



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: 23 May 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: 23 May 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR ORDER TO WITHDRAW
UNPROVEN ALLEGATIONS**

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 “Motion for Order to Withdraw Unproven Allegations” filed by the Accused on 4 May 2012 (“Motion”), and hereby issues its decision thereon.

1. In the Motion, the Accused requests that the Chamber direct the Office of the Prosecutor (“Prosecution”) to review the paragraphs and scheduled incidents of the Third Amended Indictment (“Indictment”) and withdraw those allegations for which it has not led sufficient evidence.¹ While acknowledging that the procedure established by Rule 98 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”) limits the challenges to those that go to counts of the Indictment,² the Accused submits that such an order would be in the interests of justice “by reducing the need for defence investigation and evidence of allegations not amounting to counts for which sufficient evidence has not been led in the [P]rosecution’s case.”³ The Accused contends that the Chamber may issue such order pursuant to Rule 54 of the Rules as was done in the *Nzabonimana* case before the International Criminal Tribunal for Rwanda (“ICTR”).⁴

2. The Prosecution filed the “Prosecution Response to Motion for Order to Withdraw Unproven Allegations” on 18 May 2012 (“Response”), wherein it opposes the Motion. The Prosecution first submits that the order requested in the Motion would circumvent the procedure set out in Rule 98 *bis*.⁵ However, the Prosecution undertakes to follow the Chamber’s suggestion to notify it of charges or incidents for which it has not provided sufficient evidence to secure a conviction.⁶ Finally, the Prosecution argues that the circumstances surrounding the *Nzabonimana* Order are unclear, and that the Accused fails to invoke any justification for issuing such an exceptional order in the instant case.⁷

3. The Chamber notes that Rule 98 *bis* of the Rules, as amended in 2004, provides that “[a]t the close of the Prosecutor’s case, the Trial Chamber shall, by oral decision, and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.” As established by the jurisprudence, the test to be applied is

¹ Motion, paras. 1, 6.

² Motion, para. 2.

³ Motion, para. 3.

⁴ Motion, para. 4, referring to *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order for Prosecution to Review Indictment and to File Public Version, 8 April 2011 (“*Nzabonimana* Order”).

⁵ Response, paras. 3, 6–8.

⁶ Response, para. 4.

⁷ Response, paras. 10–11.

whether there is evidence upon which, if accepted, a trier of fact could be satisfied beyond reasonable doubt of the guilt of the particular accused on the count in question.⁸ Under the amended Rule 98 *bis*, the Chamber is not required to satisfy itself that there is evidence supporting each of the individual charges covered by the counts of the Indictment.⁹ There may therefore be instances in which even though the evidence is not necessarily sufficient in respect of some allegations or particulars set out in the Indictment in respect of a count, or in respect of one or several of the forms of individual criminal responsibility, this evidence is capable of supporting a conviction on a particular count.¹⁰ Consequently, the approach to be taken by the parties with respect to Rule 98 *bis*, as well as by the Chamber in ruling on the parties' submissions, is concerned with counts and not specific charges. Prior to the 2004 amendment, Rule 98 *bis* provided that an "accused may file a motion for the entry of judgement of acquittal *on one more offences charged in the Indictment*" and that "the Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on *that or those charges*".¹¹ An order to the parties pursuant to the *lex generalis* of Rule 54 to now adopt a "charge" approach at the Rule 98 *bis* stage of the case would thus render the 2004 amendment to Rule 98 *bis* meaningless.

4. However, the Chamber takes due note of the Prosecution's undertaking to bring to the Chamber's attention, "during the course of reviewing the evidence adduced in its case in chief", any "charges or incidents for which it has not provided sufficient evidence to secure a conviction".¹² The Chamber is indeed of the view that such an approach will ultimately favour the expeditiousness of the trial and best serve the interests of justice.¹³

5. Accordingly, the Chamber, pursuant to Rule 98 *bis* of the Rules, hereby **DENIES** the Motion.

⁸ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Oral ruling pursuant to Rule 98 *bis*, 18 May 2007 ("Milutinović Rule 98 *bis* Decision"), T. 12772; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Oral ruling pursuant to Rule 98 *bis*, 3 March 2008, T. 21461.

⁹ *Milutinović Rule 98 bis Decision*, T. 12772.

¹⁰ *Prosecutor v. Mrškić et al.*, Case No. IT-95-13/1-T, Oral ruling pursuant to Rule 98 *bis*, 28 June 2006, T. 11312.

¹¹ Emphasis added.

¹² Response, para. 4.

¹³ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1, Oral ruling pursuant to Rule 98 *bis*, 3 May 2007, T. 5639.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-third day of May 2012
At The Hague
The Netherlands

[Seal of the Tribunal]