



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-05-88-T

Date: 15 April 2008

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 15 April 2008

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVCANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON MOTION FOR CERTIFICATION OF RULE 98 *BIS*
DECISION**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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 “Defence Motion on Behalf of Drago Nikolić Seeking Certification of the Trial Chamber Rule 98 *bis* Decision”, filed on 10 March 2008 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND AND SUBMISSIONS OF THE PARTIES

1. On 3 March 2008, the Trial Chamber rendered orally its Decision on the Defence submissions made pursuant to Rule 98 *bis* (“Impugned Decision”).¹

2. In the Motion, Nikolić requests certification of the Impugned Decision with a view to filing an interlocutory appeal pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”).² The arguments addressed in the Motion only relate to those parts of the Impugned Decision dealing with Counts 7 and 8. In particular, Nikolić submits that:

- (1) the Trial Chamber erred when it stated that the joint criminal enterprise (“JCE”) described in paragraph 49 of the Indictment applied to the Bosnian Muslim population “as a whole”; that adding these words amounts to a ruling as to which persons are included in the alleged forcible transfer – which was what the Trial Chamber has held was a matter “best left to be determined at the final stage of the trial”;³
- (2) the Trial Chamber erred by omitting the words “to an area outside the control of the RS” which are included in paragraph 49 of the Indictment and constitute an essential element of the alleged JCE that must be proved beyond a reasonable doubt;⁴
- (3) the Trial Chamber erred by not pronouncing “as to what constitutes forcible transfer both legally and factually in this case and particularly which persons are included in it”, because it was a matter of interpretation of the allegations of the Indictment which should have been clarified by the Trial Chamber at that stage.⁵ It is submitted, *inter alia*, that (i) the decision not to rule on this submission compels the Accused to present a defence to Count 7 even though there is no case to answer if his argument is correct, and (ii) this is unfair as it is

¹ F. 21460–21473 (3 March 2008).

² Motion, para. 1.

³ Motion, paras. 9–10.

⁴ Motion, para. 11.

⁵ Motion, paras. 12–13. Nikolić submits that it is a fundamental right of the Accused to know the case he has to meet, especially after the close of the Prosecution’s case and that if there is any doubt as to what the Accused is charged with pursuant to the Indictment, it must be clarified by the Trial Chamber. *Ibid.*, para. 13.

contrary to the presumption of innocence, it will increase the length of the Defence case and it will lead to a waste of the scarce resources at the Accused's disposal;⁶

(4) the Trial Chamber erred by finding that there is evidence on the record that the Accused had the requisite *mens rea* for deportation.⁷ In particular, Nikolić submits that forcible transfer and deportation require different *mens rea* and that the Trial Chamber erred by failing to establish that there is no evidence on the record that the Accused had the required *mens rea* for deportation.⁸ He further claims that, if his arguments were correct, (i) there would be no case to answer for him with respect to Count 8, and (ii) it would be unfair to compel him to present a defence in respect to Count 8, as it would unnecessarily prolong the defence case and affect the expeditious conduct of the proceedings;⁹

3. Nikolić therefore argues that these alleged errors of law, both with regard to Count 7 and to Count 8, significantly affect the fair and expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chamber will materially advance the proceedings.¹⁰

4. On 25 March 2008, the Prosecution filed its response ("Response")¹¹ in which it submits the following arguments:

(1) with regard to the addition of the words "as a whole", the relevant paragraph of the Impugned Decision does not constitute a ruling that the entire Bosnian Muslim population of Srebrenica and Žepa were victims of forcible transfer, rather it simply describes the JCE as pleaded in the Indictment;¹²

(2) despite the omission of the words "to areas outside of the control of the RS", the Trial Chamber explicitly found that for the purpose of Rule 98 *bis* the JCE to forcibly remove the Bosnian Muslim population out of the two enclaves existed "as pleaded in the Indictment" and therefore Nikolić has been clearly notified that there is evidence on the record to support the existence of the JCE as alleged;¹³

⁶ Motion, paras. 24–25.

⁷ Motion, paras. 35–44.

⁸ Motion, paras. 37–44. Nikolić also submits that when a JCE amounts to the commission of two crimes, it must be proved that the accused had the required *mens rea* for both. *Ibid.*, para. 38.

⁹ Motion, paras. 46–47.

¹⁰ Motion, paras. 17–34 (in relation to Count 7) and paras. 45–48 (in relation to Count 8).

¹¹ Prosecution Response to Defence Motion on Behalf of Drago Nikolić Seeking Certification of the Trial Chamber's Rule 98 *bis* Decision, 25 March 2008 ("Response").

¹² Response, para. 7.

¹³ Response, para. 8.

(3) the argument that the failure to make a finding on what constitutes forcible transfer in this case and the effect that this has on Nikolić's defence and his rights is premised on a "misstatement of the Indictment and a selective and erroneous reading" of the Impugned Decision, as both the Indictment and the Impugned Decision are clear on the nature of the case and the evidence against Nikolić. It is submitted that it is entirely up to Nikolić whether to present a defence to Count 7 and his right to make further arguments in support of his Rule 98 *bis* submissions has not been compromised;¹⁴

(4) there appear to be inconsistencies in the case law regarding the *mens rea* requirements for deportation and forcible transfer, and in any event the *mens rea* for both of these crimes clearly exist within the common purpose of the JCE to force of Bosnian Muslim population out of the enclaves and the Trial Chamber found that Nikolić was involved in the JCE "with the requisite knowledge and intent";¹⁵

5. The Prosecution therefore submits that Nikolić has not shown that any of the requirements set out by Rule 73 (B) has been met.¹⁶

