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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Case: IT-03-67-AR73.3

Date: 20 October 2006

Original: English

BEFORE THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision of: **20 October 2006**

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

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

Office of the Prosecutor

Ms. Hildegard Uertz-Retzlaff
Mr. Daniel Saxon
Mr. Ulrich Müssemeyer
Ms. Melissa Pack

Assigned Counsel

Mr. David Hooper
Mr. Andreas O'Shea

Former Stand-by Counsel

Mr. Tjarda Eduard van der Spoel

The Accused

Mr. Vojislav Šešelj

1. **THE APPEALS CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "International Tribunal", respectively), is seized of the "Appeal Against the Trial Chamber's Decision on Assignment of Counsel" filed by Mr. Tjarda Eduard van der Spoel, former Standby Counsel acting on behalf of Vojislav Šešelj ("Acting Counsel"), on 4 September 2006 ("Appeal"). In this Appeal, the Appeals Chamber must determine whether Trial Chamber I ("Trial Chamber") erred in its decision of 21 August 2006 to assign counsel to represent Šešelj in his trial before the International Tribunal ("Impugned Decision")[1] under Article 21(4) of the Statute of the International Tribunal.[2]

I. BACKGROUND

2. On 23 February 2003, Šešelj surrendered to the International Tribunal to stand trial. In correspondence to the Registrar dated 25 February 2003 and during his initial appearance on 26 February 2003, Šešelj indicated that he intended to represent himself before the International Tribunal.[3]

3. On 9 May 2003, Trial Chamber II rendered its "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence" ("Decision of 9 May 2003"), ordering the Registrar of the International Tribunal to appoint standby counsel for Šešelj upon considering, *inter alia*, that Šešelj was "increasingly demonstrating a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance."[4] Following the Decision of 9 May 2003, the Registrar assigned Mr. Aleksander Lazarević as Standby Counsel for Šešelj and, on 16 February 2004, withdrew Mr. Lazarević's assignment and replaced him with Mr. Tjarda van der Spoel.

4. On 21 August 2006, the Trial Chamber[5] rendered the Impugned Decision to assign counsel to represent Šešelj in his trial "effective immediately" on the basis that "[t]he conduct of the Accused as a whole—obstructionist and disruptive behaviour; deliberate disrespect for the rules; intimidation of, and slanderous comments about, witnesses—leads the Chamber to conclude that there is a strong indication that his self-representation may substantially and persistently obstruct the

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[1] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Assignment of Counsel, 21 August 2006.
[2] Statute of the International Criminal Tribunal for the Former Yugoslavia, June 2006, as amended ("Statute").
[3] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision of the Deputy Registrar, 30 August 2006 ("Decision of the Deputy Registrar"), p. 1.
[4] Decision of 9 May 2003, para. 23.
[5] On 3 May 2006, this case was reassigned to Trial Chamber I. *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Order Reassigning a Case to a Trial Chamber, 3 May 2006.

proper and expeditious conduct of a fair trial."[6] The Trial Chamber requested the Registry to make the necessary arrangements for assigning counsel to Šešelj as soon as practicable and, in the interim, instructed current Standby Counsel to represent Šešelj. The Trial Chamber also dismissed Šešelj's request for a three-day-per-week hearing schedule as moot.[7]

5. Pursuant to the Impugned Decision, the Registry of the International Tribunal consulted with Šešelj on 24 August 2006 as to his preference of counsel, referring him to a list of counsel eligible for assignment before the International Tribunal. Šešelj indicated that he did not wish to participate in the selection of his counsel and stated again that he wanted to represent himself. On 30 August 2006, the Deputy Registrar withdrew Mr. van der Spoel's assignment as Standby Counsel for Šešelj and, subject to the Appeals Chamber's decision on the interlocutory appeal of the Impugned Decision, assigned Mr. David Hooper as Counsel for Šešelj.[8] The Deputy Registrar further assigned Mr. Andreas O'Shea as Co-Counsel for Šešelj on 13 September 2006.[9] However, considering that Mr. van der Spoel had already filed a request for certification to appeal the Impugned Decision, the Deputy Registrar directed Mr. van der Spoel to continue acting on behalf of Šešelj for purposes of this interlocutory appeal.[10]

6. On 29 August 2006, the Trial Chamber rendered its "Decision on Request to Certify an Appeal Against Decision on Assignment of Counsel" granting the request by Acting Counsel to certify an interlocutory appeal of the Impugned Decision pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules").[11] Following the filing of the Appeal, the Prosecution filed its Response[12] on 13 September 2006 and an Addendum[13] thereto on 14 September 2006. Also on 14 September 2006, Šešelj filed a submission requesting the Appeals Chamber to reject the Appeal or, alternatively, notifying the Appeals Chamber that he withdraws the Appeal.[14] The Prosecution filed a further Addendum[15] to its Response on 18 September 2006, and Acting Counsel's Reply was filed on that same day. On 27 September 2006, the Appeals Chamber granted the Prosecution's request in the further Addendum for authorization to exceed the

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[6] Impugned Decision, paras. 79, 81.
[7] *Id.*, p. 25.
[8] Decision of the Deputy Registrar, pp. 1-2.
[9] *See Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-PT, Decision of the Deputy Registrar, 13 September 2006, p. 2.
[10] Decision of the Deputy Registrar, p. 2.
[11] *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-PT, Decision on Request to Certify an Appeal Against Decision on Assignment of Counsel, 29 August 2006 ("Decision on Certification"), p. 3.
[12] Prosecution Response to Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 13 September 2006 ("Response").
[13] Addendum to Prosecution Response to Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 14 September 2006 ("Addendum").
[14] Submission Number 199, 14 September 2006 ("Submission"). An English translation of the Submission was filed on 2 October 2006.
[15] Further Addendum to Prosecution Response to Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 18 September 2006.

word limit for responses in interlocutory appeals.[16] Out of the principle of fairness, the Appeals Chamber invited Acting Counsel to re-file the Reply exceeding the word limit for replies in interlocutory appeals in order to fully reply to the Prosecution's oversized Response.[17] Acting Counsel did not re-file the Reply.

II. STANDARD OF REVIEW

7. The Appeals Chamber recalls that a Trial Chamber's decision to assign counsel is a discretionary one drawing upon the Trial Chamber's "organic familiarity with the day-to-day conduct of the parties and practical demands of the case [. . .]."[18] Therefore, the question before the Appeals Chamber in reviewing a Trial Chamber's decision on assignment of counsel 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.'"[19] A party challenging a discretionary decision by the Trial Chamber must demonstrate that the Trial Chamber has committed a "discernible error"[20] resulting in prejudice to that party.[21] Discernible errors which will lead to the Appeals Chamber overturning a Trial Chamber's exercise of its discretion are as follows : (1) an incorrect interpretation of governing law; (2) a patently incorrect conclusion of fact; or (3) a decision that is so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[22]

III. APPLICABLE LAW

8. Pursuant to Article 21(4) of the Statute, an accused standing trial before the International Tribunal is entitled to certain minimum guarantees, which were incorporated into the Statute in line with Article 14 of the International Covenant on Civil and Political Rights ("ICCPR").[23] Among these is the right found in Article 21(4)(d) of the Statute "to defend himself in person or through legal assistance of his own choosing". The Appeals Chamber has interpreted this provision to provide accused before the International Tribunal with the presumptive right to self-

