



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: 2 August 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: 2 August 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTIONS FOR SEVERANCE OF COUNT 1 AND
SUSPENSION OF DEFENCE CASE**

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 Accused’s “Motion to Sever Count One”, filed on 16 July 2013 (“Severance Motion”), and the “Motion for Suspension of Defence Case”, filed on 24 July 2013 (“Suspension Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 28 June 2012, the Chamber, having heard the parties’ oral submissions,¹ delivered its ruling on the Accused’s oral motion for a judgement of acquittal pursuant to Rule 98 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and, *inter alia*, held:

Having reviewed the evidence admitted in this case with respect to Count 1, the Chamber finds that there is no evidence, even taken at its highest, which could be capable of supporting a conviction for genocide in the municipalities as charged under Article 4(3) of the Statute.²

2. On 11 July 2013, the Appeals Chamber issued its Judgement on the Prosecution’s appeal against the Rule 98 *bis* Ruling, reversed the Chamber’s acquittal of the Accused for genocide in certain municipalities in Bosnia and Herzegovina (“Municipalities”) under Count 1 of the Third Amended Indictment (“Indictment”), and reinstated the charges against the Accused under this Count.³

3. On 16 July 2013, the Accused filed the Severance Motion, requesting that the Chamber order that Count 1 be severed from the Indictment pursuant to Rule 54 of the Rules or, alternatively, direct the Prosecution to proceed on all counts of the Indictment except Count 1 pursuant to Rule 73 *bis* (E).⁴ The Accused submits that severing Count 1 from the rest of the Indictment would be in the interest of a fair and expeditious trial.⁵ He argues that given that the defence case has proceeded for nine months without Count 1, that the reinstatement of Count 1

¹ The Accused moved for a judgement of acquittal on all counts of the Indictment on 11 June 2012, *see* T. 28568–28626 (11 June 2012). The Office of the Prosecutor (“Prosecution”) responded orally on 13 June 2012, *see* T. 28628–28730 (13 June 2012).

² T. 28769 (28 June 2012) (“Rule 98 *bis* Ruling”).

³ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgement, 11 July 2013 (“Appeal Judgement”), para. 117. The Prosecution filed its “Notice of Appeal of Judgement of Acquittal under Rule 98*bis*” on 11 July 2012 and filed the “Prosecution Rule 98*bis* Appeal Brief” confidentially on 24 September 2012, with a public version on 25 September 2012.

⁴ Severance Motion, paras. 1–5, 20.

⁵ Severance Motion, para. 6.

would add six to seven months to the trial,⁶ and in light of the “unlikely prospects for conviction on Count One at the end of the case”, it is in the interests of justice to sever Count 1 and proceed with the defence case uninterrupted to its conclusion later this year.⁷

4. The “Prosecution Response to Karadžić’s Motion to Sever Count 1” was filed on 19 July 2013 (“Response to Severance Motion”).⁸ The Prosecution challenges the Severance Motion and argues that the Accused has failed to meet the test for severance in that severing Count 1 from the Indictment would result in a far greater delay to the proceedings against the Accused than proceeding with the Count.⁹ The Prosecution submits that while proceeding with Count 1 will require a “modest extension” of the time necessary to complete the Accused’s case and a “brief stay of proceedings”, severing Count 1 at this stage would significantly delay the proceedings, require the presentation of duplicative evidence, and place an unnecessary burden on witnesses and resources.¹⁰ The Prosecution further submits that severance cannot be used as a delay tactic to avoid criminal responsibility and that the Accused’s claim that the unlikely prospects for conviction on Count 1 militate in favour of severance is speculative and ill-founded.¹¹

5. 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”.¹² As mentioned in the Severance Motion, the Accused interprets the Appeal Judgement as reversing the Chamber’s findings in the Rule 98 *bis* Ruling on two aspects of the *actus reus* of genocide and one aspect of *mens rea*, reinstating Count 1, and remanding the matter to the Chamber to decide on his motion for acquittal pursuant to Rule 98 *bis* anew in light of the guidance provided in the Appeal Judgement.¹³ On 22 July 2013, the Chamber stated orally that it could not decide on the Severance Motion pending resolution by the Appeals Chamber of the Motion for Clarification.¹⁴ On the same

⁶ This estimate of a delay of six to seven months includes the time that the Accused argues is necessary for the Chamber to reconsider his motion for acquittal on Count 1 pursuant to Rule 98 *bis* in light of the Appeal Judgement, *see* Severance Motion, paras. 7–11, 17.

⁷ Severance Motion, paras. 17–19.

⁸ On 17 July 2013, the Chamber requested an expedited response from the Prosecution to the Severance Motion, *see* T. 41366 (17 July 2013).

⁹ Response to Severance Motion, para. 1.

¹⁰ Response to Severance Motion, paras. 7, 19.

