



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: 13 July 2012

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: 13 July 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION REQUEST FOR CERTIFICATION TO APPEAL
JUDGEMENT OF ACQUITTAL UNDER RULE 98 *BIS***

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 “Prosecution Request for Certification to Appeal Judgement of Acquittal Under Rule 98 *bis*”, filed by the Office of the Prosecutor (“Prosecution”) on 3 July 2012 (“Request”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 11 June 2012, the Accused and his Legal Adviser made oral submissions pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence (“Rules”) for a judgement of acquittal on each of the eleven counts in the Third Amended Indictment (“Indictment”) (“98 *bis* Motion”).¹ On 28 June 2012, the Chamber partially granted the 98 *bis* Motion and entered an oral judgement of acquittal with respect to Count 1 of the Indictment (“Judgement of Acquittal”).² Count 1 of the Indictment relates to the crime of genocide, which is alleged to have been committed against the Bosnian Muslim and/or Bosnian Croat groups in several municipalities in Bosnia and Herzegovina between 31 March and 31 December 1992.³

2. The Prosecution argues that the Chamber made errors of law and/or fact by (i) adding elements to the definition of genocide, (ii) incorrectly applying additional elements of genocide and of joint criminal enterprise liability, and (iii) applying the incorrect Rule 98 *bis* standard to assess the evidence.⁴ For those reasons, the Prosecution notes that it will file an appeal before the Appeals Chamber against the Judgement of Acquittal pursuant to Rule 108 of the Rules.⁵ In the Prosecution’s submission the Judgement of Acquittal constitutes a “judgement” for the purposes of Rule 108 which in turn means that the Prosecution can appeal it without requesting leave to do so from the Chamber.⁶ In support, the Prosecution cites to the “plain language” of the Statute of the Tribunal (“Statute”), the Rules, and two Trial Chamber decisions, rendered in the *Blagojević* and *Jelisić* cases respectively.⁷

¹ Hearing, T. 28569–28626 (11 June 2012).

² Hearing, T. 28774 (28 June 2012).

³ Indictment, paras. 36–40.

⁴ Request, paras. 2, 5.

⁵ Request, paras. 1, 3.

⁶ Request, para. 3.

⁷ Request, para. 3, citing *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Oral judgement *ex proprio moto* pursuant to Rule 98 *bis*, T. 2334, 2341 (19 October 1999) and *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber’s Judgement on Motions for Acquittal Pursuant to Rule 98 *bis*, 23 April 2004 (“*Blagojević* Decision”), paras. 11–13.

3. Notwithstanding this position, the Prosecution submits that it filed the Request to “preserve its right to appeal the Judgement of Acquittal should the Appeals Chamber consider that there is no appeal as of right from a judgement pursuant to Rule 98 *bis* and that certification is required under Rule 73(B)”.⁸ In that regard the Prosecution acknowledges that there is some authority which suggests that an appeal against a Rule 98 *bis* acquittal may proceed through the Rule 73(B) certification procedure.⁹

4. In the alternative, if certification is required, the Prosecution submits that the requirements for certification pursuant to Rule 73(B) have been met.¹⁰ In support, the Prosecution argues that the Judgement of Acquittal “necessarily significantly affects the outcome of the trial because it constitutes a final judgement on Count 1”.¹¹ It also contends that an immediate resolution by the Appeals Chamber would materially advance proceedings and that if the Chamber erred in dismissing Count 1, that error should be corrected now.¹² In its submission this would avoid the prospect of a lengthy retrial at the conclusion of the trial if the Appeals Chamber were to determine that the Chamber erred in entering a Judgement of Acquittal on Count 1 under Rule 98 *bis*.¹³

5. On 9 July 2012, the Accused filed his “Response to Prosecution Request for Certification to Appeal Judgment of Acquittal on Count One” (“Response”). He does not oppose the Request and agrees that the issue raised in the Judgement of Acquittal meets the criteria for certification.¹⁴ In his submission it would be more expeditious for the issue to be resolved now rather than on appeal from a final judgement and that the Prosecution’s appeal could be addressed at the same time as his appeal against the Chamber’s 98 *bis* decision with respect to Count 11 of the Indictment.¹⁵

⁸ Request, para. 1.

⁹ Request, para. 4, citing *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Oral Decision Granting Certification on 3 December 2003, T. 23122 (“*Brđanin Decision*”); *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004 (“*Brđanin Appeal Decision*”), para. 1; *Prosecutor v. Krajišnik*, Case No. IT-00-39-AR98*bis*.1, Decision on Appeal of Rule 98*bis* Decision, 4 October 2005 (“*Krajišnik Decision*”), para. 2.

