

**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-PT

Date: 16 January 2009

IN THE TRIAL CHAMBER

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

Acting Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S
APPLICATION FOR CERTIFICATION TO APPEAL THE
DECISION ON ACCUSED'S SECOND MOTION FOR
INSPECTION AND DISCLOSURE**

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

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

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Introduction

1. Karadžić's application¹ for certification to appeal the Trial Chamber's decision² on his motion for inspection and disclosure³ was filed over two weeks late without justification and should be dismissed as invalid. In any event, the Application does not meet the test for certification under Rule 73(B).

The Application was filed out of time and is invalid

2. The Application was due on 24 December 2008.⁴ Karadžić filed his Application 16 days after this deadline without showing – or even attempting to show – good cause pursuant to

¹ Application for Certification to Appeal Decision on Holbrooke Agreement Disclosure, 9 January 2009 ("Application").

² Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008 ("Decision").

³ Motion for Inspection and Disclosure: Holbrooke Agreement, 5 November 2008 ("Motion").

⁴ Rule 73(C) requires requests for certification to be filed within seven days of the filing of the impugned decision.

Rule 127(A). There is no basis for the Chamber to find that it would be “just” to recognize the Application as valid⁵ and it should therefore be dismissed.

The Application does not satisfy Rule 73(B)

3. In arguing that the Decision satisfies Rule 73(B), the Application relies on the assumption that the Pre-Trial Chamber has ruled on Karadžić’s underlying submission regarding an alleged immunity agreement,⁶ which is still pending. The Application amounts to an improper attempt to appeal matters raised in the Underlying Submission that have yet to be decided.
4. Karadžić mistakenly argues that he has satisfied the two-pronged test under Rule 73(B) because an appeal could result in his release without trial.⁷ The Decision is exclusively about disclosure.⁸ Even assuming a finding by the Appeals Chamber that Karadžić were entitled to the material that is the subject of the Decision, the only result would be the production to the Accused of any such material that may be in the Prosecution’s possession. A successful appeal of the Decision would not result in Karadžić’s release without trial.
5. The suggestion in the Application⁹ that a successful appeal of the Decision could assist Karadžić in obtaining material regarding the alleged immunity agreement that would in turn assist him in prevailing on the Underlying Submission is not only tenuous, it is also erroneous. The Chamber held that such material would not assist Karadžić, concluding that “neither its own mandate nor that of the Prosecutor is affected by any alleged undertaking made by Mr. Holbrooke.”¹⁰
6. The fact that the Decision may “foreshadow” a decision on the Underlying Submission does not deprive Karadžić of the opportunity to appeal any such a decision if and when it is rendered. If the Chamber were to reach a similar conclusion on the relevance of the alleged undertaking in its decision on the Underlying Submission, Karadžić would have the opportunity to seek to appeal that conclusion. Moreover, if such an appeal were granted, and if the Appeals Chamber were to find that the alleged undertaking was relevant, Karadžić

⁵ Rule 127(A)(ii)

⁶ “Official submission concerning my first appearance and my immunity agreement with the USA” filed on 6 August 2008 (“Underlying Submission”).

⁷ Application paras. 7-8, 11.

⁸ Neither of the two decisions Karadžić has cited in support of his Application relate exclusively to disclosure matters and they are therefore inapposite. The *Nikolić* decision dealt with a decision on the merits of a motion to challenging the jurisdiction of the Tribunal and the *Simić* decision dealt with the merits of a request for an evidentiary hearing on the circumstances of Todorović’s arrest and a related disclosure order.

⁹ Application, para. 8.

¹⁰ Decision, para.25.


would be able to revisit disclosure matters relating to that alleged undertaking. In fact, in such a case, the Prosecution would revisit this disclosure aspect itself.

7. Further, there is no proper basis for the contention that the Decision “will result in suspicion that the Tribunal is interested in concealing the true facts” surrounding the alleged undertaking.¹¹ This contention does not amount to, or support, a reason for granting certification.
8. The Decision does not satisfy either prong of Rule 73(B). It would result in procedural confusion and inefficiency if the Accused were permitted to appeal matters that are still pending before the Chamber in the Underlying Submission as he is attempting to do. Such a situation would be contrary to the fair and expeditious conduct of this trial and would impede – as opposed to advance – the proceedings.

Conclusion

9. For these reasons, the Application should be denied.

Word Count: 738


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Dated this 16th day of January 2009
At The Hague, The Netherlands

¹¹ Application, para. 12.