[16] Decision on Extension of Word Limits, 27 September 2006, p. 3.
[17] *Ibid.*
[18] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel ("*Milošević* Decision on Defence Counsel"), para. 9.
[19] *Id.*, para. 10 citing *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision on Joinder"), para. 4.
[20] *Prosecutor v. Mico Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Provisional Release Decision"), para. 6.
[21] *Milošević* Decision on Joinder, para. 6.
[22] *Milošević* Decision on Defence Counsel, para. 10. The Appeals Chamber will also consider whether the Trial Chamber "[gave] weight to extraneous or irrelevant considerations" or "failed to give weight or sufficient weight to relevant considerations [. . .]". *Ibid., citing* the *Milošević* Decision on Joinder, paras. 5-6.

representation.[24] However, the Appeals Chamber has held that while this right is indisputable, it is not absolute, and may be subject to certain limitations.[25] In particular, a Trial Chamber may restrict the right to self-representation in appropriate circumstances where "a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial."[26] Furthermore, it is not determinative whether the disruption is intentional or unintentional; in both situations, the disruption caused may be a proper basis for restricting the right to self-representation.[27]

IV. DISCUSSION

A. Preliminary Matters

1. Šešelj's Submission

9. Before disposing of this Appeal, the Appeals Chamber must first determine whether it will consider Šešelj's Submission as it was brought in Šešelj's personal capacity and not through Acting Counsel. In the Impugned Decision, the Trial Chamber held that "effective immediately", Šešelj's participation in the remainder of the proceedings shall be through assigned counsel only, and Šešelj's personal participation would only be allowed by the Trial Chamber in the interests of justice on a case-by-case basis "taking into account all circumstances and having heard from Counsel."[28] In considering Acting Counsel's request for certification to appeal the Impugned Decision, the Trial Chamber did not determine that the interests of justice require that Šešelj be allowed, as an exception, to personally participate in appealing the Impugned Decision.[29]

10. The Appeals Chamber considers that neither the Impugned Decision nor the Trial Chamber's Decision on Certification preclude it from considering Šešelj's Submission. The Trial Chamber's order in the Impugned Decision assigning counsel to act on behalf of Šešelj was with regard to the remainder of *its* proceedings for ensuring a fair *trial*.[30] The Impugned Decision may not be interpreted so as to bar Šešelj's personal participation in this interlocutory appeal proceeding. Indeed, in this context, a Trial Chamber cannot extend its power beyond its own proceedings such

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[23] Entered into force on 23 March 1976. *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, S/25704, 3 May 1993, para. 106.
[24] *Milošević* Decision on Defence Counsel, para. 11.
[25] *Id.*, paras. 12-13.
[26] *Id.*, para. 13.
[27] *Id.*, para. 14 (holding that "it cannot be that the only disruption legitimately cognizable by a Trial Chamber is the intentional variety.").
[28] Impugned Decision, paras. 80-81 and p. 25. The Appeals Chamber notes that as the Impugned Decision has not been stayed, it has binding effect pending the outcome of this Appeal.
[29] *See generally* Decision on Certification.
[30] *See e.g.*, Impugned Decision, para. 79.

that it may stipulate who may or may not appear in proceedings before the Appeals Chamber. This principle is evident in the *Milošević* case where the Trial Chamber had ordered that assigned counsel should act on behalf of Milošević for the remainder of his trial and that he could continue to participate actively only with leave of the Trial Chamber.[31] Nevertheless, the Appeals Chamber allowed the personal participation of Milošević in the appeal filed by assigned counsel against the Trial Chamber's decision on assignment of counsel and heard him before reaching its decision.[32]

11. In this case, the Appeals Chamber notes that Acting Counsel requests that Šešelj be allowed to make oral representations to the Appeals Chamber in order for the Judges to hear Šešelj's point of view in this Appeal "given (i) that the Accused could not respond to the Impugned Decision, (ii) the fundamental importance of the issue at stake and (iii) its impact upon the current preparation for trial."[33] The Appeals Chamber agrees with Acting Counsel that in light of the fundamental nature of the right to represent one's self as one of the minimum guarantees to which an accused is entitled under the International Tribunal's Statute, Šešelj's perspective should be heard in this Appeal. Thus, the Appeals Chamber finds that the interests of justice require that it consider the arguments raised by Šešelj in his Submission.[34]

2. The Validity of the Appeal

12. Having decided to consider Šešelj's Submission, the Appeals Chamber must also determine, as a preliminary matter, whether it is validly seized of this Appeal. Šešelj argues that the Appeal should be rejected by the Appeals Chamber for "formal reasons" because Acting Counsel lacks "legal legitimacy" in filing the Appeal.[35] Šešelj contends that Acting Counsel "falsely presented himself" as representing Šešelj due to the fact that he never obtained Šešelj's consent for filing the Appeal.[36] Furthermore, Šešelj states that the contents of the Appeal do not "express my will and run fundamentally counter to the basic concept of my defence."[37] Alternatively, Šešelj notifies the Appeals Chamber that if it does not reject the Appeal, he withdraws it on the basis of his fundamental procedural right to decide whether or not he will appeal against a certain decision.[38] Thus, the question before the Appeals Chamber is whether assigned counsel may file an appeal on

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[31] *Milošević* Decision on Defence Counsel, paras. 7, 16.
[32] *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Scheduling Order, 18 October 2004, pp. 2-3.
[33] Appeal, para. 82; Reply, para. 29.
[34] However, the Appeals Chamber does not consider that an oral hearing is necessary for rendering its Decision. It is not the usual practice of the Appeals Chamber to orally hear parties on review of an interlocutory appeal. Furthermore, the Appeals Chamber considers that it is fully able to come to a reasoned decision on the basis of the written submissions alone.
[35] Submission, p. 1.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*

behalf of an accused against a Trial Chamber's decision on assignment of counsel where the accused does not consent to the filing of that appeal.

13. The Appeals Chamber notes that pursuant to Article 25 of the Statute of the International Tribunal, accused before the International Tribunal are guaranteed the right to an appeal. Article 25 mirrors the right of appeal found in Article 14(1)(5) of the ICCPR and is a fundamental right.[39] As such, the Appeals Chamber considers that the decision on whether or not to exercise the right of appeal under Article 25 ultimately lies with an accused.

14. However, the Appeals Chamber further considers that Article 25 of the Statute does not address whether Šešelj had to give his consent prior to the filing of the present Appeal. This is due to the fact that this Appeal is an interlocutory appeal against a decision rendered by the Trial Chamber during pre-trial proceedings, and Article 25 specifically guarantees the right of appeal to "persons convicted by the Trial Chambers", in other words, against their judgement and sentence. While the Statute is silent with respect to whether there is a right to file an interlocutory appeal against a Trial Chamber's decision rendered during the pre-trial or trial proceedings, the Rules of the International Tribunal give guidance in this regard. Under the Rules, two types of interlocutory appeals may only be filed by a party after a Trial Chamber has granted certification for bringing the appeal.[40] However, in a few matters, such as a challenge to the Trial Chamber's jurisdiction or a request for provisional release, the ability to file an interlocutory appeal lies as of right.[41]

15. With respect to this Appeal, the Appeals Chamber notes that it falls into the first category of interlocutory appeals such that its filing was contingent upon the Trial Chamber's approval in its Decision on Certification. Nowhere in the Rules is provision made for the possibility of appealing a Trial Chamber's decision on assignment of counsel as of right. This is due to the fact that, as noted previously,[42] it is of the type of discretionary decisions which draw upon "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case" for proper regulation of the trial proceedings.[43] Thus, appeals against these types of decisions are only allowed in limited circumstances where the Trial Chamber is of the opinion that they "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and thus "an

[39] *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, 3 May 1993, para. 116.
[40] *See* Rules 72(B)(ii) and 73(B) of the Rules.
[41] *See e.g.*, Rule 65(D) and 72(B)(i) of the Rules.
[42] *See supra* para. 7.
[43] *Milošević* Decision on Defence Counsel, para. 9.

immediate resolution by the Appeals Chamber may materially advance the proceedings."[44] Otherwise, trial proceedings could be indefinitely delayed and the Trial Chamber's judicial independence in managing a trial compromised by the possibility of frequent intervention by the Appeals Chamber upon being seized directly by one of the parties.

