



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-T
Date: 5 November 2009
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 5 November 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON APPOINTMENT OF COUNSEL AND
ORDER ON FURTHER TRIAL PROCEEDINGS**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

THIS TRIAL 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 (“Tribunal”), in the exercise of its statutory responsibility to ensure the fair and expeditious conduct of the trial of Radovan Karadžić (“Accused”) and being seised of an oral request by the Office of the Prosecutor (“Prosecution”) to assign counsel to the Accused, hereby issues this decision and order in relation thereto.

I. Background and Submissions

1. At a Status Conference held on 20 August 2009, the former pre-trial Judge stated that this case was ready to proceed to trial, and that he would report this to the President of the Tribunal.¹ On 3 September 2009, the Accused filed a “Submission on Commencement of Trial” (“Submission”) in which he, *inter alia*, requested that his trial not commence for a further ten months as he did not consider himself to be adequately prepared.² On 8 September 2009, the Prosecution filed its “response” to this Submission, confirming its readiness to commence trial, and opposing the Accused’s request for a ten month postponement.³ At a Status Conference held that same day, the pre-trial Judge stated that the Trial Chamber had carefully considered the Accused’s Submission and had determined that the appropriate date for the commencement of trial was 19 October 2009, with the Pre-trial Conference to be held on 6 October 2009.⁴

2. The Accused and the Prosecution attended the 6 October Pre-trial Conference, at which the presiding Judge noted that the matter of the date for commencement of trial was pending before the Appeals Chamber, the Accused having been granted certification to appeal the Trial Chamber’s decision setting the date at 19 October 2009. The presiding Judge also noted that preparations for the trial must continue on the basis that it would commence as planned, although, for administrative reasons, this would be on 21 October, rather than 19 October 2009.⁵

3. On 13 October 2009, the Appeals Chamber issued its decision on the commencement of trial. It found that the Trial Chamber had not erred in its assessment of the adequacy of the time that the Accused had had to prepare for his trial, but stated that the Accused should have at least one week to review the marked-up version of the Indictment, which the Trial Chamber had ordered the Prosecution to file pursuant to its decision on the application of Rule 73 *bis* of the Tribunal’s

¹ Status Conference, T. 434 (20 August 2009).

² Submission, para. 35.

³ Prosecution’s Response to Karadžić’s Submission on Commencement of Trial, 8 September 2009, paras. 2, 4.

⁴ Status Conference, T. 456 (8 September 2009).

⁵ Pre-trial Conference, T. 465 (6 October 2009).

Rules of Procedure and Evidence (“Rules”).⁶ The Trial Chamber immediately issued a Scheduling Order, noting that the Prosecution’s marked-up version of the Indictment was due to be filed on 19 October, and ordering that the trial would therefore commence on 26 October 2009, being one week thereafter.⁷

4. On 21 October 2009, the Accused filed a further “Submission on Commencement of Trial” in the form of a five page letter, which informed the Chamber that he would not appear on 26 October for the scheduled commencement of the trial, due to the fact that, in his view, his defence is not ready. Without specifying how much more time he considered to be necessary, the Accused stated that his defence team would continue with their preparations for the trial, and that he would inform the Trial Chamber when they are prepared.⁸

5. On 22 October 2009, the presiding Judge wrote to the Accused, on behalf of the Trial Chamber, stating as follows:

Dear Mr. Karadžić,

The Trial Chamber is in receipt of your Submission on the Commencement of Trial, dated 21 October 2009, in which you state that you will not appear at the hearing for the commencement of trial scheduled for 26 October 2009. I must inform you that the 26 October hearing will go ahead as scheduled, and urge you to reconsider your decision not to attend. The Trial Chamber is very aware of your general co-operative conduct throughout the proceedings to date.

