

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-AR73.4

IN THE APPEALS CHAMBER

Before: An Appeals Chamber

Registrar: Mr. John Hocking

Date: 27 July 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPEAL OF DECISION ON HOLBROOKE AGREEMENT

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadzic

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1. Dr. Radovan Karadzic respectfully appeals, pursuant to certification¹, the Trial Chamber's *Decision on Accused's Holbrooke Agreement Motion* (8 July 2009).

2. On 18 July 1996, Richard Holbrooke, the international community's chief negotiator for Bosnia, came to the region to enforce the Dayton Agreement's provision that a person indicted by this Tribunal could not hold public office. Threatening UN Security Council sanctions, and promising no prosecution at the ICTY, he convinced Dr. Karadzic to resign from his positions as President of Republika Srpska and President of the SDS party, and to withdraw from public life.

3. Dr. Karadzic kept his promises, but Holbrooke did not. The issue on appeal is whether the Tribunal, as the pillar of justice and conscience of the United Nations, will enforce Holbrooke's promise or whether it will sanction duplicity and deception on behalf of the international community.

Procedural History

4. The procedural history of the Holbrooke Agreement motion is fully and accurately set forth in the Impugned Decision.²

The Impugned Decision

5. In the Impugned Decision, despite widely divergent versions of what occurred and on whose authority, the Trial Chamber refused to order an evidentiary hearing. Instead, it averred that it would make its decision on the basis that all the evidence submitted by Dr. Karadzic was true.³ It held that assuming all those facts were true, the motion could not succeed as a matter of law.⁴

6. The Trial Chamber went on to find that the requirements of the doctrine of apparent authority were not met.⁵

7. In support of this finding, the Trial Chamber relied upon a number of arguments.

8. First, it held that Dr. Karadzic's early submissions contradicted his assertion that Holbrooke acted with the apparent authority of the UNSC. It cited his initial

¹ *Decision on Accused's Application for Certification to Appeal Decision on Holbrooke Agreement* (17 July 2009)

² Impugned Decision at paras. 1-8

³ Impugned Decision at para. 47

⁴ Impugned Decision at para 46

⁵ Impugned Decision at para. 69

submissions to the Chamber on this issue which alleged that Holbrooke acted on behalf of the US. It further relied upon the fact that Dr. Karadzic was never personally in contact with Holbrooke, which it said brought into doubt his ability to gauge on whose behalf Holbrooke was acting on this particular occasion.⁶

9. Second, the Trial Chamber found that Dr. Karadzic had admitted that he was not convinced Holbrooke would keep his side of the Agreement since he insisted that Holbrooke's promises be put in writing. It found that Dr. Karadzic's own associates also had doubts about Holbrooke's involvement and willingness to keep his side of the deal. It further found that rather than signing the agreement on the basis of his full faith in Holbrooke, the accused capitulated to persuasion by President Slobodan Milosevic of the Federal Republic of Yugoslavia, who mediated the talks. It also found that Dr. Karadzic's reliance on Holbrooke's earlier involvement in Dayton as a basis for his apparent authority was "questionable" considering that Holbrooke had resigned from the Department of State following Dayton and had since then not been involved in Bosnian matters until July 1996.⁷

10. Third, the Trial Chamber found that Holbrooke's conduct at Dayton and High Representative Carl Bildt's confirmation that it was the US, and not the UN Security Council, which was calling the shots belied Dr. Karadzic's claim that Holbrooke was acting on behalf of the UNSC.⁸

11. Fourth, the Trial Chamber concluded that the fact that Holbrooke's earlier promises had been implemented by the UN Security Council did not indicate a consistency of behavior that would justify the notion of apparent authority. Rather it was an indication of a case-by-case approach to different negotiations designed to end the hostilities.⁹

12. Fifth, the Trial Chamber found that because Dr. Karadzic was not in personal contact with Holbrooke in July 1996, and Holbrooke was then out of office, Dr. Karadzic

⁶ Impugned Decision at para. 70

⁷ Impugned Decision at para 71

⁸ Impugned Decision at para 72

⁹ Impugned Decision at para 73

was not entitled to assume from the previous dealings in 1995 concerning the Sarajevo cease-fire, that Holbrooke was entering into an agreement on behalf of the UNSC.¹⁰

13. Sixth, after distinguishing other decisions on apparent authority in criminal cases, the Trial Chamber concluded that “given all the circumstances, it cannot be said that the Accused could reasonably believe that Holbrooke had any authority to grant him immunity from prosecution by this Tribunal”,¹¹ and that Dr. Karadzic had failed to show that Holbrooke acted with the apparent authority of the UNSC in July 1996.¹²

14. The Trial Chamber also rejected the abuse of process claim, holding that since Holbrooke was essentially a third party, unconnected to the Tribunal, promising immunity years before Dr. Karadzic’s transfer to the Tribunal, it was difficult to see how the decision to proceed with the case can be said to be such an abuse of process that the Tribunal would be obliged to stay the proceedings.¹³ The Trial Chamber went on to declare that it could only be in exceptional circumstances that the actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed.¹⁴

Grounds of Appeal

15. Dr. Karadzic respectfully asserts that the Trial Chamber erred as follows:

- (A) in refusing to hold an evidentiary hearing, professing to accept the facts proffered by Dr. Karadzic as true, but then discounting them.
- (B) in taking into account irrelevant considerations such as (1) Dr. Karadzic’s inconsistent positions on the source of Holbrooke’s authority; (2) that the agreement was concluded without face-to-face consultations; (3) that Dr. Karadzic wanted the agreement to be in writing; (4) the fact that the agreement was not consummated by a United Nations Security Council resolution; and (5) the length of time between the agreement and the transfer of Dr. Karadzic to the Tribunal.
- (C) in failing to take into account relevant considerations such as (1) manifestations of the U.N. Security Council granting authority to Holbrooke; (2) the fact that it was the Dayton Agreement provision prohibiting an ICTY fugitive from holding public office that was the basis for the agreement; (3) the fact that Holbrooke was threatening the

¹⁰ Impugned Decision at para. 74

¹¹ Impugned Decision at para. 74

¹² Impugned Decision at para 79

¹³ Impugned Decision at para 84

¹⁴ Impugned Decision at para 85

imposition of U.N. Security Council sanctions if Dr. Karadzic did not resign; and (4) the fact that Holbrooke was back in the region with the blessing of the Contact Group, comprised of the permanent members of the U.N. Security Council.

