



United Nations
Nations Unies



International
Criminal Tribunal
for the Former
Yugoslavia

Court
Management and
Support Services
Section

Tribunal Pénal
International pour
l'ex-Yougoslavie

Section des
Services
d'administration et
d'appui judiciaire

Notice of confidentiality applicable to fax
This facsimile transmission contains United Nations proprietary information that is strictly confidential and/or legally privileged, and is intended solely for the use of officials of the United Nations and/or the named recipient hereof. Any unauthorized disclosure, copying, distribution or other use of the information herein is strictly prohibited. If you have erroneously received this facsimile transmission, please notify the United Nations immediately.

CASE/AFFAIRE NO. IT-95-5/18-PT (R. KARADŽIĆ) **DATE** 14 September 2009 D 24780

FROM/DE RIAZ HAIDER, ACTING LEGAL COORDINATOR JH

TO/A		
<input checked="" type="checkbox"/> President/Président (1)	<input checked="" type="checkbox"/> Prosecutor/Procureur	0 Defense Counsel/Conseil de la Défense
<input checked="" type="checkbox"/> Vice President/Vice-Président		
0 Appeals Chamber/ Chambre d'appel	<input checked="" type="checkbox"/> Case Manager/ Commis aux affaires	<input checked="" type="checkbox"/> Self-representing Accused MR. R. KARADŽIĆ
0 Trial Chamber I/ Chambre de 1ère instance I	0 Chief of Investigations/ Chef des enquêtes	
0 Trial Chamber II/ Chambre de 1ère instance II		<input checked="" type="checkbox"/> Legal Advisers MR. G. PETRONIJEVIĆ MR. P. ROBINSON MR. M. SLADOJEVIĆ
<input checked="" type="checkbox"/> Trial Chamber III/ Chambre de 1ère instance III		
<input checked="" type="checkbox"/> E-copy		
0 Embassy/Ambassade		
<input checked="" type="checkbox"/> Pro Se Legal Liaison Officer/Juriste chargé de la liaison avec l'accusé MS. J. GUDURIĆ		
0 Other/Autre		
<input checked="" type="checkbox"/> Registrar/Deputy Registrar/Greffier/Greffier adjoint MS. T. MAIKOWSKI / MS. S. FOFANA	0 VWS Coordinator/Coordinateur de la SVT	
<input checked="" type="checkbox"/> Senior Legal Officer/Juriste hors-classe MS. Y. FEATHERSTONE / MS. L. DAVIDSON	0 UNDU Commanding Officer/Commandant du QPNU	
<input checked="" type="checkbox"/> Communications Service/Service Communication	<input checked="" type="checkbox"/> OLAD	

PLEASE FIND ATTACHED/VEUILLEZ TROUVER CE JOINT

0 Order/Warrant/decision issued by Appeals Chamber or Trial Chamber or a Judge on/ Ordonnance/Mandat/Décision émis(e) par la Chambre d'appel ou les Chambres de 1ère instance ou un Juge le ___/___/___
0 Order/Decision issued by the President on/Ordonnance/Décision émise par le Président le ___/___/___
<input checked="" type="checkbox"/> Motion/Request/Application submitted by Prosecution/Defence Counsel/Accused on/ Motion/Requête/Demande présentée par l'Accusation/le Conseil de la défense le 14 / 09 / 2009
0 Response/reply/brief submitted by Prosecution/Defence Counsel/Accused on/ Réponse/Réplique/Mémoire présenté(e) par l'Accusation/le Conseil de la défense le ___/___/___
0 Decision of the Registrar on/Décision du Greffier le ___/___/___
0 Other/Autre

RECEIVED/RECU	FILED/ENREGISTRE
<input checked="" type="checkbox"/> Office hours/heures ouvrables Date: 14 / 09 / 2009	<input checked="" type="checkbox"/> Office hours/heures ouvrables Date: 14 / 09 / 2009
0 Outside Office hours/en dehors des heures ouvrables Date: ___/___/___ Time/Heure: ___h___	0 Outside Office hours/en dehors des heures ouvrables Date: ___/___/___ Time/Heure: ___h___

Article 27.2- Directive for the Registry: A party anticipating a late filing will call the Registry during office hours to request permission of the Registrar and instruction for after hour filing.
Article 27.2-Directive pour le Greffe: une partie prévoyant un dépôt hors des heures ouvrables se mettra en rapport avec le personnel du Greffe durant les heures de bureau pour solliciter l'autorisation du Greffier et les instructions nécessaires.
Churchillplein 1, 2517 JW The Hague. P.O. Box 13888, 2501 EW The Hague. Netherlands
Churchillplein 1, 2517 JW La Haye. B.P. 13888, 2501 La Haye. Pays-Bas
Tel.: 31-70-416 5000 Fax: 31-70-416 8637

