

**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 the  
former Yugoslavia since 1991

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

Date: 27 March 2009

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**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**

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**PROSECUTION'S RESPONSE TO KARADŽIĆ'S  
APPLICATION FOR CERTIFICATION TO APPEAL THE  
DECISION ON ACCESS TO RULE 68 MATERIAL**

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**The Office of the Prosecutor:**

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

**The Accused:**

Mr. 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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**I. INTRODUCTION**

1. Karadžić filed an "Application for Certification to Appeal Decision on Access to Rule 68 Material" pursuant to Rule 73(B) of the Rules on 20 March 2009 ("Application"). He challenges the Trial Chamber's "Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities" rendered on 10 March 2009 ("Decision") and takes issue with the manner in which Rule 68 material is disclosed to him. Karadžić's Application is premised on a mischaracterization of the nature of his access to exculpatory material, and it does not meet either of the requirements for certification under Rule 73(B). Accordingly it should be dismissed.

**II. DISCUSSION**

*(A) The Underlying Premise of the Application is Unsound*

2. Karadžić's Application is premised on a mischaracterization of his ability to access the EDS. Karadžić submits that the error in the Decision is that "most accused do not

have access to the EDS and therefore disclosure in that format prejudices the ability of the accused to have access to this important material” and “for self-represented accused who do have access to the EDS, the Registry refuses access to those persons in the best position to help them.”<sup>1</sup> The first part of this argument is irrelevant because Karadžić *does* have access to the EDS. The second part of the argument mischaracterizes the Registry’s position.

3. In the “Registry Submission Regarding the Electronic Disclosure System” (“Registry Submission”),<sup>2</sup> the Registry stated: “If the Prosecution is prepared to provide access to this material to other persons assisting the Accused, the Registrar would facilitate such access.”<sup>3</sup> In addition, the Trial Chamber in its Decision has encouraged the Parties and the Registry to reach an arrangement “satisfactory to all to allow access to the EDS, including confidential material thereon, to a reasonable number of others assisting the Accused in his defence.”<sup>4</sup> Moreover, Karadžić acknowledges in the Application that he has acted on this guidance by requesting the Registry to grant EDS access to three legal interns, and he notes that this request is pending.<sup>5</sup> Thus, Karadžić’s claim that there has been a refusal of access by the Registry is incorrect. As the underlying premise of the Application is unsound, the Application should be dismissed.

*(B) The Decision does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings*

4. Karadžić’s claim that the Decision involves the issue of the accused’s functional access to exculpatory evidence which significantly affects the fairness of the trial<sup>6</sup> is grounded in his misapprehension of the nature of that access and is therefore misconceived.

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<sup>1</sup> Application, para.13.

<sup>2</sup> *Prosecutor v. Karadžić*, Registry Submission Regarding the Electronic Disclosure System, 5 March 2009.

<sup>3</sup> Registry Submission, para.9. *See also Prosecutor v. Karadžić*, Prosecution Response to Karadžić’s Motion for Disclosure of Rule 68 Material, 17 Feb. 2009, para.6 (“the Prosecution would not oppose a request for further access to the EDS for a reasonable number of Karadžić’s team members...”); Decision, para. 19 (pointing out that the Registrar’s Submission Pursuant to Rule 33(B) on Access by the Accused’s Defence Team to Confidential Information, filed on 23 February 2009, “does not indicate that the Registry is unwilling to provide access to confidential material to individuals assisting the Accused in his defence, in addition to his legal associates, but rather simply suggests a manner of monitoring who has such access”).

<sup>4</sup> Decision, para.22.

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

5. This argument must be considered in light of the fact that Karadžić's "functional access" to the EDS is greater than he represents it to be, and that Karadžić either does not understand or has misrepresented the Registry's position in relation to that access. This misconception results in Karadžić's further mistaken claim that he "will be prejudiced throughout the trial by the operation of this decision in conjunction with the Registrar's refusal to allow access to the EDS to persons whose role on the defence team make it necessary and appropriate for them to access the EDS..."<sup>7</sup>

6. Furthermore, Karadžić has acted on the Trial Chamber's guidance to him to request expanded access to the EDS, and that request is pending. Since the nature of Karadžić's "functional access to exculpatory evidence" is still to be determined, it would be premature – if not impossible – for a Chamber to rule on whether that access is consistent with the rights of the Accused. In light of these factors, the first requirement under Rule 73(B) is not met.

*(C) The Decision does not involve an issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings*

7. Karadžić mistakenly submits that the Trial Chamber's holding that the Prosecution can satisfy its Rule 68 obligations through the EDS is one of "first impression at the ICTY and is based upon distinguishing an ICTR Appeals Chamber decision and another ICTY Trial Chamber decision which found that disclosure on the EDS was not adequate."<sup>8</sup>

8. The issue as to whether the Prosecution's disclosure practice in the present case conforms with appellate jurisprudence has been squarely addressed by the Appeals Chamber in *Karemera*.<sup>9</sup> The composition of the Appeals Chamber of the ICTR and that of the ICTY is the same. Moreover, the provisions of Rule 68 at the ICTR are virtually identical to the provisions of Rule 68 at the ICTY. Thus, a resolution of this issue by the

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<sup>6</sup> Application, para.10.

<sup>7</sup> Application, para. 14.

<sup>8</sup> Application, para.11.

<sup>9</sup> *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 20 June 2006.

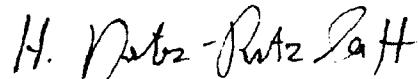
ICTY Appeals Chamber is not necessary and would not materially advance the proceedings.

9. In addition, as observed by the Trial Chamber, the reasoning in the *Lukić* decision cannot be applied to the present case.<sup>10</sup> In *Lukić*, the key issue concerned the deadline by which Rule 66(A)(ii) material (interview notes) should have been disclosed to the Defence.<sup>11</sup> Thus, that decision cannot support Karadžić's argument that the issue upon which he seeks certification is unsettled in the jurisprudence and warrants appellate intervention.

### III. CONCLUSION

10. For the reasons set out above, the Application should be dismissed.

Word Count: 1043 words



Hildegard Uertz-Retzlaff  
Senior Trial Attorney

Dated this 27<sup>th</sup> day of March 2009  
At The Hague, The Netherlands

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<sup>10</sup> Decision, para.21.

<sup>11</sup> *Prosecutor v. Lukić and Lukić*, Decision on Milan Lukić's Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 Nov. 2008.