



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: 13 February 2009

Original: English

**IN THE TRIAL CHAMBER**

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

**Acting Registrar:** Mr. John Hocking

**Decision of:** 13 February 2009

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC***

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**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL  
DECISION ON ADEQUATE FACILITIES**

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**Office of the Prosecutor:**

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

**The Accused:**

Mr. Radovan Karadžić

**THIS TRIAL CHAMBER** of the 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 (“Tribunal”) is seised of the Accused’s “Application for Certification to Appeal Decision on Adequate Facilities”, filed on 6 February 2009 (“Application”), and the “Prosecution Submission on Application for Certification to Appeal Decision on Adequate Facilities”, filed on 12 February 2009 (“Submission”), and hereby renders its decision thereon.

### **I. Brief procedural background**

1. On 28 January 2009, the Trial Chamber issued its “Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates” (“Decision”), in which it denied a motion of the Accused<sup>1</sup> in which he requested, first, an order that Registrar authorise, and remunerate accordingly, highly qualified legal associates to assist in the preparation of his defence; and second, a judicial review of both the Registry scheme<sup>2</sup> for determining such remuneration, and a decision made by the Registrar pursuant to that policy in respect of the Accused.<sup>3</sup> In the Decision, the Trial Chamber concluded that a general review of the Remuneration Scheme was not warranted, and that the Registrar, in making the Remuneration Decision, had not fallen below the standard for proper administrative decision-making as set out by the Appeals Chamber in *Prosecutor v. Kvočka et al.*<sup>4</sup> In making the Decision, the Trial Chamber also considered that the Remuneration Decision would not impinge on the Accused’s fair trial rights pursuant to Article 21(4) of the Statute of the Tribunal (“Statute”) and the guidance provided by the Appeals Chamber in *Prosecutor v. Krajišnik*.<sup>5</sup> The Decision was intimated to the Accused in B/C/S on 5 February 2009.

### **II. Submissions**

2. In the Application, the Accused, pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), requests certification for interlocutory appeal of the Decision. The Accused contends that the Decision deprives him “of ‘related legal consultation’

<sup>1</sup> Motion for Adequate Facilities and Equality of Arms: Legal Associates, 25 November 2008.

<sup>2</sup> See Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused, 28 September 2007 (“Remuneration Scheme”).

<sup>3</sup> Decision made by the Registrar to assign legal assistants to the Accused and to remunerate them according to the Remuneration Scheme, conveyed to the Accused in a letter from the Head of the Office of Legal Aid and Detention Matters, dated 16 October 2008 (“Remuneration Decision”); see Decision, para. 2.

<sup>4</sup> Decision, paras 27, 28, 37; see *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/I-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić”, 7 February 2003, para. 13.

<sup>5</sup> See *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and Prosecution Motion, 11 September 2007 (“Krajišnik Decision”), paras 41–42.

from experienced lawyers ... who cannot afford or be expected to work on [the Accused's] case at the rate of support staff".<sup>6</sup> The Accused submits that such deprivation will "will diminish his ability to have a fair trial", since it will "substantially affect his ability to bring legal challenges ..., to prepare for cross-examination of high level witnesses, and to focus his defence on issues which an experienced advisor can assist him in identifying and rebutting".<sup>7</sup> The Accused submits that Article 21(4) of the Statute provides the link "between adequate representation and fair conduct of the proceedings".<sup>8</sup> The Accused argues that the Decision assesses whether a determination by the Registrar on the funding of defence assistance impinges on fair trial rights, and therefore "undoubtedly involves an issue intimately connected with the fair conduct of the proceedings".<sup>9</sup> The Accused also submits that "without remuneration for the quality of legal assistance he requires", there will be "delays in his trial preparation and ability to react to events during the trial", and that "[w]itnesses will not be able to be met, pleadings may go unanswered, evidence will remain undiscovered, and trial dates will be pushed back".<sup>10</sup>

3. The Accused further submits that "if the Trial Chamber is found to have erred in its decision in an appeal from final judgement, the damage to the Accused's fair trial rights would be irreparable".<sup>11</sup> The Accused is of the view that, given the issue turns on the Appeals Chamber ruling in *Prosecutor v. Krajišnik*, the Appeals Chamber is in the best position to ensure that the case proceeds on the correct legal footing, and that it would "materially advance the proceedings to have that interpretation before, rather than after, the trial".<sup>12</sup> The Accused submits that similar issues have been found to meet the test for certification in other cases.<sup>13</sup>

4. In the Submission, the Prosecution states that it does not take a position on the merits of the Application.<sup>14</sup> However, the Prosecution submits that, in order to obtain certification, the Accused is required to "identify an error in the Trial Chamber's decision", and that he has failed to do so.<sup>15</sup> The Prosecution submits that the basis for the Application is the Accused's claim that the Trial Chamber "rejected [his] contention that the Registrar misinterpreted and misapplied' the *Krajišnik* Decision".<sup>16</sup> The Prosecution states that in making the Decision the Trial Chamber took into account various considerations, and that its approach "accords with

<sup>6</sup> Application, para. 5.

<sup>7</sup> Application, para. 6.

<sup>8</sup> Application, para. 7.

<sup>9</sup> Application, para. 8.

<sup>10</sup> Application, para. 9.

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

<sup>12</sup> Application, paras 10–11.

<sup>13</sup> Application, paras 12–16.

<sup>14</sup> Submission, para. 1.