- (D) in giving insufficient weight to the relevant consideration of the effect of previous ratification of Holbrooke's promises by the U.N. Security Council.
- (E) in making errors as to the facts that (1) Dr. Karadzic's agents did not believe that Holbrooke was acting on behalf of the U.N. Security Council; and (2) Holbrooke had resigned from the Department of State following Dayton and had not been involved in Bosnian matters since.
- (F) in applying a dual standard for abuse of process on the basis that the alleged misconduct was committed by a third party.

Standard of Review

16. It is Dr. Karadzic's position the Trial Chamber erred in failing to hold an evidentiary hearing, and in taking into account irrelevant considerations and in failing to adequately take into account relevant considerations in deciding the operative facts. Dr. Karadzic also contends that the Trial Chamber misdirected itself as to the relevant law in deciding that the abuse of process doctrine did not apply. As such, the Trial Chamber made discernible errors in dismissing the Holbrooke Agreement motion.

17. The Appeals Chamber has previously held that discernible errors include: that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law relevant to the exercise of its discretion; took into account irrelevant considerations, or failed to take into account relevant considerations, or gave insufficient weight to relevant considerations; made an error as to the facts upon which it has exercised its discretion; or reached a decision that no reasonable Trial Chamber could have reached.¹⁵

¹⁵ See, for example, *Prosecutor v. Krajisnik*, Case No. IT-IT-00-39-AR73.1, *Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment* (25 April 2005) at para. 7. See also, *Prosecutor v. Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 5; *Prosecutor v. Milosevic*, Case No: IT-02-54-AR73.7, *Decision on Interlocutory Appeal of The Trial Chamber's Decision on The Assignment of Defence Counsel* (1 November 2004) para. 9; *Prosecutor v. Prlic et al.*, Case No. IT-04-74-PT, *Decision on Milivoj Petkovic's Application for Certification to Appeal Decision on Motions Alleging Defect in the Form of the Indictment* (19 September 2005), at page 2.

Argument

(A) The Trial Chamber Erred in Refusing to Hold an Evidentiary Hearing

18. The Trial Chamber's decision was an elaborate dance designed to avoid a potentially embarrassing evidentiary hearing.

19. The Trial Chamber sidestepped the fundamental, and highly disputed, issue of whether Holbrooke had promised Dr. Karadzic that he would not be prosecuted at this Tribunal. Holbrooke and the United States government have steadfastly denied making the promise. Dr. Karadzic and his 17 witnesses say that he did.

20. The Trial Chamber instead focused on another highly disputed issue: whether Holbrooke acted with the apparent authority of the United Nations Security Council. But instead of resolving this dispute by holding an evidentiary hearing and making findings of fact, the Trial Chamber decided that Holbrooke did not have such apparent authority.

21. The Trial Chamber avoided an evidentiary hearing on this issue by professing to accept all of the facts asserted by Dr. Karadzic as true. However, it then proceeded to ignore critical facts, impeach the credibility of Dr. Karadzic and his witnesses without hearing them, and make findings contrary to the facts put forth by Dr. Karadzic.

22. Rather than accept Dr. Karadzic's assertions as true, the Trial Chamber inappropriately engaged in a credibility determination—discounting,¹⁶ misconstruing,¹⁷ and flatly disbelieving¹⁸ Dr. Karadzic's assertions. Given the seriousness of Dr. Karadzic's claim, an evidentiary hearing where Dr. Karadzic could be confronted and questioned was required before the Trial Chamber could make such a credibility determination.

23. As the Appeals Chamber has recognized, it is fundamentally unfair to question a person's credibility without putting the issue before him and allowing the Trial

¹⁶ Impugned Decision at para. 70 (doubting Dr. Karadzic's ability to gauge Holbrooke's authority because they did not interact in person).

¹⁷ Impugned Decision at para. 71 (misconstruing the fact that Dr. Karadzic did not trust Holbrooke to uphold his side of the bargain as evidence that Dr. Karadzic did not have a belief in Holbrooke's authority, when in fact, Dr. Karadzic simply doubted that Holbrooke would *uphold* the agreement because it was not in writing).

¹⁸ Impugned Decision at para. 70 (pointing to Dr. Karadzic's statements that Holbrooke was acting on behalf of the U.S. as evidence that Dr. Karadzic could not also believe that Holbrooke was acting on behalf of the UNSC, when in fact, those two beliefs are not mutually exclusive.)

Chamber the benefit of watching his reaction and hearing his explanation.¹⁹ Indeed, this is the rationale behind the adoption of Rule 90(H)(ii).

24. Two cases from the domestic courts of the United States are instructive. In *Pacific Mutual Life Ins. Co. v. Haslip*, the United States Supreme Court found that a question of whether an employee was acting as an agent of his employer when he committed fraud was a question of fact for the jury to determine.²⁰ Similarly, in *Mutual Benefit Life Ins. Co. v. City of Winston-Salem*, the question of whether an individual was acting under the apparent authority of an insurance company was held to be a question of fact for the jury.²¹

25. Likewise, Dr. Karadzic contends that the Trial Chamber erred in deciding the disputed questions of fact presented in the motion without holding an evidentiary hearing, as he requested. In doing so the Trial Chamber committed a discernible error which warrants remand of the matter back to the Trial Chamber to hold an evidentiary hearing and to decide the question of the legal effect of the agreement on the basis of the facts adduced at the hearing.

