

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

Date: 21 June 2010

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO KARADŽIĆ'S APPEAL OF
ORDER ON TRIAL SCHEDULE**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

Standby Counsel:

Mr. Richard Harvey

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

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

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO KARADŽIĆ'S APPEAL OF ORDER ON
TRIAL SCHEDULE**

1. Karadžić's Appeal¹ should be dismissed because he fails to establish that the Trial Chamber abused its discretion by ordering that the Trial Chamber will sit four days per week.²

Standard of review

2. Decisions on trial scheduling and on the time afforded to the accused are matters falling within the Trial Chamber's discretion.³ This is due to the "Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case."⁴ The Appeals Chamber's examination of the Decision is therefore limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error. The Appeals Chamber may overturn the Decision only if it is "found to be (1) based on an incorrect interpretation of governing law; (2)

¹ Appeal from Order on the Trial Schedule, 10 June 2010 ("Appeal").

² Order on the Trial Schedule, 27 May 2010 ("Decision").

³ See *Prosecutor v. Momčilo Krajišnik*, Case No.IT-00-39-A, App.Ch., Judgement, 17 March 2009, para.81; *Prosecutor v. Radovan Karadžić*, Case No.IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009, para.6 ("Decision on Appeal Against Trial Commencement"); *Augustin Ngirabatware v. The Prosecutor*, Case No.ICTR-99-54-A, App.Ch., Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009 ("*Ngirabatware* Appeal Decision"), para.8.

⁴ *Prosecutor v. Slobodan Milošević*, Case No.IT-02-54-AR73.7, App.Ch., Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para.9.

based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".⁵

Trial Chamber did not err in its interpretation of the governing law, nor in its analysis of the relevant factors

3. Karadžić's principal ground of appeal is that the Trial Chamber incorrectly interpreted governing law by equating his situation with that of an accused represented by a counsel.⁶ He argues in particular that the Trial Chamber erred in failing to consider the distinction between a self-represented accused, who cross-examines all witnesses, and an accused represented by two counsel, where counsel share the task of cross-examination.⁷ He cites no authority in support of these arguments.

4. The Trial Chamber did not err in its analysis. In deciding to move to a four-day trial schedule, the Trial Chamber took into account all relevant factors, including a number of factors which Karadžić does not address in his Appeal, including that:

- a. the Accused had been on notice since September 2009 that the three day per week sitting schedule would be in place for the first few months of trial only;⁸
- b. by electing to be self-represented, the Accused knowingly undertook the task of cross-examining those Prosecution witnesses he chooses;⁹
- c. the Accused had been aware since October 2009 of the witnesses to be called in the first two months of trial;¹⁰
- d. the President had ordered that considerable resources be made available to the Accused in the pre-trial, adjournment and trial phases of the case, such that his resources are comparable to those of a represented accused;¹¹
- e. the Accused had been repeatedly warned about the manner in which he was using the resources assigned to him, and it had been repeatedly

⁵ *Ngirabatware* Decision, para. 8.

⁶ Appeal, para. 11.

⁷ Appeal, para. 20.

⁸ Decision, para. 3.

⁹ Decision, para. 4.

¹⁰ Decision, para. 4.

suggested to him during cross-examination that he move to more relevant lines of questioning;¹²

- f. the Chamber had not been made aware of any health problems of the Accused;¹³ and
- g. the Chamber had ensured and would continue to ensure that the Accused's right to a fair trial is respected.¹⁴

5. In the context of its overall discussion of the factors relevant to moving to a four-day trial schedule, the Trial Chamber's observation that many defence counsel have represented clients before this Tribunal on a five-day sitting schedule was not central to its reasoning. Insofar as the Trial Chamber's analysis relied on that observation, that reliance was in line with binding jurisprudence.

6. According to that jurisprudence, the Accused cannot complain of the ordinary and anticipated disadvantages which flow from his choice to represent himself. In electing to represent himself, the Accused has knowingly deprived himself of the many advantages which flow from being represented by professional counsel. As the Appeals Chamber stated in the *Slobodan Milošević* case:

There is no doubt that, by choosing to conduct his own defence, the Accused deprived himself of resources a well-equipped legal defence team could have provided. A defendant who decides to represent himself relinquishes many of the benefits associated with representation by counsel. The legal system's respect for a defendant's decision to forgo assistance of counsel must be reciprocated by the acceptance of responsibility for the disadvantages this choice may bring.¹⁵¹⁶

¹¹ Decision, para. 5.

¹² Decision, para. 6.

¹³ Decision, para. 7.

¹⁴ Decision, para. 7.

