

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

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

IN TRIAL CHAMBER No. 3

Before: Judge Patrick Robinson, Presiding  
Judge Iain Bonomy, Pre-Trial Judge  
Judge Michele Picard

Registrar: Mr. Hans Holthuis

Date Filed: 30 October 2008

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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APPLICATION FOR CERTIFICATION TO APPEAL  
PERISIC ACCESS DECISION

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The Office of the Prosecutor:

Mr. Alan Tieger  
Mr. Mark Harmon

The Accused:

Radovan Karadzic

The Accused Momcilo Perisic:

Mr. Novak Lukic  
Mr. Gregor Guy Smith

1. On 14 October 2008, the Trial Chamber issued its *Decision on Momcilo Perisic's Motion for Access to Confidential Materials in the Radovan Karadzic Case*. (the "Impugned Decision") The decision was served on the accused on 28 October 2008.

2. In the decision, the Trial Chamber granted access to General Perisic without bothering to hear from Dr. Karadzic.

3. Dr. Radovan Karadzic, pursuant to Rule 73 (B), respectfully applies for certification to appeal that decision.

4. 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.

5. In its decision, the Trial Chamber held:

In respect of the Karadzic motion, the Trial Chamber notes that the accused has so far opted to proceed *pro se* in his case, and there is no guarantee that the Registry will act favourably upon his application for funding of persons who are not to be assigned as his counsel. As the Trial Chamber has pointed out on prior occasions, the Accused must realize the disadvantages of his decision to represent himself in these proceedings, and in the words of the Appeals Chamber 'must take the bitter with the sweet when making this choice'. It is an ongoing practice at the Tribunal that, where the accused seeks authorization by the Office of Legal Aid and Detention (OLAD) of a defence team, a temporary assignment may be made and delay thereby avoided, irrespective of a final determination of indigency. Declining to exercise that reasonably available option does not constitute good cause for extending the time-limit for response. The Chamber does not find that the requested extension of time is warranted, and accordingly the deadline for the submission of a response by the Accused was 13 October 2008."<sup>1</sup>

6. Dr. Karadzic respectfully contends that the Trial Chamber erred in finding that he had not exercised the "reasonably available option" of seeking temporary assignment of legal advisors and other personnel to assist him. In fact, he had requested such assistance from the Registry on 29 September 2008, the very same day the *Perisic* motion

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<sup>1</sup> Impugned Decision at para. 14

was served upon him.<sup>2</sup> It was not until 17 October 2008, after the motion was decided, that he received a response to his request.

7. Dr. Karadzic contends that this issue meets the test for certification to appeal set forth in Rule 73(B). The decision of the Trial Chamber to decide the merits of motions without affording him an opportunity to be heard goes to the heart of Dr. Karadzic's right to a fair trial.

8. Article 20 of the Tribunal Statute provides, in pertinent part, that:

1. The Trial Chambers shall 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.

9. Article 21 of the Statute provides, in pertinent part, that:

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

...

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

...

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

10. In addition, the principle of *audi alteram partem* requires that a party to a proceeding before this Tribunal be given an opportunity to be heard on issues related to his case.<sup>3</sup>

11. Without arguing the merits of the issue sought to be appealed, it is clear that the issue itself—the right to be heard—and the reason Dr. Karadzic was not heard—denial of adequate facilities for his defence—all significantly affect his right to a fair trial.

<sup>2</sup> *Motion for Extension of Time to Respond to Perisic Motion for Access to Confidential Material* (6 October 2008) at para. 4

<sup>3</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for an Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion* (30 May 2006) at para. 3; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment* (3 May 2005) at paras. 11,13

12. Ironically, Dr. Karadzic must recognize that the issue significantly affects the expeditiousness of the trial as well. If the Trial Chamber is allowed to decide issues without hearing from Dr. Karadzic, it will be a very expeditious trial indeed.

13. Therefore, the issue sought to be appealed is one which significantly affects the fair and expeditious conduct of the trial. The first requirement of Rule 73(B) is therefore met.