<sup>15</sup> Submission, para. 1.

principles governing the scope of judicial review of an administrative decision established by the Appeals Chamber in *Prosecutor v. Kvočka*.<sup>17</sup> The Prosecution submits that “[n]o suggestion is made by the Accused that the Trial Chamber failed to abide by the standard set in *Kvočka*”; “[r]ather, the Accused seeks a rehearing of his motion before the Appeals Chamber because he disagrees with the Trial Chamber’s interpretation of the *Krajišnik* Decision”, and suggests that this is not the purpose of further appellate review.<sup>18</sup>

### III. Applicable law

5. According to the Rules, decisions on motions other than preliminary motions are without interlocutory appeal save with certification by the Trial Chamber.<sup>19</sup> Rule 73 governs the exercise of the Chamber’s discretion to grant certification for an interlocutory appeal.<sup>20</sup> Rule 73(B) requires that two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (a) the decision in question involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.<sup>21</sup>

6. This Trial Chamber has previously held that “even when an important point of law is raised ..., the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied”;<sup>22</sup> furthermore, other Trial Chambers have held that “even where both requirements of Rule 73(B) are satisfied, certification remains in the discretion of the Trial Chamber”.<sup>23</sup> A request for certification is “not concerned with whether a decision was correctly reasoned or not. That is a matter for appeal, be it an

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<sup>16</sup> Submission, para. 2.

<sup>17</sup> Submission, para. 2.

<sup>18</sup> Submission, para. 3.

<sup>19</sup> Rule 73(B).

<sup>20</sup> *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 (“*Strugar* Decision”), para. 2.

<sup>21</sup> *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber’s Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008 (“*Lukić* Decision”), para. 42; *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-PT, Decision on Prosecution’s Request for Certification for Appeal of Decision on Vladimir Lazarević and Sreten Lukić’s Preliminary Motions on Form of the Indictment, 19 August 2005, p. 3; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005 (“*Milošević* Decision”), para. 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 12 January 2005 (“*Halilović* Decision”), p. 1.

<sup>22</sup> *Halilović* Decision, p. 1.

<sup>23</sup> *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4; *Strugar* Decision, para. 2; *Prosecutor v. Popović*, IT-05-88-T, Decision

interlocutory appeal or one after final Judgement has been rendered. Rule 73(B) concerns the fulfilment of two criteria, after which the Trial Chamber may decide to certify an interlocutory appeal”.<sup>24</sup>

#### IV. Discussion

7. Although one Trial Chamber referred to by the Prosecution in its motion did, in 2003, require that the moving party specify “an error” in the impugned decision in order to justify certification,<sup>25</sup> this Trial Chamber is of the view that the test in Rule 73(B) does not require the identification of such an error. Nor does a decision on certification require the Trial Chamber to engage in a judicial review of its own initial decision, as the Prosecution’s Submission appears also to suggest. It is indicated, by both the Rules and the relevant case law, that the test set out in Rule 73(B) is the exclusive basis for certifying an issue for interlocutory appeal.<sup>26</sup> The Trial Chamber will therefore look only to the two elements of that test in determining whether certification is warranted.

8. The Trial Chamber accepts that the issue of the lawfulness of the level of remuneration provided to the self-represented Accused’s legal assistants is one that may significantly affect the fair trial of the Accused. The Trial Chamber considers that resolution of the issue by the Appeals Chamber at this stage would materially advance these proceedings. The Trial Chamber concludes that the legal standard for certification of an interlocutory appeal has been satisfied, and will exercise its discretion to grant the Application.

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on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2001, p. 1.

<sup>24</sup> *Lukić* Decision, para. 42, *Milošević* Decision, para. 4.

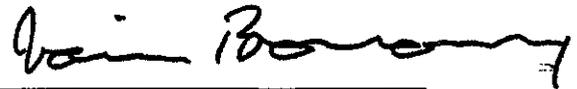
<sup>25</sup> See *Prosecutor v. Strugar*, Case No. IT-01-42-PT, Decision on the Defence’s Request for Certification to Appeal the Trial Chamber’s Decision dated 26 November 2003 on the Prosecution’s Motion for Separate Trial and Order to Schedule a Pre-Trial Conference and the Start of Trial Against Pavle Strugar, 12 December 2003, para. 6. The other authorities to which the Prosecution refers do not support this conclusion: see *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Milivoj Petković’s Application for Certification to Appeal Decision on Motions Alleging Defect in Form of Indictment, 19 September 2005, in which the Defence pled legal and factual errors in the impugned decision but the application was denied on the basis that it did not meet the test for certification set out in the Rules; see also *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5, where the Appeals Chamber ruled, where the impugned decision was made pursuant to an exercise of discretion by the Trial Chamber and once certification had been granted to appeal, that the appellant must identify a “discernible error” in his submissions to the Appeals Chamber.

<sup>26</sup> See *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Prosecution Request for Certification for Appeal of Decision of 25 May 2006 on Lead Counsel’s Assignment of Mr Orsat Miljenić as *Pro Bono* Co-Counsel for the Accused Petković, 23 June 2006, p. 3 (“Rule 73(B) of the Rules states that a Trial Chamber can only certify an interlocutory appeal after having ascertained that two conditions are met”.); *Halilović* Decision, p. 1 (“Rule 73(B) requires [that] two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal”.); *Strugar* Decision, para. 2 (“Rule 73 of the Rules of Procedure and Evidence governs the exercise of the Chamber’s discretion to grant certification for an interlocutory appeal.”).

**V. Disposition**

9. Accordingly, the Trial Chamber, pursuant to Rules 54 and 73(B) of the Rules, hereby **GRANTS** the Application.

Done in English and French, the English text being authoritative.



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Judge Iain Bonomy  
Presiding

Dated this thirteenth day of February 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**