UNITED NATIONS

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 October 2014

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 October 2014**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION FOR WITHDRAWAL OF CHARGES

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 for Withdrawal of Charges", filed on 20 August 2014 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests, pursuant to Rules 73 and 73 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), that the Chamber order the Office of the Prosecutor ("Prosecution") to withdraw the charges in the Indictment in relation to which the Prosecution was instructed not to lead evidence as per the "Decision on the Application of Rule 73 *bis*", filed on 8 October 2009 ("Rule 73 *bis* Charges" and "Rule 73 *bis* Decision" respectively).[1] The Accused argues that the Prosecution did not move to amend the terms of the Rule 73 *bis* Decision throughout the trial, and since the trial has now come to an end, the Rule 73 *bis* Charges should be withdrawn.[2] The Accused also requests that the Chamber, in the interests of justice and judicial economy, invite the Prosecution to withdraw those charges upon which it has voluntarily decided not to lead evidence, as well as those charges for which it has led evidence that is "plainly insufficient to sustain a conviction."[3] As an example of such charges, the Accused refers to the alleged shelling of a flea market in Sarajevo on 22 December 1994, described in Schedule G.9 of the Indictment, and the fact that other accused persons before this Tribunal have been acquitted in relation to this incident.[4]

2. On 26 August 2014, the Prosecution filed the "Prosecution Response to the Accused's Motion for Withdrawal of Charges" ("Response"), arguing that the Motion should be denied. In the Response, the Prosecution submits that the Accused's Motion is premature given the fact that the trial has not yet ended.[5]

3. On 5 September 2014, the Chamber issued the "Interim Order Regarding the Accused's Motion for Withdrawal of Charges" ("Interim Order") wherein it ordered the Prosecution, while

[1] Motion, paras. 1–2.

[2] Motion, paras. 3–4 and fn. 1, citing Decision on the Accused's Motion for Finding of *Non-Bis-In-Idem*", 16 November 2009 ("*Non-Bis-In-Idem* Decision"), para. 14 and *Prosecutor v. Milutinović at al.*, Case No. IT-05-87-T, Order Regarding Prosecution's Submission With Regard to Rule 73 *bis* (D), 7 April 2009.

[3] Motion, para. 5 .

[4] Motion, para. 5, fn. 2.

[5] Response, p. 1.

still remaining seised of the Motion, to file a submission by 15 September 2014 outlining its intentions with respect to the Rule 73 *bis* Charges.[6]

4. On 10 September 2014, the Prosecution filed the "Prosecution Submission with Respect to Incidents and Charges on which No Evidence was Presented" ("Submission"). In the Submission, the Prosecution outlined "its intention to state – once the judgement is delivered – that it does not intend to proceed further with the [Rule 73 *bis* Charges] against the Accused before the ICTY and to request the Trial Chamber to declare that there remain no outstanding charges against the Accused before the ICTY."[7]

5. On 2 October 2014, during closing arguments, the Chamber inquired with the Prosecution as to why it could not make the above declaration now, as opposed to after the judgement, so that the Rule 73 *bis* Charges are withdrawn well before the delivery of the judgement.[8] On 7 October 2014, the Prosecution responded to the Chamber's inquiry, declaring that it does not intend to proceed further with the Rule 73 *bis* Charges against the Accused.[9]

II. Applicable Law

6. Rule 73 *bis*(D) of the Rules empowers a Trial Chamber to invite the Prosecution to reduce the number of counts charged in an indictment, and to fix a number of crime sites or incidents in respect of which evidence may be presented by the Prosecution, in the interests of a fair and expeditious trial.[10] When a Chamber exercises this power, it remains open to the Prosecution, after the commencement of trial, to apply under Rule 73 *bis*(F) of the Rules to vary the Chamber's decision as to the number of crime sites or incidents in respect of which evidence may be presented.[11]

III. Discussion

7. With respect to the Accused's request that the Chamber order the Prosecution to withdraw Rule 73 *bis* Charges, the Chamber recalls the Prosecution's declaration of 7 October 2014 outlined in paragraph 5 of this decision. Accordingly, by reason of that declaration, the Accused's request is now moot.

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[6] Interim Order, paras. 7–8.
[7] Submission, para. 3.
[8] Closing Arguments, T. 48033 (2 October 2014).
[9] Closing Arguments, T. 48034 (7 October 2014).
[10] *See also* Rule 73 *bis* Decision, para. 4; *Non-Bis-In-Idem* Decision, para. 11.
[11] *See also Non-Bis-In-Idem* Decision, para. 11.

8. As noted above, the Accused also requests that the Prosecution be invited to withdraw charges upon which it has voluntarily decided not to provide evidence as well as charges on which, in the opinion of the Accused, there is "plainly insufficient evidence".[12] With respect to the first part of that request, the Chamber notes that withdrawal of charges falls within the discretion of the Prosecution. Should the evidence in the end prove incapable of sustaining a conviction on a particular charge, the Chamber will acquit the Accused of that charge.[13] With respect to the second part of the Accused's request, the Chamber reminds the Accused that two different Chambers, both acting reasonably, can come to different conclusions on the basis of the same evidence.[14] It therefore does not follow – as a matter of course – that a particular body of evidence which was deemed insufficient by a Trial Chamber or even the Appeals Chamber in another case will also be regarded as insufficient for the purposes of entering a conviction on a particular charge by this Chamber. In addition, as was stated above, withdrawal of charges falls within the discretion of the Prosecution. If the evidence ultimately proves insufficient to sustain a conviction on a particular charge, the Accused will be acquitted of that charge. For the foregoing reasons, the Chamber finds that the Accused's request for an invitation to the Prosecution to withdraw any additional charges from the Indictment is without merit.

IV. Disposition

9. Accordingly, the Chamber, pursuant to Rules 54 and 73 *bis* of the Rules, hereby:

a) **DECLARES** moot the Accused's request with respect to Rule 73 *bis* Charges; and

b) **DENIES** the Motion in all other respects.

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

Judge O-Gon Kwon
Presiding

[12] The Chamber recalls that the Prosecution did not address this part of the Accused's request in its Response to the Motion.

[13] The Chamber also notes that the Prosecution has already withdrawn an incident listed in Schedule A.5.1 of the Third Amended Indictment and thus appears to have begun the process of reviewing its own evidence and withdrawing unsupported charges. *See* Notice of Withdrawal of Incident A.5.1., 18 August 2014.

[14] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 64.

Dated this thirteenth day of October 2014
At The Hague
The Netherlands

[Seal of the Tribunal]