(B) The Trial Chamber Erred in Taking Irrelevant Considerations into Account

(1) Dr. Karadzic's Earlier Submissions

26. The Trial Chamber's first reason for rejecting the motion was that:

First, the Accused's early submissions contradict his assertion that Holbrooke acted with the apparent authority of the UNSC. For example, the Accused's initial submissions to the Chamber on this issue explicitly alleged that Holbrooke acted on behalf of the US alone.²²

27. This was a completely irrelevant consideration if the Trial Chamber was to be true to its word that "the Chamber will make its determination on the basis that the evidence submitted by the Accused is accepted *pro veritate*."²³

28. In the written statement submitted with the motion, Dr. Karadzic set forth the reasons why he believed that Holbrooke was acting on behalf of the Security Council:

¹⁹ *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 24

²⁰ 499 U.S. 1, 13 (1991)

²¹ 100 N.C. App. 300, 304-05 (N.C. App. 1990)

²² Impugned Decision at para. 70

²³ Impugned Decision at para 47

I was aware that during negotiations over Bosnia in which Holbrooke had been involved since 1995, whenever he had made a promise to us, it had been fulfilled. When those promises had involved action by the United Nations Security Council, that action soon followed. Indeed, the United Nations had expressly encouraged us to work with Holbrooke and others to find a solution to the problems in Bosnia.²⁴

29. Dr. Karadzic then went on to clearly state: “Therefore, I had no doubt that Holbrooke had the authority to make such an agreement and I relied upon it.”²⁵

30. Dr. Karadzic’s statement was corroborated by what he told others after he had entered into the Holbrooke Agreement:

“He said that the Contact Group and Security Council had authorized the American representative Holbrooke to negotiate and provide such guarantees.²⁶

The next day, he said that the Contact Group and Security Council had authorized the American representative Holbrooke to conduct these negotiations and provide these guarantees.²⁷

He said that the Contact Group and Security Council had authorized the American representative, Richard Holbrooke, to conduct the negotiations, and guarantee that there would be no persecution, arrest, or trial.²⁸

He said that Holbrooke acted as the representative of US administration and the person authorized to speak for the International Contact Group and UN Security Council.²⁹

31. The Trial Chamber was bound to accept this evidence if, as it professed, it was proceeding to decide the motion on the basis that all facts asserted by the accused were true. Therefore, any statement by the accused which allegedly undermined this claim was irrelevant.

32. In addition, the Trial Chamber erred when it stated that Dr. Karadzic had claimed that Holbrooke had acted for the US alone. The pleading in question indicated that Holbrooke acted “in the name of the USA”. There is no inconsistency between acting in the name of the USA and with the apparent authority of the UNSC where the

²⁴ Annex B at para. 14

²⁵ Annex B at para. 15

²⁶ Ljiljana Zelen-Karadzic statement, Annex O, Sonja Karadzic-Jovicevic statement, Annex P

²⁷ Branslav Jovicevic statement, Annex Q

²⁸ Dragan Draskovic statement, Annex R

²⁹ Punisa Lucic statement, Annex AE (First Supplement)

UNSC had deferred to the US in Bosnian peace negotiations. Dr. Karadzic could have explained this at an evidentiary hearing if the inconsistency had been put to him.

(2) No Face-to-Face Consultations

33. The Trial Chamber also provided as a reason for rejecting the motion the fact that:

...the Accused admits that he was never personally in contact with Holbrooke, which brings into doubt his ability to gauge on whose behalf Holbrooke was acting on this particular occasion.³⁰

34. This, too, was an irrelevant consideration. If the Trial Chamber was in fact accepting the facts put forward by the Accused as true, then it was obligated to accept the unequivocal statement of Dr. Karadzic, corroborated by what he had told others, that Holbrooke was acting on behalf of the Security Council.

35. This was particularly true given the fact that the Trial Chamber also had before it the statement of Momcilo Krajisnik, who was personally in contact with Holbrooke, and who was likewise convinced that Holbrooke had the authority to make such a promise.³¹

36. This is yet another example of how the Trial Chamber professed to accept the facts put forth by the Accused as true, but then refused to credit those facts.

37. In addition, given that Dr. Karadzic was constantly in touch with the participants during the meeting by telephone, who conveyed Holbrooke's representations to him, the fact that he did not speak to Holbrooke directly on that occasion is in and of itself irrelevant.

(3) Wanting the Agreement in Writing

38. The Trial Chamber also found, as the basis for rejecting the claim of apparent authority that:

...[the Accused] himself admits he was not convinced Holbrooke would keep his side of the Agreement. He recounts how, once he heard that Holbrooke did not want to put his part of the undertaking in writing for political reasons, he became mistrustful and insisted that this be done.³²

³⁰ Impugned Decision at para. 70

³¹ Momcilo Krajisnik statement, Annex D, at paras. 4,6,14,and 15

³² Impugned Decision at para 71

39. This is yet another example of how the Trial Chamber, while professing to accept the facts put forth by the Accused as true, went ahead and disbelieved those facts.

40. As shown above, Dr. Karadzic was unequivocal in the statement he submitted with the motion, as corroborated by the statements of those he had told about the agreement, that he believed that Holbrooke had the authority of the Security Council to make such an agreement. By focusing on his request that the agreement be in writing, the Trial Chamber took into account an irrelevant consideration. Having refused to order an evidentiary hearing, and having professed to accept the facts put forth as the truth, the Trial Chamber was obligated to accept Dr. Karadzic's statement.

41. Had an evidentiary hearing been held, and the matter been put to Dr. Karadzic, he would have had the opportunity to explain that his request that the agreement be in writing had nothing to do with any doubts about Holbrooke's authority, but was for the purpose of having undisputable proof of Holbrooke's promise. Therefore, the fact that he had asked that the agreement be in writing was an irrelevant consideration on the issue of Holbrooke's apparent authority.

(4) No Security Council Resolution

42. The Trial Chamber also professed to accept, for the purpose of deciding the motion without an evidentiary hearing, that the doctrine of apparent authority applied in the context of international criminal law.³³ However, it then found that:

A UN resolution was necessary before the UNSC was able to limit the jurisdiction of the Tribunal. Thus, the Accused's assertion, citing no authorities in support, that UNSC resolutions are not required before binding the Tribunal to an agreement limiting its jurisdiction is not persuasive.³⁴

43. The lack of a Security Council resolution adopting the Holbrooke agreement is an irrelevant consideration when determining whether the doctrine of apparent authority applies. A resolution would constitute actual authority.

44. No resolution from the corporate boards was required when the doctrine of apparent authority was applied in cases of international claims against companies whose agents had entered into agreements with third parties.³⁵ Likewise, no written plea

³³ Impugned Decision at para. 79

³⁴ Impugned Decision at para 58

³⁵ Motion at paras 55-56

agreements signed by prosecuting authorities were required when the doctrine of apparent authority was applied to promises made to an accused.³⁶

45. The doctrine of apparent authority exists to enforce promises which are not ratified by resolutions or written agreements. The lack of a resolution of the United Nations Security Council was therefore an irrelevant consideration as to whether or not Mr. Holbrooke acted with the apparent authority of the Security Council.

