

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: 3 February 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON RULE 70(B)

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark Harmon

The Accused:

Radovan Karadzic

1. Radovan Karadzic respectfully applies, pursuant to Rule 73(B), for certification to appeal the Trial Chamber's *Decision on Accused's Motion for Disclosure of Rule 68 Material Obtained Under Rule 70(B) and Order on Prosecution Disclosure Report* (15 January 2009). The Serbian version was served on him on 27 January 2009.

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 held that:

CONSIDERING that, with respect to material falling under Rule 68, the language of Rule 68(iii), by its reference not only to the need to obtain the consent of the provider of Rule 70(B) material to its disclosure, but also to "the fact of its existence", militates against the disclosure of the specific information sought by the Accused, namely, the number of documents, if any, provided under Rule 70(B) for which the providers have not yet authorised disclosure of the material; but that the Prosecution may include such information if it so wishes."¹

4. It is respectfully submitted that the issue at stake in the Impugned Decision meets both of the criteria for interlocutory appeal.

5. The issue of notice of exculpatory evidence being withheld from disclosure under Rule 70(B) goes to the very heart of a fair trial. Under the Trial Chamber's ruling, there is no way for the defence or the Trial Chamber to know if Rule 70(B) material which is also exculpatory is being withheld from disclosure. It was this very problem which caused judges at the International Criminal Court to stay the proceedings in the *Lubanga* case.²

6. The Trial Chamber's decision on this point was one of first impression. Indeed it cited no jurisprudence in support of the decision. If the Trial Chamber is in error, and it later turns out exculpatory material should have been disclosed, it would affect the

¹ *Decision* at p. 3

² *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials, (13 June 2008) ; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of the Prosecutor, (21 October 2008)

integrity of any final judgement. Therefore, an immediate decision by the Appeals Chamber would materially advance the proceedings.

7. In a case closely on point, an ICTR Trial Chamber granted certification to appeal its decision concerning the restrictions placed upon testimony for an accused by a Rule 70(B) provider, finding that the issue satisfied both conditions of Rule 73(B).³

8. Other Trial Chambers at the ICTR, where disclosure is a troublesome problem, have granted certification to appeal questions on the scope of disclosure required of the prosecutor, finding the two conditions of Rule 73(B) have been satisfied for these issues.⁴

9. Dr. Karadzic contends that the Trial Chamber's failure to put a mechanism in place to monitor the withholding of exculpatory evidence, particularly in an issue of first impression, warrants certification to appeal.

Word count: 773

Respectfully submitted,


RADOVAN KARADZIC

³ *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision Dated February 8, 2007 in Relation to Condition (B) Requested by the United States Government* (22 May 2007)

⁴ *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); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 10th Rule 68 Motion* (4 March 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for Certification to Appeal the Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Pierre Celestin Mbonankira and Decision on Prosecution's Cross-Motion for Enforcement of Reciprocal Disclosure* (2 October 2007); *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)