THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-AR73.2

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Date: 14 April 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

CONSOLIDATED REPLY TO THE PROSECUTION RESPONSE AND TO THE REGISTRAR'S SUBMISSION REGARDING RADOVAN KARADZIC'S APPEAL OF THE TRIAL CHAMBER'S DECISION ON ADEQUATE FACILITIES

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadzic

1. On 13 March 2009, the prosecution filed its *Response to Karadzic's Appeal of the Trial Chamber's Decision on Adequate Facilities*.[1] The prosecution limited its response to challenging the applicable standard for appellate review of the Impugned Decision,[2] and to disputing Dr. Karadzic's characterization of the *Krajisnik* Appeals Decision.[3] On 30 March 2009, more than three weeks after Dr Karadzic filed his appeal,[4] the Registrar filed its *Registrar's Submissions Pursuant to Rule 33(B) Regarding Radovan Karadzic's Appeal of the Trial Chamber's Decision on Adequate Facilities*.[5] In these lengthy submissions, the Registrar asserts that the Impugned Decision was correct, and Dr Karadzic's grounds of appeal are based on a misunderstanding of the *Krajisnik* Appeals Decision and should be dismissed.

2. The submissions of the parties and the Registrar reveal the following: at its core, this interlocutory appeal turns on the Appeals Chamber's intention behind its finding that the Tribunal "should adequately reimburse legal associates for their coordinating work and *for related legal consultation*."[6] In short, is the "adequate facilities" provision of Article 21(4)(b) of the Statute limited to the provision of support staff to a self-represented accused, as the Registrar insists, or is a high-ranking accused faced with the complex and fast-paced litigation at this Tribunal, and the need for contact with high level authorities, entitled to legal consultation, as Dr. Karadzic has requested?

3. On this point, Dr. Karadzic respectfully draws the attention of the Appeals Chamber to the recent statement of His Honour Judge Bonomy, presiding judge in the current proceedings. In a status conference held on 2 April 2009, Judge Bonomy specifically noted the assistance provided to Dr Karadzic in drafting legal submissions, which the Chamber had found "helpful"

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[1] *Response to Karadzic's Appeal of the Trial Chamber's Decision on Adequate Facilities*, 13 March 2009 ("Prosecution Response") (Translation received by Dr Karadzic on 8 April 2009).
[2] *Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates*, 28 January 2009 ("Impugned Decision").
[3] *Prosecutor v Krajisnik*, IT-00-39-A, *Decision on Krajisnik Request and Prosecution Motion*, 11 September 2007 ("*Krajisnik* Appeal Decision").
[4] *Appeal of the Trial Chamber's Decision on Adequate Facilities*, 5 March 2009 ("Appeal Brief").
[5] *Registrar's Submissions Pursuant to Rule 33(B) Regarding Radovan Karadzic's Appeal of the Trial Chamber's Decision on Adequate Facilities*, 30 March 2009 ("Registrar's Submissions") (Translation received by Dr Karadzic on 8 April 2009).
[6] *Prosecutor v Krajisnik*, IT-00-39-A, *Decision on Krajisnik Request and Prosecution Motion*, 11 September 2007 ("*Krajisnik* Appeal Decision"), para. 42 (emphasis added).

and "instructive".[7] This assistance has been provided by high-level and experienced practitioners who cannot be expected, and cannot afford to continue to assist Dr Karadzic when paid at the level of support staff. Judge Bonomy's comments provide a practical illustration of the rationale behind providing self-represented accused with legal associates, being to provide helpful and instructive assistance to the Chamber on complex legal issues. This cannot be reconciled with the prosecution or Registry position.

4. Having offered this initial observation, Dr Karadzic will briefly respond to the main arguments contained in the Prosecution Response and the Registrar's Submissions. As a starting point, the prosecution,[8] the Registry[9] and Dr. Karadzic all agree[10] that the applicable standard for a first instance review of administrative rulings is that set out in *Kvocka*, meaning that the decision will only be overturned if the Registrar:[11]

> (a) has failed to comply with the requirements of the relevant legal authorities; (b) has failed to observe the basic rules of natural justice and procedural fairness towards the person affected by the decision; (c) has taken into account irrelevant material or failed to take into account relevant material; or (d) has reached a conclusion that is unreasonable, in the sense that it is a conclusion which no sensible person who has properly applied his mind to the issue could have reached.

5. The prosecution is then alone in asserting that when the Appeals Chamber is seized with an interlocutory appeal of a Trial Chamber decision reviewing an administrative ruling, it should again apply the *Kvocka* standard to its review of the Trial Chamber decision, and depart from its established standard of review in interlocutory appeals.[12] The Registrar does not adopt the prosecution approach, but rather makes the more general argument that "*the question of whether*

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[7] Transcript, Status Conference, 2 April 2009: "It's also important not to ignore the fact that you have had a significant number of pro bono legally qualified personnel providing assistance to you to the point that the submissions made by you have been many; they have been helpful; they have been instructive. So the picture that the Chamber has is one of an accused person at the moment doing a pretty good job of representing himself on legal challenges."
[8] Prosecution Response, para. 2.
[9] Registrar's Submissions, para. 15.
[10] Appeal Brief, para. 12.
[11] *Prosecution v. Kvocka et al.*, IT-98-30/1-A, *Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic*, 7 February 2003, para. 13.
[12] Prosecution Response, para. 3.

a judicial decision on review can be subjected to appellate scrutiny is not free from doubt."[13] The Registrar's argument can be dismissed on the basis that an interlocutory appeal from the Impugned Decision has been granted in this case.