In this regard, I remind you that it is the statutory responsibility of the Chamber to ensure the fair and expeditious conduct of the trial. As the Chamber has done throughout the pre-trial phase, we will continue to do our utmost to ensure that your rights are protected during the trial. I also note the Trial and Appeals Chamber decisions determining that your case is ready for trial, and that you have had sufficient time to prepare for it. There has been no adverse consideration as to timing or any other issue in respect of your election to self-representation. Indeed, for one example, the element of rights of audience to Mr. Peter Robinson took that election very much into consideration. The Trial Chamber would regret the loss of Mr. Robinson if that was to be a consequence of your non-attendance at trial.

While the Statute of the Tribunal guarantees all accused persons the right to be tried in their presence, and to defend themselves in person or through legal assistance, there are circumstances in which trials can proceed in the absence of an accused who has voluntarily waived his right to be present. There are also circumstances in which a Chamber can assign counsel to an accused, if his self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial. I encourage you to take this into consideration in your decision on whether to attend the 26 October hearing.

⁶ Decision on Radovan Karadžić’s Appeal of the Decision on Commencement of Trial, 13 October 2009, para. 27.

⁷ Scheduling Order for the Commencement of Trial, 14 October 2009.

⁸ Submission on the Commencement of Trial, 21 October 2009, p. 5.

I would also like to note that, pursuant to Rule 84 of the Tribunal's Rules of Procedure and Evidence, you may elect to make your opening statement after the conclusion of the Prosecution's case, rather than at the commencement of the trial. Therefore, should you consider that you are not in a position to make your opening statement at this time, you may make it at a later stage. Furthermore, should you determine, during trial, that you are not in a position to cross-examine any of the Prosecution's witnesses, you may bring this to the attention of the Chamber, giving reasons. The matter will then be considered by the Chamber on a case-by-case basis, and appropriate relief may be granted.

On behalf of the Chamber, I encourage and request you to attend the 26 October hearing.

6. On 26 October 2009, a second letter from the Accused, dated 23 October 2009, was filed, in which he repeated his assertion that he is not yet adequately prepared for trial, but stated that he "would and will never boycott [his] trial ...".⁹

7. The trial proceedings opened on 26 October 2009, in the absence of the Accused. At that time, the presiding Judge stated as follows:

I note that the accused, Mr. Karadžić, is not present. I also note that as he has chosen to represent himself in these proceedings to date, there's no counsel present on his behalf. Last week, on 21st of October, Mr. Karadžić filed a submission, stating that he would not appear for today's hearing on the basis that he's not fully prepared for the commencement of trial. The Trial Chamber carefully considered this submission and on 22nd October we sent a letter to Mr. Karadžić, urging him to reconsider his decision. Clearly, he has not done so.¹⁰

8. After reading out the text of the Chamber's 22 October letter, the presiding Judge instructed the Registry to convey the transcript and audio recording of the proceedings to the Accused and his assigned legal advisors, stating that "[b]y this method, the Chamber wishes to again encourage Mr. Karadžić to attend these proceedings and reiterates that there are measures that may be taken should he continue to obstruct the progress of the trial."¹¹

9. The Prosecution was then invited to make an oral submission on the matter, during which it made further arguments as to the adequacy of the time that has been available to the Accused for his preparation for trial, and then stated as follows:

The accused has decided not to attend the trial and he has indicated in his letter that he will persist in failing to attend the trial until he thinks he should come. This will substantially and persistently obstruct the proper and expeditious conduct of trial.

⁹ Response to Letter from the Chamber, 26 October 2009.

¹⁰ T. 502 (26 October 2009).

¹¹ T. 504 (26 October 2009).

This Trial Chamber is faced with two choices: Either allowing the accused to continue to represent himself and thus frustrate these proceedings; or to assign counsel. As a self-represented accused his presence is necessary to start this trial and his refusal to attend effectively blocks the commencement. The Trial Chamber should therefore impose counsel in order to prevent the fundamental obstructions of these proceedings.

