

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: 7 February 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON JUDICIAL NOTICE OF INTERCEPTS

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully requests, pursuant to Rule 73(B) certification to appeal that portion of the Trial Chamber's *Decision on Prosecution's Motion for Judicial Notice of Intercepts Related to the Sarajevo Component...* (4 February 2011) which held that the requirements of taking judicial notice of adjudicated facts are not applicable to the taking of judicial notice of documents and which held that the term "documentary evidence" encompasses recordings.¹

2. Dr. Karadzic had argued that judicial notice could not be taken of the authenticity of documents which were admitted pursuant to an agreement in the original proceeding; related to the acts, conduct, or mental state of the accused; or were subject to pending appeal or review.² The Trial Chamber's decision rejecting those safeguards is one of first impression in this Tribunal and warrants a decision by the Appeals Chamber.

3. Dr. Karadzic had also argued that the plain meaning of the term "documentary evidence" in Rule 94(B) does not include recordings.³ This, too, is a question of first impression in this Tribunal.

4. 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.

5. The issues identified in the Impugned Decision meet both criteria of Rule 73(B). First, given the large number of trials on the same events which have preceded the trial of Dr. Karadzic, the Impugned Decision opens the door to the taking of judicial notice of hundreds of prosecution exhibits on its Rule 65 *ter* exhibit list, including hundreds of recordings of intercepted conversations relating to the Municipalities and Srebrenica components of the case. Therefore, the issue of the criteria to be applied to judicial notice of documentary evidence involves an issue which affects both the fair and expeditious conduct of the proceedings.

¹ Impugned Decision at paras. 16-17

² *Supplemental Response to Motion for Judicial Notice of Intercepted Conversations Relating to Sarajevo* (6 January 2011) at para. 7

³ *Supplemental Response to Motion for Judicial Notice of Intercepted Conversations Relating to Sarajevo* (6 January 2011) at para. 3

6. With respect to fairness, Dr. Karadzic contends that it is unfair to admit exhibits which have been admitted by agreement of the parties, because a party may well decide not to object to an exhibit for tactical reasons and the subsequent admission of the exhibit does not mean that a meaningful decision on the authenticity of the exhibit has been made. Dr. Karadzic further contends that it is fundamentally unfair to take judicial notice of any kind of evidence pertaining to the acts and conduct of the accused. Finally, Dr. Karadzic contends that it is unfair, and unwise, to take judicial notice of documents admitted in proceedings which are not yet final.

7. With respect to expeditiousness, Dr. Karadzic contends that by dispensing with the need for the prosecution to establish the authenticity of hundreds of its exhibits, the proceedings will indeed be more expeditious. For his part, Dr. Karadzic prefers a fair trial to an expeditious one.

8. The second criteria of Rule 73(B) is also met. An immediate decision by the Appeals Chamber would materially advance the proceedings for two reasons. First, if it is found after judgement that the Trial Chamber erred in deciding this issue of first impression, the Appeals Chamber will have to consider the effect of excluding such evidence on the judgement, or order a new proceeding at which the prosecution can establish the authenticity of the exhibits. Second, the issue is likely to recur in this case with some frequency as the prosecution makes similar motions for the remaining components of the trial, as well as residual documents for the Sarajevo component which it may seek to admit.

9. Trial Chambers of the ICTR have found that issues relating to the taking of judicial notice of adjudicated facts meet the criteria of Rule 73(B).⁴ Likewise, at the Special Court of Sierra Leone, issues of judicial notice were found to meet the criteria of Rule 73(B).⁵

10. Dr. Karadzic rarely seeks certification to appeal. However, in this instance, the issues presented not only meet the criteria of Rule 73(B), but they are novel and an

⁴ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Certification of Appeal Concerning Judicial Notice* (2 December 2005); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Motion to Admit Testimony of Elizaphan Ntakirutimana* (24 March 2009)

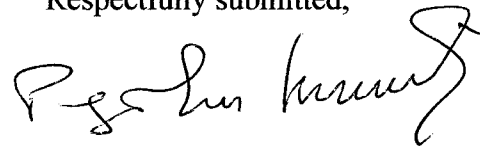
⁵ *Prosecutor v Norman et al*, No. SCSL-04-14-T, *Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice* (19 October 2004)

immediate decision will advance the jurisprudence of the Tribunal for other cases as well. Given the scope of this case and the page limitations of appellate proceedings, delaying consideration of this issue until after judgement is in no one's interest.

11. Therefore, it is respectfully requested that the Trial Chamber grant certification to appeal the Impugned Decision.

Word count: 949

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', written in a cursive style.

Radovan Karadzic