

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

IN TRIAL CHAMBER No. 3

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Date Filed: 6 February 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON ADEQUATE FACILITIES

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark Harmon

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic, pursuant to Rule 73(B), respectfully seeks certification to appeal the Trial Chamber's *Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates* (28 January 2009). The decision was served on him in Serbian on 5 February 2009.

2. Rule 73(B) provides that:

Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

3. In the *Decision*, the Trial Chamber upheld the provision of the Registrar's *Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused* which limits remuneration for all members of a defence team for a self represented accused to the "hourly rates for support staff."¹

4. The Trial Chamber rejected Dr. Karadzic's contention that the Registrar had misinterpreted and misapplied the Appeals Chamber's decision in *Krajisnik* which provided that the Registrar should "adequately reimburse the legal associates for their coordinating work and related legal consultation."²

5. Dr. Karadzic contends that the *Decision* involves an issue which will significantly affect the fair and expeditious conduct of his trial, and may well affect its outcome. Under the decision, he is deprived of "related legal consultation" from experienced lawyers such as Peter Robinson, who the Registrar has assigned as a legal associate, but who cannot afford or be expected to continue to work on Dr. Karadzic's case at the rate of support staff.

6. Dr. Karadzic contends that if he is forced to rely only on persons remunerated at the level of support staff, it will substantially affect his ability to bring legal challenges to the jurisdiction of the Tribunal and the indictment, to prepare for cross-examination of high level witnesses, and to focus his defence on issues which an experienced advisor can assist him in identifying and rebutting. This will diminish his ability to have a fair trial.

¹ Para 3.4

² *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and Prosecution Motion* (11 September 2007) at para. 42

7. When deciding on issues of funding for *Krajisnik*, a self-represented appellant, the Appeals Chamber identified the relevant applicable law as Article 21(4) of the Statute.³ This is the very provision which governs the rights of the accused, and enumerates safeguards to ensure that accused before the Tribunal receive a fair trial. Accordingly, in order to find the link between the issue adequate representation and fair conduct of the proceedings one must look no further than the Statute itself.

8. Put simply, there is no way to divorce the issue of adequate defence assistance from the overall issue of fair conduct of the proceedings. One of the primary tools used to safeguard the right to a fair trial is adequate representation. The *Decision* relates to the assistance to be provided to an accused defending a legally and factually complex case, and whether a decision by the Registrar on the funding of this assistance impinges on Dr. Karadzic's fair trial rights. The *Decision* therefore undoubtedly involves an issue intimately connected with the fair conduct of the proceedings, as required by Rule 73(B).

9. If Dr. Karadzic's assistance is limited to that of persons remunerated at the level of support staff, it will also result in delays in his trial preparation and ability to react to events during the trial, which will substantially affect the expeditiousness of the trial. Without remuneration for the quality of legal assistance he requires, Dr. Karadzic's trial preparations will stall. As he has previously made known, his incarceration prevents him from making contacts with high-level witnesses who have personal knowledge and materials relevant to his defence.⁴ Only a lawyer of significant experience has the ability to make such contacts and efficiently extract relevant information. Dr. Karadzic also requires assistance in answering detailed pleadings from the Prosecution on technical aspects of procedural and substantive international criminal law. This is particularly so during the pre-trial period when complicated indictment and jurisdictional issues arise, and an accused is often required to respond to motions for judicial notice and admission of witness statements. If the assistance of support staff is substituted for that of an experienced legal advisor, Dr. Karadzic will be prevented from readying himself for trial.

³ *Prosecutor v. Krajisnik*, IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion*, (11 September 2007) at para. 31.

⁴ Letter, Dr. Radovan Karadzic to The Honourable Hans Holthius, Registrar, (21 October 2008), appended as 'Annex C' to the *Motion for Adequate Facilities and Equality of Arms: Legal Associates*, (24 November 2008).

Witnesses will not be able to be met, pleadings may go unanswered, evidence will remain undiscovered, and trial dates will be pushed back as a result.

10. An immediate decision by the Appeals Chamber would materially advance the proceedings. If the Trial Chamber is found to have erred in its decision in an appeal from a final judgement, the damage to the fair trial rights of the accused will be irreparable. By allowing certification, the Trial Chamber will ensure that the trial proceeds on a correct legal footing. An immediate resolution will also allow Dr. Karadzic to confirm and consolidate his legal team, and issue concrete instructions to ensure the timely commencement of his trial.

