

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-AR98bis.1

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding  
Judge Patrick Robinson  
Judge Liu Daqun  
Judge Khalida Rachid Khan  
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. John Hocking

Date: 7 August 2013

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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APPEAL OF DECISION ON REMAND  
OF COUNT ONE

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The Office of the Prosecutor:

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

The Accused:

Dr. Radovan Karadzic

1. Dr. Radovan Karadzic hereby appeals from that portion of the Trial Chamber's *Decision on Accused's Motion to Sever Count One and for Suspension of Defence Case* (2 August 2013) which held that:

In the Chamber's view, the Appeal Judgement is unequivocal in making a final determination on the Rule 98 *bis* Ruling. With this understanding, the Chamber therefore considers that the Appeals Chamber did not direct it to consider the Accused's motion for acquittal anew when it remanded "the matter for further action consistent with this Judgement". Instead, the Chamber was simply instructed to take necessary and appropriate action with regard to the defence case, with Count 1 having been reinstated.<sup>1</sup>

2. Dr. Karadzic contends that the Trial Chamber failed to comply with the instructions of the Appeals Chamber in its *Judgement*. He requests that the Trial Chamber's decision be reversed.

#### **Procedural History**

3. On 11 July 2013, the Appeals Chamber issued its *Judgement* in this case, reversing the Trial Chamber's acquittal of Dr. Radovan Karadzic, reinstating Count One of the Indictment, and remanding the matter to the Trial Chamber for further action consistent with the *Judgement*.<sup>2</sup>

4. Following the judgement, Dr. Karadzic filed a *Motion to Sever Count One*. In that motion, Dr. Karadzic contended that the *Judgement* had reversed findings of the Trial Chamber on two aspects of the *actus reus* of genocide and one aspect of *mens rea*, reinstated Count One, and remanded the matter for the Trial Chamber to decide the Motion for Judgement of Acquittal anew, in light of the guidance provided in the *Judgement*.<sup>3</sup>

5. Dr. Karadzic found support for his interpretation of the *Judgement* from two aspects of its reasoning.

6. First, in declining to address the prosecution's ground of appeal concerning alternative modes of liability under Count One, the Appeals Chamber said that "the relevant analysis, including the analysis of the remaining modes of liability, will necessarily be reconsidered by the Trial Chamber in light of the present Judgement."<sup>4</sup>

<sup>1</sup> para. 14

<sup>2</sup> *Judgement* at para. 117

<sup>3</sup> *Motion to Sever Count One* (16 July 2013) at paras. 7-11

<sup>4</sup> *Judgement* at para. 107

7. Second, in declining to address Dr. Karadzic's principal contention that there was no confluence of *actus reus* and *mens rea* and therefore no genocide in the municipalities of Bosnia in 1992, the Appeals Chamber said that having reversed findings of the Trial Chamber on genocidal intent, serious bodily harm, and conditions of life calculated to destroy, "it would be premature for the Appeals Chamber to consider Karadzic's submissions."<sup>5</sup>

8. In the *Prosecution Response to Karadzic's Motion to Sever*, the prosecution put forth a different interpretation of the *Judgement*. It contended that the Appeals Chamber decided the Motion for Judgement of Acquittal itself, denying the motion, and that the references to further action pertain to the decision on Count One to be made by the Trial Chamber in connection with the final judgement.<sup>6</sup>

9. Dr. Karadzic filed a *Motion for Clarification* with the Appeals Chamber on 22 July 2013 requesting that the Appeals Chamber clarify the disposition of the *Judgement*. The prosecution filed its *Prosecution Response to Karadzic Motion for Clarification and Request for Urgent Relief* on 23 July 2013. On 1 August 2013, the Appeals Chamber denied the motion.<sup>7</sup>

10. On 2 August 2013, the Trial Chamber issued the Impugned Decision, interpreting the *Judgement* as having denied the Motion for Judgement of Acquittal on Count One and leaving it no discretion to further consider the motion.<sup>8</sup> The Trial Chamber ordered the trial to resume on 28 October 2013 including Count One.

11. On 7 August 2013, contemporaneous with the filing of this appeal, Dr. Karadzic has sought certification to appeal the Impugned Decision.<sup>9</sup>

### **Jurisdiction**

12. Dr. Karadzic contends that the Appeals Chamber retains jurisdiction to consider whether the Trial Chamber complied with its directions on remand regardless of whether the Trial Chamber grants certification to appeal.