¹¹ Response to Severance Motion, para. 13. The Prosecution opposes the Accused’s interpretation of the Appeal Judgement which would require the Chamber to reconsider the Accused’s Rule 98 *bis* motion for acquittal and on the contrary contends that the Appeal Judgement clearly reversed the Rule 98 *bis* Ruling and reinstated Count 1; *see* Response to Severance Motion, paras. 2–6.

¹² *Prosecutor v. Karadžić*, Case. No. IT-95-5/18-AR98*bis*.1, Motion for Clarification, 22 July 2013 (“Motion for Clarification”), para. 7.

¹³ Motion for Clarification, para. 2.

¹⁴ T. 41725–41726 (22 July 2013).

day, the Prosecution filed the “Prosecution Response to Karadžić’s Motion for Clarification and Request for Urgent Relief”, challenging the Accused’s interpretation of the Appeal Judgement and requesting that the Appeals Chamber decide on the Motion for Clarification on an urgent basis.¹⁵

6. On 23 July 2013, the Chamber stated orally that the Accused should be prepared for the eventuality that in ruling on the Motion for Clarification, the Appeals Chamber may decide that the Appeal Judgement is clear that Count 1 is reinstated, as well as for the possibility that the Chamber may dismiss the Severance Motion thereafter.¹⁶ The Chamber then added that it expected the Accused to examine any witnesses who are scheduled to testify and who may be relevant to Count 1 thereon if he so wishes.¹⁷

7. On 24 July 2013, the Accused filed the Suspension Motion, arguing that the defence case should be suspended for four months to enable him to prepare “for a trial that includes Count One”.¹⁸ The Accused first submits that the trial must be suspended pending a determination on the Severance Motion, the Motion for Clarification, and an allocation of the number of hours for the defence to complete its case if the remainder of the trial includes Count 1.¹⁹ Second, the Accused argues that he needs four months to identify and interview additional witnesses envisioned for the defence case on Count 1, compile a witness list, and draft “legally sufficient summaries” of the expected testimony of those witnesses.²⁰

8. On 26 July 2013, the Prosecution filed the “Prosecution Response to Karadžić’s Motion for Suspension of Defence Case” publicly with Confidential Appendix A (“Response to Suspension Motion”).²¹ The Prosecution argues that while it accepts that the re-inclusion of Count 1 may require a brief stay of the proceedings to assist the Accused in making marginal adjustments to his witness list, it submits that the Accused has failed to adequately substantiate his request for a four-month stay of proceedings in order to question approximately 64 additional witnesses.²²

9. 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

¹⁵ *Prosecutor v. Karadžić*, Case. No. IT-95-5/18-AR98bis.1, Prosecution Response to Karadžić’s Motion for Clarification and Request for Urgent Relief, 22 July 2013 (“Response to the Motion for Clarification”), paras. 1, 6–7.

¹⁶ T. 41825 (23 July 2013).

¹⁷ T. 41826 (23 July 2013).

¹⁸ Suspension Motion, paras. 24, 26. The Chamber notes that the Suspension Motion contains two paragraphs numbered “24”.

¹⁹ Suspension Motion, para. 13.

²⁰ Suspension Motion, paras. 14–24.

²¹ On 25 July 2013, the Chamber granted the Prosecution’s request for an extension of the word limit of the Response to Suspension Motion, *see* T. 42065 (25 July 2013).

²² Response to Suspension Motion, paras. 2, 20.

sought by the Accused in the Motion for Clarification, and denied the Motion for Clarification in its entirety. The Appeals Chamber considered that “any dispute about the application of the [...] Appeal Judgement by the [...] Chamber can, subject to the appropriate certification, be appealed”,²³ but concluded that neither the Motion for Clarification nor the Response to the Motion for Clarification “cites to any such certification, or discusses any application of the [...] Appeal Judgement by the [...] Chamber”.²⁴

II. Applicable Law

10. Article 20(1) of the Tribunal’s Statute (“Statute”) provides that the Chamber shall ensure the fairness and expeditiousness of trial with full respect for the rights of the accused. In turn, Articles 21(4)(b) and (c) of the Statute provide that an accused shall be entitled to the minimum guarantees of adequate time for the preparation of his defence and shall be tried without undue delay.