6. For its part, the prosecution argues that to allow the Appeals Chamber to apply its established standard of review to a Trial Chamber's review of an administrative decision would "*invite Appeals Chamber secondary review from all judicial reviews of administrative decisions*".[14] This argument is baseless. A Trial Chamber's first instance review will only be subject to appellate review if the all the conditions for certification to appeal pursuant to Rule 73(B) can be fulfilled. Absent this criteria being met, a decision reviewing an administrative decision of the Registrar can not be subject to an interlocutory appeal. It is certainly not that case that all reviews of administrative decisions will pass straight to the Appeals Chamber.

7. The prosecution then argues that "*past decisions provide limited guidance on the standard applicable on a second review of administrative decision.*"[15] On the contrary, it is the position of Dr. Karadzic that past decisions are clear in illustrating that the Appeals Chamber has not departed from its authoritative and established standard when reviewing Trial Chamber decisions which themselves review an administrative ruling of the Registrar.

8. In addition, the jurisprudence cited by the prosecution does not support its argument that the *Kvocka* standard should be applied by the Appeals Chamber in this case. The prosecution admits that in the first two cited decisions, the Appeals Chamber was the court of first review of a Registrar's ruling. As such, they provide no guidance. As regards the cited *Ojdanic* decision,[16] Dr Karadzic does not agree that it suggests that the Appeals Chamber was applying the *Kvocka* standard in its review of the Trial Chamber decision. The *Kvocka* standard is certainly referred to within the decision, but in the context of the appellant's arguments.[17] It is respectfully submitted that had Appeals Chamber decided to hold itself to the standard for review

[13] Registrar's Submissions, para. 17.
[14] Prosecution Response, para. 3.
[15] Prosecution Response, para. 4.
[16] Prosecution Response, para. 5.
[17] *Prosecutor v. Milutinovic et al.*, IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds*, 13 November 2003, para. 12.

of administrative rulings, and depart from its established standard for interlocutory review of Trial Chamber decisions, this would have been explicitly stated. It was not. The *Nahimana* decision also provides no assistance to the prosecution, as the Appeals Chamber was reviewing a decision of the President, rather than that of a Trial Chamber. The Appeals Chamber was overt in substituting the "Registrar" for the "President" in its application of the *Kvocka* jurisprudence, and was therefore clear in its application this standard to the President's decision.[18] It has done no such thing when reviewing a Trial Chamber's review of an administrative ruling.

9. In any event, even if the Appeals Chamber decides to articulate a new standard of review in this case, and finds that the applicable standard through which to assess the Impugned Decision is that of *Kvocka*, and not its established standard for appellate review, Dr. Karadzic repeats and relies upon the arguments made in his Appeal Brief, and argues that the Trial Chamber failed erred in law in interpreting the relevant authorities, failed to act with procedural fairness towards the accused, and reached a conclusion that no reasonable Trial Chamber could have made on the material before it. Even under the *Kvocka* standard of review, the arguments set out by Dr. Karadzic in his Appeal Brief warrant the overturning of the Impugned Decision in this case.

10. The prosecution then argues that Dr. Karadzic's arguments as to the misapplication of the *Krajisnik* Appeals Decision by the Registrar and the Trial Chamber are based on a mischaracterization of the decision itself. It then sets out several excerpts from the *Krajisnik* Appeals Decision, emphasizing several portions of text in italics, but without showing how its interpretation of this text is superior to that of Dr. Karadzic. Dr. Karadzic therefore repeats and relies on the arguments contained in his Appeal Brief, and welcomes the opportunity for clarification of this issue by the Appeals Chamber itself.

11. As regards the Registrar's Submissions, the first recurrent theme of these extensive submissions is the distinction the Registrar draws between legal associates and counsel, culminating in his assertion that "the Accused wants his associates to be paid as defence

[18] *Prosecutor v. Ferdinand Nahimana et al.*, ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel*, 23 November 2006, para. 9.

counsel."[19] This is not the case. Dr Karadzic has maintained that for the limited and defined tasks with which he requires assistance, his legal associates should be paid at a rate which reflects their experience and skills. He has never asserted that they should receive an overall amount equivalent to that of counsel representing accused, who are tasked with conducting all aspects of an accused's defence. The Registry's assertion blurs this distinction.

12. The Registrar also appears to be submitting that a self-represented accused is precluded from making arguments as to the fairness of the proceedings, as any limitations in the presentation of this defence he has brought upon himself.[20] This position stands in opposition to the Appeals Chamber's finding that *"[w]here an accused elects self-representation, the concerns about the fairness of the proceedings are, of course, heightened, and a Trial Chamber must be particularly attentive to its duty of ensuring that the trial be fair."*[21] It is not the case that an accused who elects to represent himself is barred from alerting the Trial Chamber to aspects of the trial process which impinge on the fairness of the proceedings.

