution's case, proceedings had to be suspended thirteen times because of Milosevic's ill health, for a total of 66 days.[6] Even during periods of good health, the Trial Chamber's working schedule was substantially constrained by doctors' recommendations of a reduced hearing schedule. In order to allow Milosevic to recover from the exertions of trial, the Trial Chamber initially mandated four consecutive rest days between every two weeks of hearings. After signs of a further downturn in Milosevic's health, however, that period had to be increased to four days of rest for every week of trial, yielding a sitting schedule of three days per week.[7]

5. Through the summer of 2004, there had been little indication this situation could be expected to ameliorate. To the contrary, Milosevic's health actually "seemed to decline rather than improve" with time,[8] presenting particular problems during this calendar year. After the Prosecution rested its case on 25 February 2004, the Trial Chamber scheduled the opening of Milosevic's defense

presentation for 8 June 2004. But even though that three-month delay was already intended to account for "the illness of the Accused,"[9] continuing bouts of bad health necessitated five more postponements of Milosevic's opening statement.[10] The second phase of the trial ultimately commenced on 31 August 2004 with a two-day opening statement by Milosevic – more than six months after the close of the Prosecution's case.[11]

6. In the face of Milosevic's mounting health problems, the Trial Chamber decided to "carry out a radical review of the trial process and the continuation of the trial in the light of the health problems of the Accused, which are clearly chronic and recurrent based on the most recent report from the doctor."[12] The Trial Chamber ordered two separate medical examinations to assess Milosevic's fitness to continue representing himself: one by Milosevic's treating physician, and one by an independent cardiologist with no prior involvement in the case.[13] Both doctors concluded that, given the current state of Milosevic's health, there was a real risk that a life-threatening hypertensive emergency would develop if he continued to represent himself under the scheduling regime in place at that time. They further concluded that the scheduling accommodations necessary to allow Milosevic to represent himself without gravely endangering his health would significantly delay the progress of the trial.[14]

7. After reviewing the medical evidence and considering its experience with the trial to that point, the Trial Chamber ruled at a hearing on 2 September 2004 that counsel would be assigned to Milosevic notwithstanding his strenuous objections.[15] As explained in its subsequent written decision, the Trial Chamber found that

> the risk to the health, and indeed the life, of the Accused and the prospects that the trial would continue to be severely disrupted [are] so great as to be likely to undermine the integrity of the trial process. There [is] a real danger that this trial might last for an unreasonably long time or, worse yet, might not be concluded should the Accused continue to represent himself without the assistance of counsel. In the face of these circumstances, it would [be] irresponsible to allow the Accused to continue to represent himself. No court, mindful of its duty to ensure a fair and expeditious trial and its inherent responsibility to preserve the integrity of its proceedings, could countenance this....
>
> In light of the history of the case and the conclusions that the Trial Chamber had reached, the Chamber [is] of the opinion that it was necessary to relieve the Accused of the burden of conducting his own case with a view to stabilising his health to ensure, so far as possible, that the trial proceeds with the minimum of interruption in a way that will permit the orderly presentation of the Accused's case and the completion of the trial within a reasonable time in his interests and the interests of justice: in other words, to secure for the Accused a fair and expeditious trial.[16]

The next day, the Trial Chamber issued an order specifying the working arrangement between Milosevic and Assigned Counsel. That order stated:

> (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.[17]

The Trial Chamber thus contemplated the possibility of allowing Milosevic to continue "active[] participat[ion] along with counsel in the preparation and presentation of his case," even to the extent of "giving evidence, examining and re-examining witnesses as permitted by the Chamber, selecting and submitting documentary evidence, and making final submissions on the evidence."[18] However, his participation would be secondary to that of Assigned Counsel and strictly contingent on the discretionary permission of the Trial Chamber in any given instance.