<sup>5</sup> *Judgement* at para. 112

<sup>6</sup> *Prosecution Response to Karadzic's Motion to Sever* (19 July 2013) at paras. 2-6

<sup>7</sup> *Decision on Motion for Clarification* (1 August 2013)

<sup>8</sup> *Decision on Accused's Motion to Sever Count One and for Suspension of Defence Case* (2 August 2013)

<sup>9</sup> *Application for Certification to Appeal Decision on Remand of Count One* (7 August 2013)

13. In the *Gotovina* case, the Appeals Chamber was seized of a petition for writ of mandamus in which the accused contended that the Trial Chamber had failed to follow the Appeals Chamber's direction. The Appeals Chamber held that:

When remanding the 9 October 2008 Decision to the Trial Chamber for reconsideration, the Appeals Chamber did not request that the Trial Chamber review its entire decision, but rather that it review it in light of the two errors identified by the Appeals Chamber. To the extent that the Joint Defence now submits that the Trial Chamber failed to address the two errors identified by the Appeals Chamber and thus challenges the same issues for which leave to appeal the 9 October 2008 Decision was originally granted, the Appeals Chamber remains competent to address the Joint Request.<sup>10</sup>

14. Since the Trial Chamber had also granted certification to appeal its decision, the Appeals Chamber decided to consider the question in the context of the certified appeal.

15. In the *Ngirumpatse* case, the ICTR Appeals Chamber stated the law:

The Appeals Chamber agrees that it 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.<sup>11</sup>

16. The Appeals Chamber dismissed Ngirumpatse's appeal, however, finding that "the question as to whether the Trial Chamber complied with the Appeals Chamber's instructions is not at issue."<sup>12</sup>

17. Since the issue in Dr. Karadzic's appeal is precisely whether the Trial Chamber complied with the Appeals Chamber's instructions, the Appeals Chamber has jurisdiction to decide this appeal without the need for certification by the Trial Chamber.

### **The Merits**

18. There is little point in arguing over whether the Appeals Chamber intended to deny the Motion for Judgement of Acquittal on Count One or intended that the Trial Chamber reconsider the motion in light of the guidance provided in the Appeals Chamber's *Judgement*. The Appeals Chamber knows what it intended,

<sup>10</sup> *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.3, *Decision on Joint Request of Ante Gotovina and Mladen Markac for a Writ of Mandamus* (27 March 2009) at para. 5

<sup>11</sup> *Karemera et al v Prosecutor*, No. ICTR-98-44-AR82, *Decision on Matthieu Ngirumpatse's Further Motions for Extension of Time, and Motion for Reconsideration and on the Appeal filed on 25 September 2009* (29 September 2009) at para. 19

<sup>12</sup> *Ibid*

19. From Dr. Karadzic's perspective, the grounds upon which he claimed that he should be acquitted on Count One have not been addressed by the Appeals Chamber's *Judgement*.

20. Before the Trial Chamber, Dr. Karadzic's Legal Advisor Peter Robinson argued that:

Genocide is not simply the sum of killings on the one hand, the *actus reus*, and expressions such as the Muslims should disappear on the other hand, that being part of *mens rea*, but instead genocide is a confluence of those acts and intent so that the killings can be said to be committed not only because of hatred or revenge but with the special intent to actually destroy the group or a significant part thereof.<sup>13</sup>

21. Dr. Karadzic never disputed before the Trial Chamber that there was evidence which, at its highest, could establish the element of *actus reus* of genocide, such as killings. He never disputed before the Trial Chamber that there were statements which, at their highest, could establish the element of *mens rea* or genocidal intent. His point was that the acts which occurred were not the product of the expressions from which one could infer genocidal intent.

22. In its decision on the Motion for Judgement of Acquittal, the Trial Chamber came to the same conclusion. It held that:

The Chamber has heard evidence of culpable acts systematically directed against Bosnian Muslims and/or Bosnian Croats in the municipalities and of the repetition of discriminatory acts and derogatory language. However, the nature, scale, and context of these culpable acts, be it in all the municipalities covered by the indictment or the seven municipalities in which genocide is specifically alleged, do not reach the level from which a reasonable trier of fact could infer that they were committed with genocidal intent.<sup>14</sup>

the Chamber finds that notwithstanding the statements of the accused, there is no evidence upon which, if accepted, a reasonable trier of fact could find that the acts of killing, serious bodily or mental harm, and conditions of life inflicted on the Bosnian Muslims and/or Bosnian Croats were perpetrated with the *dolus specialis* required for genocide.<sup>15</sup>

