



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: 3 September 2013

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: 3 September 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON REMAND OF COUNT ONE**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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”) is seised of the “Application for Certification to Appeal Decision on Remand of Count One”, filed by the Accused on 7 August 2013 (“Application”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 28 June 2012, the Chamber delivered its ruling (“Rule 98 *bis* Ruling”) on the Accused’s oral motion for a judgement of acquittal pursuant to Rule 98 *bis* (“Rule 98 *bis* Motion”) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and held *inter alia* that, with respect to Count 1 of the Third Amended Indictment (“Count 1”), there was “no evidence, even taken at its highest, which could be capable of supporting a conviction for genocide in the municipalities”.¹

2. On 11 July 2013, the Appeals Chamber issued its Judgement on the appeal filed by the Office of the Prosecutor (“Prosecution”) against the Rule 98 *bis* Ruling, reversed the Chamber’s acquittal of the Accused for genocide under Count 1, and reinstated the charges against the Accused under this count.²

3. On 22 July 2013, the Accused filed a “Motion for Clarification” before the Appeals Chamber, requesting the Appeals Chamber to clarify what it meant in the Appeal Judgement when it remanded the matter to the Chamber “for further action consistent with this Judgement”.³ The Accused’s interpretation is that the Appeals Chamber reversed the Chamber’s findings on the *actus reus* and *mens rea* for genocide, reinstated Count 1, and remanded the matter for the Chamber to decide on his Rule 98 *bis* Motion anew, in light of the guidance set out in the Appeal Judgement.⁴

4. On 1 August 2013, the Appeals Chamber issued its “Decision on Motion for Clarification”, wherein it considered that it was not appropriate for the Appeals Chamber to provide the relief sought by the Accused and denied the Motion for Clarification in its entirety.⁵ The Appeals Chamber considered that “any dispute about the application of the [...] Appeal Judgement by the

¹ T. 28769 (28 June 2012) (“Rule 98 *bis* Ruling”).

² *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98*bis*.1, Judgement, 11 July 2013 (“Appeal Judgement”), para. 117.

³ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98*bis*.1, Motion for Clarification, 22 July 2013, para. 7.

⁴ Motion for Clarification, para. 2.

⁵ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98*bis*.1, Decision on Motion for Clarification, 1 August 2013, p. 2.

[...] Chamber can, subject to the appropriate certification, be appealed”,⁶ but noted that no reference “to any such certification” had been made.⁷

5. On 2 August 2013, the Chamber issued the “Decision on Accused’s Motions for Severance of Count 1 and Suspension of Defence Case” (“Decision on Suspension and Severance”) in which it found, *inter alia*, that the “Appeal Judgement [wa]s unequivocal in making a final determination on the Rule 98 *bis* Ruling” and that the Chamber was “simply instructed to take necessary and appropriate action with regard to the defence case, with Count 1 having been reinstated”.⁸

6. On 7 August 2013, the Accused simultaneously filed the Application before the Chamber as well as the “Appeal of Decision on Remand of Count One” (“Appeal”) before the Appeals Chamber.⁹ The Accused contends that the decision of the Chamber on the remand of Count 1 is “appealable [as] of right” given that the Appeals Chamber “retains jurisdiction over a matter which it remanded to a Trial Chamber where the question as to whether the Trial Chamber complied with its instructions is at issue”.¹⁰ However, in the event that the Appeals Chamber were to find that such an appeal requires certification, he requests the Chamber to grant certification or decide that the requirements for certification have been met.¹¹

7. In the Application, the Accused requests, pursuant to Rule 73(B) of the Rules, certification to appeal the portion of the Decision on Suspension and Severance in which the Chamber held that the Appeals Chamber had made a final determination on the Rule 98 *bis* Ruling when it remanded the matter “for further action”.¹² The Accused submits that the question of whether the Chamber was directed to “reconsider Count One” in light of the Appeal Judgement or whether the Appeals Chamber had itself decided on his Rule 98 *bis* Motion with respect to Count 1 is an issue which could “significantly affect the fairness, expeditiousness, and outcome of the trial”.¹³ In that regard, the Accused observes that if the Chamber erred in its interpretation of the Appeal Judgement, he would be deprived of his right to a decision on the merits of the Rule 98 *bis* Motion at the end of

⁶ Decision on Motion for Clarification, pp. 1–2.

⁷ Decision on Motion for Clarification, p. 2.

⁸ Decision on Suspension and Severance, para. 14.

⁹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98*bis*.1, Appeal of Decision on Remand of Count One, 7 August 2013 (“Appeal”), paras. 12, 17.

¹⁰ Application, para. 3.

¹¹ Application, para. 4.

¹² Application, para. 1, *citing* Decision on Suspension and Severance, para. 14.