¹⁰ Request, paras. 2, 5.

¹¹ Request, para. 2.

¹² Request, paras. 2, 6–8.

¹³ Request, paras. 2, 6–8.

II. Applicable Law

6. Decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.¹⁶ 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”.

7. A request for certification is “not concerned with whether a decision was correctly reasoned or not”.¹⁷ 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”.¹⁸ Under Rule 73(C), requests for certification must be filed within seven days of when the decision was filed or delivered.

8. Pursuant to Rule 108 of the Rules, a party seeking to appeal a judgement is required to file a notice of appeal “not more than thirty days from the date on which the judgement was pronounced”. Article 25(1) of the Statute provides that the Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

- (a) an error on a question of law invalidating the decision; or
- (b) an error of fact which has occasioned a miscarriage of justice.

III. Discussion

9. The Request has been filed by the Prosecution simply to preserve its right to appeal the Judgement of Acquittal in the event that the Appeals Chamber finds that certification by the Chamber is necessary pursuant to Rule 73(B).

¹⁴ Response, paras. 1–2.

¹⁵ Response, para. 2.

¹⁶ See Rules 72(B), 73(C) of the Rules.

¹⁷ *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.

¹⁸ *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.

10. As noted by the Trial Chamber in a decision rendered in the *Blagojević* case, the “effect of granting, in whole or in part, a motion pursuant to Rule 98 *bis* of the Rules is that a judgement of ‘acquittal’ is entered”.¹⁹ Granting a motion under Rule 98 *bis* and thereby entering a judgement of acquittal at the Rule 98 *bis* stage has the same practical effect as entering a judgement of acquittal at the end of the trial from which there is an automatic right of appeal under Rule 108. In that sense, such a judgement cannot be considered a decision, which requires certification before an interlocutory appeal can proceed pursuant to Rule 73(B).²⁰ Accordingly, as the *Blagojević* Trial Chamber held, it is under Rule 108 that an appeal from “a judgement including a judgement rendered pursuant to Rule 98 *bis*” should be brought.²¹ This is to be contrasted with a decision to dismiss a Rule 98 *bis* motion, which does not involve the Chamber rendering a judgement on the guilt of an accused, and remains a decision, from which certification is required in order to appeal.²² As the Appeals Chamber has held, all interlocutory appeals are subject to the certification procedure under Rule 73, including denials of a Rule 98 *bis* motion for acquittal.²³

11. In the event that the Appeals Chamber disagrees with this finding, and determines that certification is required by the Chamber before the Judgement of Acquittal can be appealed, the Chamber will, in the interests of judicial economy, address the test for certification. With respect to the first limb of the test for certification, namely whether the Judgement of Acquittal involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Chamber notes that if the Prosecution is not given the opportunity to appeal at this stage, the Judgement of Acquittal will represent the final ruling on Count 1 of the Indictment. Such a final determination on the guilt of the Accused with respect to Count 1 of the Indictment clearly involves an issue which affects the outcome of the trial and therefore the first limb of the test for certification has been met.

12. With respect to the second limb of the test for certification, the Chamber must assess whether an immediate resolution by the Appeals Chamber of whether this Chamber erred in fact and/or law by entering the Judgement of Acquittal would materially advance the proceedings. The Chamber considers that an immediate resolution of this question by the Appeals Chamber

¹⁹ *Blagojević* Decision, paras. 10–11, 13 (emphasis in original).

²⁰ *Blagojević* Decision, para. 10.

²¹ *Blagojević* Decision, para. 13. The Chamber observes that, while the *Brđanin* Trial Chamber certified an appeal against a judgement of acquittal entered pursuant to Rule 98 *bis*, the issue of whether such certification was required under the Rules was not specifically considered in that case: *See Brđanin* Decision; *Brđanin* Appeal Decision, para. 1.

²² *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to Rule 98 *bis* of the Rules, 26 October 2004, p. 3.

²³ *Krajišnik* Decision, para. 5.

will have an impact on the evidence that is to be presented during the defence case and will also avoid the prospect of a partial re-trial if the Appeals Chamber later finds that the Chamber erred in entering the Judgement of Acquittal. Accordingly, the Chamber finds that resolution of that issue now by the Appeals Chamber will materially advance the proceedings and that the second limb of the test for certification has been met.

IV. Disposition

13. Accordingly, the Chamber, pursuant to Rule 54 and 73(C) of the Rules hereby:

(a) **DENIES** the Request; and

(b) **DECLARES** that the requirements for certification to appeal under Rule 73(C) are met.

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



Judge O-Gon Kwon
Presiding

Dated this thirteenth day of July 2012
At The Hague
The Netherlands

[Seal of the Tribunal]