8. Upon Assigned Counsel's motion, the Trial Chamber certified an interlocutory appeal of its decision to impose counsel.[19] Applying Rule 73(B) of the Rules of Procedure and Evidence, the Trial Chamber reasoned that the assignment of counsel could significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial, and that an immediate resolution of Milosevic's challenge would materially advance the proceedings.[20] This appeal followed swiftly on the heels of certification.

Standard of Review

9. As the Appeals Chamber has previously noted, a Trial Chamber exercises its discretion in "many different situations – such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure."[21] A Trial Chamber's assignment of counsel fits squarely within this last category of decisions. It draws on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and requires a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings. The Appeals Chamber therefore reviews the Trial Chamber's decision only to the extent of determining whether it properly exercised its discretion in imposing counsel on Milosevic.

10. In reviewing this exercise of discretion, the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."[22] In order to challenge a discretionary decision, appellants must demonstrate 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 the Trial Chamber "[gave] weight to extraneous or irrelevant considerations,... failed to give weight or sufficient weight to relevant considerations, or... made an error as to the facts upon which it has exercised its discretion," or that the Trial Chamber's decision was "so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."[23] In practice, this array of factors boils down to the following simple algorithm: a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. Absent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited: even if the Appeals Chamber does not believe that counsel should have been imposed on Milosevic, the decision below will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously.

Analysis

11. Both the Trial Chamber and the Prosecutor recognize that defendants have a presumptive right to represent themselves before the Tribunal. It is not hard to see why. Article 21 of the ICTY Statute, which tracks Article 14 of the International Convention on Civil and Political Rights,[24] recognizes that a defendant is entitled to a basic set of "minimum guarantees, in full equality," including the right "to defend himself in person or through legal assistance of his own choosing."[25] This is a straightforward proposition: given the text's binary opposition between representation "through legal assistance" and representation "in person," the Appeals Chamber sees no reasonable way to interpret Article 21 except as a guarantee of the right to self-representation. Nor should this right be taken lightly. The drafters of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a structural par with defendants' right to remain silent,[26] to confront the witnesses against them,[27] to a speedy trial,[28] and even to demand a court-appointed attorney if they cannot afford one themselves.[29] In the words of the United States Supreme Court in *Faretta* v. *California*, which was recognized by the Trial Chamber as the classic statement of the right to self-representation,[30] an "unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction," such that "counsel [becomes] not an assistant, but a master."[31] Defendants before this Tribunal, then, have the presumptive right to represent themselves notwithstanding a Trial Chamber's judgment that they would be better off if represented by counsel.

12. While this right to self-representation is indisputable, jurisdictions around the world recognize that it is not categorically inviolable. In *Faretta* itself, the United States Supreme Court noted that, since "[t]he right of self-representation is not a license to abuse the dignity of the courtroom," a trial judge "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[32] Recognizing this same basic contingency of the right, England,[33] Scotland,[34] Canada,[35] New Zealand,[36] and Australia[37] have all developed the principle that, in order to protect vulnerable witnesses from trauma, courts may severely restrict the right of defendants to represent themselves in sexual assault trials. Scotland goes so far as to forbid such defendants from conducting any portion of their defenses in person.[38] And while this Appellate Chamber has not previously passed on the question, existing precedent from contemporary war crimes tribunals is unanimous in concluding that the right to self-representation "is a qualified and not an absolute right."[39]

13. Recognizing that a defendant's right to represent himself is subject to some limitations, however, does not resolve this case. It must further be decided whether the right may be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the

proper and expeditious conduct of his trial. The Appeals Chamber believes that, under the appropriate circumstances, the Trial Chamber may restrict the right on those grounds. It is particularly instructive in this regard to consider the parallel statutory right of an accused before the Tribunal "to be tried in his [own] presence"[40] – a right that is found in the very same clause of the ICTY Statute as the right to self-representation. Notwithstanding the express enunciation of this right in the Statute, Rule 80(B) of the Rules of Procedure and Evidence allows a Trial Chamber to "order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct." If a defendant's right to be present for his trial – which, to reiterate, is listed in the same string of rights and indeed in the same *clause* as the right to self-representation – may thus be restricted on the basis of substantial trial disruption, the Appeals Chamber sees no reason to treat the right to self -representation any differently.