46. In addition, the doctrine of apparent authority requires an assessment of the reasonableness of the third party's reliance on the agent's promise *at the time the promise was made*. Had the matter been put to him at an evidentiary hearing, Dr. Karadzic could have explained that Mr. Holbrooke's insistence that the agreement could not be put in writing, and that indeed there would be harsh rhetoric against him, led him to believe that the lack of a Security Council resolution did not affect the validity of the promise made to him.

47. Therefore, the lack of a Security Council resolution adopting the Holbrooke Agreement was an irrelevant consideration to the existence of Mr. Holbrooke's apparent authority to enter into the agreement.

(5) Lapse of Time Between Agreement and Arrest

48. In rejecting Dr. Karadzic's abuse of process claim, the Trial Chamber held that Holbrooke was "essentially a third party, unconnected to the Tribunal, promising immunity years before the Accused's transfer to the Tribunal."³⁷

49. The lapse of time between Holbrooke's promise (18 July 1996) and Dr. Karadzic's transfer to the Tribunal (30 July 2008) is an irrelevant consideration. Had Dr. Karadzic been transferred to the Tribunal on 19 July 1996 would he have been entitled to dismissal of the indictment for abuse of process?

50. Therefore, the Trial Chamber erred in using the length of time which had elapsed between the offending conduct and Dr. Karadzic's transfer to the Tribunal as a reason for denying the motion.

³⁶ Motion at paras. 59-63

³⁷ Impugned Decision at para 84

(C) The Trial Chamber Erred in Failing to Take Relevant Considerations into Account

(1) Manifestations of the Security Council

51. An important element of Dr. Karadzic's claim of apparent authority was that "the United Nations had expressly encouraged us to work with Holbrooke and others to find a solution to the problems in Bosnia."³⁸ The Trial Chamber failed to consider the evidence that Dr. Karadzic had marshaled showing that the Security Council had manifested that Holbrooke had the authority to act on its behalf on Bosnian matters.

52. In September 1995, five days after Dr. Karadzic consummated an agreement with Holbrooke that ended the siege of Sarajevo and ended UN bombing of Bosnian Serb positions, the United Nations expressly signaled to Dr. Karadzic and the rest of the world that Holbrooke would have the authority to speak for them. United Nations Secretary General Boutros Boutros-Ghali informed the Security Council on 18 September 1995 that he would be ready to delegate the UN role in the former Yugoslavia, to "allow all key aspects of implementation to be placed with others."³⁹

53. Three days later, on 21 September 1995, the Security Council itself sent the same message in Resolution 1016 in which it called upon "member states involved in promoting an overall peaceful settlement in the region to intensify their efforts."⁴⁰

54. On 8 December 1995, UN Secretary General Boutros Boutros-Ghali addressed the opening session of the London conference on the implementation of the Dayton agreements negotiated by Holbrooke. He "saluted the brilliant diplomacy that had been seen at Dayton and paid tribute to the negotiators who had laid the foundation for the breakthrough that had taken place there." He pledged that "the United Nations would do all it could to support the agreement."⁴¹

55. Even China, the only permanent member of the UN Security Council not represented on the Contact Group, gave its express support to Holbrooke's efforts.

³⁸ Annex B at para. 14

³⁹ Holbrooke, *To End a War* (Modern Library 1998) at p. 175; Annex AB at para. 23

⁴⁰ Annex AB at para. 24

⁴¹ UN Secretary General Report (13 December 1995); Annex AB at para. 37

During the Security Council proceedings on 15 December 1995, the Chinese Ambassador expressed his country's support for the peace process.⁴²

56. On that same day, the Security Council passed a resolution welcoming the signing of the Dayton agreement the day before and specifically urged "that all parties should cooperate fully with all entities involved in the implementation of the peace settlement." The resolution authorized member States to "take all necessary measures to assure compliance with the peace agreement."⁴³

57. Dr. Karadzic highlighted all of these statements in his motion, and affirmed that "this sent an unmistakable message to Dr. Karadzic and the others involved in the Bosnia peace process that Holbrooke had full authority and support from the United Nations for his efforts."⁴⁴

58. The Trial Chamber made no mention of these manifestations in its decision and gave no indication that it had considered them when it concluded that "the Accused has failed to show that the UNSC acted in such a way as to indicate that Holbrooke was its authorized representative, with authority to grant immunity for the most serious international crimes."⁴⁵ Its failure to take these relevant considerations into account demonstrates that its analysis of Holbrooke's apparent authority was flawed.⁴⁶

(2) The Effect of the ICTY Indictment

59. The Trial Chamber also erred in failing to consider that Holbrooke was in Belgrade on 18 July 1996 to insist upon Dr. Karadzic's resignation as a direct result of the ICTY indictment.

60. Holbrooke had inserted a provision in the Dayton Agreement that:

No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.⁴⁷

⁴² UNSC Statement (15 December 1995); Annex AB at para. 39

⁴³ UNSC Resolution 1031 (15 December 1995); Annex AB at para. 40

⁴⁴ Annex AB at para. 38

⁴⁵ Impugned Decision at para. 69

⁴⁶ There may well be additional manifestations of UNSC authority to Holbrooke. Dr. Karadzic's legal advisor is scheduled to inspect the UN Archives in New York on 28 July-1 August. Dr. Karadzic will move to supplement this appeal with any additional material located during that inspection.

⁴⁷ Annex IV, Article 9, Annex AB at para. 28

61. This was the sole basis upon which Dr. Karadzic's resignation was demanded.

62. Therefore, the negotiations were directly linked to the ICTY indictment. This made it more likely that Holbrooke had the authority to promise that Dr. Karadzic would not be prosecuted by the ICTY. It was thus a relevant consideration in evaluating Dr. Karadzic's belief of Holbrooke's apparent authority. The Trial Chamber erred in failing to take into account the link between the ICTY proceedings and the negotiations which led to the Holbrooke Agreement

(3) The Threat of UN Sanctions

63. The ICTY indictment was one stick wielded by Holbrooke to obtain Dr. Karadzic's resignation. The other was the threat of re-imposition of UN Security Council sanctions against the Federal Republic of Yugoslavia.

64. The Trial Chamber erred in failing to take into account the fact that it was the UN Security Council sanctions that Holbrooke was using as a weapon to force Dr. Karadzic to resign, not only from his public office, but from his party office, and to withdraw completely from public life. The fact that Holbrooke purported to speak for the UN Security Council in threatening the re-imposition of sanctions, made it more likely that he also was speaking for the UN Security Council when promising that Dr. Karadzic would not be prosecuted by the Tribunal.

