

**UNITED  
NATIONS**

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International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

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Case No. IT-95-5/18-PT  
Date: 9 February 2009

**IN TRIAL CHAMBER III**

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

**Acting Registrar:** Mr. John Hocking

**THE PROSECUTOR**

**v.**

**RADOVAN KARADŽIĆ**

**PUBLIC**

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**PROSECUTION RESPONSE TO KARADŽIĆ'S APPLICATION  
FOR CERTIFICATION TO APPEAL  
DECISION ON RULE 70(B)**

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**The Office of the Prosecutor:**

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

**The Accused:**

Radovan Karadžić

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

**Case No. IT-95-5/18-PT**

**THE PROSECUTOR**

**v.**

**RADOVAN KARADŽIĆ**

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CERTIFICATION TO APPEAL DECISION ON RULE 70(B)**

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1. Karadžić's Application<sup>1</sup> for certification to appeal the Trial Chamber's Decision<sup>2</sup> should be dismissed because it does not meet the test for certification under Rule 73(B) of the Rules of Procedure and Evidence.

2. In his Application,<sup>3</sup> Karadžić takes issue with the Trial Chamber's finding that the Prosecution is not obliged to inform him of the number of documents obtained under Rule 70(B) for which consent of the provider has yet to be obtained because Rule 68(iii) requires the Prosecution to take reasonable steps to obtain the consent of the provider not only for disclosure of the material, but also for the disclosure of the "fact of its existence".<sup>4</sup>

3. Karadžić has not met the requirements of Rule 73(B) that the Decision 1) involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the fair trial and 2) that an immediate resolution of

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<sup>1</sup> Application for Certification to Appeal Decision on Rule 70(B), 3 February 2009 ("Application").

<sup>2</sup> Decision on Accused Motion for Disclosure of Rule 68 Material Obtained Under Rule 70(B) and Order on Prosecution Disclosure Report, 15 January 2009 ("Decision").

<sup>3</sup> Application, para.3.

<sup>4</sup> Application, para.3; *See also* Decision, p.3.

the issue may materially advance the proceedings. He provides general and unspecific arguments and fails to properly substantiate his assertion “that the issue at stake in the Impugned Decision meets both of the criteria for interlocutory appeal”.<sup>5</sup> This runs contrary to the language and purpose of the certification process under Rule 73 (B).<sup>6</sup> Moreover, Karadžić has not identified a discernable error in law or fact by the Trial Chamber.

4. Further, Karadžić’s general argument that his fair trial rights are affected by the Decision is based on the erroneous assumption that material is being or may be “withheld” by the Prosecution.<sup>7</sup> The Accused does not indicate on which facts he bases this assumption.

5. In the impugned Decision the Trial Chamber simply addresses the Prosecution’s disclosure obligations pursuant to rule 68 (iii) and that the Prosecution is not obliged to inform Karadžić of the number of documents it intends to disclose before consent of the provided has been obtained. Once such consent is obtained under Rule 70(B) the documents have to be disclosed.

6. There is a presumption that the Prosecution is fulfilling its disclosure obligations in good faith.<sup>8</sup> The Accused has provided no facts to the contrary. Moreover, the Prosecution is discharging its disclosure obligations diligently and has provided detailed disclosure information.<sup>9</sup> Regular reports on disclosure including Rule 70 materials are provided to the Accused and the Trial Chamber.<sup>10</sup> The fact that prior to its disclosure Karadžić is not informed of the amount of material subject to Rule 70(B) cannot have any impact on the fair and expeditious outcome of the proceedings or the outcome of the fair trial as required by Rule 73(B).<sup>11</sup>

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<sup>5</sup> Application, para.4.

<sup>6</sup> *Prosecutor v. Prlić et al.* Case No. IT-04-74-PT, Decision on Milivoj Petković’s Application for Certification to Appeal Decision on Motions Alleging Defect in the Form of Indictment, 19 September 2005, p.5.

<sup>7</sup> Application, para.5.

<sup>8</sup> *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera’s Interlocutory Appeal, Case No. ICTR-98-44-AR73.6, App.Ch., 28 April 2006, para.17; *Prosecutor v. Kordić and Čerkez*, Appeal Judgement, Case No. IT-95-14/2-A, App.Ch., 17 December 2004, para.183.

<sup>9</sup> Prosecution Response to Motion For Disclosure of Rule 68 Material Obtained Under Rule 70, 10 December 2008, para.3. See also Decision, p.2.

<sup>10</sup> Decision, pp.2-3.

<sup>11</sup> See Rule 73(B).

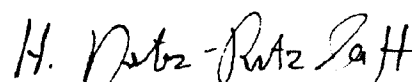
7. Karadžić has also not met the requirement of Rule 73(B) that an immediate resolution by the Appeals Chamber is warranted. He merely speculates that “if it later turned out that material should have been disclosed, it would affect the integrity of any final judgement and that therefore an immediate resolution by the Appeals Chamber is warranted.”<sup>12</sup> This again wrongly pre-supposes that material is not disclosed.

8. The cases cited by Karadžić in support of the Application<sup>13</sup> are not on point. They deal with issues arising out of alleged non-disclosure of specific documents,<sup>14</sup> restrictions on evidence obtained pursuant to Rule 70,<sup>15</sup> and the ambit of reciprocal disclosure.<sup>16</sup> In this case however, no such issue has arisen.

9. Finally, Karadžić’s argument that the impugned Decision was one of “first impression” by the Trial Chamber<sup>17</sup> goes to the subject of the issue and is irrelevant for the decision on certification.<sup>18</sup>

10. For the above-mentioned reasons the Application should be denied.

Word Count: 903



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Dated this 9<sup>th</sup> day of February 2009  
At The Hague  
The Netherlands

<sup>12</sup> Application, para.7.

<sup>13</sup> Application, paras.5, 7-8.

<sup>14</sup> See *Prosecutor v. Thomas Lubanga Dylo*, Judgement on the Appeal of the Prosecutor, 21 October 2008, para.6; *Prosecutor v. Karemera et al*, Decision on Joseph Nzirorera’s Application for Certification to Appeal Decision on 10<sup>th</sup> Rule 68 Motion, Case No. ICTR-98-44-T, 4 March 2008; *Prosecutor v. Bagosora et al*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, Case No. ICTR-98-41-T, 22 May 2006, para.1.

<sup>15</sup> See *Prosecutor v. Bizimungu et al*, Case No. ICTR-99-50-T, “Decision on Casimir Bizimungu’s Request for Certification to Appeal the Decision on Casimir Bizimungu’s Motion in Reconsideration of the Trial Chamber’s Decision Dated February 8, 2007”, 22 May 2007, para.8.

<sup>16</sup> *Prosecutor v. Karemera et al*, Decision on Prosecutor’s Application for Certification to Appeal the Chamber’s Decision on Joseph Nzirorera’s Motion for Inspection of Statement of Pierre Celestin Mbonankira and Decision on Prosecution’s Cross-Motion for Enforcement of Reciprocal Disclosure, Case No. ICTR-98-44-T, 2 October 2007, para.5.

<sup>17</sup> Application, para.6.

<sup>18</sup> *Prosecutor v. Lukić M. and Lukić S.*, Decision on Prosecution Motion to Amend the Second Indictment, Case No. IT-98-32/1-PT, T.Ch., 19 August 2008, para.14.