



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: 18 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: 18 July 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL
DENIAL OF MOTION FOR JUDGEMENT OF ACQUITTAL UNDER RULE 98 *BIS*
(COUNT 11)**

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 Denial of Motion for Judgement of Acquittal on Count Eleven”, filed by the Accused on 5 July 2012 (“Application”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 28 June 2012, the Chamber pronounced its ruling on the Accused’s oral submissions pursuant to Rule 98 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) for a judgement of acquittal on each of the eleven counts in the Third Amended Indictment (“98 *bis* Motion” and “Indictment”, respectively).¹ The Chamber partially granted the 98 *bis* Motion, entering an oral judgement of acquittal with respect to Count 1 of the Indictment and denying the remainder of the 98 *bis* Motion with respect to Counts 2 to 11 of the Indictment. Count 11 of the Indictment relates to the taking of United Nations (“UN”) personnel hostage between May and June 1995 in Bosnia and Herzegovina, charged as a violation of the laws or customs of war pursuant to Article 3 of the Statute of the Tribunal and common Article 3(1)(b) of the Geneva Conventions of 1949 (“Common Article 3”).

2. In the Application, the Accused requests, pursuant to Rule 73(B) of the Rules, certification to appeal the decision of the Chamber denying the 98 *bis* Motion with respect to Count 11 of the Indictment (“98 *bis* Ruling”).² The Chamber held that even if UN personnel were combatants immediately before their detention, they were rendered *hors de combat* by virtue of their detention by the Bosnian Serb forces and therefore became protected persons for the purposes of Common Article 3.³ The Accused argues that the Chamber erred in concluding that “the act of taking a combatant hostage turns him into a protected person”.⁴ He further argues that “it makes no sense that a perpetrator is privileged to shoot and kill a combatant, but commits a crime when he threatens him with death or detention”.⁵ Further, the Accused submits that the Chamber erred in finding that he had the requisite *mens rea* with respect to the crime of taking hostages.⁶

¹ T. 28731–28774 (28 June 2012).

² Application, para. 1.

³ 98 *bis* Ruling, T. 28735 (28 June 2012).

⁴ Application, para. 5.

⁵ Application, para. 5.

⁶ Application, para. 5.

3. The Accused submits that the issues he wishes to raise on appeal satisfy both of the requirements of Rule 73(B) for certification.⁷ Firstly, the Accused submits that the Chamber's decision that "it makes no difference whether UN personnel were combatants" significantly affects the fairness and expeditiousness of the trial and its outcome because a large portion of the evidence sought to be tendered by him during his defence case will likely be excluded.⁸ In addition, the Accused argues that "the outcome of Count Eleven virtually hinges on whether the UN personnel were protected persons since most of the other facts concerning Count 11 are not in dispute".⁹ Secondly, the Accused argues that resolution by the Appeals Chamber of the issue of whether UN personnel could be considered *hors de combat* by virtue of their detention will materially advance the proceedings and "insure [sic] that the trial is not conducted on the wrong footing".¹⁰ He further submits that if this issue is not decided until the final judgement stage, then additional evidence would have to be adduced in the post-appeal proceedings to determine this issue.¹¹

4. On 13 July 2012, the Office of the Prosecutor ("Prosecution") filed the "Prosecution Response to Application for Certification to Appeal Denial of Motion for Judgement of Acquittal on Count Eleven" ("Response") submitting that the Chamber should deny the 98 *bis* Motion.¹² In the Response, the Prosecution argues that the Appeals Chamber has already ruled on the issue of whether UN personnel, even if they were combatants, were rendered *hors de combat* by virtue of their detention and were thus protected persons under Common Article 3.¹³ Further, the Prosecution argues that contrary to the Accused's submission, the Chamber did not ignore the issue of the Accused's *mens rea* but found that there was evidence showing that the Accused was aware of the factual circumstances establishing the protected status of the UN personnel.¹⁴

II. Applicable Law

5. Decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.¹⁵ 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,

⁷ Application, para. 7.

⁸ Application, para. 8.

⁹ Application, para. 9.

¹⁰ Application, para. 10.

¹¹ Application, para. 10.

¹² Response, paras. 1, 6.

¹³ Response, paras. 2-3

¹⁴ Response, para. 5.

¹⁵ See Rule 72(B), 73(C) of the Rules.

and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

6. A request for certification is “not concerned with whether a decision was correctly reasoned or not”.¹⁶ 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”.¹⁷ Under Rule 73(C), requests for certification must be filed within seven days of when the decision was filed or delivered.

III. Discussion

7. The Application requests certification to appeal the 98 *bis* Ruling. The first limb of the Rule 73(B) test for certification is whether the 98 *bis* Ruling involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In the 98 *bis* Ruling, the Chamber held that “even if UN personnel were combatants immediately before their detention, they were rendered *hors de combat* by virtue of their detention and thus were entitled to the minimum protections guaranteed by Common Article 3”.¹⁸ In the Application, the Accused submits that UN personnel were persons taking an active part in the hostilities and therefore were not protected persons for the purposes of Article 3 of the Statute and Common Article 3.¹⁹ Therefore, the issue is whether combatants who were rendered *hors de combat* by their detention are entitled to the protections under Article 3 of the Statute and Common Article 3 and whether this protection extends to the UN personnel in this case, which would affect the outcome of trial. Thus, the Chamber finds that the first limb of this test has been met with respect to this issue.

8. With respect to the second limb of the test for certification, the Chamber must assess whether a resolution by the Appeals Chamber of whether the Chamber erred in law in its finding would materially advance the proceedings. The Chamber finds that an immediate resolution of this

¹⁶ *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.

¹⁷ *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.

¹⁸ 98 *bis* Ruling, T. 28735 (28 June 2012).

¹⁹ Application, para. 3.

issue by the Appeals Chamber will have an impact on the evidence that is to be presented during the defence case and is therefore in the interests of judicial economy.

9. The Chamber finds that both of the requirements have been met for the test for certification pursuant to Rule 73(B).

IV. Disposition

10. Accordingly, the Chamber, pursuant to Rules 54 and 73 of the Rules, hereby **GRANTS** the Application.

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



Judge O-Gon Kwon
Presiding

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

[Seal of the Tribunal]