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**CASE/AFFAIRE NO.** IT-95-5/18-T (R. KARADŽIĆ) **DATE** 01 April 2010

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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-T

IN TRIAL CHAMBER III

Before: Judge O-Gon Kwon, Presiding  
Judge Howard Morrison  
Judge Melville Baird  
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 1 April 2010

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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MOTION FOR STAY OF PROCEEDINGS:  
VIOLATION OF BURDEN OF PROOF AND  
PRESUMPTION OF INNOCENCE

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The Office of the Prosecutor:  
Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

The Accused:  
Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves for a stay of proceedings on the ground that the cumulative effect of the Trial Chamber's decisions taking judicial notice of adjudicated facts and admitting statements without cross examination has impermissibly shifted the burden of proof and infringed upon the presumption of innocence to such a degree that the trial has already been rendered unfair.

**Statement of Facts**

2. As of the time of filing of this motion, the Trial Chamber has taken judicial notice of 1500 adjudicated facts:

290—Sarajevo events from the *Galic* judgement<sup>1</sup>

745—Events in the Municipalities<sup>2</sup>

465—Srebrenica events<sup>3</sup>

3. Another 1216 adjudicated facts have been proposed by the prosecution in motions which have not yet been decided:

885—Events from the *Krajisnik* judgement<sup>4</sup>

331—Sarajevo events from the *D. Milosevic* judgement<sup>5</sup>

4. As of the time of filing this motion, the Trial Chamber has admitted without the opportunity for cross examination the statements and testimony of 141 witnesses:

15—Events in the Municipalities<sup>6</sup>

24—ARK Municipality witnesses<sup>7</sup>

4—Sarajevo Municipality<sup>8</sup>

16—Sarajevo siege events<sup>9</sup>

56—Srebrenica events<sup>10</sup>

<sup>1</sup> *Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts* (5 June 2009)

<sup>2</sup> *Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts* (9 October 2009)

<sup>3</sup> *Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts* (9 July 2009)

<sup>4</sup> *Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts* (25 August 2009)

<sup>5</sup> *Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts* (14 December 2009)

<sup>6</sup> *Decision on Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Witnesses for Eleven Municipalities)* (10 November 2009)

<sup>7</sup> *Decision on Prosecution's Second Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92 bis (ARK Municipality Witnesses)* (18 March 2010)

<sup>8</sup> *Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Witnesses for Sarajevo Municipality)* (15 October 2009)

<sup>9</sup> *Decision on Prosecution's Fourth Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Sarajevo Siege Witnesses)* (5 March 2010)

<sup>10</sup> *Decision on Prosecution's Fifth Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Srebrenica Witnesses)* (21 December 2009)

7—Hostage taking events<sup>11</sup>

3—Delayed Disclosure witnesses<sup>12</sup>

16—Deceased or Unavailable witnesses<sup>13</sup>

## Argument

### Adjudicated Facts

5. Rule 94(B) provides that:

At the request of a party of *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

6. Under ICTY jurisprudence, the taking of judicial notice of an adjudicated fact creates a rebuttable presumption in favor of that fact. The prosecution is relieved from proving that fact at trial, and the burden shifts to the accused to rebut that fact.<sup>14</sup>

7. Judge Kwon has written that “taking judicial notice of adjudicated facts is a new creation of international criminal procedure that does not exist in either common-law or civil-law national systems.”<sup>15</sup> The International Criminal Court has declined to adopt this creation of the ICTY.

8. Dr. Karadzic contends that the taking of judicial notice of adjudicated facts violates the fundamental tenets of fair criminal trials that the burden of proof is on the prosecution and that an accused is cloaked in the presumption of innocence.

9. He recognizes that the Appeals Chamber has upheld the validity of judicial notice of adjudicated facts and that the Trial Chamber is obligated to follow this

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<sup>11</sup> *Decision on Prosecution's Sixth Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis: Hostage Witnesses* (2 November 2009)

<sup>12</sup> *Decision on Prosecution's Seventh Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Delayed Disclosure Witnesses)*(21 December 2009)

<sup>13</sup> *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009); *Decision on Prosecution Motion for Admission of Evidence of KDZ290 (Mirsad Kucanin) Pursuant to Rule 92 quater* (25 September 2009); *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ446 and Associated Exhibits Pursuant to Rule 92 quater* (25 September 2009); *Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 quater* (30 November 2009)

<sup>14</sup> *Prosecutor v. Milošević*, No. IT-02-54-AR73.5, *Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts*, (28 October 2003) at 4

<sup>15</sup> Kwon, O-Gon, “The Challenge of an International Criminal Trial as Seen from the Bench”, *Journal of International Criminal Justice* 5 (2007), p. 360, 369

jurisprudence.<sup>16</sup> Nevertheless, Dr. Karadzic registers his strong objection to this practice.<sup>17</sup>

#### **Admission of Prior Statements and Testimony**

10. Rule 92 *bis* provides in pertinent part that:

A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

11. Rule 92 *quater* provides in pertinent part that:

The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

- (i) is satisfied of the person's unavailability as set out above; and
- (ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

12. Under Rule 92 *quater*, statements and testimony may be admitted even if they go to matters involving the acts and conduct of the accused.