65. As Dr. Karadzic had pointed out in his motion, the United States planned to use the existing UN Security Council sanctions as its major bargaining chip, offering suspension of the sanctions after an agreement to end the war had been signed and complete lifting of sanctions once the agreement had been implemented.⁴⁸

66. Holbrooke recognized that the United Nations sanctions against Serbia were always a central issue."⁴⁹ He wrote:

Milosevic hated the sanctions. They really hurt his country and he wanted them lifted...The decision to take a hard line on sanctions proved correct, had we not done so we would have begun the negotiations with almost no bargaining chips.⁵⁰

⁴⁸ Ivo H. Daalder, *Getting to Dayton: The Making of America's Bosnia Policy* Brookings Institution 2000 at p. 113; Annex AB, para. 8

⁴⁹ Holbrooke, *To End a War* (Modern Library 1998) at p. 87

⁵⁰ Holbrooke, *To End a War* (Modern Library 1998) at p. 88; Annex AB at para. 10

67. In early June 1996, Holbrooke wrote to President Clinton that the peace process would fail unless Karadzic did not continue to thwart the Dayton powers. He wrote:

History is replete with examples of small issues leading to the unraveling of larger ones. The question of Radovan Karadzic is such an issue...Our goal should be Karadzic's removal, not only from his presidential post, but from power...We wrote into Dayton the ability to re-impose sanctions if necessary. This is our strongest remaining leverage...I would suggest Milosevic to be given a clear message.⁵¹

68. When he met President Milosevic in Belgrade before the 18 July 1996 meeting, Holbrooke expressly threatened UN Security Council sanctions if they failed to reach an agreement to get Karadzic "out of power and out of the country".⁵²

69. In his press conference announcing the Holbrooke Agreement on 19 July 1996, Holbrooke himself cited the sanctions as a reason the agreement was signed by the Bosnian Serbs.⁵³

70. In his letter to Milosevic after the meeting, Holbrooke made it clear he was speaking for more than just the US: "Pale must understand that we (the United States, NATO, Frowick) will be prepared to take whatever action is required to get Pale back on course. This might include sanctions resumption, action by Ambassador Frowick, action by NATO, or other deeds to be determined at the time."⁵⁴

71. Holbrooke's use of UN Security Council sanctions throughout the negotiations leading to the agreement was an important element in determining whether Dr. Karadzic reasonably believed that Holbrooke had the apparent authority of the Security Council. The Trial Chamber erred in failing to take Holbrooke's threat of Security Council sanctions into account.

(4) The Contact Group

72. The Contact Group was comprised of representatives of all of the permanent members of the Security Council except China. It closely followed the Bosnian peace

⁵¹ Holbrooke, *To End a War* (Modern Library 1998) at p. 340; Annex AB at para. 50

⁵² Holbrooke, *To End a War* (Modern Library 1998) at p. 341-42; Annex AB at para. 54

⁵³ *Response of the United States of America to the Accused's Motion to Subpoena Lt. Gen. Douglas Lute and Colonel John Feeley(Ret)* (25 June 2009), Exhibit C, at para. 15

⁵⁴ *Response of the United States of America to the Accused's Motion to Subpoena Lt. Gen. Douglas Lute and Colonel John Feeley(Ret)* (25 June 2009), Exhibit H

negotiations being led by the United States and collectively reported the results of those efforts to the Security Council.⁵⁵

73. At a 10 July 1996 meeting of Contact Group in London , there was considerable discussion of the “Karadzic issue”. After that meeting, the US government pressed Holbrooke back into its service to resume his role as negotiator and see if he could get Dr. Karadzic removed.⁵⁶

74. The fact that Holbrooke’s mission was undertaken in connection with the Contact Group made it more likely that he was acting with the authority of the Security Council, as both groups had essentially the same members.

75. The Trial Chamber erred in failing to take into account the fact that Holbrooke’s mission to negotiate Dr. Karadzic’s resignation was coordinated with the Contact Group, thus re-enforcing the close connection between his activities and the members of the Security Council.

(D) The Trial Chamber Erred in Giving Insufficient Weight to Relevant Considerations

(1) Security Council Ratifications of Holbrooke Promises

76. In his motion, Dr. Karadzic highlighted the pattern of Holbrooke promises followed by Security Council resolutions which marked the Bosnia peace negotiations, and cited this as a prime reason why he believed that Holbrooke had the apparent authority of the Security Council to promise that he would not be prosecuted at the Tribunal.

77. He pointed out that on 7 November 1995, under Holbrooke’s leadership, the participants at Dayton agreed to lift UN sanctions on heating fuel for the Federal Republic of Yugoslavia.⁵⁷ The United Nations Security Council dutifully lifted the sanctions a week later, saying that:

The Committee hopes that such a decision would facilitate the ongoing proximity peace talks among the parties to the conflict in the former

⁵⁵ See, for example, Security Council documents S/1195/780 (8 September 1995); S/1195/920 (3 November 1995); and S/1996/220 (26 March 1996)

⁵⁶ Bildt, *Peace Journey*, at p. 237; Annex AB at para. 52

⁵⁷ Holbrooke, *To End a War* (Modern Library 1998) at p. 252

Yugoslavia and others.”⁵⁸

78. He pointed out that the Dayton Agreement was reached on 21 November 1995. Holbrooke had promised that the arms embargo would be modified if an agreement was reached. On the very next day, the United Nations Security Council voted to modify the arms embargo.⁵⁹

79. He pointed out that Holbrooke had promised that the sanctions against the Federal Republic of Yugoslavia would be suspended if an agreement was reached. On the very next day, the United Nations Security Council voted to suspend the sanctions.⁶⁰

80. He pointed out that Holbrooke had promised that the UN would maintain a military presence in Bosnia until the end of January 1996, at which time that role would be assumed by NATO. On 30 November 1995, the United Nations Security Council dutifully voted to extend UNPROFOR’s mandate until 31 January 1996 and to ensure the orderly transition of the military mission to NATO.⁶¹

81. He pointed out that Holbrooke had promised at Dayton that the military presence in Bosnia would be maintained by an interim stabilization force run by NATO. In a resolution on 15 December 1995, the United Nations dutifully urged all member States to cooperate with the stabilization force.⁶²