14. Defense counsel objects that "the appointment of counsel to an accused who is engaging in deliberate misconduct... is quite distinct from the situation where an accused would be allowed to continue [representing himself] but for a finding of medical unfitness."[41] But it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety. How should the Tribunal treat a defendant whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigors of trial work – the late nights, the stressful cross-examinations, the courtroom confrontations – unless the hearing schedule is reduced to one day a week, or even one day a month?[42] Must the Trial Chamber be forced to choose between setting that defendant free and allowing the case to grind to an effective halt? In the Appeals Chamber's view, to ask that question is to answer it.[43]

15. The only remaining question is whether the Trial Chamber properly exercised its discretion in this particular instance. As to the preliminary issue of the bare decision to assign counsel, the Appeals Chamber cannot conclude – although the question is close – that the Trial Chamber abused its discretion in doing so. Milosevic's representation of himself required the Trial Chamber to adjourn the proceedings repeatedly throughout the presentation of the Prosecution's case, and delayed the start of the Defense case by nearly three months. The doctors who examined Milosevic in July each concluded that, given his condition at the time, Milosevic was not fit to continue defending himself.[44] And it was within the Trial Chamber's discretion to conclude that any concerns about Assigned Counsel's ability to represent Milosevic properly (whether because of Milosevic's refusal to cooperate or because of witnesses' refusal to testify)[45] were speculative at that time. There was a legitimate basis, in other words, for the Trial Chamber's conclusion that the trial "might last for an unreasonably long time, or worse yet, might not be concluded" if Milosevic were allowed to continue representing himself. Given that finding, it was within the Trial Chamber's discretion to assign counsel to Milosevic notwithstanding his opposition. [46]

16. The Appeals Chamber parts ways with the Trial Chamber, however, in its assessment of the Order on Modalities.[47] In spelling out the future working relationship between Milosevic and Assigned Counsel, the Order sharply restricts Milosevic's ability to participate in the conduct of his case in any way. The Order makes his ability to participate at all contingent on a case-by-case, discretionary decision by the Trial Chamber.[48] It implies that he would only occasionally – "where appropriate" – be permitted to examine witnesses.[49] And it indicates that, even where he is permitted to examine a witness, he may do so only after Assigned Counsel had already completed their examination. In every way, then, the Order relegates Milosevic to a visibly second-tier role in the trial.

17. These sharp restrictions, unfortunately, were grounded on a fundamental error of law: the Trial Chamber failed to recognize that any restrictions on Milosevic's right to represent himself must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably

expeditious trial. When reviewing restrictions on fundamental rights such as this one, many jurisdictions are guided by some variant of a basic proportionality principle: any restriction of a fundamental right must be in service of "a sufficiently important objective," and must "impair the right... no more than is necessary to accomplish the objective."[50] Similarly, while the International Covenant on Civil and Political Rights allows some restriction of certain civil rights where "necessary to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others,"[51] the United Nations Human Rights Committee has observed that any such restrictions "must conform to the principle of proportionality;... they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."[52] And the ICTY itself has been guided by a "general principle of proportionality" in assessing defendants' suitability for provisional release, noting that a restriction on the fundamental right to liberty is acceptable only when it is "(1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target."[53]

18. The Appeals Chamber considers that a proportionality principle of this sort was clearly called for here. The excessiveness of the Trial Chamber's restrictions is apparent for at least three reasons: (1) the medical reports relied on by the Trial Chamber explicitly rejected the notion that Milosevic's condition is permanent ;[54] (2) there was no evidence that Milosevic had suffered from any health problems since late July; and (3) Milosevic made a vigorous two-day opening statement without interruption or apparent difficulty. Despite these indications of possible improvement in Milosevic's condition, however, the Trial Chamber failed to impose a carefully calibrated set of restrictions on Milosevic's trial participation. Given the need for proper respect of a right as fundamental as this one, this failure was an improper exercise of the trial court's discretion.[55]