¹³ Application, para. 5.

the Prosecution's case, and this would be procedurally unfair and delay the trial by requiring him to defend Count 1 during the remainder of his defence case.¹⁴

8. In addition, the Accused submits that an immediate decision by the Appeals Chamber would materially advance the proceedings given that if the Chamber erred in its interpretation of the Appeal Judgement, he would be forced to defend himself with respect to Count 1 without an opportunity for "a final decision on his motion for judgement of acquittal".¹⁵ In his submission this could have an "adverse spill-over affect" on his trial with respect to the remaining counts given the need to elicit evidence that crimes were not committed with genocidal intent.¹⁶ Finally, the Accused observes that other trial chambers have granted certification to appeal "where the scope of the Appeals Chamber's remand was unclear".¹⁷

9. On 9 August 2013, the Prosecution filed the "Prosecution Response to Karadžić's Application for Certification to Appeal Decision on Remand of Count One" ("Response"). The Prosecution argues that the issue of whether the Chamber correctly concluded that the Accused was not entitled to another Rule 98 *bis* proceeding with respect to Count 1 does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that an immediate resolution by the Appeals Chamber would not materially advance the proceedings.¹⁸

10. In the Prosecution's submission, the Application is speculative and certification would "unnecessarily delay the proceedings" through further interlocutory litigation and the prospect of additional Rule 98 *bis* litigation.¹⁹ The Prosecution also disputes the Accused's claim that requiring him to elicit evidence with respect to Count 1 could have adverse spill-over effects on the remaining counts given that he has already adduced evidence from witnesses who have admitted to the underlying crimes and that his defence on the "municipalities component" of the case has "remained constant, regardless of the status of Count 1".²⁰

¹⁴ Application, para. 5.

¹⁵ Application, para. 7.

¹⁶ Application, para. 7.

¹⁷ Application, para. 8, citing *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84**bis**-PT, Decision on Application on behalf of Ramush Haradinaj for Certification Pursuant to Rule 73(B), 3 February 2011; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Joint Defence Request for Certificate to Appeal the Second Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 19 March 2009; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-R73(B), Decision on Prosecution Motion for Certification to Appeal the Limitation of the Scope of the Retrial, 29 January 2009.

¹⁸ Response, para. 1.

¹⁹ Response, paras. 1–4.

²⁰ Response, para. 6.

II. Applicable Law

11. Decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.²¹ Under Rule 73(B) of the Rules, a Trial 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”.

12. A request for certification is “not concerned with whether a decision was correctly reasoned or not”.²² Furthermore, it has previously been held that “even when an important point of law is raised [...], the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied”.²³ Under Rule 73(C), requests for certification must be filed within seven days of when the decision was filed or delivered.

III. Discussion

13. At the outset, the Chamber observes that the Accused’s Appeal and the issue of whether the Chamber’s decision on the remand of Count 1 is appealable as of right without certification is still pending before the Appeals Chamber. It is therefore not for the Chamber to rule on this aspect of the Application. However, in the interests of judicial economy and facilitating the expeditious resolution of this matter, in the event that the Appeals Chamber determines that certification is required, the Chamber will consider whether the test for certification under Rule 73(B) of the Rules is met in this instance.

14. The Chamber considered that the Appeals Chamber in the Appeal Judgement made a final determination on the Rule 98 *bis* ruling, and that when the matter was remanded to the Chamber for appropriate action, Count 1 was reinstated for the purposes of the defence case and did not require a new Rule 98 *bis* proceeding.²⁴ The Chamber is satisfied that the issue of whether this is a correct

²¹ See Rules 72(B), 73(C) of the Rules.

²² *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*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 4.

²³ *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.

²⁴ Decision on Severance and Suspension, para. 14.

interpretation of the Appeal Judgement would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. If the Appeals Chamber intended the Chamber to examine anew the Accused's Rule 98 *bis* Motion with respect to Count 1 in light of the Appeal Judgement and render a new judgement pursuant to Rule 98 *bis* in relation thereto, continuing the defence phase of the case without having rendered such a judgement would affect the fair and expeditious conduct of the proceedings as the Accused's Rule 98 *bis* Motion with respect to Count 1 would remain unresolved.

15. With respect to the second limb of the test for certification, the Chamber finds that an immediate resolution of this issue by the Appeals Chamber will have a direct impact on the course of proceedings in this case as it will determine whether a new Rule 98 *bis* proceeding and/or judgement is required in light of the Appeal Judgement. This will necessarily impact on the future timetable for the case and the evidence that is to be presented when the defence case resumes. The Chamber is therefore satisfied that an immediate decision by the Appeals Chamber would materially advance the proceedings.

IV. Disposition

16. Accordingly, the Chamber, pursuant to Rules 54 and 73(B) of the Rules, hereby **DECLARES** that the requirements for certification to appeal under Rule 73(B) have been met, and **GRANTS** the Application.

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



Judge O-Gon Kwon
Presiding

Dated this third day of September 2013
At The Hague
The Netherlands

[Seal of the Tribunal]