82. He pointed out that Holbrooke had promised at Dayton that the civilian administration would not be run by the United Nations but by a newly created Office of High Representative. In its resolution, the Security Council dutifully endorsed the Office of High Representative.⁶³

83. He pointed out that Holbrooke had promised at Dayton that the civilian police force would be under the control of the United Nations. On 21 December 1995, the Security Council dutifully passed a resolution creating the United Nations civilian police force in Bosnia.⁶⁴

⁵⁸ UN Security Council statement of 14 November 1995

⁵⁹ UNSC Resolution 1021 (22 November 1995)

⁶⁰ UNSC Resolution 1022 (22 November 1995)

⁶¹ UNSC Resolution 1026 (30 November 1995)

⁶² UNSC Resolution 1031 (15 December 1995)

⁶³ UNSC Resolution 1031 (15 December 1995)

⁶⁴ UNSC Resolution 1035 (21 December 1995)

84. The Trial Chamber disregarded the pattern of Holbrooke promises followed by Security Council ratifications which marked the Bosnia peace negotiations. It found that:

The fact that Holbrooke's promises were later implemented by the UNSC "does not indicate a consistency of behavior that would justify the notion of apparent authority." Rather it is an indication of a case-by-case approach to different negotiations. The acceptance of deals to end hostilities in the region does not indicate the UNSC was somehow bound to accept a subsequent immunity deal.⁶⁵

85. In so finding, the Trial Chamber departed from its professed approach of accepting the assertions of Dr. Karadzic as true so as to avoid holding an evidentiary hearing. Dr. Karadzic had unequivocally stated that:

I was aware that during negotiations over Bosnia in which Holbrooke had been involved since 1995, whenever he had made a promise to us, it had been fulfilled. When those promises had involved action by the United Nations Security Council, that action soon followed. Indeed, the United Nations had expressly encouraged us to work with Holbrooke and others to find a solution to the problems in Bosnia.⁶⁶

86. It was also noted in his motion that:

Dr. Karadzic had seen how Holbrooke had negotiated with Croatia on behalf of the United Nations Security Council in March 1995. Holbrooke had traveled to Zagreb after the Croatian government had insisted that UN forces in its country be replaced with troops from NATO or the European Union.⁶⁷ Holbrooke was publicly said to be leading the effort to keep the U.N. forces in place.⁶⁸ Holbrooke testified before the U.S. Congress in March 1995 that "it should be possible to reconfigure the U.N. presence in Croatia to satisfy the most important legitimate concerns of the Croats and Serbs while keeping faith with the relevant U.N. Security council resolutions."⁶⁹ And, it happened—when Holbrooke made an agreement with Croatian President Francis Tudjman, the United Nations Security Council promptly passed a resolution reconfiguring the peacekeeping operation in Croatia in accordance with that agreement.⁷⁰

⁶⁵ Impugned Decision at para 73

⁶⁶ Annex B at para. 14

⁶⁷ Alan Cowell, U.S. Envoy Calls, but Croatia Seems Firm on U.N. Ouster, 7 March 1995, *The New York Times*, 10; Annex AB at para 4

⁶⁸ James O Jackson, *Dancing at the brink*, 20 March 1995, *Time*, 55, Volume 145; Issue 11; Annex AB at para. 4

⁶⁹ William Scally, U.S. cautiously optimistic on Croatia crisis. 9 March 1995, *Reuters News*; Annex AB at para. 4

⁷⁰ UNSC Resolution 982 (31 March 1995); Annex AB at para. 4

87. By finding no connection between these events and the belief of the accused that Holbrooke had the apparent authority of the UN Security Council, the Trial Chamber found a reason to reject Dr. Karadzic's assertions without holding an evidentiary hearing. Had these matters been put to Dr. Karadzic at an evidentiary hearing, he could have explained the effect of the previous Security Council actions on his belief that Holbrooke had the apparent authority to promise that he would not be prosecuted at the Tribunal.

88. The Trial Chamber's summary dismissal of all of this evidence tending to indicate Holbrooke's apparent authority indicates that it gave insufficient weight to this highly relevant consideration, and therefore erred in failing to hold an evidentiary hearing and in its conclusions on apparent authority.

(E) The Trial Chamber Erred as to the Facts Upon Which it Based its Decision

(1) The Belief of those at the Meeting

89. The Trial Chamber, in rejecting the claim of apparent authority, found that Dr. Karadzic's "own associates also had doubts about Holbrooke's involvement and willingness to keep his side of the deal."⁷¹ This was simply wrong.

90. In his statement which accompanied the motion, Momcilo Krajisnik, who attended the meeting and negotiated on behalf of Dr. Karadzic, declared that

I understood Richard Holbrooke to be acting at this meeting as a representative of the international community. Holbrooke had come to the meeting after consulting in Sarajevo with High Representative for Bosnia Carl Bildt, who also represented the international community.⁷²

In the past, Holbrooke had acted on behalf of the international community in connection with the Dayton Peace Agreement, both before its conclusion and after on its implementation. I considered the topic of the meeting of 18 July 1996 to be directly related to the implementation of the Dayton Peace Agreement, specifically the upcoming elections in Bosnia.⁷³

⁷¹ Impugned Decision at para 71

⁷² Krajisnik declaration, Annex D, at para. 4

⁷³ Krajisnik declaration, Annex D, at para. 6

Holbrooke had orally promised that we would have our own entity and we would get the name “Republika Srpska”. This promise was fulfilled. I had no reason to believe that Holbrooke’s oral promise concerning Karadzic and The Hague would not also be fulfilled.⁷⁴

None of the negotiators on the Serbian side had any doubt that Holbrooke had the authority to make such a promise.⁷⁵

91. The Trial Chamber, to avoid holding an evidentiary hearing, claimed that it was accepting the facts presented in Dr. Karadzic’s motion as true. If that was the case, its finding that his associates doubted Holbrooke’s authority and ability to enter into the agreement was erroneous in light of Mr. Krajisnik’s statement.

92. Had it held an evidentiary hearing, the issue of whether any doubts existed as to Holbrooke’s authority could have been put to Mr. Krajisnik, as well as the other representative of Republika Srpska who attended the meeting, Alexa Buha, who also submitted a statement in support of Dr. Karadzic’s motion.⁷⁶

93. The Trial Chamber erred in concluding that Dr. Karadzic’s associates doubted the apparent authority of Richard Holbrooke.