16. As such, the Appeals Chamber considers that an accused does not have a fundamental right to appeal a Trial Chamber's decision on assignment of counsel such that an appeal may not be lodged by assigned counsel without the accused's consent. The decision to assign counsel to an accused, although a very important one impacting upon a fundamental right, is not akin to a Trial Chamber's decision on provisional release, jurisdiction or conviction and sentence, which directly impact upon an accused's liberty and from which an appeal lies as of right under the Statute and Rules of the International Tribunal. It is a discretionary decision reached by a Trial Chamber out of its obligation to ensure an accused's right to a fair and expeditious trial before the International Tribunal.[45] Where, as in this case, an accused's intention to represent himself has been consistently clear, assigned counsel may seek to appeal a Trial Chamber's decision to assign counsel out of the obligation to represent the accused's interests, even if the accused withholds consent or cooperation.

17. In sum, the Appeals Chamber finds that it is validly seized of the Appeal. It does not agree that this Appeal should be rejected or may be withdrawn by Šešelj on grounds that Acting Counsel falsely presented himself or lacks "legal legitimacy" in filing this Appeal because he did not obtain Šešelj's consent. The Appeals Chamber notes that in this case, Acting Counsel was unable to consult with or obtain the consent of his client as Šešelj has refused to communicate with Acting Counsel since the Trial Chamber issued the Impugned Decision.[46] Nor does the Appeals Chamber agree that the content of the Appeal runs counter to Šešelj's defence. In the Impugned Decision, the Trial Chamber assigned counsel to Šešelj effective as of the date of that decision and instructed Acting Counsel to represent Šešelj until the Registry of the International Tribunal had made the necessary arrangements for assigning counsel.[47] On the basis of that instruction, Acting Counsel had the authority from the Trial Chamber to request certification to file an interlocutory appeal against the Impugned Decision, acting in what he perceived to be Šešelj's best interests in light of Šešelj's consistent statements that he intended to represent himself in this case. Under the Impugned Decision, Acting Counsel correctly exercised his professional obligation to advocate Šešelj's interests regardless of whether Šešelj gave his consent or cooperation.

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[44] *See* Rules 72(B)(ii) and 73(B).
[45] *See* Articles 20(1), 21(2) and 21(4)(c) of the Statute.
[46] *See* Appeal, para. 71.
[47] *See* Impugned Decision, para. 81 and p. 25.

B. The Appeal

18. Turning to the merits of this Appeal, Acting Counsel for Šešelj argues that the Trial Chamber committed the following three discernible errors in the Impugned Decision: (1) the Trial Chamber erred in fact in its qualification of Šešelj's behaviour thus far in the proceedings of his case; (2) the Trial Chamber erred in law in its interpretation of Articles 20 and 21(4)(d) of the Statute and application of the relevant jurisprudence to his case; and (3) the Trial Chamber's exercise of its discretion in assigning counsel to represent Šešelj was unreasonable in the circumstances. Acting Counsel requests that the Appeals Chamber reverse the Impugned Decision and order that Šešelj be permitted to represent himself pursuant to Article 21(4)(d) of the Statute. Alternatively, Acting Counsel requests that the Appeals Chamber substitute the Trial Chamber's assignment of counsel to represent Šešelj with standby counsel and/or an *amicus curiae* to assist Šešelj in representing himself or order the Trial Chamber to reconsider its decision to assign counsel and the modalities of that assignment.[48]

1. Alleged Errors of Law

19. Acting Counsel submits that the Trial Chamber erred in its consideration of the jurisprudence it relied upon in support its decision to assign counsel to Šešelj. According to Acting Counsel, examination of the relevant case law, both national and international, clearly indicates that disruptive behaviour on the part of the accused warranting assignment of counsel must "reach a certain level of intensity."[49] Thus, "the right to self-representation can be restricted only in cases of extremely disruptive behaviour, rendering it practically impossible to continue the proceedings [. . .]."[50] Such disruptive behaviour "includes insults, refusal to answer the Court's questions, or refusal to appear in the courtroom."[51] Furthermore, Acting Counsel contends that the right to self-representation may only be restricted or revocated where it is immediately preceded by a clear warning to the accused.[52] Finally, Acting Counsel argues that, in most cases, the right to self-representation is only restricted during the trial stage and, where it is restricted at the pre-trial stage, there must be "a strong indication that the defendant will disrupt the proceedings in the courtroom."[53]

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[48] Appeal, paras. 15, 83.
[49] *Id.*, para. 27.
[50] *Id.*, para. 38.
[51] *Ibid.* (internal citations omitted).
[52] *Id.*, paras. 22, 27, 38.
[53] *Id.*, para. 39 (quotations omitted).

a. The Legal Test for Restriction of the Right to Self-Representation

20. With regard to the issue of the level of disruption to a trial that is required to warrant restriction on an accused's exercise of the right to self-representation, the Appeals Chamber has previously settled this question. In the *Milošević* Decision on Defence Counsel, the Appeals Chamber held that that the right may only be curtailed "on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial."[54] In that case, the Appeals Chamber held that in the "appropriate circumstances", in other words, those that demonstrate that an accused's self-representation rises to the level of substantial and persistent obstruction of the trial, a Trial Chamber may restrict the right to self-representation.[55] Whether the appropriate circumstances exist and what they are is a matter for the Trial Chamber to determine on a case by case basis when considering the particular facts of a case as a whole.[56] Thus, in the *Milošević* Decision on Defence Counsel, the Appeals Chamber upheld the Trial Chamber's determination that Milošević's self-representation could be curtailed on account of his poor health on the basis that Milošević's health condition had severely disrupted the hearing schedule over the course of at least two and a half years and was likely to continue to undermine the expeditious conduct of the trial causing it to last an unreasonably long time or even failing to conclude.[57]

21. In this case, the Appeals Chamber is satisfied that the Trial Chamber, following the *Milošević* Decision on Defence Counsel, considered all of the circumstances of Šešelj's case for determining whether his conduct thus far in the proceedings warranted the imposition of restrictions on the right to represent himself at trial.[58] Contrary to Acting Counsel's arguments, the Trial Chamber was not required under the *Milošević* test to specifically find that Šešelj's behaviour has been extremely disruptive to the point of rendering continuation of the proceedings practically impossible. Nor did it have to find that Šešelj's conduct has included specific deliberate behaviour such as insults, refusal to answer questions or refusal to appear in the courtroom. All that the Trial Chamber was required to do was find that appropriate circumstances, rising to the level of substantial and persistent obstruction to the proper and expeditious conduct of the trial exist, thereby warranting restriction of Šešelj's right to self-representation.