Disposition

19. In light of the foregoing discussion, the Appeals Chamber affirms the Trial Chamber's imposition of defense counsel, but reverses its Order on Modalities. On remand, the Trial Chamber should craft a working regime that minimizes the practical impact of the formal assignment of counsel, except to the extent required by the interests of justice. At a minimum, this regime must be rooted in the default presumption that, when he is physically capable of doing so, Milosevic will take the lead in presenting his case – choosing which witnesses to present, questioning those witnesses before Assigned Counsel has an opportunity to do so, arguing any proper motions he desires to present to the court, giving a closing statement when the defense rests, and making the basic strategic decisions about the presentation of his defense. But this presumption is just that: a presumption. Under the current circumstances, where Milosevic is sufficiently well to present a vigorous, two-day opening statement, it was an abuse of discretion to curtail his participation in the trial so dramatically on the grounds of poor health. The Appeals Chamber can hardly anticipate, however, the myriad health-related difficulties that may arise in the future, or use this occasion to calibrate an appropriate set of responses to every possible eventuality. It is therefore left to the wise discretion of the Trial Chamber to steer a careful course between allowing Milosevic to exercise his fundamental right of self-representation and safeguarding the Tribunal's basic interest in a reasonably expeditious resolution of the cases before it.

20. The Appeals Chamber stresses the following point: in practice, if all goes well, the trial should continue much as it did when Milosevic was healthy. To a lay observer, who will see Milosevic playing the principal courtroom role at the hearings, the difference may well be imperceptible. If Milosevic's health problems resurface with sufficient gravity, however, the presence of Assigned Counsel will enable the trial to continue even if Milosevic is temporarily unable to participate. The precise point at which that reshuffling of trial roles should occur will be up to the Trial Chamber.

21. The decision below is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this decision. The Trial Chamber may grant orders to enhance the proceedings as and when necessary.

Done in English and French, the English text being authoritative.

Dated this 1st day of November 2004,
At The Hague,
The Netherlands.

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Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]

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1 Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, 1 February 2002.
2 Status Conference, Case No. IT-99 -37-PT, 30 August 2001, T.15-18.
3 Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 April 2003, para. 40.
4 Oral ruling by the Trial Chamber on 18 December 2002, T.14574.
5 Reasons for Decision on Assignment of Defence Counsel, 22 September 2004 (hereinafter "Reasons for Assigning Counsel "), para. 53.
6 In its Reasons for Assigning Counsel, the Trial Chamber noted that "eight of these occasions related exclusively to problems with the Accused's blood pressure," para 56, n.120, but neither this decision nor the parties' briefs further discuss the other causes that contributed to the remaining five interruptions. At oral argument, Milosevic contended that bouts with the flu had been responsible for some portion of the delays, but we have been provided with no evidence supporting his claims.
7 Reasons for Assigning Counsel, para. 53.
8 Reasons for Assigning Counsel, para. 55.
9 Order Rescheduling and Setting the Time Available to Present the Defence Case, 25 February 2004, pp. 2, 4.
10 Reasons for Assigning Counsel, para. 59.
11 Reasons for Assigning Counsel, para. 26.
12 Hearing, 5 July 2004, T.32153-32154.
13 Reasons for Assigning Counsel, para. 13.
14 Reasons for Assigning Counsel, para. 60.
15 Hearing, 2 September 2004, T.32357 -32359. Milosevic objected as soon as the Trial Chamber announced the assignment of counsel, declaring that he "want[ed] the Appeals Chamber to consider this decision of yours, which is illegal, which violates international law, which violates every conceivable covenant on human rights." *Id.,* at T.32360
16 Reasons for Assigning Counsel, para. 65.
17 Order on the Modalities to be Followed by Court Assigned Counsel, 3 September 2004 (hereinafter "Order on Modalities"), pp. 2-3.
18 Reasons for Assigning Counsel, para. 68.
19 Order on Request for Certification to Appeal the Decision of the Trial Chamber on Court Assigned Counsel, 10 September 2004, pp. 3-4.
20 Order on Request for Certification to Appeal the Decision of the Trial Chamber on Court Assigned Counsel, 10 September 2004, pp. 3-4.
21 *Prosecutor v. Milosevic*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, 18 April 2002 (hereinafter "Refusal to Order Joinder"), para. 3.