There are -- there is a legal standard. The legal standard is actually met. An accused's right to be present at this trial can be waived subject to certain conditions. One such condition is that the interests of the accused be represented by counsel in order to safe-guard the accused's other rights. Because he is currently self represented, the accused's presence in court is necessary in order to guarantee the effective exercise of its rights and this applies actually from the very start, including the opening statement. As a result, the accused's failure to attend would prevent the trial to commence and taken his word and his previous submissions, it would actually be on hold for approximately eight months because two months ago he was speaking about ten months he would need.

Preventing the commencement of trial in this manner would substantially and obstruct the expeditious conduct of this trial and the only way to overcome this is to -- is imposition of counsel.¹²

The Prosecution then requested the Trial Chamber to issue a specific warning to the Accused that his right to self-representation may be restricted should he continue to refuse to appear for trial and recommended that, should he still refuse to appear for the commencement of trial, at that time the Trial Chamber should impose counsel on him.¹³ Thereafter, the presiding Judge stated that the proceedings would be adjourned until the following day, when the Prosecution's opening statement would be heard, and requested that the Accused be in attendance "so that the trial is not further obstructed."¹⁴

10. On 27 October 2009, the Accused again failed to attend the proceedings. At the commencement of the hearing, the presiding Judge stated as follows:

I note that the accused, Mr. Karadžić, is once again not present in spite of the Chamber's oral and written request and warnings. The Chamber regrets the decision by the accused to absent himself once again from the proceedings. He has chosen that course and must therefore accept that consequences will inevitably flow from the choice. We repeat our warning to him that there are circumstances where the Chamber may proceed in the absence of an accused and may assign counsel to the case. I note that although the right of an accused person to be present during his trial is a fundamental one, it is well recognised that this right is not absolute. Moreover, when the accused himself chooses not to exercise his right to be present, a Chamber can consider such a choice as a waiver of that right.

¹² T. 506–507 (26 October 2009).

¹³ T. 507–508 (26 October 2009).

¹⁴ T. 509 (26 October 2009).

[...]

Should the accused persist in his refusal to attend the trial and fail to appear for the conclusion of the Prosecution's opening statement at the next hearing which is scheduled for next Monday afternoon, the Chamber may decide to continue the trial in his absence. In addition, counsel may, in the interest of justice, be assigned to represent the interests of the accused for the remainder of the proceedings pursuant to Rule 44 -- excuse me, 45 *ter* of the Rules of Procedure and Evidence.

The Chamber will make its determination on this matter following the conclusion of the Prosecution's opening statement next week and after hearing from the parties.¹⁵

Once again, the Registry was ordered to provide the Accused with the transcript and an audio-recording of the proceedings, including this warning. After continuing to hear the beginning of the Prosecution's opening statement, the presiding Judge gave further detail about the manner in which the parties would be heard on how the proceedings might continue. He invited the Prosecution and the Accused to make oral submissions at a hearing to be held on Tuesday, 3 November 2009, and indicated that the Chamber was particularly interested in their submissions on the following issues:

- (1) proceeding with the trial in the absence of the Accused and in the absence of any counsel to represent him;
- (2) the assignment of counsel to the Accused and the various roles an assigned counsel may be given, both in the near future and as the trial progresses; or
- (3) the appointment of an *amicus curiae*; and
- (4) the possible adjournment of trial proceedings to allow adequate time for an assigned counsel to prepare; and
- (5) other suggested ways of ensuring the trial can proceed should the Accused continue to voluntarily absent himself from the courtroom.

11. On 2 November 2009, the remainder of the Prosecution's opening statement was heard. Prior to the hearing the Accused again communicated to the Chamber that he would not be present, although he indicated that he would attend the hearing on 3 November.¹⁶ At the end of the proceedings on 2 November, the presiding Judge issued a final oral warning to the Accused, in the following terms:

¹⁵ T. 510–511 (27 October 2009).

¹⁶ Letter to Presiding Judge, 2 November 2009.

The Accused has absented himself from the trial for consecutive three days, despite having been given several warnings that such attempts to obstruct the proper conduct and progress of the trial would not be tolerated. As I announced last week, the Chamber must now determine the manner in which we will proceed after the Prosecution's opening statement, and we'll hear from the parties on this matter tomorrow afternoon.