¹⁵The accompanying footnote states: "This principle is firmly enshrined in jurisdictions which recognize a defendant's right to self-representation: "See, e.g., *Regina v. Walton*, [2001] E.W.C.A. Crim. 1771 (C.A.), para. 50 ("[T]he right to defend oneself is acknowledged by the E[uropean] C[onvention] on H[uman] R[ights] Article 6(3)C. The exercise of that right may bring advantages and disadvantages. If a man chooses to exercise that right, whilst he may benefit from the advantages, he cannot pray in aid the ordinary and anticipated disadvantages of his choice in support of the argument that there was inequality of arms[.]"); *Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000) ("the trial judge is under no duty... to perform any legal 'chores' for the [self-representing] defendant that counsel would normally carry out") (citation omitted); *Regina v. Fabrikant*, (1995) 67 Q.A.C. 268 (C.A. Que.), para. 80 ("[A]n unrepresented Accused enjoys no particular privilege."); *Regina v. Peepetch*, 2003 SKCA 76, para 66 ("[A defendant] cannot demand the right to represent himself and at the same time demand the right to effective assistance of counsel. Having decided to represent himself he must live with the consequences and cannot later complain that his conduct of the trial did not reach the level of a competent lawyer.").

7. Certainly, in the case of a self-represented accused, the Trial Chamber must pay particular attention to the fairness of the trial,¹⁷ but the Chamber has done that in the present case. The fair trial guarantees set out in the Statute do not require a Trial Chamber to ensure that a self-represented accused receives the same benefits as an accused represented by counsel.

8. In *Krajišnik*, the Appeals Chamber stated:

While Article 21(1) may require that Accused in similar circumstances receive roughly comparable treatment, it does not require that an Accused who opts for self-representation receive all the benefits held by an Accused who opts for counsel. To the contrary, as “part of the choice to self-represent, Mr. Krajišnik must accept responsibility for the disadvantages this choice may bring”.¹⁸

9. Thus, the Trial Chamber’s observation that many counsel represent clients on a five-day schedule was not erroneous. Karadžić’s decision to represent himself necessarily means that he may have deprived himself of the advantages that a legal defence team could have provided, and cannot insist on preferential treatment as a result.

10. Arguments that a party requires further time to cross-examine a witness are best dealt with by the Trial Chamber on a case-by-case basis as the trial progresses, and fall within the Trial Chamber’s general discretion to grant adjournments when appropriate; they are not a reason to limit the Trial Chamber to sitting three days per

¹⁶ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 19. This paragraph was cited by the Appeals Chamber in *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.5, App.Ch., Decision on Radovan Karadžić’s Appeal of the Decision on Commencement of Trial, 13 October 2009, para. 24 and in *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.2, App.Ch., Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Adequate Faculties, 7 May 2009, para. 27.

¹⁷ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 19.

¹⁸ The accompanying footnote refers to *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 19. *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007, para. 41.

week. The Trial Chamber expressly stated that it will continue ensure that the trial is fair and expeditious.¹⁹ No error has been established.

Trial Chamber’s identification of options available in case of the Accused encountering difficulties with self-representation was not erroneous

11. Karadžić argues that the Trial Chamber erred by suggesting the possibility of Karadžić giving up his right to self-representation.²⁰ This argument is without merit. The Trial Chamber committed no error in keeping the Accused informed of the options available to him and to it, should he encounter difficulties in coping with the burden of self-representation.

12. Thus, it was appropriate for (a) the Presiding Judge to express his opinion that one potential solution would be an exemplary hearing, with the Accused represented by a full team capable of investigating and defending;²¹ and (b) the Trial Chamber to observe that, if the Accused should find the task of self-representation “becomes too arduous, he may consider the various options available for varying his representation arrangements”.²²

13. The Trial Chamber’s observations were in line with the jurisprudence of the Tribunal. The Appeals Chamber has said that “a self-represented Accused is expected to undertake all the tasks normally assumed by counsel”,²³ and has identified restriction of the right to self-representation as an appropriate remedy if the Accused is unable to conduct his own case:

where an Accused elects to self-represent, he is asserting his ability to conduct his case without legal assistance²⁴ ... To the

¹⁹ Decision, para. 7.

²⁰ Appeal, paras. 16-17.

²¹ The Accused refers to this opinion by the Presiding Judge at para. 5 of the Appeal.

²² Decision, para. 7.

²³ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.5, App.Ch., Decision on Radovan Karadžić’s Appeal of the Decision on Commencement of Trial, 13 October 2009 (“Decision of 13 October 2009”), para. 23

²⁴ It must be emphasized that Karadžić is not conducting his case without legal assistance, but is enjoying very considerable legal assistance. As the Appeals Chamber has noted in earlier decisions in this case, Karadžić has “a relatively large group of paid and unpaid advisers” (Decision of 13 October 2009, para. 24), including “a larger number of paid legal assistants than is normally accorded by the Tribunal’s programme to assist those representing themselves” (Decision of 13 October 2009, par. 22). The Appeals Chamber also noted that the Trial Chamber in this case had made “special efforts” to ensure that disclosure assistance was “above and beyond what would be done in the case of a represented Accused”. (*Ibid.*) Further, Karadžić is assisted in his legal submissions by Mr. Robinson, who is permitted to address the Trial Chamber on legal issues and whose role, as the President has stated, “more closely reflects work normally undertaken by co-counsel” (Decision on Request for

extent that the Accused lacks the ability to conduct his own case and his self-representation is thus ‘substantially and persistently obstructing the proper and expeditious conduct of his trial’, then the remedy is restriction of his right to self-representation.²⁵

14. The Trial Chamber’s identification of representation of the accused by counsel as one of a range of a possible solutions, should Karadžić find the burdens of self-representation too onerous, was not erroneous.