11. Given that the issue turns on the interpretation of the Appeals Chamber's decision in *Krajisnik*, the Appeals Chamber is in the best position to advise the Trial Chamber, Registrar, and Accused just what it meant by requiring that legal associates be adequately compensated for related legal consultation. It would materially advance the proceedings to have that interpretation before, rather than after, the trial.

12. Decisions concerning the amount of funding to be provided to accused have previously been regarded as Trial Chambers as being appropriate for certification. In *Milutinovic*, for example, the Trial Chamber granted a request to certify a decision rejecting additional funds for defence assistance, finding that "questions relating to the legal representation of an accused may affect the conduct of a trial, and have implications for the statutory rights of the accused."⁵

13. Trial Chambers have also found that issues relating to the adequate time and facilities provided to an accused meet the requirements of Rule 73(B). In the *Tolimir* case, the Trial Chamber held that the issue of translation of documents into the language of the accused met the criteria for certification to appeal.⁶ In the *Prlic* case, the Trial Chamber found that the issue of adequate translation facilities for defence exhibits met the requirements of the Rule.⁷

⁵ *Prosecutor v. Milutinovic et al.*, IT-99-37-PT, *Decision on Defence Request for Certification of Appeal against the Decision of the Trial Chamber on Motion for Additional Funds*, (16 July 2003).

⁶ *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Motion for Certification to Appeal the 11 December 2007 Decision* (15 January 2007)

⁷ *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Request for Reconsideration or for Certification to Appeal the Order of 16 May 2008* (11 June 2008); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Request for Reconsideration or for Certification to Appeal the Order of 13 October 2008* (4 November 2008)

14. In the *Krajisnik*, *Oric*, and *Prlic* cases, the Trial Chambers held that issues of adequate time for the defence to present its case met the criteria for interlocutory appeal.⁸

15. Likewise, at the ICTR, Trial Chambers have held that issues such as adequate time for defence counsel to be prepared, and adequate time to present the defence case, are issues which meet the criteria of Rule 73(B).⁹

16. Similarly at the Special Court of Sierra Leone, Trial Chambers have found that the criteria for interlocutory appeal have been met for issues relating to the adequacy of legal assistance afforded to the accused.¹⁰

17. Dr. Karadzic's case is of exceptional complexity and scope, making the issue of adequate facilities critical to his ability to receive a fair trial, and to its outcome. He respectfully requests that the Trial Chamber allow him to appeal its *Decision*, so that a definitive resolution of this critical issue can be reached. In the words of Judge Shahabuddeen, "the Tribunal, as a judicial body established on behalf of practically the whole of the international community, has to satisfy the highest possible standards."¹¹

⁸ *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Application for Certification on Interlocutory Appeal* (15 March 2005); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Defence Request Filed Jointly by the Six Accused for Certification of Interlocutory Appeal Against the Oral Decision of 8 May on Time Allocated for Cross Examination by the Defence* (29 May 2006); *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Request for Certification to Appeal Trial Chamber's Decision on Defence Filings* (4 July 2005); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Request of Certification of Appeal Concerning the Trial Chamber's Decision of 1 March 2007* (22 March 2007); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision Allocating Time to the Defence to Present its Case* (25 April 2008) at para. 46; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Petkovic Defence Motion for Certification to Appeal the Decision of 24 April 2008* (29 May 2008)

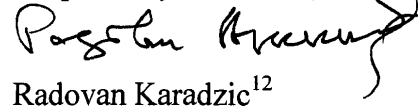
⁹ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses* (11 September 2003); *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Joseph Kanyibashi's Motion for Certification to Appeal the Decision of 21 March 2007* (3 May 2007); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Order to Joseph Nzirorera to Reduce his Witness List* (24 October 2008) at para. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Request for Certification to Appeal Decision of 17 September Concerning Defence Case of Mathieu Ngirumpatse* (24 October 2008)

¹⁰ *Prosecutor v Sesay et al*, No. SCSL-04-15-T, *Decision on Application for Leave to Appeal Gbao—Decision on Application to Withdraw Counsel* (7 August 2004); *Prosecutor v Brima et al*, No. SCSL-2004-16-T, *Decision on Brima-Kamara Application for Leave to Appeal Decision on the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel* (5 August 2005)

¹¹ *Prosecutor v Krajisnik*, IT-00-39-A, *Decision on Momcilo Krajisnik's Request to Self Represent, on Counsel's Motion in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007*, (11 May 2007), Separate Opinion of Judge Shahabuddeen, at para. 31.

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Respectfully submitted,



Radovan Karadzic¹²

¹² The assistance of Ms. Kate Gibson, PHD candidate at University of Queensland (Australia) in the research and drafting of this application is gratefully acknowledged.