22 Refusal to Order Joinder, para. 4.
23 Refusal to Order Joinder, paras. 5-6.
24 *See* Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, 3 May 1993, S/25704, para. 106.
25 Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY Statute"), Art. 21, §4.
26 ICTY Statute, Art. 21 §4(g).
27 ICTY Statute, Art. 21 §4(e)
28 ICTY Statute, Art. 21 §4(c).
29 ICTY Statute, Art. 21 §4(d).
30 Reasons for Assigning Counsel, para. 45.
31 422 U.S. 806, 820-821 (1975) (United States Supreme Court).
32 422 U.S. 806, 834 n.46 (1975) (United States Supreme Court).
33 Youth Justice and Criminal Evidence Act (England) 1999, secs. 34-35
34 Criminal Procedure (Scotland) Act 1995, sec. 288C(1), as amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002
35 Criminal Code, RS 1985, sec. 486 (2.3)
36 Evidence Act 1908 (NZ), sec. 23F
37 Crimes Act 1914 (Cth), secs 15YF, 15YG, 15YH; Evidence Act 1906 (Cth), sec. 106G; Criminal Procedure Act 1986 (NSW), sec. 294A; Sexual Offences (Evidence and Procedure) Act 1983 (NT), sec. 5; Evidence Act 1977 (Qld), sec. 21(L)-(S).
38 Criminal Procedure (Scotland) Act 1995, sec. 288C(1), as amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. Civil law jurisdictions, of course, go further still: as the Trial Chamber noted, defendants often have no choice but to accept representation by counsel in serious criminal cases. *E. g.*, Article 274 of the French Code of Criminal Procedure; Section 140 of the German Code of Criminal Procedure; Article 294 of the Belgian Code of Criminal Procedure; Article 71(1) of the Yugoslavian Code of Criminal Procedure; Articles 282 and 283 of the Code of Criminal Procedure of the Republic of Korea.
39 *Prosecutor v. Norman*, Case No. SCSL-2004-14-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, paras. 9, 15 (Special Court for Sierra Leone) (denying defendant's request to represent himself in significant part because of the "long adjournments" that would be necessary if the request were granted); *see also Prosecutor v. Seselj* , Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šeselj with his Defence," 9 May 2003, para. 20 (recognizing that right to self-representation "is not absolute" and may be restricted on the basis of the Tribunal's "legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments, or disruptions").
40 ICTY Statute, Art. 21 §4(d).
41 Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel, 29 September 2004, para. 54.
42 We reject Assigned Counsel's contention that Milosevic's inability to represent himself necessarily rendered him unfit to stand trial at all. Trial litigation is an extraordinarily demanding profession. It cannot be that only those defendants capable of meeting its demands are formally fit to stand trial.
43 *See generally Savage v. Estelle*, 924 F.2d 1459 (9th Cir. 1990) (United States Ninth Circuit Court of Appeals) (holding that defendant who suffered from an incapacitating stutter did not have the right to represent himself); *Johnson v. State*, 17 P.3d 1008 (Nev. 2001) (Nevada Supreme Court, United States) (finding that right to self-representation was properly denied where expert testimony indicated that defendant's fragile mental state "might well succumb to the added stress of self-representation and deteriorate to the point where it would become necessary to continuously disrupt the proceedings to monitor his 'present' mental abilities and competence"). *Cf. State v. Christian* , 657 N.W.2d 186, 200 (Minn. 2003) (Minnesota Supreme Court, United States) (recognizing that even "unintentional[]" disruption of a trial by a defendant's can serve as a basis for denying self-representation).
44 Reasons for Assigning Counsel, para. 60.
45 *See* Amici Curiae Submissions in Response to the Trial Chamber's "Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel" Dated 7 August 2004, 13 August 2004, para. 16.
46 We reject Assigned Counsel's contention that it was improper for the Trial Chamber to deny Milosevic's leave to obtain his own medical report before counsel was assigned. We need not reach the substance of this challenge, since we find that it was waived at the trial level. Milosevic waited to make this request until 1 September 2004, despite the fact that it had been clear since early July 2004 that the Trial Chamber was investigating Milosevic's health at least in part because it doubted his ability to continue representing