11. Severance of counts after the start of trial is not specifically provided for in the Rules. Rule 48 of the Rules pertains to the joinder of trials of different individuals accused of the same or different crimes committed in the course of the same transaction while Rule 49 of the Rules provides that “[t]wo or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.” The Appeals Chamber has held that if, after granting joinder under Rule 49, it becomes apparent to a Trial Chamber that a trial has become unmanageable, that Trial Chamber may order severance of the charges.²⁵ A decision on joinder or severance pursuant to Rule 49 is discretionary and requires a complex balancing of intangibles in order to properly regulate the proceedings.²⁶

12. Finally, the Appeals Chamber has also held that while Rules 48 and 49 apply to two different types of joinder, Trial Chambers must consider similar legal requirements and weigh similar factors under the terms of both Rules.²⁷ Considerations which the Appeals Chamber has deemed appropriate to take into account are i) protecting the rights of the Accused under Article 21 of the Statute; and ii) protecting the interests of justice by avoiding the duplication of evidence,

²³ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Decision on Motion for Clarification, 1 August 2013 (“Decision on Motion for Clarification”), pp. 1–2.

²⁴ Decision on Motion for Clarification, p. 2.

²⁵ *Prosecutor v. S. Milošević*, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 (“*Milošević* Appeal Decision”), para. 26.

²⁶ *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006 (“*Miletić* Appeal Decision”), paras. 4–5.

²⁷ *Miletić* Appeal Decision, para. 5.

promoting judicial economy, minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence.²⁸

13. In relation to the Motion for Suspension, the Chamber recalls that an adjournment of the proceedings is an exceptional measure, which it will only order if convinced that it is in the interests of justice to do so.²⁹

III. Discussion

14. As a preliminary matter, the Chamber recalls that the Appeals Chamber has denied the Accused's Motion for Clarification, which sought clarification of the Appeal Judgement. As mentioned above, the Appeal Judgement reversed the Chamber's acquittal of the Accused, pursuant to Rule 98 *bis*, for genocide in the Municipalities under Count 1 of the Indictment, and reinstated the charges against the Accused under this Count.³⁰ 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".³¹ Instead, the Chamber was simply instructed to take necessary and appropriate action with regard to the defence case, with Count 1 having been reinstated.

A. Severance Motion

15. The Accused's request that Count 1 be severed from the rest of the Indictment revolves primarily around a time consideration in that he argues that should Count 1 be severed, the defence case on the remaining counts could proceed, uninterrupted, to its conclusion later this year and the Chamber could proceed to issue its judgement thereafter.³² On the contrary, the Accused estimates a total delay of six to seven months should the trial proceed with Count 1 having been reinstated.³³

16. In relation to the time argument presented by the Accused, the Chamber first notes that the Prosecution's case is closed in all respects, including on Count 1. Severing Count 1 and proceeding with it in a separate trial would essentially require the Prosecution to recommence the presentation of all of the evidence pertaining to the Municipalities component of the case, which has already been concluded in these proceedings. Time would also have to be granted to both

²⁸ *Miletić* Appeal Decision, para. 8.

²⁹ Decision on Accused's Motion for Suspension of Proceedings, 18 August 2010, para. 5.

³⁰ *See supra* para. 2.

³¹ *See* Appeal Judgement, para. 117.

³² Severance Motion, para. 19.

³³ Severance Motion, para. 17. As noted above, the Accused ties this six to seven month estimate to the Chamber having to reconsider his motion for acquittal afresh, in light of the Appeal Judgement, *see supra*, footnote 6.

parties to prepare their respective cases during a pre-trial phase and additional time would have to be put aside for new Rule 98 *bis* proceedings. For a charge as broad as genocide in the Municipalities, in relation to which the Prosecution called more than 50 witnesses to testify in these proceedings, the Chamber estimates that the full duration of a new trial on Count 1 would be much longer than six to seven months. However, as the Chamber will discuss below in relation to the Accused's Suspension Motion, while it cannot at this stage determine how much additional time, if any, it would grant to the Accused to present his case to include Count 1, the Accused himself does not foresee that the entire delay would exceed six to seven months.³⁴ In any event, there is no indication at this stage that completing these proceedings with Count 1 reinstated as instructed by the Appeals Chamber would make the proceedings unmanageable.³⁵ The Chamber is thus not satisfied that severing Count 1 is in the interests of justice in terms of safeguarding the Accused's right to an expeditious trial.

17. Although the Accused has limited his request for severance to time considerations, the Chamber has also considered a number of other factors. Holding a second, separate trial on Count 1 alone would create an unnecessary burden on victims and witnesses who would have to return to the Tribunal to give additional and wholly repetitive evidence. The Chamber has also considered the unnecessary burden on the resources of all relevant Tribunal sections that a new trial on Count 1 would generate.

18. Accordingly, the Chamber does not consider that the interests of justice warrant severing Count 1 from the Indictment and will therefore proceed with the rest of the trial with Count 1 having been reinstated as directed by the Appeals Chamber.

B. Suspension Motion

19. The Accused is requesting a suspension of four months "to complete the process of identifying additional witnesses for Count One, obtaining sufficient information about those witnesses, compiling a witness list, and drafting legally sufficient summaries of the expected testimony of those witnesses".³⁶

20. The Chamber first wishes to recall that the defence case opened on 16 October 2012, four months after the Chamber's Rule 98 *bis* Ruling, and that at this stage, the Chamber has heard 173 defence witnesses in the span of approximately 230 hours of the 300 hours granted to the Accused to present his case. The Chamber therefore acknowledges that at this advanced stage of the defence

³⁴ See Severance Motion, para. 17.

