

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-PT

IN TRIAL CHAMBER No. 3

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

Acting Registrar: Mr. John Hocking

Date Filed: 2 March 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPLICATION FOR CERTIFICATION TO APPEAL
DECISIONS ON EXTENSION OF TIME AND
RECONSIDERATION OF MOTION TO AMEND INDICTMENT

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

The Accused:
Radovan Karadzic

1. Dr. Radovan Karadzic respectfully applies, pursuant to Rule 73(B) for certification to appeal the Trial Chamber's *Decision on Accused Motion for Extension of Time to File Response to Prosecution Motion for Reconsideration* (25 February 2009) and its subsequent decision granting the prosecution's motion for reconsideration of its decision on the amended indictment.

Procedural History

2. On 16 February 2009, the Trial Chamber granted the *Prosecution Motion to Amend the First Amended Indictment* with the exception of three incidents which it found had not been supported by sufficient evidence to make out a *prima facie* case.¹

3. On 17 February 2009, the prosecution filed a motion for reconsideration as to one of the incidents.²

4. On 18 February 2009, the Trial Chamber denied the request for stay and ordered the Second Amended Indictment filed that day.³

5. At the status conference of 20 February 2009, the Pre-Trial Judge ordered that Dr. Karadzic file an expedited response to the prosecution motion for reconsideration by 25 February 2009.⁴

6. On 24 February 2009, Dr. Karadzic filed a request for extension of time to respond to the motion for reconsideration.⁵

7. On 25 February 2009, the Trial Chamber denied the motion for extension of time and ordered the response to be filed that day.⁶ This decision was not intimated to Dr. Karadzic until 26 February 2009, at which time it was too late to file a response.

8. Subsequently, from media reports, Dr. Karadzic has learned that the Trial Chamber granted the prosecution's motion for reconsideration without any response from him. He has not yet been served with that decision.

¹ *Decision on Prosecution Motion to Amend the First Amended Indictment* (16 February 2009)
Prosecution Motion for Reconsideration of the Trial Chamber's Decision on Prosecution Motion to Amend the First Amended Indictment and Urgent Request for a Stay of the Trial Chamber's Order to File a Second Amended Indictment (17 February 2009)

³ *Order on Prosecution Urgent Requests for Stay of the Trial Chamber's Order to File a Second Amended Indictment* (18 February 2009)

⁴ The Response would have otherwise been due on 5 March--14 days after service of the prosecution's motion for reconsideration on Dr. Karadzic.

⁵ *Motion for Extension of Time to File Response to Prosecution Motion for Reconsideration* (24 February 2009)

⁶ *Decision on Accused Motion for Extension of Time to File Response to Prosecution Motion for Reconsideration* (25 February 2009)

Argument

9. 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.

10. This is now the third time in these nascent proceedings that the Trial Chamber has decided a motion without waiting for a response from the accused.⁷ Dr. Karadzic respectfully contends that this issue meets the test for certification to appeal set forth in Rule 73(B). The decision of the Trial Chamber to decide the merits of motions without affording him an opportunity to be heard goes to the heart of Dr. Karadzic's right to a fair trial.

11. Article 20 of the Tribunal Statute provides, in pertinent part, that:

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

12. Article 21 of the Statute provides, in pertinent part, that:

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

...

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

⁷ See also *Application for Certification to Appeal Perisic Access Decision* (30 October 2008); *Application for Certification to Appeal Decision on Protective Measures* (5 November 2008)

13. In addition, the principle of *audi alteram partem* requires that a party to a proceeding before this Tribunal be given an opportunity to be heard on issues related to his case.⁸

14. Without arguing the merits of the issue sought to be appealed, it is clear that the issue itself—the right to be heard—and the reason Dr. Karadzic was not heard—denial of adequate facilities for his defence—all significantly affect his right to a fair trial.

15. Ironically, Dr. Karadzic must recognize that the issue significantly affects the expeditiousness of the trial as well. If the Trial Chamber is allowed to decide issues without hearing from Dr. Karadzic, it will be a very expeditious trial indeed.