(2) Holbrooke as Private Citizen

94. The Trial Chamber also erred in its finding that Dr. Karadzic’s “reliance on Holbrooke on the basis on Holbrooke’s earlier involvement in Dayton is even more questionable considering that Holbrooke had resigned from the Department of State following Dayton and had not been involved in Bosnian matters since, until July 1996.”⁷⁷

95. This is yet another example of the Trial Chamber’s claiming on one hand to accept all of Dr. Karadzic’s assertions as true, and then discounting those assertions when drawing its conclusions. Dr. Karadzic had stated unequivocally that “I had no doubt that Holbrooke had the authority to make such an agreement and I relied upon it.”⁷⁸

96. In addition, the Trial Chamber got the facts wrong. As Holbrooke points out in his book, although he resigned his full-time position as Assistant Secretary of State in

⁷⁴ Krajisnik declaration, Annex D, at para. 14

⁷⁵ Krajisnik declaration, Annex D, at para. 15

⁷⁶ Annex E

⁷⁷ Impugned Decision at para 71

⁷⁸ Annex B at para. 15

February 1996, he immediately signed papers as an unpaid advisor to the Secretary of State.⁷⁹ U.S. Ambassador Madeline Albright referred to Holbrooke as United States “Special Envoy” when reporting on the Holbrooke Agreement during her 23 July 1996 briefing to the Security Council.⁸⁰ Therefore, Holbrooke was not acting as a private citizen when he entered into the agreement.

97. The Trial Chamber also erred when stating that Holbrooke had not been involved in Bosnian matters since his resignation as Assistant Secretary of State. In fact, Holbrooke had continued to be involved in Bosnian matters, meeting with High Representative Carl Bildt and U.S. Secretary of Defence William Perry on or about 24 May 1996 in Toronto⁸¹ and writing a letter to President Clinton in early June 1996 calling for the removal of Dr. Karadzic.⁸²

98. Had the Trial Chamber held an evidentiary hearing, these matters could have been brought forward, and the status of Mr. Holbrooke and its effect upon his apparent authority put to Dr. Karadzic. Dr. Karadzic could have explained, if given the opportunity, that Holbrooke’s status as a Special Envoy, as opposed to Assistant Secretary of State, had no effect on his perception that Holbrooke continued to act with the apparent authority of the Security Council.

99. Therefore, the Trial Chamber erred in concluding that Mr. Holbrooke had resigned and had not been involved in Bosnian matters since.

(F) Abuse of Process and a Third Party

100. The Trial Chamber, in rejecting Dr. Karadzic’s alternative claim of abuse of process, held that Dr. Karadzic had failed to show that any abuse of process had taken place, as Holbrooke was “a third party, unconnected to the Tribunal, promising immunity years before the Accused’s transfer to the Tribunal.”⁸³

101. The Trial Chamber relied on two principal sources of law in articulating the relevant legal test: the decision of Appeals Chamber of the ICTR in *Prosecutor v.*

⁷⁹ Holbrooke, *To End a War* at p. 334

⁸⁰ *Response of the United States of America to the Accused’s Motion to Subpoena Lt. Gen. Douglas Lute and Colonel John Feeley(Ret)* (25 June 2009), Exhibit E, at para. 1

⁸¹ Bildt, *Peace Journey* at p. 226

⁸² Holbrooke, *To End a War* at p. 339-340; Annex AB at para. 50

⁸³ Impugned Decision at para. 84

*Barayagwiza*⁸⁴ and the decision of a Trial Chamber of the ICTY in *Prosecutor v. Nikolić*.⁸⁵ Following the *Nikolic* decision, the Trial Chamber improperly concluded that there were two different standards for abuse of process—one for Tribunal actors and one for non-Tribunal actors. This conclusion is not properly supported by either the Appeals Chamber’s jurisprudence. Nor is it consistent with a holistic interpretation of the Tribunal’s Statute or by the nature of international tribunals.

102. The *Barayagwiza* decision makes it plain and explicit that in considering whether misconduct amounts to an abuse of process, it is “irrelevant” whether or not the conduct was attributable to the Tribunal. In the opening paragraph of its discussion of the law of abuse of process, the Appeals Chamber could not have been clearer:

First and foremost, this analysis [of abuse of process] focuses on the alleged violations of the Appellant’s rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant’s rights. However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant’s rights.⁸⁶ (emphasis added)

103. In most of its discussion of abuse of process, the *Nikolić* Trial Chamber relies heavily on *Barayagwiza*. However, it created, on its own, two separate standards for abuse of process—one for conduct attributable to the Tribunal and one for conduct attributable to third parties. For the latter, it limited the relevant conduct to an extremely narrow range of misconduct in which the Accused has been “seriously mistreated” akin to “inhuman, cruel or degrading treatment, or torture.”⁸⁷

104. The *Barayagwiza* Appeals Chamber never purported to exclude third-party conduct from scrutiny under the abuse of process doctrine or to limit such scrutiny only to extreme cases of severe physical mistreatment or torture. Indeed, it based its own

⁸⁴ *Prosecutor v. Barayagwiza*, No. ICTR-97-19-AR72, *Decision* (3 November 1999).

⁸⁵ *Prosecutor v. Nikolić*, No. IT-94-2-PT, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal* (9 October 2002)

⁸⁶ *Prosecutor v. Barayagwiza*, No. ICTR-97-19-AR72, *Decision* (3 November 1999) at para. 73

⁸⁷ *Prosecutor v. Nikolić*, No. IT-94-2-PT, *Id* at para. 114.

abuse of process finding partly on delay attributable to Cameroon;⁸⁸ there were no allegations that Barayagwiza had been physically harmed in any way. As such, the *Nikolić* Trial Chamber erred in concluding that misconduct must be attributable to the Tribunal before it can be considered under the primary abuse of process doctrine. It also erred in holding that third-party misconduct can only be considered under a residual category of abuse of process that requires severe physical mistreatment akin to torture. The Trial Chamber in the present case likewise erred in adopting the same approach.

105. In the decision, the Trial Chamber never properly considered Dr. Karadzic's claims under the core of the abuse of process doctrine. It focused almost entirely on distinguishing the misconduct on the basis of to whom it is attributable. As a result of this approach, it never considered the overall impact of the misconduct on Dr. Karadzic or on the ICTY. Instead, the doctrine of abuse of process – one designed to broadly protect the administration of justice – was truncated into a simple question of whether the Accused had been tortured or severely mistreated by a third-party.