6. On 28 March 2008, Nikolić filed a motion seeking leave to reply and a reply to the Response ("Motion Seeking Leave to Reply" and "Reply", respectively),¹⁷ in which he mainly challenges the validity of the Prosecution's submissions by reiterating the arguments already raised in the Motion. Nikolić submits, *inter alia*, that the aim of the Reply is to highlight the erroneous submissions and the absence of justifications in the Response, and to assist the Trial Chamber in adjudicating on the Motion.¹⁸ He requests, *inter alia*, to "disregard" the Prosecution's Response, because the Prosecution "omissions and erroneous submissions demonstrate that the Response: (a) misconceives the arguments in the Motion; (b) fails to respond to the Defence arguments; (c) omits to consider the consequences of the alleged errors of the Trial Chamber on the need for an interlocutory appeal at this stage; and (d) does not succeed in countering any of the arguments of the Defence in this regard."¹⁹

¹⁴ Response, paras. 9–12.

¹⁵ Response, para. 14.

¹⁶ Response, paras. 11–12, 15.

¹⁷ Defence Motion Seeking Leave to Reply and Reply to Prosecution Response to Defence Motion on Behalf of Drago Nikolić Seeking Certification of the Trial Chamber Rule 98 *bis* Decision, 28 March 2008 ("Motion Seeking Leave to Reply" and "Reply", respectively).

¹⁸ Reply, paras. 3, 5.

¹⁹ Reply, paras. 27, 29.

II. APPLICABLE LAW

7. Pursuant to Rule 73(B), “[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the 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 [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

8. Rule 73(B) precludes certification unless the Trial Chamber finds that both of its requirements are satisfied, and that even where both requirements of Rule 73(B) are met certification remains in the discretion of the Trial Chamber,²⁰ and that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not.²¹

III. DISCUSSION

9. Nikolić argues that adding the words “as a whole” when discussing the JCE to forcibly remove the populations from Srebrenica and Žepa amounts to a ruling as to which persons are included in the alleged forcible transfer. He also submits that omitting the words “to an area outside the control of the RS” indicates that the Trial Chamber did not establish this aspect of the JCE. The Trial Chamber notes that in both cases, the addition and omission of these words should be read in the context of the relevant part of the Impugned Decision, where the Trial Chamber described the JCE “as alleged in the Indictment”. The allegations against Nikolić are clear and the addition or omission of words by the Trial Chamber did not amount to any ruling that may have changed the nature of these allegations. Nikolić therefore has not shown that this is an issue that may significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

10. Nikolić further argues that refraining from pronouncing on what constitutes forcible transfer both factually and legally and which persons are included in it is an issue that may significantly affect the fair and expeditious conduct of the proceedings, as “if his argument is correct”, namely that the group allegedly transferred is limited to the women, children and elderly persons, he would not need to present a defence to Count 7 of the Indictment.

²⁰ See, for example, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2; *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. See also, Decision on Miletić’s Request for Certification of the Decision on Defence Objections to the Admission of the Expert Statement of General Rupert Smith, 15 April 2008 (“Decision of 15 April 2008”), p. 4.

²¹ See, for example, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings, 20 June 2005, para. 4; Decision of 15 April 2008, p. 4.

11. The issue for certification is the Trial Chamber's decision to defer this matter to the end of the case rather than determine it at the Rule 98 *bis* stage. The Trial Chamber acknowledges that the question whether such a determination of fact and law should have been made at the Rule 98 *bis* stage is one that could ultimately have an impact on the fair and expeditious conduct of the proceedings. However, because of the very nature of the issue—a decision as to whether a decision should be taken—a determination by the Appeals Chamber has a possible consequence of further requests for certification, subsequent appeals and delays pending any final result. Thus, there is a real risk that the granting of certification could result in a substantial delay of the trial proceedings in relation to all of the Accused. Considering this, as well as the nature of the factual allegations underlying the counts against Nikolić and the fact that all of the Accused will have the opportunity to fully argue the question at the end of the trial, the Trial Chamber is not satisfied that this is an issue that would *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial nor that a decision from the Appeals Chamber at this time would *materially* advance the proceedings. In contrast in fact, a consideration of this issue at this stage of the trial may have the opposite effect.

12. The Trial Chamber therefore is of the opinion that neither of the requirements of Rule 73(B) has been satisfied.

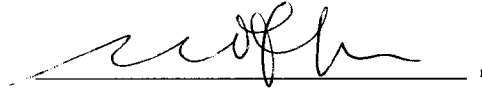
13. Nikolić further argues for certification because the *mens rea* for deportation is different from that for forcible transfer and the “Trial Chamber failed to establish that there is no evidence on the record on the basis of which a reasonable trier of fact could conclude beyond a reasonable doubt that Drago Nikolić had the required *mens rea* for deportation, and thus to find that there was no case to answer in respect of the alleged joint criminal enterprise.”

14. A request for certification must be based upon the actual findings in the Impugned Decision. The issue as framed above does not arise from the Trial Chamber's Rule 98 *bis* decision. In relation to Count 8 the Trial Chamber found that there was evidence for the purpose of Rule 98 *bis* that Nikolić through his actions furthered the common purpose of the JCE to forcibly remove the populations from Srebrenica and Žepa. Therefore, the Trial Chamber is not satisfied that the Impugned 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 an immediate resolution by the Appeals Chamber may materially advance the proceedings.

PURSUANT TO Rule 73(B) of the Rules,

HEREBY GRANTS the Motion Seeking Leave to Reply and **DENIES** the Motion.

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



Carmel Agius
Presiding

Dated this fifteenth day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]