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[54] *Milošević* Decision on Defence Counsel, paras. 11, 13.
[55] *Id.*, para. 13.
[56] The Appeals Chamber agrees with this statement made by the Trial Chamber in *Prosecutor v. Gojko Janković & Radovan Stanković*, Case No. IT-96-23/2-PT, Decision Following Registrar's Notification of Radovan Stanković's Request for Self-Representation, 19 August 2005 ("*Janković & Stanković* Decision on Defence Counsel"), para. 10.

b. The Warning Requirement

22. Turning to the issue of whether a clear warning must be issued to an accused immediately prior to the imposition of restrictions on the right to self-representation, this is a matter of first impression for the Appeals Chamber. The Appeals Chamber recalls that in the *Milošević* Decision on Defence Counsel, it noted that the right to self-representation is a "parallel statutory right" to the right of an accused to be tried in his own presence, both being minimum guarantees for accused standing trial before the International Tribunal found in Article 21(4)(d) of the Statute.[59] As such, they are among a list of rights found in Article 21(4) of the Statute "not to be taken lightly" and indispensable to the administration of justice.[60] The Appeals Chamber in *Milošević* considered, however, that under Rule 80(B) of the Rules, the right to be tried in one's presence is not an absolute right and a Trial Chamber may restrict that right if an accused persists in disruptive conduct in the courtroom. It therefore concluded that if the right to be tried in one's presence could be restricted on the basis of substantial trial disruption, there was no reason to treat the parallel right to self-representation any differently.[61]

23. In this case, the Appeals Chamber finds further guidance from the provisions of Rule 80(B) with regard to the question of issuing a warning before restricting the right to self-representation. Rule 80(B) allows for a Trial Chamber to "order the removal of an accused from the courtroom and continue proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom." The Appeals Chamber again considers that the right to self-representation should not be treated differently. Due to the fundamental nature of both rights, an accused should be duly warned before restricting those rights. In this way, an accused is fully and fairly informed and is afforded the opportunity to change the disruptive circumstances, whether resulting from deliberate misconduct or unintentional factors,[62] so as to avoid surrendering those rights.

24. Of course, the question remains as to the nature of the warning that a Trial Chamber is required to give under Rule 80(B). First, the Appeals Chamber does not agree with the assertion by

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[57] At the time that the Trial Chamber assigned counsel to Milošević, the sitting schedule for the trial had been reduced to three days a week and the opening of the defence case was delayed by over six months due to Milošević's health. *See Milošević* Decision on Defence Counsel, paras. 4-5, 7.
[58] Impugned Decision, paras. 73, 79.
[59] *Milošević* Decision on Defence Counsel, para. 13.
[60] *Id.*, para. 11.
[61] *Id.*, para. 13.
[62] For example, where an accused's exercise of the right to self-representation is causing disruption to his trial due to poor health or an unfamiliarity with the law and procedures of the International Tribunal, an accused may be able to remedy the situation in the former case by changing his diet, exercise or medicinal regime and, in the latter case, by informing himself as to the applicable substantive and procedural law.

Acting Counsel that such a warning "has to be given immediately prior to the restriction of the right of self-representation, parallel to the warning that is provided for under Rule 80(B) of the Rules."[63] Rule 80(B) provides that a Trial Chamber may order the removal of an accused from the courtroom "if the accused has *persisted* in disruptive conduct *following* a warning."[64] This language implies that there may be some gap in time between the issuance of a warning and any subsequent restriction on the right to be present at one's trial during which a Trial Chamber will assess whether the disruptive conduct persists. If it finds this to be the case, only then will the Trial Chamber restrict the right after hearing the accused. Furthermore, a Trial Chamber is only required to issue "*a* warning"[65] and, upon finding that the disruptive conduct persists, is not required to then issue a further warning to the accused just before restricting the right. At that point, the accused already received due notice of the disruptive conduct and is not entitled to a further opportunity to avoid the consequences of that disruption.[66] The warning safeguard provided for in Rule 80(B) is not a license for testing the outer limits of a Trial Chamber's patience with respect to maintaining decorum and respect for its rules in the proceedings.

25. Second, the question arises whether a warning as to a restriction of the right to be present at one's trial or the right to self-representation under Rule 80(B) should be of a general or specific nature. In other words, whether it is sufficient for a Trial Chamber to warn an accused that the disruption caused could generally lead to sanctions or whether a Trial Chamber should specifically state that the disruption could lead to restriction of a specific right. The Appeals Chamber finds that Rule 80(B) clearly indicates the content of the warning that is required—it should specifically indicate that the disruptive conduct, if it persists, could result in a specific restriction.[67] In this way, there can be no question that the accused has been put on notice that the warning is serious and could lead to restriction of a fundamental right if it is not heeded.

26. In this case, the Appeals Chamber notes that the Trial Chamber did not state that, as a matter of law, Šešelj was entitled to receive a warning as to his disruptive behaviour and that it could result in restrictions on his right to self-representation, prior to assigning him counsel in the Impugned Decision. Nor did it make a finding of fact that such a warning was issued to Šešelj. While the Trial

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[63] Appeal, para. 22.
[64] Emphasis added.
[65] Emphasis added.
[66] The Appeals Chamber is not persuaded by Acting Counsel's argument that the Trial Chamber's Decision of 9 May 2003 assigning standby counsel is authority for the requirement that a Trial Chamber must issue a further warning *immediately* prior to restricting the right to self-representation by assigning counsel. *See* Appeal, para. 22. The Trial Chamber merely noted that in exceptional circumstances, the Trial Chamber would allow standby counsel to take over Šešelj's defence if it found that disruptive conduct continued following a warning. *See* Decision of 9 May 2003, para. 30.

Chamber specifically considered that, in the Decision of 9 May 2003, Trial Chamber II stated, when assigning standby counsel to Šešelj, that its decision to do so was warranted because Šešelj was "in fact increasingly demonstrating a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance,"[68] this decision did not serve as clear and sufficient notice to Šešelj that if he persisted with such obstructionist behaviour, it would result in a complete restriction of his right to self-representation. The Appeals Chamber especially notes that in the Decision of 9 May 2003, the Trial Chamber ordered that, in "exceptional circumstances" where Šešelj continued to engage in disruptive conduct at trial after receiving a *warning*, standby counsel could completely take over the defence from Šešelj as a result of him being removed from the courtroom under Rule 80(B).[69] None of the other warnings mentioned by the Trial Chamber in the Impugned Decision suffice given that they did not specifically state that Šešelj would lose his right to self-representation as a sanction if his obstructionist behaviour persisted.[70] The Appeals Chamber considers that a warning with regard to possible assignment of counsel needs to be explicit, in the form of an oral or written statement to an accused explaining the disruptive behaviour and that, if it persists, the consequence will be restriction on the accused's right to self-representation.

c. Restriction of the Right to Self-Representation at the Pre-Trial Stage

27. Finally, with respect to the question of whether the right to self-representation may be restricted at the pre-trial stage of a case, this is also an issue of first impression before the Appeals Chamber. Acting Counsel argues that the Trial Chamber committed an error of law with regard to this issue because, while there are examples in the case law cited by the Trial Chamber with regard to revocation of the right of self-representation in the pre-trial stage, this is only where "it affords a strong indication that the defendant will disrupt the proceedings in the courtroom."[71] The Appeals Chamber notes that the Trial Chamber, in making a determination as to whether Šešelj's conduct during the pre-trial phase of his case warranted restriction on his right to represent himself in the remainder of the proceedings, looked to *United States v. Brock* for guidance.[72] In that case, the United States 7th Circuit Court of Appeals looked to see whether Brock's pre-trial conduct was sufficient for the court to conclude that there is a strong indication that Brock would continue to be

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[67] As noted previously, Rule 80(B) allows a Trial Chamber to "order the removal of an accused from the courtroom and continue proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning *that such conduct may warrant the removal of the accused from the courtroom.*" (Emphasis added).
[68] Impugned Decision, para. 67 *citing* the Decision of 9 May 2003 at para. 23.
[69] *Id.*, para. 2 *citing* the Decision of 9 May 2003 at para. 26.
[70] *Id.*, paras. 67-71, 76.
[71] Appeal, para. 39 (internal citations omitted).
[72] Impugned Decision, para. 73.