[...]

I would like to repeat once again to Mr. Karadžić our previous warnings, and I'll ask the Registry to convey the transcript and audio-recordings of this hearing to him and his assigned legal advisor. Should he maintain his position that he will not attend the trial, we may proceed in his absence and assign counsel to represent him. We advise him to consider this carefully prior to making his oral submissions tomorrow.¹⁷

12. The Accused attended the hearing held on 3 November, and repeated his assertions that he is not prepared for the trial, the reasons he considers he is not prepared, and that he will not attend the proceedings until such time as he deems himself ready.¹⁸ He did not specifically address the issues that the presiding Judge had elaborated at the end of the hearing on 27 October. In its submissions, the Prosecution proposed two options: first, for the Accused to make an initial opening statement, on the understanding that he could supplement it at a later stage, and to proceed with hearing the evidence of some crime-base witnesses, at the same time as assigning a "duty" or "standby" counsel to step in and represent the Accused should it become necessary; and, second, for the Chamber to immediately assign counsel to represent the Accused for the remainder of the proceedings, in which case the trial should be adjourned to allow such an assigned counsel time to prepare.¹⁹ However, without giving any indication of how much further time he would need, the Accused insisted that he must prepare for the case in its entirety before giving his opening statement or cross-examining any of the Prosecution's witnesses.²⁰

II. Applicable Law

13. Article 20 of the Statute of the Tribunal ("Statute") requires that Trial Chambers "ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." Article 21 then sets out the rights of an accused person, including minimum guarantees, such as "to have adequate time and facilities for the preparation of his defence....", and "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."

¹⁷ T. 672-673 (2 November 2009).

¹⁸ T. 676-678 (3 November 2009).

¹⁹ T. 681-686 (3 November 2009).

²⁰ T. 704 (3 November 2009).

14. The Appeals Chamber has determined that the rights of an accused to be physically present during his trial, and to represent himself should he so choose, are fundamental.²¹ However, it has also found that neither of these rights are absolute.²² Indeed, Rule 80(B) of the Rules empowers a Trial Chamber to order the removal of an accused from the courtroom and continue the proceedings in his absence, if the accused has “persisted in disruptive conduct” following a warning. In addition, Rule 45 *ter* permits a Trial Chamber to instruct the Registrar to assign a counsel to represent the interests of an accused, if it determines that to do so would be in the interests of justice.

15. In the *Slobodan Milošević* case, the Appeals Chamber held that the right to self-representation may be curtailed when its exercise by the accused is “substantially and persistently obstructing the proper and expeditious conduct of his trial.”²³ The existence of circumstances justifying curtailing the right to self-representation is for the Trial Chamber to determine on a case-by-case basis, in light of all the facts.²⁴ However, drawing an analogy with the warning requirement contained in Rule 80(B) in relation to the removal of an accused from the courtroom, the Appeals Chamber in the *Šešelj* case found that “an accused should be duly warned” before a Trial Chamber restricts his right to self-representation, so that he is “fully and fairly informed and is afforded the opportunity to change the disruptive circumstances... so as to avoid surrendering those rights.”²⁵ The Appeals Chamber continued to specify that a warning with regard to the 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.”²⁶

16. With regard to the manner of restriction on an accused’s right to self-representation, the Appeals Chamber has also said that this must be guided by a principle of proportionality and must be “limited to the minimum extent necessary to protect the Tribunal’s interest in assuring a reasonably expeditious trial.”²⁷

²¹ *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 (“*Milošević* Appeals Decision”), paras. 11, 13.

²² *Milošević* Appeals Decision, para. 13. See also, *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel, 20 October 2006 (“*Šešelj* Appeals Decision”), paras. 22–23.

²³ *Milošević* Appeals Decision, para. 13.

²⁴ *Šešelj* Appeals Decision, para. 20.

²⁵ *Šešelj* Appeals Decision, para. 23.