himself. With respect, we find implausible Assigned Counsel's suggestion that " it had not crossed Milosevic's mind that counsel [might] be imposed on him" until September 1. Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel, para. 84.
47 We are unconvinced by the Prosecution's contention that the propriety of this Order is not fairly encompassed within the question certified for review. *See* Prosecution Motion to Strike Ground of Appeal (3) from Assigned Counsel "Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel," 5 October 2004. The Trial Chamber's decision to assign counsel cannot be understood without reference to its explanation of what, practically speaking, that assignment entails; indeed, the Reasons for Assigning Counsel itself reproduces all relevant portions of the Order on Modalities.
48 Order on Modalities, pp. 2-3.
49 Order on Modalities, pp. 2-3.
50 *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands, and Housing*, 1 A. C. 69 (1998) (United Kingdom Privy Council) (striking down a restriction on civil servants' right to demonstrate) (citing Zimbabwean, South African, and Canadian jurisprudence); *see also, e.g., McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (United States Supreme Court) (finding that a campaign finance law must not restrict the right to free speech substantially more than the extent necessary to advance the state's interest in preventing electoral corruption); *Chassagnou v. France* , 29 E.H.R.R. 615 (2000) (European Court of Human Rights) (holding that only "indisputable imperatives" can justify restrictions on a right protected by the European Convention on Human Rights, and even then only if the restrictions are a "necessary" and "proportionate" means of advancing the state objective) (striking down French law requiring rural landowners to make their land available to hunters); *Edmonton Journal v. Alberta*, 1989 CarswellAlta 198 (Canadian Supreme Court) (holding that a statute restricting the publication of information about divorce proceedings must impair the right to freedom of expression no more than strictly necessary to protect personal privacy).
51 International Covenant on Civil and Political Rights, Article 12, para. 3.
52 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.6, 12 May 2003, p. 176 ("The application of restrictions in any individual case must... meet the test of necessity and the requirements of proportionality.").
53 *Prosecutor v. Limaj*, Case No. IT-03-66-AR65, 31 October 2003, para. 13 (three-judge bench of the Appeals Chamber).
54 The doctors explicitly concluded that Milosevic is not "unfit by any permanent condition," but rather "has shown himself by the history to be periodically, but now somewhat regularly unfit." Hearing, 30 September 2004, T.27029.
55 The Prosecution proposes that we uphold the entirety of the Trial Chamber's order on alternate grounds: specifically, that Milosevic practiced a premeditated policy of deliberate obstructionism by engaging in disruptive courtroom behavior as well as by sabotaging his medication regimen to artificially induce periods of poor health. While intentional obstructionism of this kind, in principle, might well justify the imposition of counsel on an unwilling defendant, the Trial Chamber explicitly declined to make any factual findings on this score. Opinion Assigning Counsel, para. 67. It is rarely appropriate for an Appeals Chamber to make the first assessment of complicated, fact-intensive evidence on an interlocutory appeal (particularly as to evidence that turns in part on an *in personam* assessment of the intangibles of courtroom demeanor), and we decline to do so here.