disruptive at trial.[73] The court found that it did, noting that Brock's behaviour demonstrated a deliberate lack of good faith cooperation leading to severe impeding of pre-trial proceedings.[74] The Trial Chamber then concluded on the basis of *Brock* and the test articulated by the Appeals Chamber in the *Milošević* Decision on Defence Counsel that, at the pre-trial stage, the appropriate test was whether it was satisfied that Šešelj's pre-trial behaviour, when considered as a whole, "provides a strong indication that self-representation may substantially and persistently obstruct the proper and expeditious conduct of the proceedings."[75]

28. The Appeals Chamber agrees with the Trial Chamber's approach save for use of the word "may" and holds that, at the pre-trial stage, the Trial Chamber should satisfy itself that the accused's pre-trial behaviour, when considered as a whole, provides a strong indication that continued self-representation *would* substantially and persistently obstruct the proper and expeditious conduct of the trial proceedings. The Appeals Chamber notes that this one-word modification to the test is consistent with the language found in *United States v. Brock* as well as that that used in *Prosecutor v. Janković and Stanković* wherein the Trial Chamber found that the deliberate and serious disruptions caused by Stanković as well as the language he used during pre-trial proceedings were sufficient to "convince the Chamber that the obstructive behaviour of the Accused *would* disrupt the conduct of the proceedings and seriously impair the effective and fair defence of the Accused if he were to defend himself in person."[76] The Appeals Chamber is persuaded that the use of the word "would" is more appropriate as a Trial Chamber should have a high degree of certainty before exceptionally placing a restriction on the right to self-representation pre-emptively at the pre-trial stage before an accused has had the opportunity to conduct his own defence at trial.

29. Nevertheless, the Appeals Chamber considers that this error by the Trial Chamber does not require reversal of the Impugned Decision. Assessment of the whole of Šešelj's pre-trial conduct to date by reference to the Trial Chamber's factual findings provides a strong indication that his self-representation at trial *would* lead to substantial and persistent disruption of the trial proceedings. As noted by the Trial Chamber, the frivolous and abusive nature of many of Šešelj's 191 pre-trial submissions; his wilful refusal on a number of occasions to follow the rules for the proceedings as established by the International Tribunal's Rules and Practice Directions as well the orders of the Trial Chamber; his persistent use of abusive language in his submissions and during his pre-trial

[73] *United States v. Brock,* 159 F.3d 1077, 1080 (7th Cir. 1998) applying a test articulated in *United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989).
[74] *Id.* at fn. 3. The Court of Appeals considered that the defendant's "steadfast refusal to answer the court's questions" or to cooperate in any way constituted such behavior making it "extremely difficult to resolve threshold issues" in the pre-trial phase. *Id.* at 1078, 1080-81.
[75] Impugned Decision, paras. 74, 79 (emphasis added).
[76] *Janković & Stanković* Decision on Defence Counsel, paras. 19, 23.

appearances in the courtroom; his revelation of the name of a protected witness, intimidation of potential witnesses, and unauthorized disclosure of confidential materials; and his continued obstructionist and disruptive behaviour despite repeated general warnings from the Trial Chamber, Appeals Chamber, Bureau and President of the International Tribunal, clearly suffice to lead to the conclusion that Šešelj displayed a deliberate lack of good faith to cooperate in pre-trial proceedings, which led to considerable disruption and waste of the International Tribunal's resources.[77] This consistent disruptive conduct warrants the conclusion that if Šešelj were to represent himself at trial, such behaviour would continue and lead to similar substantial disruption to the trial proceedings.

2. Alleged Errors of Fact

30. Acting Counsel submits that the Trial Chamber committed two errors of fact in determining whether restriction of Šešelj's right to self-representation at trial was warranted. First, Acting Counsel contends that the Trial Chamber erred in its assessment of Šešelj's pre-trial behaviour by referring mainly to facts occurring as early as 1993 and as late as 2005 but not within the past year, taking some of Šešelj's acts out of context, and relying mainly on Šešelj's out-of-court written submissions; by failing to consider that, apart from the length and insulting language of his submissions, Šešelj has generally followed the Rules of the International Tribunal and has been "very cooperative" with the Pre-Trial Judge; and by ignoring the fact that since the reassignment of his case from Trial Chamber II to Trial Chamber I, Šešelj has been reasonably respectful and cooperative in the courtroom. Acting Counsel also submits that it is of relevance that Šešelj voluntarily surrendered to the International Tribunal.[78]

31. The Appeals Chamber finds that Acting Counsel fails to demonstrate that the Trial Chamber made a "patently incorrect conclusion of fact" in the Impugned Decision.[79] As noted previously,[80] the Appeals Chamber considers that the Trial Chamber appropriately considered the course of Šešelj's pre-trial behaviour from his initial appearance in 2003 well into 2006 to date.[81]

32. Furthermore, the Appeals Chamber does not agree that the Trial Chamber's reference to some of Šešelj's statements and publications before his arrival at The Hague constitutes reversible error.[82] Even supposing such statements to be outside the scope of what a Trial Chamber may properly consider—a matter the Appeals Chamber need not resolve today—the Trial Chamber here did not rely materially on these statements. Although it noted them briefly in its description of the

[77] *See* Impugned Decision, paras. 34-71, 75-79.
[78] Appeal, paras. 16-20; Reply, paras. 5-10.
[79] *See supra* para. 7.
[80] *See supra* para. 29.
[81] *See* Impugned Decision, paras. 34, 37, 45, 47, 51-54, 56-57, 59, 64 and corresponding footnotes.

facts, it instead relied primarily upon Šešelj's written submissions, his conduct in court, his unauthorized disclosure of confidential documents to his expert team, and his disclosure of the name of a protected witness to an unauthorized individual.[83]

33. Also, the Appeals Chamber does not agree with Acting Counsel's contention that the Trial Chamber erred by relying largely on Šešelj's out-of-court written statements to find that his pre-trial behaviour warrants assignment of counsel at trial because the International Tribunal "is based on an adversarial model."[84] According to Acting Counsel, the Trial Chamber should have looked primarily to Šešelj's behaviour in court during the pre-trial status conferences.[85] The Appeals Chamber considers that, while Šešelj's out-of-court submissions were undoubtedly an important basis for the Impugned Decision, the Trial Chamber considered them together with Šešelj's in-court behaviour in sixteen pre-trial appearances and status conferences, specifically noting particular instances of his disruptive behaviour and offensive language with respect to the Judges, participants in these proceedings as well as against other individuals.[86] In addition, the Trial Chamber considered his in-court behaviour when testifying in another trial that was before the International Tribunal.[87] Furthermore, the Appeals Chamber does not agree that "out-of-trial submissions cannot justify such a stringent measure as the complete waiver of the right to self-representation."[88] When considering at the pre-trial stage whether to restrict an accused's right to represent himself at trial, a Trial Chamber looks to all of the appropriate circumstances.[89] A considerable part of the examined circumstances will inevitably include out-of-court behaviour or written submissions given the nature of pre-trial proceedings. Nevertheless, this is not problematic because the issue for the Trial Chamber is whether there is a strong indication that continued self-representation by an accused would substantially and persistently obstruct the proper and expeditious conduct of the trial proceedings, *both* in and out of court.[90] Furthermore, a Trial Chamber may also find that out-of-court written submissions at pre-trial give a strong indication of what the accused's behaviour would be in the courtroom at trial.