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

IN TRIAL CHAMBER No. 3

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

Registrar: Mr. John Hocking

Date: 14 September 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON COMMENCEMENT OF TRIAL

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

The Accused:
Radovan Karadzic

Introduction

1. Dr. Radovan Karadzic respectfully applies, pursuant to Rule 73(B), for certification to appeal the Trial Chamber's oral decision of 8 September 2009 that the trial will commence on 19 October 2009 and denying his request for adequate time to prepare. (the "Impugned Decision")

2. This is a watershed issue for the fairness of the trial. Dr. Karadzic has cooperated fully with the Tribunal during the pre-trial stage of his case. He has been working day and night to prepare for his trial and to bring out the truth of what happened in Bosnia. But he simply cannot agree to participate in proceedings which will be fundamentally unfair from the beginning.

3. Therefore it is imperative that the Impugned Decision be immediately reviewed by the Appeals Chamber before the trial commences and that the Trial Chamber's decision be reversed.

The Impugned Decision

4. On 3 September 2009, Dr. Karadzic filed his *Submission on the Commencement of Trial* in which he detailed the scope of the case, his efforts to prepare for the trial to date, and the remaining time needed to prepare for the trial. He requested an additional 10 months to prepare for the trial.

5. The prosecution filed the *Prosecution's Response to Karadzic's Submission on Commencement of Trial* on 7 September 2009. This pleading was not served on Dr. Karadzic prior to the Status Conference of 8 September, although it was read and considered by the Trial Chamber.¹

6. At that Status Conference, the Pre-Trial Judge said that:

Nonetheless, the Chamber has considered all that you have submitted on this matter in determining when the trial should start. It has decided that the appropriate date is 19th of October, 2009, although a formal Scheduling Order will be issued closer to that time.²

7. It is this ruling that Dr. Karadzic seeks certification to appeal.

¹ Transcript of 8 September 2009 @ 454

² Transcript of 8 September 2009 @ 456

The Standard for Certification

8. 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.

9. The issue of commencing a trial before the accused is adequately prepared meets both criteria of the Rule. By its very nature, lack of preparation by one party significantly affects the fair and expeditious conduct of the trial, as well as its potential outcome. Likewise, an immediate resolution by the Appeals Chamber would materially advance the proceedings since the damage done by commencing an unfair trial would be irreparable on appeal from final judgement, save for ordering a trial *de novo*.

10. Other decisions of Trial Chambers of the *ad hoc* Tribunals support this position.

11. In the *Krajisnik* case, the Trial Chamber granted certification to appeal on a similar issue. The accused sought to appeal a decision which refused to adjourn the trial because he had inadequate time to prepare. The Trial Chamber addressed both prongs of Rule 73(B).

12. First, it held that:

[I]t is clear that the decision which the Defence wishes to appeal deals with the fairness of the proceedings to date, and in particular with whether the Accused and his Defence have had sufficient time in preparation, both in relation to witnesses already heard and in relation to witnesses to be heard in the near future. If the Appeals Chamber would find that the Chamber's decision is flawed, whether because it mistakes the law or because it makes an unreasonable assessment of the facts, the consequences for the outcome of the trial of proceeding on the basis of the flawed decision could be extremely serious.³

13. Second, the Trial Chamber found that an immediate resolution by the Appeals Chamber of the issue of adequate time to prepare would materially advance the

³ *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Application for Certification on Interlocutory Appeal* (15 March 2005) at para. 3

proceedings because the issue was important to the fairness of the trial and witnesses would have to be recalled if the Trial Chamber's decision was found to be flawed.⁴

14. The *Krajisnik* decision is directly on point to Dr. Karadzic's application for certification to appeal. Notably, Mr. Krajisnik had more than 3 ½ years to prepare for his trial. If his application for certification to appeal met the criteria of Rule 73(B), then Dr. Karadzic's application must also meet the criteria as well.

15. A decision of a Trial Chamber of the ICTR in the *Bagosora* case is similarly on point. There, the accused Ntabakuze sought to appeal a decision denying him additional time to prepare. The Trial Chamber granted certification, finding that both criteria of Rule 73(B) were met. It reasoned that the issue went directly to the fairness of the proceedings, the outcome of the trial may be at stake where the accused was not adequately prepared, and an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings.⁵

16. At the time of the Trial Chamber's decision, Major Ntabakuze had been in the custody of the Tribunal for 6 years. Therefore, if his application for certification to appeal met the criteria of Rule 73(B), then Dr. Karadzic's application also meets the criteria as well.