23. In responding to the prosecution's appeal, Dr. Karadzic again conceded that there was evidence from which both the *actus reus* and *mens rea* of genocide could

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<sup>13</sup> T28570

<sup>14</sup> T28768

<sup>15</sup> T28769

separately be inferred, but that there was no evidence that the acts were the product of genocidal intent. In a section of his brief entitled "Genocidal Rhetoric but no Genocide", Dr. Karadzic contended that the Trial Chamber had correctly concluded that notwithstanding expressions which at their highest could satisfy the requirement of genocidal intent, the acts in the municipalities were not carried out with that intent. He stated that:

The Trial Chamber acknowledged the existence of the *actus reus* of killings and infliction of serious harm, and the existence of statements that the Muslims should disappear. However, it recognized that genocide is the *confluence* of *actus reus* and *mens rea*, where such acts and statements are not viewed in isolation, but are viewed in their totality to determine if the prohibited acts were committed with the intent to destroy the group.<sup>16</sup>

24. At the Appeals Hearing, Dr. Karadzic's Legal Advisor Peter Robinson once again conceded that there was evidence from which the *actus reus* and *mens rea* of genocide could separately be inferred, but that the acts were not the product of an intent to destroy the group.

25. Mr. Robinson argued:

The Prosecution says we have *actus reus* and we have *mens rea* and therefore we have genocide. The fallacy behind that is that genocide is the confluence of those two ingredients, not the mere existence of two separate elements.

In his book "Unimaginable Atrocities," Professor Schabas explained the words *mens rea* and *actus reus* come from a Latin maxim that holds there to be no punishable act that is not the result of a guilty mind. An act that is not the result of a guilty mind is not a crime. And just because you have evidence of *actus reus* and *mens rea* does not mean you have a genocide. There has to be a result. The act has to result from the *mens rea* or from the intent.

I can have a loaf of bread, I can have a package of ham, I don't have a ham sandwich. There has to be a confluence in order for you to have a genocide.<sup>17</sup>

26. In its Judgement, the Appeals Chamber found that the Trial Chamber had erred in its assessments of the *actus reus* and the *mens rea*. But it only addressed Dr. Karadzic's argument as follows:

<sup>16</sup> *Respondent's Brief* (5 November 2012) at para. 233

<sup>17</sup> T41

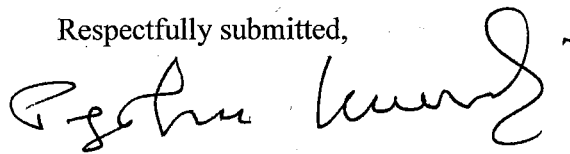
As an initial matter, the Appeals Chamber finds unconvincing Karadzic's assertion that the Trial Chamber's decision to acquit him of genocide in the Municipalities was premised on the lack of a confluence between killings and other harmful acts against Bosnian Muslims and/or Bosnian Croats and genocidal intent. The Judgement of Acquittal was based on the Trial Chamber's separate findings, *inter alia*, that Karadzic and other alleged members of the JCE did not possess genocidal intent and that no evidence on the record indicated that Bosnian Muslims and/or Bosnian Croats suffered serious bodily or mental harm or conditions of life calculated to destroy. In any event, the Appeals Chamber recalls again that it has reversed the Trial Chamber's findings with respect to genocidal intent, serious bodily or mental harm, and conditions of life calculated to destroy. **In this context, it would be premature for the Appeals Chamber to consider Karadzic's submissions regarding the confluence between genocidal intent and the alleged genocidal acts.**<sup>18</sup> (emphasis added)

27. Dr. Karadzic believes that the Appeals Chamber, having reversed the Trial Chamber's findings with respect to genocidal intent, serious bodily or mental harm and conditions of life calculated to destroy, reinstated Count One and put the parties back where they were before the Trial Chamber granted the motion for judgement of acquittal. The Trial Chamber then had the duty to decide the motion consistent with the Trial Chamber's judgement. By failing to do this, the Trial Chamber erred.

28. Dr. Karadzic respectfully requests that the Appeals Chamber reverse the Impugned Decision and direct the Trial Chamber to make a decision on the Motion for Judgement of Acquittal consistent with the Appeals Chamber's Judgement.

Word count: 2238

Respectfully submitted,



Radovan Karadzic

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<sup>18</sup> *Judgement* (11 July 2013) at para. 112