34. In addition, the Trial Chamber did not err in failing to consider that Šešelj has generally followed the Rules of the International Tribunal apart from the length and insulting language of his

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[82] *See* Reply, paras. 5-6 (referencing Impugned Decision, para. 29).
[83] *See generally* Impugned Decision, paras. 31-66; *see also* paras. 74-79.
[84] Reply, para. 8.
[85] *Ibid.*
[86] Impugned Decision, paras. 32 and fn. 66, 34-40, 58-62.
[87] *Id.*, para. 38.
[88] Reply, para. 9.
[89] *See supra* paras. 20, 28.
[90] *Ibid.* The question is whether there is a strong indication that self-representation would substantially and persistently disrupt the "trial proceedings" generally. This language does not suggest that there is a restriction to consideration of in-court trial proceedings.

submissions, and that he has been very cooperative with the Pre-Trial Judge, because the facts indicate otherwise. For example, the Trial Chamber noted that in June 2003, Šešelj shared the name of a protected witness over the phone with an unauthorized individual.[91] In addition, Šešelj disclosed confidential documents to his self-appointed expert team even though they have not been authorized to have access to them.[92] Furthermore, in November and December 2003, Šešelj used communication facilities in the United Nations Detention Unit ("UNDU") to make statements to the press concerning the upcoming Serbian parliamentary elections in breach of the Rules of Detention, even after being warned against doing so by the Commanding Officer of the UNDU.[93] Šešelj's interactions with the Pre-Trial Judge, including in the Status Conferences of May and July 2006 which were taken into consideration by the Trial Chamber in the Impugned Decision,[94] are hardly "very cooperative."[95]

35. Furthermore, the Trial Chamber did not err in failing to consider Šešelj's purported improvement in behaviour in the courtroom upon the assignment of Trial Chamber I to his case as is allegedly evidenced in the Status Conferences of 19 May 2006 and 4 July 2006. Contrary to Acting Counsel's contention, in these status conferences, Šešelj made ominous comments with regard to Serb detainees in the UNDU;[96] made personal accusations against the Pre-Trial Judge;[97] and indicated deliberate and persistent unwillingness to follow the Rules of the International Tribunal with respect to procedure for pleading and disclosure practice.[98] This hardly indicates improved cooperation with the Trial Chamber. In addition, the Appeals Chamber notes that the Trial Chamber considered that Šešelj's behaviour has improved somewhat to date because he has changed or ceased his objections with regard to specific issues.[99] Nevertheless, it concluded that "[t]he record shows that his conduct in general has not improved, and his attacks against persons affiliated with

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[91] Impugned Decision, para. 63.
[92] *Id.*, para. 54.
[93] *Id.*, para. 43.
[94] *Id.*, para. 20 and fn. 66. *See especially* Status Conference (19 May 2006), T. 516-517, 519-520; Status Conference (4 July 2006), T. 540.
[95] *See e.g., id.*, at para. 34 (noting that Šešelj made persistent submissions to the Pre-Trial Judge protesting the attire of the Judges of the International Tribunal because their robes remind him of the Catholic inquisition or German SS or Gestapo uniforms); para. 35 (noting that Šešelj accused the Pre-Trial Judge of deliberately trying to irritate him and provoke him into committing an act he did not want to commit); para. 36 (noting that Šešelj knowingly misled the Pre-Trial Judge with his allegation that he had been waiting for a surgical treatment for three months and the lack of medical treatment in the UNDU amounted to torture); and para. 45 (noting that despite the Pre-Trial Judge's oral warnings to Šešelj on 19 May 2006 to comply with the Practice Direction on the Length of Briefs and Motions, nine of Šešelj's submissions were declared null and void by the Trial Chamber on 19 June 2006 for failing to comply with that Practice Direction).
[96] Status Conference (19 May 2006), T. 492.
[97] Status Conference (4 July 2006), T. 540.
[98] *Id.*, T. 542. *See also* Status Conference (19 May 2006), T. 516-517, 519-520.
[99] *See* Impugned Decision, paras. 39-40 (noting that Šešelj has submitted more justifiable explanations for his refusal to use a computer and ceased his objections to the requirements that he wear a bullet-proof jacket for security reasons during transfers from the UNDU to the International Tribunal, and that his family apply for visas in order to visit him in the UNDU).

the Tribunal have become increasingly offensive."[100] Acting Counsel fails to demonstrate that this was a patently incorrect conclusion of fact.

36. Finally, with respect to Šešelj's voluntary surrender to the International Tribunal, the Trial Chamber was certainly aware of that fact. However, the Appeals Chamber does not find that the Trial Chamber erred in concluding that Šešelj's pre-trial behaviour warranted assignment of counsel in spite of that voluntary surrender after appropriately considering all of the circumstances subsequent to that surrender.

37. Second, Acting Counsel argues that the Trial Chamber committed an error of fact in concluding that Šešelj had been sufficiently warned by the Trial Chamber's Decision of 9 May 2003 that his obstructionist behaviour might lead to the assignment of counsel. He contends that this conclusion is contradicted by the Decision of 9 May 2003. In addition, while Šešelj was warned generally that his behaviour would be met with sanctions, these warnings could not have provided Šešelj with sufficient notice that his right to self-representation could be revoked and that he would be assigned counsel.[101]

38. The Appeals Chamber agrees and recalls that it has already disposed of these arguments above.[102]

3. Alleged Abuse of Discretion

39. Acting Counsel argues that there are seven grounds for the Appeals Chamber to find that the Trial Chamber's assignment of counsel in the Impugned Decision was unreasonable in the circumstances and therefore, constitutes an abuse of discretion. They are as follows: (1) the Trial Chamber failed to take into account the importance of self-representation as a human right and that it should only be restricted in exceptional circumstances; (2) the Trial Chamber violated Šešelj's right to free access to the court as the Impugned Decision does not allow him to appeal that decision or file submissions independently; (3) the Trial Chamber did not issue any warning to Šešelj that his right to self-representation would be revoked; (4) prior to the Impugned Decision, the Pre-Trial Judge allowed Šešelj to play a substantial role in the preparation of his defence giving rise to a reasonable expectation that he would be allowed to continue to present his case at trial; (5) the Trial Chamber applied the incorrect standard regarding Šešelj's ability to represent himself; (6) the Trial Chamber failed to take into account other alternatives for solving the issue of Šešelj's undesirable

[100] *Id.*, para. 78.
[101] Appeal, paras. 21-25, Reply, paras. 11-13.
[102] *See supra* para. 26.

behaviour; and (7) the Trial Chamber failed to take into consideration the practical difficulties that will arise from assigning counsel on an unwilling accused.[103]

40. As a preliminary matter, the Appeals Chamber considers that most of Acting Counsel's arguments under ground one allege that the Trial Chamber was unreasonable in finding that Šešelj's behaviour meets the legal test for restriction of the right to self-representation and prematurely basing its decision on his behaviour before and during the pre-trial proceedings. The Appeals Chamber has already rejected these arguments above and will not consider them further.[104] It will therefore only consider the arguments under ground one that the Trial Chamber's complete restriction of his right to self-representation through the assignment of counsel was excessive and disproportionate in light of Šešelj's pre-trial conduct. With respect to the third ground, the Appeals Chamber has already found that the Trial Chamber erred by failing to issue an appropriate warning before assigning counsel and thus, accepts this ground.[105] In the fourth ground, Acting Counsel raises arguments with respect to Šešelj not being warned that his right to self-representation could be restricted because the Status Conferences of 19 May 2006 and 4 July 2006 were cooperative between him and the Pre-Trial Chamber giving rise to a reasonable expectation that he would be able to represent himself at trial. While the Appeals Chamber agrees that Šešelj was not sufficiently warned, it has already considered and rejected Acting Counsel's arguments with respect to Šešelj's purportedly improved behaviour in the Status Conferences of 19 May 2006 and 4 July 2006 and therefore will not consider this ground further.[106]