13. Dr. Karadzic contends that the admission of prior statements and testimony without the ability of the accused to confront or cross examine the witnesses likewise creates a presumption in favor of the facts asserted by those witnesses which violates the fundamental tenets of fair criminal trials that the burden of proof is on the prosecution and that an accused is cloaked in the presumption of innocence, in addition to the right of confrontation.

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<sup>16</sup> *Prosecutor v. Milošević*, No. IT-02-54-AR73.5, *Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts*, (28 October 2003); *Prosecution v. Karemera et al.*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice*, (16 June 2006), para. 48-50

<sup>17</sup> See *Prosecutor v. Milošević*, No. IT-02-54-AR73.5, *Dissenting Opinion of Judge David Hunt to Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (28 October 2003)

14. He recognizes that the Appeals Chamber has upheld the validity of admission of prior statements and testimony and that the Trial Chamber is obligated to follow this jurisprudence.<sup>18</sup> Nevertheless, Dr. Karadzic registers his strong objection to this practice.<sup>19</sup>

#### **Cumulative Effect**

15. One issue which the Appeals Chamber has not ruled upon is whether the cumulative effect of devices such as judicial notice of adjudicated facts and admission of prior statements and testimony can operate to deprive the accused of his right to a fair trial. It is this issue which forms the heart of the instant motion.

16. The Appeals Chamber has held that defects in an indictment, which deprive an accused of his right to be informed of the charges against him, can be cured by timely notice through other instruments, such as the pre-trial brief or opening statement. However, the Appeals Chamber has also held that the cumulative effects of such defects may operate to deny the accused of his right to a fair trial.<sup>20</sup>

17. Likewise, even if the taking of judicial notice of an adjudicated fact, or the admission of a prior statement, does not violate the right of an accused to a fair trial, the cumulative effect of taking judicial notice of *thousands* of adjudicated facts, and admitting *hundreds* of prior statements does operate to turn the trial upside down, requiring the accused to mount a massive case to rebut the adjudicated facts and assertions of facts in prior statements and testimony and violating the fundamental rights of an accused of the burden of proof and presumption of innocence.

18. A judicial act that, for reasons of judicial economy, cuts down the accused's right to test evidence cannot be justified if the incursion is so unrestrained as to destroy

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<sup>18</sup> *Prosecutor v Galic*, No. IT-98-29-AR73.2, *Decision on Interlocutory Appeal Concerning Rule 92 bis* (7 June 2002). The Appeals Chamber has never ruled on the validity of Rule 92 *quater* and its admission of evidence of acts and conduct of the accused without cross examination, but this Trial Chamber has already ruled on this issue. *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009), paras. 8-9

<sup>19</sup> See *Luca v Italy*, Application No. 33354/96, ECHR 2001, 27 February 2001, Final Judgement 27 May 2001, para. 40; United States Constitution, 6<sup>th</sup> Amendment.

<sup>20</sup> *Prosecutor v. Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for the Exclusion of Evidence*, (18 September 2006), para. 26; *Prosecutor v Ntagerura et al.*, No. ICTR-99-46-A, *Judgement* (7 July 2006), para. 114

his fair-trial right.<sup>21</sup> In the *Milosevic* case, the Trial Chamber recognised the possibility that taking judicial notice of a large number of facts would place an unreasonable burden on the accused who wishes to rebut them, and that the process of rebutting the evidence may consume excessive time and resources, thus frustrating judicial economy.<sup>22</sup>

19. In their recent article in the *Journal of International Criminal Justice*, Eugene O’Sullivan and Dierdre Montgomery have chronicled how the ICTY’s use of time-saving devices such as judicial notice of adjudicated facts and admission of prior statements and testimony have encroached upon the rights of the accused.<sup>23</sup> The massive use of these devices in Dr. Karadzic’s case has tipped the scales to where a fair trial is no longer possible.

