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CASE/AFFAIRE NO. IT-95-5/18-AR73.8 **DATE** 10 June 2010

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-AR73.8

IN THE APPEALS CHAMBER

Before: A Bench of the Appeals Chamber

Registrar: Mr. John Hocking

Date: 10 June 2010

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPEAL FROM ORDER
ON THE TRIAL SCHEDULE

The Office of the Prosecutor:

Mr. Alan Tieger

Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic hereby appeals, pursuant to certification, the Trial Chamber's *Order on the Trial Schedule* (27 May 2010) in which the Trial Chamber confirmed that the trial would proceed four days per week. Dr. Karadzic contends that such a schedule unfairly infringes upon the exercise of his right to self-representation.

Procedural History

2. On 1 April 2010, the Trial Chamber issued a *Scheduling Order* in which is scheduled the presentation of evidence in this case to commence on 13 April 2010 and indicated that "the Chamber will sit three days per week for the remainder of April and until further order."

3. The proceedings were held on a three day per week schedule until the end of May. On 19 May 2010, after seeing the courtroom calendar which indicated a four day per week sitting schedule commencing on 31 May, Dr. Karadzic raised the matter with the Trial Chamber.

4. Dr. Karadzic indicated that he was unable to properly prepare for cross examination of prosecution witnesses on a four day a week schedule. He noted that the prosecution's direct examination of all witnesses was short, given that every witness was called pursuant to Rule 92 *ter*, requiring him to cross examine one witness after another with little break. He also indicated that his own resources were limited, and that he himself had to cross examine every witness, compared to those of the prosecution, which has far greater resources and brings in a new prosecutor for each witness.¹

5. The Trial Chamber indicated that it was indeed planning to sit four days per week and that it was minded to sit five days a week after the summer recess. The Presiding Judge said:

Speaking for myself, one potential solution may be to have an exemplary hearing with you being represented, a full team capable of investigating, defending, et cetera.²

6. The Chamber allowed Dr. Karadzic to supplement his arguments with written submissions. On 20 May 2010, he filed a *Submission on Trial Schedule*. In his submission, Dr. Karadzic contended that he could not effectively exercise his right to self-representation if forced to proceed on a four day per week schedule.

¹ Transcript of 19 May 2010 at pp. 2374-76

² Transcript of 19 May 2010 at p. 2381

7. On 27 May 2010, the Trial Chamber issued the Impugned Order confirming that it would sit four days per week.

8. On 31 May 2010, Dr. Karadzic filed his *Application for Certification to Appeal Order on Trial Schedule and for Stay Pending Appeal*. The prosecution filed its *Prosecution Response to Accused's Application for Certification to Appeal Order on Trial Schedule and for Stay Pending Appeal* on 2 June 2010. On 4 June 2010, the Trial Chamber granted certification to appeal.³

The Impugned Order

9. In its Order, the Trial Chamber held that “by electing to be self-represented, the Accused knowingly undertook the task of cross-examining those Prosecution witnesses he chooses.”⁴ It indicated that “sitting four or five days a week should not impose an unreasonable burden on the Accused; indeed many defence counsel have represented their clients before this Tribunal on a five-day sitting schedule.”⁵ The Trial Chamber continued:

“However, should the Accused find that the task of representing himself becomes too arduous, he may consider the various options available for varying his representation arrangements. In the *Slobodan Milosevic* case that the Accused cites, for example, Slobodan Milosevic’s self-represented status was modified in light of his health problems.”⁶

10. The Chamber then ordered that a four-day per week sitting schedule would be in place from 31 May 2010.

Ground of Appeal

11. Dr. Karadzic contends that the Trial Chamber incorrectly interpreted governing law by equating his situation with that of an accused represented by a Lead Counsel and Co-Counsel and thereby denied him the means to effectively exercise his right of self-representation.

Standard of Review

12. The standard of review for a decision concerning the scheduling of trial is one of abuse of discretion. The Appeals Chamber will only overturn the Trial

³ *Decision on Accused's Application for Certification to Appeal Order on Trial Schedule and for Stay*

⁴ *Order* at para. 4

⁵ *Order* at para. 7

⁶ *Order* at para. 7

Chamber's exercise of its discretion where it is found to be (i) based upon an incorrect interpretation of governing law; (ii) based upon a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁷

Argument

13. The Appeals Chamber has affirmed that there is a right to self-representation at this Tribunal.⁸ In order for a right to exist, it must be able to be effectively exercised. The President of the Tribunal has held on two occasions in this case that the Registrar's restriction on the amount of resources available to a self-represented accused was unreasonable as it did not allow for the effective exercise of the right of self-representation.⁹

14. The same situation presents itself in this appeal from the Trial Chamber's *Order*. A self-represented accused is required to conduct the cross examination of all prosecution witnesses alone.¹⁰ The Trial Chamber therefore made an incorrect interpretation of governing law by equating self-representation with representation by counsel when making its decision to proceed on a four-day schedule.