17. More recently, in the *Ngirabatware* case, another Trial Chamber of the ICTR granted certification to appeal denial of the accused's motion to postpone the commencement of the trial. The Trial Chamber held that the question of whether the defence had adequate time to prepare for the trial pertained to the fairness of the proceedings and might have an effect on the outcome of the trial. Therefore the first criterion of Rule 73(B) was met.⁶

18. The Trial Chamber also found that the second criterion of Rule 73(B) was met since a resolution of the issue at a later stage could impact on the accused's right to a fair

⁴ *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Application for Certification on Interlocutory Appeal* (15 March 2005) at para. 4

⁵ *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) at para. 9

⁶ *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date* (15 April 2009) at para. 19

trial.⁷ Notably, the Trial Chamber stayed the commencement of the trial until a decision of the Appeals Chamber.⁸

19. Other Trial Chambers of the ICTY have found the criteria for certification to appeal to be met concerning issues of adequate time for the defence.⁹

20. Therefore, the issue of adequate time for Dr. Karadzic to prepare for his trial squarely meets the criteria for certification to appeal in the jurisprudence of both ad hoc Tribunals.

The Merits

21. It is well established that an application for certification to appeal is not concerned with the merits of the impugned decision, but only with whether the criteria for an interlocutory appeal is satisfied.¹⁰ Nevertheless, Dr. Karadzic wishes to correct several misconceptions of the Trial Chamber concerning the issue of adequate preparation.

22. First, although he has been in custody for 13 months, he has not been able to commence focused trial preparation until after May 2009 when he received the prosecution's witness materials and pre-trial brief. Before then he was simply able to review Rule 66(A)(i) and 68 materials disclosed to him in a random manner. In addition, the Registry's erroneous refusal to appoint Mr. Sladojevic as his legal associate in charge of trial preparation denied him assistance in organizing the disclosure material until

⁷ *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date* (15 April 2009) at para. 20

⁸ Para. 21. The Appeals Chamber later reversed. *Prosecutor v Ngirabatware*, No. ICTR-99-54-AR73, *Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, Appeals Chamber* (12 May 2009). The Trial Chamber granted additional time for preparation, and denied a subsequent application for certification to appeal the new trial date. *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date Rendered on 15 July 2009* (10 August 2009)

⁹ *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)

¹⁰ *Decision on Accused's Application for Certification to Appeal Decision on Languages* (22 April 2009) at para. 5

reversed by the Trial Chamber in late April 2009.¹¹ And the pre-trial disclosure is still not complete—Dr. Karadzic is receiving material on a daily basis.

23. Second, Dr. Karadzic has, of necessity, a small team dealing with trial preparation. While he has been most fortunate to be able to recruit a large number of distinguished law professors and talented law students to his defence team on a part-time, *pro bono* basis, these people could not be expected to do the factual work necessary for trial preparation. Instead, they could only be used for legal research and drafting of pleadings.

24. Third, Dr. Karadzic has had to prepare to defend against all of the allegations of the indictment. If a reduction in the scope of the trial is ultimately ordered on or after the Pretrial Conference of 6 October 2009, it will only be at that time that he can narrow the focus of his trial preparation. Therefore, his preparation time will only be reduced from that day forward and the calculation of the remaining time that he will need cannot be made as if he had been preparing for a narrower trial from the beginning.

25. Fourth, reduced sitting time during the trial assumes that an accused should prepare the trial “on the fly”, after the trial has already commenced. This is both impractical and impossible. Material from a witness to be called later in the prosecution case may be relevant to the opening statement, which Dr. Karadzic has a right to make at the commencement of the case, and to the cross examination of earlier witnesses. This would be particularly true if some of the earlier witnesses are historical and political experts, whose testimony covers a wide scope of events. Therefore, it is necessary to have at least read all of the witness-related material before the trial commences.¹²

26. In addition, the Pre-Trial Judge’s own experience at this Tribunal allows him to have had observed how, inevitably, vast amounts of additional material is produced to the accused during the course of the trial in the form of newly discovered information, 92 *ter* packages, and exhibit binders. It is a fallacy that an accused can have a fair trial by denying him adequate pre-trial preparation and requiring him to prepare as he goes along.

¹¹ *Decision on Accused Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojevic as Legal Associate* (20 April 2009)

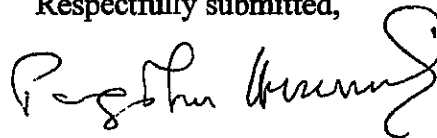
¹² The prosecution to this day has given no indication of the order of presentation of its case, either by event or by witness.

Conclusion

27. Dr. Karadzic has been in good faith with this Tribunal from the beginning. He asks that it be in good faith with him. He therefore requests that his application for certification to appeal the decision on the commencement of the trial be granted, and that the trial be stayed until a decision by the Appeals Chamber.

Word count: 2167

Respectfully submitted,

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

Dr. Radovan Karadzic