³⁵ See *Milošević* Appeal Decision, para. 26.

³⁶ Suspension Motion, para. 24.

case, the implementation of the Appeal Judgement will necessarily require some adjustment to the Accused's preparation of his case and thus warrants some additional time in order for him to prepare before proceeding with the remainder of the case including Count 1.³⁷

21. The Chamber first recalls that it is incumbent on all accused persons to prepare for their defence cases throughout the trial proceedings as shown in other Trial Chambers' rulings, that

it is the obligation of the accused to have been planning for and preparing the presentation of their evidence based upon all the charges in the Indictment, and not simply upon the ones that may survive the Chamber's decision upon the Rule 98 *bis* motions. Such preparation necessitates that the majority of the work will have already taken place prior to the rendering of the Rule 98 *bis* decisions, and indeed dating back to the pre-trial phase of the proceedings.³⁸

22. Thus, in determining a reasonable length of time for the Accused to adjust his preparations, the Chamber has considered a number of factors. First of all, the Chamber notes that the various lists of witnesses filed by the Accused pursuant to Rule 65 *ter* of the Rules have all included references to witnesses relevant to Count 1.³⁹ Of particular importance, it is worth noting the most recently revised witness list filed by the Accused, which lists more than 150 witnesses whose evidence is, at least in part, relevant to Count 1.⁴⁰ The Accused has therefore already conducted the initial preparations required to identify which witnesses would be able to give evidence relevant to Count 1 and thus, any additional work by the defence team at this stage should focus on supplementing the work completed to date. The Chamber therefore does not consider that the Accused needs to start his preparations on Count 1 from scratch. Second, throughout the course of his defence case, the Accused has presented a substantial amount of evidence relevant to parts of Count 1.⁴¹ Thus, while it is true that additional witnesses may have to be identified and interviewed to supplement evidence already on the record in relation to Count 1, the Chamber is not persuaded by the Accused's claim that the number of additional individuals that he and his defence team need to interview is as high as 64.

³⁷ *But see* Appeal Judgement, para. 114: "The Appeals Chamber is similarly unpersuaded by Karadžić's submission that a reversal of the Judgement of Acquittal would disrupt the ongoing trial on the remaining Counts of the Indictment and would represent an irresponsible use of public funds."

³⁸ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Order on Close of Prosecution Case-in-Chief, Rule 98 *bis* Proceedings, and Defence Rule 65 *ter* Filings, 5 March 2007, para. 4; referred to in *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Motion for Extension of time for the Commencement of the Defence Case and Adopting a New Schedule, 28 January 2008, p. 6.

³⁹ *See for instance* Rule 65 *ter* Submission: Defence Witness List, public with confidential annex, 27 August 2012.

⁴⁰ Defence Further Revised Rule 65 *ter* Witness List, public with confidential annex, 26 February 2013.

⁴¹ This is referred to extensively in the Response to Suspension Motion, paras. 6, 7, 9, 13, 18.

23. The Chamber also recalls its “Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case” issued on 26 April 2012, in which it decided, in light of the breadth of this case, that the defence case should start five months after the last Prosecution witness was called and about three and a half months after the delivery of the Rule 98 *bis* Ruling.⁴² The Chamber determined this period of preparation for the defence case on the basis on the totality of the Indictment, including Count 1. While the Chamber acknowledges that most of that preparation period occurred after the Rule 98 *bis* Ruling, and therefore may have focused on the then remaining Counts of the Indictment, the Accused already had close to two months to start his defence case preparation at a stage when the Indictment included Count 1.

24. Accordingly, in light of all of the above, the Chamber considers that it is reasonable for the Accused to be granted a period of suspension in the proceedings of two months in which to adjust his preparations for the defence case to include a defence on Count 1.

⁴² Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case, 26 April 2012, paras. 10–13, 28.

IV. Disposition

25. Accordingly, the Chamber, pursuant to Articles 20(1), 21(4)(b), and 21(4)(c) of the Statute and Rule 54 of the Rules, hereby:

- a) **DENIES** the Severance Motion;
- b) **GRANTS** the Suspension Motion in part;
- c) **ORDERS** that the hearings in this case are hereby suspended and shall recommence on 28 October 2013;
- d) **ORDERS** that the Accused file a revised Rule 65 *ter* witness list and a revised Rule 65 *ter* exhibit list no later than 18 October 2013; and
- e) **DENIES** the Suspension Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this second day of August 2013
At The Hague
The Netherlands

[Seal of the Tribunal]