20. International jurisprudence provides guidance on the level at which the applicable threshold is set. Regarding evidence that has been adduced through methods that bypass an accused’s right to cross-examine, the applicable test suggested in this jurisprudence is that a Trial Chamber must not rely “*to a decisive extent*” on such evidence, or else the fair-trial right will be violated.<sup>24</sup>

21. The European Court of Human Rights has underlined the importance of the right of an accused to cross-examine the witnesses against him and has held, for example, that “where a conviction is based ... *to a decisive degree* on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6” of the European Convention for Human Rights. (emphasis added)<sup>25</sup>

<sup>21</sup> See jurisprudence of the European Court of Human Rights (ECtHR), e.g. ECtHR, *Brualla Gómez de la Torre v. Spain*, App. No. 26737/95, Judgment of 19 December 1997, para. 31; ECtHR, *Pérez de Rada Cavanilles v. Spain*, App. No. 28090/95, Judgment of 28 October 1998, paras 44-45.

<sup>22</sup> *Prosecutor v Milosevic*, IT- 02-54-T, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 16 December 2003, paras. 11-12; see also *Response to First Prosecution Motion for Judicial Notice of Adjudicated Facts*, 27 October 2008, para. 8.

<sup>23</sup> O’Sullivan and Montgomery, “The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY”, *Journal of International Criminal Justice* (2010)

<sup>24</sup> ECtHR, *Kostovski v. Netherlands*, App. No. 11454/85, Judgment of 20 November 1989 (“ECtHR *Kostovski*”), para. 44; ECtHR, *Visser v. The Netherlands*, App. No. 26668/95, Judgment of 14 February 2002 (“ECtHR *Visser*”), para. 50.

<sup>25</sup> ECtHR, *Luca v. Italy*, App. No. 33354/96, Final Judgment of 27 May 2001, para. 40; ECtHR, *Sadak and Others v. Turkey*, App. Nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, Judgment of 17 July 2001, para. 65. See also ECtHR *Kostovski*, paras 41-44; ECtHR, *Delta v. France*, App. No. 11444/85,

22. Even accepting, for argument's sake, that some adjudicated facts and untested prior statements can be admitted in a criminal trial for the purpose of judicial economy without violating the rights of the accused, the duty of the Trial Chamber is, at a minimum, to maintain a balance. There will be a threshold after which the balance can no longer be maintained. That threshold is exceeded once the facts in evidence are to a "decisive extent" untested. Once exceeded, the balance the judges were meant to maintain is destroyed. In this case, the amount of untested evidence already admitted amounts to a significant proportion of the evidence on which the Chamber will have to base its final decision. Therefore the "decisive extent" test has been met and a fair trial is impossible.

23. The Trial Chamber's unprecedented admission of adjudicated facts and prior statements in this case has buried Dr. Karadzic in an avalanche of incriminating evidence before the trial has even started. He stands at the starting line while the prosecution has been propelled by these devices to within millimeters of the finish line. There is simply no way Dr. Karadzic can receive a fair trial under these circumstances.

#### **Stay of Proceedings**

24. The jurisprudence of this Tribunal has established that the remedy of a stay of proceedings may be imposed where a fair trial is impossible.<sup>26</sup> A Trial Chamber has inherent power to stay the proceedings when to continue with the trial would violate the fundamental rights of the accused.<sup>27</sup>

25. Dr. Karadzic respectfully submits that the proceedings in his case have been rendered fundamentally unfair by the taking of judicial notice of an unprecedented number of adjudicated facts and the admission of an unprecedented number of prior statements and testimony. Therefore, he respectfully requests that the Trial Chamber issue a stay of proceedings in his case.

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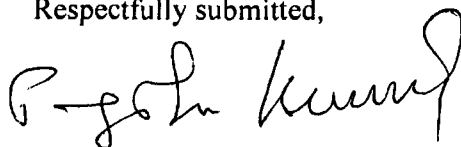
Judgment of 19 December 1990, para. 37; ECtHR, *A.M v. Italy*, App. No. 37019/97, Judgment of 14 December 1999, paras 25-26; ECtHR *Visser*, para. 46.

<sup>26</sup> *Prosecutor v. Tadić*, IT-94-1-A, *Judgement*, (15 July 1999), para. 55.

<sup>27</sup> *Prosecutor v Bobetko*, No. IT-02-62-AR54 bis, *Decision on Challenge by Croatia to Decision and Orders of Confirming Judge* (29 November 2002), para. 15

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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', written in a cursive style.

Radovan Karadzic<sup>28</sup>

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<sup>28</sup> The assistance of Dr. Alexander Zahar of Griffith University (Australia), Roman Graf of the University of Lausanne (Switzerland) and Legal Intern Charlene Chew of the University of Melbourne (Australia) to the preparation of this motion is gratefully acknowledged.