²⁶ *Šešelj* Appeals Decision, para. 26.

²⁷ *Milošević* Appeals Decision, para. 17.

III. Discussion

17. Despite the fact that the majority of the Accused's written submissions in relation to his absence from the trial, as well as his oral submissions during the 3 November hearing, have amounted to a repetition of his arguments as to why he considers himself inadequately prepared for the trial, it is not the purpose of this decision to re-open that particular matter. The Trial Chamber has already issued a decision concerning the adequacy of the time that has been available to the Accused to prepare, and this decision has been upheld by the Appeals Chamber. Even if it were in a position to reconsider that decision, the Trial Chamber would not do so, the Accused having failed to raise any new argument or factor that would merit such reconsideration.

18. Rather, the issue for determination is the manner in which the trial will proceed, either with or without the presence of the Accused, and the appropriate date on which the trial hearings will resume.

19. On the issue of continuing the trial in the absence of the Accused, and without any counsel to represent him, the Prosecution has stated that it does not exclude the possibility of proceeding in such a manner but that its position is that it is in the interests of justice to assign counsel to the Accused so that he is represented in the courtroom should he continue to absent himself from the trial.²⁸ The right of an accused to be present during his trial is, indeed, a right that can be voluntarily waived by that accused and there may indeed be circumstances in which a Trial Chamber could decide to proceed in his absence, even if an accused were not represented by counsel. However, there are problems associated with that course which, in the present case, lead the Chamber to conclude that it would not be in the interests of justice to proceed with the presentation of evidence by the Prosecution in the absence of the Accused or counsel to represent him.

20. In the first place, the truth-seeking function of the trial process would be deprived of defence evidence which may go to challenge the evidence adduced by the Prosecution. Secondly, an important function of the trial process, as originally envisaged by the Security Council of the United Nations in the very creation of the Tribunal, was to seek to further peace and reconciliation amongst and between the various factions involved in the conflict in the former Yugoslavia. To allow the Trial Chamber to hear and assess only half of the evidence, albeit from the party charged with the burden of proving its case beyond reasonable doubt, would be to deny the opportunity the

²⁸ T. 696 (3 November 2009).

trial process may have to engender such peace and reconciliation as may be gleaned from a full hearing of the evidence brought by both the Prosecution and the Accused.

21. Turning then to the assignment of counsel to the Accused in the interests of justice, the Chamber finds that the Accused has indeed substantially and persistently obstructed the proper and expeditious conduct of his trial by refusing to attend the proceedings until such time as he considers himself to be ready, despite this Chamber's decision, upheld by the Appeals Chamber, that he has had sufficient time to prepare, and the warnings that were given to him by the Chamber. The Accused's conduct has effectively brought the trial to a halt, which is evidently his purpose. Furthermore, he has made it clear that he wishes to control when the trial will resume, rather than the Chamber. These are blatant examples of deliberately obstructive conduct, no matter how cooperative the Accused has been up until the commencement of the trial. While it cannot be said of this Accused that he has been at all rude or disrespectful to the Tribunal when he has been present before this or other differently composed Trial Chambers, or in his written submissions, the Chamber notes that he has not behaved in a manner other than that expected of both a counsel and an accused person. It further notes that his pre-trial conduct has no bearing on the effect of his recent conduct, which as the Chamber has stated, has prevented the trial from proceeding further.

22. As set out above, the Trial Chamber warned the Accused on 22 October, 26 October, 27 October, and again on 2 November, that the specific consequence of persisting with his obstructive conduct could be the assignment of counsel to him and the continuation of the proceedings without him. He was therefore given ample opportunity to alter his behaviour, and was put on notice of the consequences should he not do so. He was also given the opportunity, at the hearing on 3 November, to propose solutions so that the trial could proceed. He did not take up this opportunity, choosing instead only to re-state previous submissions. Indeed, at that hearing the Prosecution suggested that he give his opening statement on the understanding that he could supplement it at a later stage, and that the presentation of evidence could then proceed on a witness-by-witness basis, allowing the Accused to present arguments as to why he needs additional time to prepare his cross-examination of individual witnesses and with the possibility of short adjournments to allow him additional preparation time for such cross-examination. However, he firmly rejected this suggestion, claiming that he needs to complete his preparation for the Prosecution's entire case before he is in a position to make his opening statement or to cross-examine any witnesses.