15. This is manifested by the Trial Chamber's statement that "sitting four or five days a week should not impose an unreasonable burden on the Accused; indeed many defence counsel have represented their clients before this Tribunal on a five-day sitting schedule."¹¹

16. The Trial Chamber seems determined to force Dr. Karadzic into forfeiting his right to self representation. It has imposed a standby counsel against his will and has him at the ready to take over.¹² When the issue first arose, the Presiding Judge suggested that

⁷ *Decision on Radovan Karadzic's Appeal of the Decision on Commencement of Trial* (13 October 2009) at para. 6

⁸ *Milosevic v Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel* (1 November 2004) at para. 11; *Prosecutor v Seselj*, No. IT-03-67-AR73.3, *Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel* (20 October 2006) at para. 8

⁹ *Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds* (17 December 2009); *Decision on Request for Review of OLAD Decision on Trial Phase Remuneration* (19 February 2010)

¹⁰ See *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Accused's Request to the Trial Chamber Concerning Assistance of his Legal Advisor* (28 April 2010) at para. 31, refusing the request of a self-represented accused to have his Legal Advisor cross examine some witnesses.

¹¹ *Order* at para. 7

¹² *Decision on Designation of Standby Counsel* (15 April 2010)

the solution might be for Dr. Karadzic to be represented by counsel.¹³ In its *Order*, the Trial Chamber once again suggested the alternative of Dr. Karadzic giving up his right to self-representation.¹⁴

17. This approach was erroneous. The Trial Chamber has before it an Accused who has consistently expressed his desire to exercise his right to self-representation. The question before it was not whether a four day schedule was appropriate for an accused represented by counsel, but whether it was appropriate for a self-represented accused. The Trial Chamber erred in applying the same standard.

18. There have only been three cases of self-represented accused defending themselves at trial at this Tribunal. In the case of Slobodan Milosevic, the four and five day per week trial schedule contributed to his health problems and ultimately his death. In the cases of Vojislav Seselj and General Tolimir, the Trial Chambers have decided to sit three days per week, maximum.

19. Dr. Karadzic's task is even greater than that facing the other three self-represented accused. He has received over 1.5 million pages of disclosure and, unlike President Milosevic, wishes to read and make use of this important material in his cross-examinations.¹⁵ He has introduced almost 300 exhibits through the first eight witnesses, almost all of them from the prosecution's disclosure. The scope of Dr. Karadzic's case, covering alleged genocide in 20 municipalities in Bosnia over a 5 year period dwarfs that of Dr. Seselj and General Tolimir.

20. The extensive use of Rule 92 *ter* exacerbates the situation facing a self-represented accused. He is called upon to constantly cross-examine prosecution witnesses with little or no break. While a represented accused has the benefit of two lawyers who can share this job, a self represented accused must do this job alone. The Trial Chamber erred in failing to consider this distinction, or by considering that the solution to this problem was for the accused to relinquish his right to self-representation.

¹³ Transcript of 19 May 2010 at p. 2381

¹⁴ *Order* at para. 7

¹⁵ *Submission on Trial Schedule* (20 May 2010) at para. 6

21. Dr. Karadzic had suggested that a four-day per week sitting schedule might be possible during the defence case, when he could employ Rule 92 *ter* and his task would not be so great.¹⁶ However, the Trial Chamber never addressed this suggestion.

22. The Trial Chamber also failed to consider Dr. Karadzic's argument that the four-day sitting schedule created an improper imbalance in the equality of arms with the prosecution, which has vast resources and a seemingly unlimited army of lawyers ready to examine witnesses.¹⁷ While an accused is not entitled to the same resources as those provided to the prosecution, he is entitled not to be put at a disadvantage when presenting his case.¹⁸ The Trial Chamber's *Order* does just that.

23. Dr. Karadzic recognizes that a Trial Chamber has wide discretion over the conduct and management of a trial. He has stretched his resources and personal strength to the maximum to comply with the arduous requirements of the Trial Chamber since the presentation of evidence began, not missing a day of court nor a single filing deadline. However, he is only human. To require him to do this job alone on a four day a week basis jeopardizes not only the fairness of the trial, but his own health.

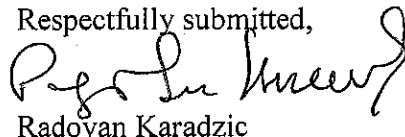
Conclusion

24. The Trial Chamber made an incorrect interpretation of governing law when it considered the issue of the trial schedule by equating Dr. Karadzic's situation to that of an accused represented by counsel and failed to consider whether such a schedule would unduly impinge on the right of self-representation.

25. The Appeals Chamber is respectfully requested to reverse the *Order* of the Trial Chamber and direct that it consider the issue under an appropriate legal standard.

Word count: 1901

Respectfully submitted,



Radovan Karadzic

¹⁶ *Submission on Trial Schedule* (20 May 2010) at para. 4

¹⁷ The prosecution has had six lawyers in court at various times during the testimony of the first eight witnesses and has even more working behind the scenes on this case.

¹⁸ *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-A, *Judgement* (17 December 2004) at paras. 175-76; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003) at para. 23; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 149