41. Consequently, the Appeals Chamber turns to consider grounds five and seven relating to the Trial Chamber's restriction of Šešelj's right to self-representation as such. It will then consider part of ground one, ground two and ground six together as they raise related arguments alleging that the Trial Chamber's restriction on Šešelj's right to self-representation by assigning counsel was disproportionate.

a. Šešelj's Ability to Represent Himself

42. Acting Counsel argues under ground five that the Trial Chamber abused its discretion in paragraph 66 of the Impugned Decision when, upon consideration of the complexity of the case against Šešelj as well as his behaviour, it expressed doubts in the Impugned Decision with regard to Šešelj's ability to defend himself.[107] Acting Counsel states that there is no requirement that an

[103] *See* Appeal, paras. 15, 40-81; Reply, paras. 19-28.
[104] *See supra* paras. 28-29.
[105] *See* supra paras. 26, 38.
[106] *See supra* para. 35.
[107] Appeal, para. 60.

accused have certain legal qualifications in order to retain the right to self-representation and, in any event, Šešelj "is a professor of law and has a legal team composed of 25 members, most of them being lawyers, to assist him with the preparation of his defence."[108] Acting Counsel contends that the Trial Chamber's decision to assign counsel to Šešelj is therefore not in line with the *Milošević* Decision on Defence Counsel, wherein the Appeals Chamber held that accused before the International Tribunal "have a 'presumptive right to represent themselves notwithstanding a Trial Chamber's judgement that they would be better off if represented by counsels [*sic*].'"[109]

43. The Appeals Chamber does not agree. Although the Trial Chamber noted that in the Decision of 9 May 2003 Trial Chamber II expressed concerns about the legal complexity of Šešelj's case and that Šešelj was exhibiting a need for legal assistance, it did not take into consideration Šešelj's legal competence for representing himself as a factor weighing in favour of assigning counsel.[110] Rather, it considered Šešelj's "ongoing disruptive conduct and unwillingness to follow the ground rules", his increasing "non-compliance with orders and directives" in filing his written submissions, and his wilful distraction of "all persons engaged in these proceedings with irrelevant allegations and material" as evidence of a lack of good faith cooperation and concluded that,"[t]hese developments, particularly in light of the imminent start of the trial, trouble the Chamber and must be taken into account" when deciding whether to assign counsel to Šešelj.[111] The Trial Chamber did not weigh Šešelj's legal ability to represent himself as such; rather it expressed concern that his ongoing disruptive conduct was deliberately "undermining his *intention* to present his defence" and was causing him to be "ineffective in achieving his stated purposes."[112] The Appeals Chamber therefore finds that Acting Counsel has failed to demonstrate that the Trial Chamber was unreasonable in this regard.

b. The Practical Difficulties in Assigning Counsel

44. Acting Counsel also contends under ground seven that the Trial Chamber gave insufficient consideration to the practical difficulties that are faced by an assigned counsel when trying to represent an accused against his will. For example, assigned counsel might not be able to effectively represent the accused in the absence of instructions, may be unable to put forward a reliable case theory, may find it nearly impossible to cross-examine Prosecution witnesses, and could face refusal to cooperate from Defence witnesses as occurred in *Milošević*. Consequently, the lack of an

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[108] *Id.*, para. 62.
[109] *Id.*, para. 61 *citing* to the *Milošević* Decision on Defence Counsel, para. 11.
[110] Impugned Decision, para. 66. The Appeals Chamber notes that Acting Counsel concedes that this was not a ground "of itself" for the Trial Chamber's revocation of Šešelj's right to represent himself. *See* Reply, para. 25.
[111] *Ibid.*
[112] *Ibid.* (Emphasis added).

effective defence could be raised as a ground of appeal resulting in a waste of the International Tribunal's time and resources. In this case, Acting Counsel notes that Šešelj has objected to an assignment of counsel from the very beginning of his case, has refused to communicate with Standby Counsel when he was assigned, and has refused any communication with assigned counsel since the Trial Chamber rendered the Impugned Decision.[113]

45. The Appeals Chamber notes that the Trial Chamber did not expressly take these practical difficulties into consideration when assigning counsel to Šešelj in the Impugned Decision. However, it was undoubtedly aware that such potential problems could arise given that it knew of the history of Šešelj's objection to counsel and refusal to communicate or cooperate with Standby Counsel during the pre-trial proceedings. In spite of this, it decided to assign counsel to him. The Appeals Chamber does not find that this was so unreasonable as to constitute an abuse of discretion. The Trial Chamber also had before it the history of Šešelj's persistent and wilful misconduct during the pre-trial proceedings causing substantial disruption and a waste of the Tribunal's resources and had a strong indication that this would continue at trial. Thus, the Trial Chamber had a choice between allowing Šešelj to represent himself at trial, resulting in the near certain disruption to the trial that occurred at pre-trial, or assigning counsel to represent Šešelj, resulting in the possibility that problems could arise in that representation due to Šešelj's refusal to cooperate with assigned counsel. It was not unreasonable for the Trial Chamber to choose the latter option given that it is unclear as to the extent to which Šešelj may refuse to cooperate with assigned counsel and what practical difficulties may arise. Furthermore, the Appeals Chamber agrees with the statement of the Trial Chamber in *Milošević* that a fair and expeditious trial cannot be frustrated by an accused's refusal to communicate or instruct counsel lawfully assigned to him. Where an accused fails to cooperate, "[w]hat is required of counsel is that they act in what they perceive to be the best interests of the Accused. That is [. . .] all that can be reasonably expected of counsel in such circumstances."[114] As previously held by the Appeals Chamber, where an accused "unjustifiably resists legal representation from assigned Counsel, Counsel's professional obligations to continue to represent the accused remain."[115]

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[113] Appeal, paras. 71-73.
[114] *Prosecutor v. Milošević,* Case No. IT-02-54-T, Decision on Assigned Counsel's Motion for Withdrawal, 7 December 2004, paras. 19, 33.
[115] *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 51.

c. The Principle of Proportionality

46. As a final matter, Acting Counsel argues under grounds one, two and six that the Trial Chamber's assignment of defence counsel to Šešelj with complete control over the case was an abuse of discretion because it was an excessive and "too stringent" measure imposed at the pre-trial stage in light of Šešelj's behaviour.[116] Acting Counsel notes that subsequent to the Impugned Decision, the Trial Chamber has clarified that Šešelj will be denied any participation in the proceedings and cannot make oral submissions in the courtroom except through counsel.[117] According to Acting Counsel, the Trial Chamber failed to properly apply the "requirement of proportionality" found in international human rights law that the limitation on a fundamental human right must be necessary and proportionate to what a court seeks to achieve.[118] As a result, the Impugned Decision broadly restricts Šešelj's right to access to a court under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"),[119] prevents him from exercising his right to appeal the Impugned Decision, violates his right to independently seek *habeas* review of his detention,[120] and prevents him from making effective his right to apply for provisional release under Rule 65 of the Rules of the International Tribunal.[121]

47. Acting Counsel further contends that the Trial Chamber erred by failing to take into account other, less extreme solutions than assignment of counsel that would preserve Šešelj's right to self-representation. For example, assigned counsel could assist Šešelj rather than represent him.[122] Alternatively, a more active standby counsel could be used at trial to supervise Šešelj's submissions and assist Šešelj if necessary.[123] In addition, an *amicus curiae* could be appointed pursuant to Rule 74 of the Rules.[124] Further, future written submissions by Šešelj could be reviewed by assigned or standby counsel as well as the Registry, pursuant to the Practice Direction on the Procedure for the Review of Written Submissions Which Contain Obscene or Otherwise Offensive Language,[125] in order to prevent their filing if they contain abusive language.[126] With respect to intimidation and slanderous comments aimed at witnesses, the Registry could continue to limit Šešelj's communication and visiting rights while in detention. Finally, the Trial Chamber could apply Rule

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[116] Appeal, paras. 47, 49.
[117] Reply, para. 21 *citing* the Status Conference of 14 September 2006, T. 510, T. 572.
[118] Appeal, paras. 41-43, 47, 49 wherein Acting Counsel cites to case law from the European Court of Human Rights.
[119] Entered into force on 3 September 1953.
[120] Acting Counsel finds a basis for this right in Article 9 of the ICCPR; Article 5(4) of the ECHR; and Article 7(6) of the American Convention on Human Rights, entered into force on 18 July 1978.
[121] Appeal, paras. 50-52; Reply, para. 22.
[122] Appeal, para. 74.
[123] Appeal, para. 76; Reply, para. 19.
[124] Appeal, paras. 77-81.
[125] IT/240, 14 November 2005.
[126] Appeal, paras. 66-67; Reply, para. 9.

