



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-95-5/18-T

Date: 15 January 2015

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 15 January 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

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

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”);

BEING SEISED of the Accused’s “Application for Certification to Appeal Denial of Third Motion to Re-Open Defence Case”, filed on 19 December 2014 (“Application”), in which the Accused seeks, pursuant to Rule 73(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), certification for leave to appeal the Chamber’s “Decision on Accused’s Third Motion to Re-Open Defence Case” issued on 17 December 2014 (“Impugned Decision”);¹

NOTING that in the Impugned Decision, the Chamber denied the Accused’s motion to re-open his defence case (“Initial Motion”)² in order to admit one document (“Document”) which the Office of the Prosecutor (“Prosecution”) had only disclosed to him on 17 November 2014 despite having had the Document in its possession for 10 years;³

NOTING that the Chamber also found that there was no legal basis for the Accused’s contention that, in deciding whether to permit the requested re-opening to admit the Document, the Chamber should not require him to show exceptional circumstances because the belated tendering of the Document was solely attributable to the Prosecution’s failure to disclose it to the Accused;⁴

NOTING that in the Application, the Accused submits that whether an accused must demonstrate exceptional circumstances when seeking to re-open his case to admit material which he would have offered during the defence case but for the Prosecution’s disclosure violation is an issue which satisfies both requirements for certification (“Issue”);⁵

NOTING the Accused’s submission that the Issue affects the expeditiousness of the proceedings because, when deciding whether to grant the Motion, the Chamber found that permitting the re-opening of the case to permit the admission of the Document would result in “unjustifiable delay”;⁶

¹ Application, paras. 1, 13.

² Third Motion to Re-Open Defence Case: Fadil Banjanović Document, 9 December 2014.

³ Impugned Decision, paras. 1, 3.

⁴ Impugned Decision, para. 13 (referring to the submissions contained in paragraph 10 of the Initial Motion).

⁵ Application, para. 5.

⁶ Application, para. 7 (quoting Impugned Decision, para. 14).

NOTING the Accused's further contention that the denial of the Motion affects the fair conduct of the proceedings because such a result effectively rewards the Prosecution for its disclosure violation;⁷

NOTING the Accused's argument that an immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings because it "will likely recur" in connection with other late-disclosed documents for which he may seek re-opening and admission, and because such a resolution of the matter would avoid any delay during the appellate phase if the Chamber's application of the "exceptional circumstances" test is later found to be erroneous;⁸

NOTING the "Prosecution's Response to the Accused's Application for Certification to Appeal Denial of Third Motion to Re-Open Defence Case" filed on 31 December 2014 ("Response"), in which the Prosecution opposes the Application and submits that as a result of the Document's low probative value, neither requirement of Rule 73(B) is satisfied in this instance;⁹

RECALLING that decisions on all motions are without interlocutory appeal save with certification by the Chamber, and that under Rule 73(B) of the Rules, the Chamber may grant certification to appeal if the said 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

RECALLING further that Rule 73(B) precludes certification unless the Chamber finds that both of its requirements are satisfied,¹¹ and that a request for certification is "not concerned with whether a decision was correctly reasoned or not";¹²

⁷ Application, para. 6.

⁸ Application, paras. 10–11. *See also* Application, para. 12 (citing examples of Trial Chambers having found that the Appeals Chamber's immediate resolution of issues which are likely to arise repeatedly, as well as those that pertain to whether a party may re-open its case, would materially advance proceedings).

⁹ Response, paras. 1–4, 9.

¹⁰ Rules 73(B) and 73(C) of the Rules.

¹¹ *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment", 12 January 2005, p. 1.

¹² *See Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber's Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para. 42; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98 *bis* Decision, 14 June 2007, para. 4; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić and Beara Motions for Certification of the Rule 92 *quater* Motion, 19 May 2008, para. 16; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Motion for Certification of Rule 98 *bis* Decision, 15 April 2008, para. 8; *Prosecutor v. S. Milošević*,

CONSIDERING that even if the Accused were certain to file future motions to re-open his case to admit other documents that are found to be the subject of disclosure violations in the future, a possibility that is necessarily speculative at present, the Chamber would need to conduct the same assessment as it did in the Impugned Decision by weighing such document's probative value against the advanced stage of proceedings and the potential for delay at that time;

CONSIDERING that, because of the case-by-case nature of such assessments, an immediate resolution of the Issue would not materially advance these proceedings and that the term "proceedings" in the context of Rule 73(B) is necessarily limited to consideration of the trial phase;

CONSIDERING that the second criteria of Rule 73(B) for granting certification to appeal has not been met and that the Chamber therefore need not consider whether the Issue affects the fair and expeditious conduct of the proceedings;

PURSUANT to Rule 73(B) of the Rules,

HEREBY DENIES the Application.

Done in English and French, the English text being authoritative.



Judge O-Gon Kwon
Presiding

Dated this fifteenth day of January 2015
At The Hague
The Netherlands

[Seal of the Tribunal]