

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 9 December 2014

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

THIRD MOTION TO RE-OPEN DEFENCE CASE:
FADIL BANJANOVIC DOCUMENT

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves the Trial Chamber for leave to re-open his case in order to secure the admission of a document relating to the credibility of Prosecution Witness Fadil Banjanovic.¹ Because the document was provided pursuant to Rule 70, the document is proposed to be admitted under seal.²

Legal Considerations

2. This Chamber has already set forth the requirements for re-opening a party's case in its *Decision on Prosecution Motion to Re-Open Its Case* (20 March 2014). The Chamber held that:

- (A) A party may seek leave to re-open its case to present "fresh" evidence, that is, evidence that could not be obtained by the moving party by the conclusion of its case-in-chief despite exercising all reasonable diligence to do so.
- (B) The primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case-in-chief of the party making the application.
- (C) The Chamber has the discretion, pursuant to Rule 89(D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. The following factors are relevant to the exercise of the Chamber's discretion: (i) the advanced stage of the trial; (ii) the delay likely to be caused by the proposed re-opening and the suitability of an adjournment in the overall context of the trial; as well as (iii) the probative value of the evidence to be presented.

Timeliness

3. On 17 November 2014, the prosecution disclosed, for the first time, a document relating to the credibility of Fadil Banjanovic.³

4. The prosecution has indicated that the material had been in its possession for ten years, but not been earlier disclosed to Dr. Karadzic due to "human error".⁴

¹ A copy of the document is attached as Confidential Annex "B" to the *95th Motion for Finding of Disclosure Violation and for Exclusion of Testimony of Fadil Banjanovic* (19 November 2014)

² Dr. Karadzic requests that the prosecution contact the provider and request that the document be admitted publicly.

³ *95th Motion for Finding of Disclosure Violation and for Exclusion of Testimony of Fadil Banjanovic* (19 November 2014) at para. 5

5. Through no fault of Dr. Karadzic, and owing to the prosecution's violation of its obligation to disclose exculpatory evidence pursuant to Rule 68, the Banjanovic document could not be presented before the Trial Chamber ruled on the prosecution's motion to admit Mr. Banjanovic's testimony pursuant to Rule 92 *bis*,⁵ or even by the time Dr. Karadzic's case-in-chief closed in May 2014.

Probative Value of the Document

6. The probative value of the document is discussed in Confidential Annex "A" to the 95th *Motion for Finding of Disclosure Violation and for Exclusion of Testimony of Fadil Banjanovic* (19 November 2014) so as not to reveal its contents publicly.

7. In its *Decision on the Accused's 95th Disclosure Violation Motion* (5 December 2014), the Trial Chamber found that "there are certain portions which could affect the credibility of Banjanovic."⁶ Therefore, the document has probative value.

8. The Trial Chamber went on to find that the information contained in the document was not of any important significance to the assessment of Banjanovic's credibility.⁷ However, this is a matter going to the weight, and not the admissibility, of the evidence and does not preclude admission of the document as a trial exhibit.

The Need to Ensure a Fair Trial

9. The probative value of the document is not outweighed by the need to ensure a fair trial. The document would have been admitted in Dr. Karadzic's case-in-chief were it not for the fact that the prosecution violated its disclosure obligation by failing to disclose it until after the defence case had closed. Therefore, the fact that re-opening of the case is required to admit the document at this stage cannot be held against Dr. Karadzic.

10. It would be error to consider whether exceptional circumstances exist which would warrant the Chamber to exercise its discretion to re-open the case in the interests of justice when the fact that the document is being sought for admission after the defence case closed is solely due to the prosecution's violation of its disclosure obligation. Rather, the admission of the document must be considered as if it were being offered

⁴ *Prosecution Response to 95th Motion for Finding of Disclosure Violation and for Exclusion of Testimony of Fadil Banjanovic* (2 December 2014) at para. 1

⁵ *Decision on Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony pursuant to Rule 92 bis (Witnesses for Eleven Municipalities)*(10 November 2009) at paras. 30-33

⁶ para. 10

⁷ para. 11

during the course of the trial.


11. In any event, re-opening the defence case to admit the cable would not cause any delay. Dr. Karadzic proposes that the document be admitted from the bar table. The Trial Chamber has already found that the document is relevant. Its authenticity is not in dispute, having been provided to the prosecution directly by the agency that created it. And it fits into the defence case by undermining the credibility of prosecution witness Fadil Banjanovic, whose evidence of the forcible deportation of the Bosnian Muslim population of Kozluk village the defence challenges as unreliable and untrue.

12. Should the Trial Chamber believe that cross-examination is required concerning the information provided in the document, Dr. Karadzic would be prepared to call the author of the document as a witness if permitted to do so by the provider. Such testimony would be extremely brief and would not significantly delay the Trial Chamber's deliberations.

13. Therefore, the discretionary factors weigh in favor of allowing Dr. Karadzic to re-open his defence case and admitting the document from the bar table.

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Respectfully submitted,



Radovan Karadzic