23. The Chamber notes in this context that the Accused also, once again, gave some indication that he intends, in the course of his defence, to "correct" what has been adjudicated by this Tribunal

in prior cases concerning other accused persons, which is something he has stated during status conferences held during the pre-trial stage,²⁹ and show who was responsible for “the outbreak of the war.”³⁰ The Trial Chamber reiterates that the Accused’s task is only to address the allegations in the Indictment against him, and to challenge the evidence brought by the Prosecution in support of those allegations, and that he should be focusing his preparation accordingly. He cannot reasonably claim to require many more months to prepare for trial when his preparation includes matters that are not, and will not be, the subject of the trial.

24. The Chamber recognises that if counsel is to be appointed to the Accused, such counsel will require some time to become familiar with the case before he or she can act in the interests of the Accused at trial. It is certainly true that this case is a voluminous one and that counsel will have many thousands of pages of documents to read so that he or she can properly cross-examine the witnesses brought by the Prosecution. No counsel, not even the most experienced and efficient, could reasonably be expected to be in a position to assist the Accused and, by extension, the trial process, without sufficient, albeit defined, preparation time. Thus, there will need to be a delay of some months before the trial can resume, if it does so with a form of appointed counsel.

25. In the present circumstances, considering the fundamental nature of the right to self-representation, which cannot be diminished lightly, and in accordance with the principle of proportionality, the Trial Chamber finds it necessary to instruct the Registrar to appoint counsel, who will begin immediately to prepare him or herself to represent the interests of the Accused when the trial resumes, if that should be required. Notwithstanding the appointment of counsel for this specific purpose, the Accused will continue to represent himself, including by dealing with the day-to-day matters that arise, such as the filing of motions and responses to motions filed by the Prosecution, and further preparing himself for the trial.

26. The Trial Chamber encourages the Accused to discuss his defence and co-operate fully with the appointed counsel, so that he or she can make most effective use of the time available for preparation. In light of the fact that the appointed counsel will be focused solely on preparation for trial, the Chamber considers that an appropriate preparation period is three and a half months, and will order that the trial resume on 1 March 2010, with the Accused’s opening statement, should he still wish to make it at this time rather than elect to make it after the conclusion of the Prosecution’s case.

²⁹ Status Conference, T. 389–390 (23 July 2009).

³⁰ T. 705 (3 November 2009).


27. The Trial Chamber states unequivocally that, should the Accused continue to absent himself from the resumed trial proceedings in March, or should he engage in any other conduct that obstructs the proper and expeditious conduct of the trial, he will forfeit his right to self-representation, no longer be entitled to assistance from his assigned defence team, and the appointed counsel will take over as an assigned counsel to represent him. Should he not engage in such conduct, the trial will proceed with the Accused continuing to represent himself and the appointed counsel will attend the proceedings and remain available to step in at any time the Chamber determines it to be necessary.

IV. Disposition

28. For these reasons, pursuant to Article 20(1) of the Statute, and Rule 54 of the Rules, the Trial Chamber hereby:

- (i) **DETERMINES** that the overall interests of justice are best met by the appointment of counsel;
- (ii) **ORDERS** the Registrar to appoint a counsel to prepare to represent the interests of the Accused at trial, subject to further order of the Chamber;
- (iii) **REQUESTS** the Registry and the Prosecution to take all necessary measures to ensure that the appointed counsel is enabled to prepare him or herself fully, including through the provision of relevant documents; and
- (iv) **ORDERS** that the trial will resume on Monday, 1 March 2010.

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



Judge O-Gon Kwon,
Presiding

Dated this fifth day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]