77 of the Rules to hold Šešelj in contempt of court where necessary.[127] As a consequence of the disproportionate measure taken in the Trial Chamber's Impugned Decision, Acting Counsel warns that Šešelj has refused to communicate with counsel and now refuses to appear in court.[128]

48. The Appeals Chamber recalls that, in the *Milošević* Decision on Defence Counsel, the Appeals Chamber held that where a Trial Chamber restricts an accused's right to represent himself, it must be guided by the proportionality principle such that the restrictions imposed "must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial."[129] In this case, the Trial Chamber expressly recognized the proportionality principle and the Appeals Chamber's decision in *Milošević* finding that, while the Trial Chamber was correct in assigning counsel in that case, its decision not to leave Milošević in control of the presentation of his case was disproportionate. The Trial Chamber distinguished Šešelj's case from *Milošević* because its restriction on Šešelj's right to self-representation was predicated on Šešelj's persistent and wilful conduct rather than ill-health. Thus, the Trial Chamber held that "a firmer and stricter approach in determining the role of the Accused in the proceedings" is required and concluded that it saw "no alternative that would sufficiently protect the fairness and the integrity of the proceedings than to order that the Accused participate in proceedings through Counsel only."[130] The Trial Chamber further stated that it would "consider on a case-by-case basis, taking into account all circumstances and having heard from Counsel, whether and to what extent the interests of justice would allow for any personal participation of the Accused in the proceedings."[131]

49. The Appeals Chamber first considers that Acting Counsel is incorrect to state that the Impugned Decision gives assigned counsel complete control over Šešelj's case. Rather, the Trial Chamber ordered that Šešelj may participate in the proceedings through assigned counsel and this includes requesting the Trial Chamber, on a case-by-case basis that he be allowed to personally participate in the proceedings. Second, assignment of counsel is not excessive as a measure simply because it is imposed in the pre-trial stage of a case. As found previously, where the appropriate circumstances exist as they do in this case, a Trial Chamber may restrict the right to self-representation at the pre-trial stage.[132] Third, the Trial Chamber's assignment of counsel to Šešelj is not excessive in that it forfeits his rights to access the court, appeal, seek review of his detention conditions, or request provisional release. All of this he may do through assigned counsel. Furthermore, while Šešelj may not personally exercise those rights, unless allowed on a case-by-

[127] Appeal, para. 68.
[128] Reply, paras. 21-22.
[129] *Milošević* Decision on Defence Counsel, para. 17.
[130] Impugned Decision, paras. 72, 80.
[131] *Id.*, para. 80.
[132] *See supra* paras. 28-29.

case basis, the Trial Chamber did not forfeit them. Rather, Šešelj surrendered them though his persistent, wilful misconduct throughout the pre-trial proceedings.

50. Finally, the Appeals Chamber does not agree that the Trial Chamber failed to consider other, less stringent measures than the assignment of counsel. Although the Trial Chamber did not list the possible alternatives it considered, it concluded that "it sees no alternative that would sufficiently protect the fairness and integrity of the proceedings than to order that the Accused participate in proceedings through Counsel only."[133] With regard to the alternatives proposed by Acting Counsel, the Appeals Chamber notes that assignment of counsel merely for assisting Šešelj or use of a standby counsel at trial has already proven not to work over the course of two years in pre-trial proceedings with Šešelj refusing to cooperate at all with any kind of counsel assigned to him by the International Tribunal. Rather, he has insisted upon working with his legal advisers who have not been recognized by the Registry of the International Tribunal because of Šešelj's failure to submit the required documentation.[134] Furthermore, it is hard to see how the presence of an *amicus curiae* could mitigate the continued disruption caused to trial proceedings by Šešelj's self-representation such as deliberate disrespect for the rules and orders of the Trial Chamber, abusive language towards the Trial Chamber and participants in the trial proceedings and intimidation of witnesses. As for the last three alternatives proposed, the Appeals Chamber notes that all of these were used during the pre-trial proceedings or were available to the Trial Chamber and still, Šešelj's self-representation caused substantial and persistent disruption to pre-trial proceedings. This does not bode well for their potential effectiveness in ensuring a fair and efficient trial if Šešelj were to continue representing himself.

51. Therefore, the Appeals Chamber finds that Acting Counsel fails to demonstrate how the Trial Chamber's decision to assign counsel to Šešelj at trial was a disproportionate measure in light of the history of Šešelj's pre-trial behaviour while representing himself and his refusal to cooperate with standby counsel assigned by the International Tribunal. The Trial Chamber's conclusion that Šešelj's case differs from that of Milošević, wherein the Appeals Chamber found that Milošević should be left in control of the presentation of his case, was reasonable. The disruption caused by Milošević's self-representation was due to poor health and, at the time counsel was assigned to him, his health demonstrated some improvement.[135] Here, the disruption caused by Šešelj's self-representation during pre-trial was due to deliberate misconduct and, to date, his conduct in general has not improved providing a strong indication that it would continue at trial. Thus, the Trial

[133] Impugned Decision, para. 80.
[134] *Id.*, para. 8.
[135] *See Milošević* Decision on Defence Counsel, para. 18.

Chamber's decision to assign counsel to Šešelj as necessary for ensuring a reasonably expeditious trial and to protect the integrity of the proceedings, did not constitute an abuse of discretion.

V. DISPOSITION

52. On the basis of the foregoing, this Appeal is **GRANTED** in part and the Impugned Decision is **REVERSED** in light of the absence of a specific warning to Šešelj before assigning him counsel. The Appeals Chamber hereby explicitly warns Šešelj that, should his self-representation subsequent to this Decision substantially obstruct the proper and expeditious proceedings in his case, the Trial Chamber will be justified in promptly assigning him counsel after allowing Šešelj the right to be heard with respect to his subsequent behaviour.[136]

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

Dated this 20th day of October 2006,

At The Hague,

The Netherlands.

Judge Fausto Pocar

Presiding Judge

[Seal of the International Tribunal]

[136] In this regard, the Appeals Chamber notes that while the Trial Chamber afforded Šešelj the right to be heard in reaching the Impugned Decision, it does not appear that the right was effectively realized due to the fact that the Trial Chamber ordered the Registry to return Šešelj's Submission No. 161 in response to the Prosecution's motion seeking assignment of counsel for Šešelj on grounds that it did not meet formal requirements. *See* Impugned Decision, para. 6. There is no other indication in the Impugned Decision that Šešelj was heard. The Appeals Chamber considers that when deciding upon restricting a fundamental right such as the right to self-representation, it is especially incumbent upon a Trial Chamber to ensure that the accused is heard.