Trial Chamber was not obliged to follow scheduling arrangements in other trials

15. Karadžić’s reliance²⁶ on the scheduling arrangements in the *Šešelj* and *Tolimir* cases, each of which concerns a self-represented accused in a trial has operated on a three-day schedule, is misplaced.

16. The fact that the trials of other self-represented Accused might have taken or be taking place on two or three days per week is irrelevant. Merely because one Chamber in one trial adopts a more limited sitting schedule than that usually adopted at the Tribunal does not mean that other accused are entitled to the same sitting schedule. A Chamber’s context-limited decision to provide for processes beyond those guaranteed by the Statute and the Rules does not create an automatic right to these processes.²⁷

17. As the *Tolimir* Chamber itself pointed out, “the pace of this trial must be determined on the basis of the trial proceedings in the instant case and the individual circumstances of the Accused, and should not be affected by the practice applied in cases of other self-represented Accused before the Tribunal”.²⁸

18. Further, both the *Šešelj* and *Tolimir* precedents are of limited assistance, due to their particular circumstances.

Review of OLAD Decision on Trial Phase Remuneration, President, 19 February 2010, par 51.) Mr. Robinson is remunerated at the same rate as co-counsel. *Ibid.*, par. 53.

²⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR-73.3, Decision on Appeal against the Trial Chamber’s Decision on Assignment of Counsel, 20 October 2006, para. 20. Restrictions of the right of self-representation must be guided by a general principle of proportionality: *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, 1 November 2004, paras. 17-18.

²⁶ Appeal, para. 18.

²⁷ *Prosecutor v. Radovan Karadžić*, IT-95-5/18-Ar73.6, Decision on Radovan Karadžić’s Appeal From Decision On Motion To Vacate Appointment Of Richard Harvey, 12 February 2010, Par. 31.

²⁸ *Prosecutor v. Zdravko Tolimir*, Case No. IT-95-5/18-AR-73.8, Decision on Zdravko Tolimir’s Submission Concerning the Possible Trial Schedule for June, 26 May 2010, page 2.

19. The *Šešelj* Trial Chamber, in deciding to conduct proceedings three days per week, expressly took into account a scheduling difficulty (the presiding judge in that trial was also the presiding judge in *Prosecutor v. Prlić et al.*, thus limiting his availability to sit full time in both trials), and the fact that Mr. Šešelj had certain health problems.²⁹ These two elements are absent in the present case and it may be distinguished on those bases alone.

20. In *Tolimir*, the Trial Chamber has stated that it intends to increase the number sitting days after the summer recess.³⁰ Thus, it will be sitting four or more days per week. Therefore, this case is of no assistance to the Accused.

No error concerning the Accused's health has been established

21. Karadžić's unsubstantiated submission concerning the possible future negative impact on his health³¹ does not clearly allege, let alone establish, any error by the Trial Chamber. The Chamber expressly stated that it had not been made aware of any health problems of the Accused, that it would continue to ensure that the Accused's right to a fair trial is protected, and that the Accused might consider other options for varying his representation arrangements, should he find the task of representing himself becomes too arduous.³² No error has been established.

No error concerning equality of arms has been established

22. Karadžić's argument that the Trial Chamber failed to take into account his argument that a four-day per week trial schedule would negatively impact on his right to equality of arms³³ has no merit. There has been very extensive litigation in this case on this issue and the Accused's complaints concerning resources have been addressed by the Appeals Chamber and by the President.³⁴ The Trial Chamber expressly considered the argument concerning resources in the Decision, noting that it has been satisfactorily addressed,³⁵ that the President had made available considerable

²⁹ *Prosecutor v. Šešelj*, 13 March 2007, T. 978.

³⁰ *Prosecutor v. Zdravko Tolimir*, Case No. IT-95-5/18-AR-73.8, Decision on Zdravko Tolimir's Submission Concerning the Possible Trial Schedule for June, 26 May 2010, page 2.

³¹ Appeal, para. 23.

³² Decision, para. 7.

³³ Appeal, para. 22.

³⁴ *Prosecutor v. Karadžić*, Case No. IT-95/5/18-T, President's Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds, 17 December 2009; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, President's Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.2, App.Ch., Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Faculties, 7 May 2009.

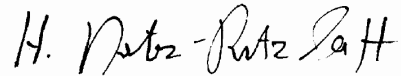
³⁵ Decision, para. 4.

resources for Karadžić's support staff in the pre-trial, adjournment and trial phases of his case, and that his resources are comparable to an accused represented by counsel.³⁶ No error has been established.

Conclusion

23. For the reasons set out above, Karadžić's Appeal should be dismissed.

Word Count: 2,919



Hildegard Uertz-Retzlaff
Senior Trial Attorney

Dated this 21st day of June 2010
At The Hague, The Netherlands

³⁶ Decision, para. 5.