16. Therefore, the issue sought to be appealed is one which significantly affects the fair and expeditious conduct of the trial. The first requirement of Rule 73(B) is therefore met.

17. The second requirement of Rule 73(B) is that the issue be one in which an immediate resolution by the Appeals Chamber may materially advance the proceedings. Since this is now the third time the Trial Chamber has decided an issue without waiting to hear from the accused, it appears that this issue is a recurring one, and that therefore, a decision by the Appeals Chamber on whether the Trial Chamber can decide issues without hearing from the Accused would materially advance the proceedings.

18. The inability of Dr. Karadzic to respond to the prosecution's motion for reconsideration in the expedited time-frame set by the Pre-Trial Judge is a direct result of decisions by the Registry to refuse assignment of the legal associate tasked with reviewing the supporting material, to remunerate his legal advisor at the rate of support staff, and to restrict the travel of the legal advisor to The Hague to three days per month. These issues, which remain unresolved, prevent the accused from effectively managing his defence and infringe upon his right to self-representation.

19. Until these issues are resolved, Dr. Karadzic is unable to receive sufficient legal advice and access to materials to be able to respond to substantive motions. If the

⁸ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for an Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion* (30 May 2006) at para. 3; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment* (3 May 2005) at paras. 11,13

Trial Chamber is of a mind to continue to forge ahead and decide issues relating to the case without hearing from the Accused, the issue ought to be decided by the Appeals Chamber immediately.

20. Waiting until after judgement for a decision on these issues by the Appeals Chamber risks upsetting the entire judgement over denial at this stage of fundamental issues of the right to be heard and the right to adequate facilities for one's defence.

21. Therefore, it is respectfully contended that the issue sought to be appealed satisfies the second requirement of Rule 73(B) in that an immediate determination by the Appeals Chamber may materially advance the proceedings.

22. A review of other decisions at the ICTY reveals that the requirements of Rule 73(B) were found to have been satisfied relating to issues of adequate time and facilities under Article 21(4)(b) of the Statute, including the necessity of translation of pleadings into the language of a self-represented accused⁹, the denial of additional time for defence to prepare¹⁰, and limitations on number of pages translated for the defence¹¹.

23. In addition, certification has also been granted relating to issues of the right to legal assistance under Article 21(4)(d) of the Statute including denial of self-representation¹² and consultation between an Accused and his counsel during his testimony¹³.

24. At the ICTR, Trial Chambers have held that where similar issues may arise during the proceedings, certification is appropriate because a decision by the Appeals Chamber may materially advance the proceedings.¹⁴ Concern for proceeding throughout the remainder of the case on an incorrect legal footing has been held to support a finding

⁹ *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Motion for Certification to Appeal the 11 December 2007 Decision* (15 January 2007)

¹⁰ *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Application for Certification on Interlocutory Appeal* (15 March 2005)

¹¹ *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prljak Defence Request for Reconsideration or for Certification to Appeal the Order of 16 May 2008* (11 June 2008)

¹² *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Request to Certify an Appeal Against Decision on Assignment of Counsel* (29 August 2006); *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel* (5 December 2006)

¹³ *Prosecutor v Prlic et al*, No. IT-04-74-T, *Order on the Mode of Examining an Accused Pursuant to Rule 85(C) of the Rules* (1 July 2008)

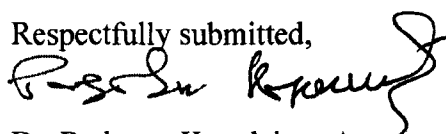
¹⁴ *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyibashi's Request to Cross-Examine Ntahobali's 1997 Custodial Interviews* (1 June 2006) at para. 27

that an immediate decision by the Appeals Chamber may materially advance the proceedings.¹⁵ Such is the situation with the Impugned Decision.

25. In conclusion, Dr. Karadzic respectfully requests that the Trial Chamber grant certification to appeal its decision to deny his request for an extension of time and to decide the prosecution's motion for reconsideration without hearing from him.

Word count: 1381

Respectfully submitted,



Dr. Radovan Karadzic

¹⁵ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements* (22 May 2006) at para. 6