106. The Trial Chamber's restrictive approach concerning violations by third parties is also contrary to both a holistic reading of the Statute and the nature of international tribunals.

106. Indeed, the Special Court for Sierra Leone has made clear the doctrine of abuse of process was never intended to play a superfluous role to the protections of the rights of the accused already found in the Statute. Rather, it provides “additional” or “further” protections than those provided for in the Statute:

...Judges exercise their inherent powers to control the process and procedures, including any abuse thereof, and which permit the parties to bring abuse of process motions as a right deriving from common law precedent. The rationale behind providing an additional basis for bringing preliminary motions in the Rules of the Special Court is primarily to enhance and further protect the rights of the accused.⁸⁹(emphasis added)

107. Only an approach to abuse of process which empowers the Tribunal to scrutinize the conduct of all actors for their impact on the rights of the Accused or the court's sense of justice would provide this “additional” or “further” protection. Indeed,

⁸⁸ *Prosecutor v. Barayagwiza*, No. ICTR-97-19-AR72, *Decision* (3 November 1999) at para. 85.

⁸⁹ *Prosecutor v. Brima et al.* No. SCSL-04-16-PT, *Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts* (31 March 2004) at para. 26.

the abuse of process doctrine has traditionally been a fail-safe or residual remedy. Where serious misconduct has occurred (regardless of to whom it is attributable and regardless of whether it is caught by other constitutional/statutory protections), the doctrine empowers the judges to ask whether *on the whole* it would contravene the Court's sense of justice to proceed in light of it. This approach, followed by the ICTR and the SCSL, results in a more logical and holistic interpretation of the Statute – complementing, rather than duplicating, the rights already guaranteed to the Accused therein.

108. Further support for adopting the ICTR and SCSL's liberal approach to the abuse of process doctrine can be drawn from the nature of international tribunals as decentralized structures whose creation of law, investigation, enforcement and adjudication is often shared by unrelated actors.

109. Within national jurisdictions, it will almost always be a single state authority which creates the criminal law, investigates and arrests individuals for breaches of it, and establishes the courts in which to hear the criminal case. It is also the same state authority which is represented by the prosecution that proceeds with the case. In these circumstances, it will be exceedingly rare for an actor unrelated to the state to be involved in the law enforcement and adjudication. As such, it is perhaps rational for an abuse of process doctrine operating in this context to look primarily or solely to misconduct attributable to the state – reserving only an extraordinary or residual category for abusive misconduct attributable to other unrelated actors.

110. The exact opposite is true of international tribunals. These are highly decentralized institutions. Only the actors which create the criminal law (the UNSC) and which hear and prosecute cases for breaches of it (the Tribunal/OTP) are exclusively related to the central authority (the UN). As the Tribunal itself frequently points out, “the International Tribunal has no enforcement arm of its own — it lacks a police force.”⁹⁰ As such, it is entirely dependent on a diverse range of actors to fill this critical role. A whole host of states, inter-state organizations and international agencies – as well as diplomats, special envoys, local authorities, and military personnel, – routinely fill the key roles of investigating crimes, sharing intelligence, and arresting and transferring suspects. This

⁹⁰ *Prosecutor v. Simic et al*, No. IT-95-9, *Decision on Motion for Judicial Assistance to be Provided by SFOR and Others* (18 October 2000) at para. 46.

involvement may be formal or informal, and it may occur with or even without the Tribunal's knowledge.⁹¹

111. Where so many diverse actors may be involved in creating, enforcing and adjudicating international criminal law – sometimes even without one another's knowledge or consent – it is essential that the doctrine of abuse of process in this setting not be applied in a restrictive or technical manner. Indeed, the Special Court for Sierra Leone has stressed that a key aspect of abuse of process is the “doctrine's flexibility.”⁹² A Court operating in these circumstances must have a discretionary authority to look at *all* the events that have led to the proceedings and decide, regardless of whom they are attributable, whether *on the whole* they breach the Accused's rights or contravene the Court's sense of justice.

112. Therefore, it is respectfully contended that the Trial Chamber erred in employing a dual standard for abuse of process claims depending on the status of the perpetrator of the misconduct and his/her connection to the Tribunal.

Conclusion

113. The existence and effect of the Holbrooke Agreement presents a host of complex factual and legal disputes. The Trial Chamber tried to bang a square peg into a round hole by deciding the issues without holding an evidentiary hearing. As demonstrated above, it failed to accept the assertions of Dr. Karadzic as true, as it professed it would do, it took into account irrelevant considerations, failed to take relevant considerations into account or give them adequate weight, and committed errors of fact. It also applied an unduly restrictive standard to abuse of process claims involving persons not directly connected to the Tribunal.

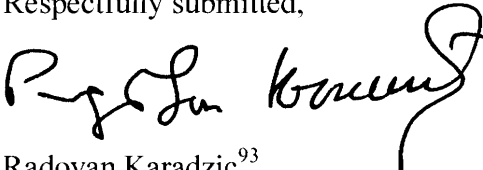
114. The Appeals Chamber is respectfully requested to reverse the Trial Chamber's decision and to remand the matter for a proper evidentiary hearing, applying a proper standard for evaluating Dr. Karadzic's claims.

⁹¹ In *Nikolić* for instance, the Trial Chamber concluded that SFOR and the OTP had no knowledge of the unknown individuals who devised and executed a criminal plan to kidnap the accused from the then-Federal Republic of Yugoslavia solely for the purpose of delivering him to SFOR forces in BiH for transfer to the Tribunal.

⁹²*Prosecutor v. Brima et al.* No. SCSL-04-16-PT, *Id.* at para. 24.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', with a stylized flourish at the end.

Radovan Karadzic⁹³

⁹³ The assistance of Legal Interns Anthony Navaneelan of the University of Toronto (Canada), Alexandra Lampert of Stanford University (USA), Kevin Griffith of Case Western University (USA), Bjoern Eberling of the University of Kiel (Germany) and Stylianos Millaris of the Athens Bar (Greece), in the preparation of this appeal, and Kate Gibson, PHD Candidate at University of Queensland (Australia) to the editing of the brief is gratefully acknowledged.