13. By contrast, Dr Karadzic is seeking to illustrate that self-representation, being a right afforded to accused at the International Tribunals, can be effected in a way that is meaningful and does not make a mockery of the trial process, or lead to an unbalanced presentation of the evidence. It is in the interests of the Chamber, the parties, and the Tribunal that Dr Karadzic's defence is conducted in a manner which can best assist the Tribunal in creating an accurate record of events in question; which ensures that the Chamber has the best evidence before it; and which allows for a full hearing on the important legal issues which arise in this case. It is not the place of the Registry to block the funding which would facilitate this.

14. The Registry's administration of Dr. Karadzic's case so far has repeatedly shown that its misinterpretation of the decision of this Chamber in *Krajisnik* and decision to authorize only support staff to assist a self-represented accused is unworkable and impractical. It initially refused to allow access to the prosecution's electronic disclosure suite (EDS) to members of Dr.

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[19] Registrar's Submissions, para. 45.
[20] Registrar's Submissions, paras 52, 54.
[21] *Prosecutor v. Slobodan Milosevic*, IT-02-54-AR73.6, *Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case*, 20 January 2004, para. 19.

Karadzic's defence team because, with only support staff, there was no one to be held responsible under the Code of Conduct, as there was in the case of an accused with a lead counsel.[22] Then it refused to authorize Dr. Karadzic to employ an associate who had worked on a related case on the ground that the potential conflict of interest could not be alleviated since there was no one to be held responsible under the Code of Conduct, as there was in the case of an accused with a lead counsel.[23]

15. In fact, Dr. Karadzic has on his team a lawyer who meets the criteria of Rule 45, is a member of the ICTY Association of Defence Counsel, and is fully subject to the Code of Conduct. The refusal of the Registry to remunerate that lawyer to perform the functions of ensuring against the unlawful dissemination of confidential information has resulted in the disparate treatment of a self-represented accused's ability to employ experienced personnel like Mr. Sladojevic and limited his team's access to the enormous amount of disclosure material in his case. These concrete examples show how the Registrar's misinterpretation of the *Krajisnik* decision has impacted on the right of the accused to a fair and expeditious trial.

16. In addition, the experience of the pre-trial stage has so far shown that Dr. Karadzic is in need of lawyers who can make high-level contacts with governments and interview prominent witnesses. He has been granted interviews with a United States Ambassador[24] and has been denied the right to interview a former Foreign Minister himself, necessitating that this task be done by a member of his team.[25] In addition, the Registrar refuses to serve his requests for information to governments and international organizations through diplomatic channels.[26]

17. These developments demonstrate that the Registrar's restrictive interpretation of the *Krajisnik* decision is both erroneous and impractical. Dr Karadzic is not seeking an excessive or unlimited amount of funding. Nor is he requesting a fully-paid defence team of counsels and assistants working around the clock on the Registry's budget. He accepts the limitations of his

[22] See *Registrar's Submission Pursuant to Rule 33(B) on Access by the Accused's Defence Team to Confidential Information* (23 February 2009)
[23] See *Registry Submission Regarding the Denial of Assignment of Marko Sladojevic* (27 March 2009) at para. 11
[24] *Orders Pursuant to Rules 54 and 70* (5 March 2009) at paras. 2-3
[25] *Decision on Accused Motion for Interview of Defence Witness and Third Motion for Disclosure* (9 April 2009) at para. 20
[26] See *Motion for Service of Documents* (6 April 2009)

choice to self-represent,[27] but has always represented with frankness and candour that there are some tasks that he simply can not perform. These tasks have been defined and explained.[28] They do not illustrate that Dr Karadzic is unable to represent himself, as was suggested in the Registrar's Submissions,[29] but rather are an honest reflection of the assistance required as he continues to make all efforts to participate in a meaningful way in his trial while exercising his right to self-representation. Experienced lawyers are required to perform these tasks. They should be adequately compensated.

18. In his Separate Opinion in the *Krajisnik* case, Judge Shahabuddeen said that "the Tribunal, as a judicial body established on behalf of practically the whole of the international community, has to satisfy the highest possible standards." The Registrar's refusal to provide for facilities to a self-represented accused above that of support staff falls short of that standard.

Relief Sought

19. For all the reasons set out above, the Appeals Chamber is respectfully requested to quash the Impugned Decision and find that the Registrar has misinterpreted its decision in *Krajisnik*. It should direct the Registrar to adequately remunerate those associates providing legal consultation to Dr. Karadzic.

Word count: 2,786

Respectfully submitted,

Radovan Karadzic[30]

[27] Appeal Brief, para. 48.
[28] Appeal Brief, para. 40.
[29] Registrar's Submissions, para. 55.
[30] Dr. Karadzic wishes to acknowledge with gratitude the assistance of Kate Gibson, PHD Candidate at the University of Queensland (Australia) in the preparation of this reply.