

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: 20 March 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON ACCESS TO RULE 68 MATERIAL

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 Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities* (10 March 2009). The decision was served on Dr. Karadzic on 13 March 2009.

Procedural History

2. On 6 February 2009, after the prosecution refused to provide him with Rule 68 material on DVD or CD Rom, Dr. Karadzic filed his *Motion for Disclosure of Rule 68 Material*. The prosecution responded on 17 February 2009.¹ The Registrar made submissions on 5 March 2009.²

3. Meanwhile, on 23 February 2009, the Registrar raised the issue of access to confidential material by persons assisting Dr. Karadzic in a separate submission.³ Dr. Karadzic responded on 3 March 2009 and moved for reconsideration of the Trial Chamber's earlier decision on remuneration of his legal associates.⁴

4. On 10 March 2009, the Trial Chamber issued the Impugned Decision. It ruled, *inter alia*, that, despite the limited access afforded to those assisting the self-represented accused, the prosecution satisfied its Rule 68 obligations by placing material on the Electronic Disclosure Suite ("EDS"), segregating it, and notifying Dr. Karadzic of its existence. The Trial Chamber also encouraged Dr. Karadzic to request the Registry to approve an expansion of the number of people who would be allowed access to the EDS.

5. Dr. Karadzic's request for access to the EDS by the legal interns working for him on a *pro bono* basis had already been rejected by the Registry. However, following the Trial Chamber's decision, he once again requested access for three legal interns. No response has yet been received.

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

¹ *Prosecution Response to Karadzic's Motion for Disclosure of Rule 68 Material* (17 February 2009)

² *Registry Submission Regarding the Electronic Disclosure System* (5 March 2009)

³ *Registrar's Submission Pursuant to Rule 33(B) on Access by the Accused's Defence Team to Confidential Information* (23 February 2009)

⁴ *Response to Registrar's Submission on Access to Confidential Information and Motion for Reconsideration of Decision on Adequate Facilities* (3 March 2009)

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. The prosecution's duty to provide exculpatory evidence has been held to be of paramount importance to ensure the fairness of proceedings before the Tribunal.⁵ The disclosure of Rule 68 material has been said to be fundamental to the fairness of proceedings before the Tribunal.⁶ Therefore, the issue of the accused's functional access to exculpatory evidence significantly affects the fairness of the trial. The first requirement of Rule 73(B) is therefore met.

11. 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. The decision of the Trial Chamber that the prosecution can satisfy its Rule 68 requirement through the EDS is one of first impression at the ICTY and is based upon distinguishing an ICTR Appeals Chamber decision and another ICTY Trial Chamber decision which found that disclosure on the EDS was not adequate.

12. While the Chamber's reasons for distinguishing those decisions go to the merits of the appeal, the fact that the issue is unsettled in the jurisprudence demonstrates that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings. If the Chamber is later found to be erred, the entire trial would have been conducted on a footing which was unsound, thus jeopardizing the finality of any judgement.

13. The error in the Impugned Decision is that (1) most accused do not have access to the EDS and therefore disclosure in that format prejudices the ability of the accused to have access to this important material; and (2) for self-represented accused who do have access to the EDS, the Registry refuses access to those persons in the best position to help them.

14. In Dr. Karadzic's case, he will be prejudiced throughout the trial by the operation of this decision in conjunction with the Registrar's refusal to allow access to the EDS to persons whose role on the defence team make it necessary and appropriate for

⁵ *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005) at para. 20

⁶ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 188

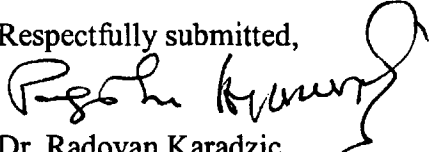
them to access the EDS and its limitation of access to the EDS to those team members it refuses to adequately remunerate—and who are thus able to only work part-time on Dr. Karadzic's case.

15. A Trial Chamber of the ICTR has already explicitly found, upon application by the prosecution, that the issue of whether the prosecution satisfies its Rule 68 obligation by placing material on the EDS met both criteria for certification to appeal.⁷ If the issue was worthy of an interlocutory appeal when sought by the prosecution, it should be equally subject to interlocutory appeal when sought by the Accused.

16. Therefore, Dr. Karadzic respectfully requests that the Trial Chamber grant certification to appeal the Impugned Decision

Word count: 878

Respectfully submitted,



Dr. Radovan Karadzic

⁷ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Certification of the Oral Decision of 16 February 2006 for Stay of Proceedings* (26 February 2006)