14. The second requirement of Rule 73(B) is that the issue be one in which an immediate resolution by the Appeals Chamber may materially advance the proceedings. Dr. Karadzic believes that this issue is likely to recur during the course of the proceedings in his case, and that therefore, a decision by the Appeals Chamber on whether the Trial Chamber can decide issues without hearing from the Accused would materially advance the proceedings.

15. The issue of the assignment of legal advisors and other personnel to assist the Accused in his defence is not resolved with the Registry, and appears unlikely to be resolved in the near future. On 17 October 2008, the Registry declined to assign one of the requested Legal Advisors, and agreed only to assign the other requested Legal Advisor at an unacceptable remuneration rate equivalent to that of a secretary at a law firm.

16. A request for reconsideration of these decisions was made on 21 October 2008, and no answer has been received from the Registrar. However, until these issues are resolved, Dr. Karadzic is unable to receive sufficient legal advice and access to materials to be able to respond to substantive motions. If the Trial Chamber is of a mind to continue to forge ahead and decide issues relating to the case without hearing from the Accused, the issue ought to be decided by the Appeals Chamber immediately.

17. Waiting until after judgement for a decision on these issues by the Appeals Chamber risks upsetting the entire judgement over denial at this stage of fundamental issues of the right to be heard and the right to adequate facilities for one's defence.

18. Therefore, it is respectfully contended that the issue sought to be appealed satisfies the second requirement of Rule 73(B) in that an immediate determination by the Appeals Chamber may materially advance the proceedings.

19. A review of other decisions at the ICTY reveals that the requirements of Rule 73(B) were found to have been satisfied relating to issues of adequate time and facilities under Article 21(4)(b) of the Statute, including the necessity of translation of pleadings into the language of a self-represented accused<sup>4</sup>, the denial of additional time for defence to prepare<sup>5</sup>, and limitations on number of pages translated for the defence<sup>6</sup>.

20. In addition, certification has also been granted relating to issues of the right to legal assistance under Article 21(4)(d) of the Statute including denial of self-representation<sup>7</sup> and consultation between an Accused and his counsel during his testimony<sup>8</sup>.

21. At the ICTR, Trial Chambers have held that where similar issues may arise during the proceedings, certification is appropriate because a decision by the Appeals Chamber may materially advance the proceedings.<sup>9</sup> Concern for proceeding throughout the remainder of the case on an incorrect legal footing has been held to support a finding that an immediate decision by the Appeals Chamber may materially advance the proceedings.<sup>10</sup> Such is the situation with the Impugned Decision.

22. In conclusion, Dr. Karadzic respectfully requests that the Trial Chamber grant certification to appeal its decision to decide the *Perisic* motion without hearing from him. The principles involved are important ones, and “the rules of the road” ought to be settled

<sup>4</sup> *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Motion for Certification to Appeal the 11 December 2007 Decision* (15 January 2007)

<sup>5</sup> *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Application for Certification on Interlocutory Appeal* (15 March 2005)

<sup>6</sup> *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prljak Defence Request for Reconsideration or for Certification to Appeal the Order of 16 May 2008* (11 June 2008)

<sup>7</sup> *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Request to Certify an Appeal Against Decision on Assignment of Counsel* (29 August 2006); *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel* (5 December 2006)

<sup>8</sup> *Prosecutor v Prlic et al*, No. IT-04-74-T, *Order on the Mode of Examining an Accused Pursuant to Rule 85(C) of the Rules* (1 July 2008)

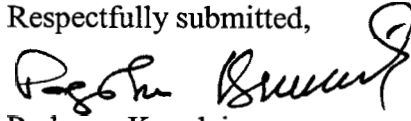
<sup>9</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyibashi's Request to Cross-Examine Ntahobali's 1997 Custodial Interviews* (1 June 2006) at para. 27

<sup>10</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements* (22 May 2006) at para. 6

at the outset of this long and complex journey for justice.

Word count: 1449

Respectfully submitted,

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

Radovan Karadzic