

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: 19 December 2014

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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APPLICATION FOR CERTIFICATION TO APPEAL  
DENIAL OF THIRD MOTION TO RE-OPEN DEFENCE CASE

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The Office of the Prosecutor:

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully applies for certification, pursuant to Rule 73(B), to appeal the Trial Chamber's *Decision on Accused's Third Motion to Re-Open Defence Case* (17 December 2014)(the "Impugned Decision")

2. Rule 73(B) provides that:

Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

3. In the Impugned Decision, the Trial Chamber rejected Dr. Karadzic's contention that:

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 during the course of the trial.<sup>1</sup>

4. The Trial Chamber stated that "the Chamber finds no legal basis for the Accused's assertion that given his Motion is based on a disclosure violation by the Prosecution, it would be an error to apply this test to determine the merits of the Motion."<sup>2</sup>

5. Dr. Karadzic contends that the two requirements for certification are met by the issue of whether an accused must demonstrate exceptional circumstances when seeking to re-open his case based upon material which he would have offered in his defence case but for the prosecution's disclosure violation.

6. First, he contends that the denial of the motion to re-open his case significantly affects the fair conduct of the proceedings in that it rewards the prosecution for its disclosure violations. The prosecution is in a better position for having failed to disclose the material than if it had disclosed the material in time for use during the defence case. That is unfair.

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<sup>1</sup> *Third Motion to Re-Open Defence Case: Fadil Banjanovic Document* (9 December 2014) at para. 10

<sup>2</sup> Impugned Decision at para. 13

7. The significance of this unfairness lies in the repeated nature of the disclosure violations that have occurred in this case and continue to occur. While the Chamber has already found the Banjanovic material to not be of much probative value, the cumulative effect of exclusion of all items sought to be admitted after the defence case closed due to prosecution disclosure violations has been and will be significant.

8. The issue also affects the expeditiousness of the proceedings. Indeed, it was in part on that basis that the Trial Chamber denied the motion to re-open, finding that “the Chamber...considers that any attempt to re-open the case to secure the admission of the Document would cause an unjustifiable delay in proceedings...”<sup>3</sup>

9. In the *Popovic* case, certification to appeal the decision to allow the prosecution to re-open its case was granted on the basis that allowing a party to reopen its case “will necessarily lengthen the trial—albeit minimally.”<sup>4</sup> The same considerations apply to whether the defence is allowed to re-open its case. Therefore certification to appeal should likewise be granted,

10. As to the second prong, Dr. Karadzic contends that an immediate resolution by the Appeals Chamber will materially advance the proceedings. The same issue has already been raised in the second motion to re-open the defence case, and will likely recur in connection with a fourth motion to re-open the defence case based upon the document which is the subject of the *96<sup>th</sup> Motion for Finding of Violation of Disclosure Violation and for Exclusion of Evidence* (11 December 2014). In addition, considering that the prosecution has represented that its search for Rule 68 material is not yet completed, even at this stage of the case, the issue is likely to recur throughout the Trial Chamber’s deliberations.

11. If Dr. Karadzic is found to have had a right to re-open his case without showing exceptional circumstances, the proceedings would have continued on the wrong footing for the remainder of the Trial Chamber’s deliberations and multiple documents will go unconsidered by the Trial Chamber. While it might be possible for the Appeals Chamber to correct the error on review from the final judgement by admitting the disputed evidence on appeal, the delay in the Appeals Chamber in issuing its final

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<sup>3</sup> Impugned Decision at para. 14

<sup>4</sup> *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Popovic’s Motion for Certification of Decision on the Motion to Reopen the Prosecution’s Case* (27 May 2008) at p. 4

judgement due to ancillary motions to admit additional evidence, could be avoided by settling the issue without any delay at this time through an interlocutory appeal where no stay of the Trial Chamber's deliberations is being sought.<sup>5</sup>

12. Trial Chambers have found the second prong of Rule 73(B) to be met where the issue is one that may arise repeatedly.<sup>6</sup> Trial Chambers have also found that issues relating to whether a party may be allowed to re-open its case, or introduce fresh evidence after its case has closed, meet both prongs of the test for certification to appeal.<sup>7</sup>

13. For all of these reasons, Dr. Karadzic respectfully requests that the Trial Chamber grant him certification to appeal its denial of his third motion to re-open his defence case.

Word count: 1158

Respectfully submitted,



Radovan Karadzic

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<sup>5</sup> See *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Cermak and Markac Defence Requests for Certification to Appeal the Trial Chamber Decision of 21 April 2010 to Reopen the Prosecution Case* (10 May 2010) at para. 9

<sup>6</sup> See, for example, *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyibashi's Request to Cross-Examine Ntahobali's 1997 Custodial Interviews* (1 June 2006) at para. 27

<sup>7</sup> *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Popovic's Motion for Certification of Decision on the Motion to Reopen the Prosecution's Case* (27 May 2008); *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Cermak and Markac Defence Requests for Certification to Appeal the Trial Chamber Decision of 21 April 2010 to Reopen the Prosecution Case* (10 May 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Joint Motion for Certification to Appeal the Decision on Presentation of Documents by the Prosecution in Cross Examination of Defence Witnesses* (9 January 2009)