

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-PT

IN TRIAL CHAMBER No. 3

Before: Judge Patrick Robinson, Presiding
Judge Iain Bonomy, Pre-Trial Judge
Judge Michele Picard

Registrar: Mr. Hans Holthuis

Date Filed: 5 November 2008

THE PROSECUTOR

v.

RADOVAN KARADZIC

PUBLIC *Per [Signature]*

MOTION FOR INSPECTION AND DISCLOSURE:
HOLBROOKE AGREEMENT

The Office of the Prosecutor:

Mr. Allan Tieger
Mr. Mark Harmon

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves, pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, for an order requiring the prosecution to allow inspection and disclosure of the following items:

- (A) all information in the possession of the prosecution concerning the agreement made with Radovan Karadzic on or about 18-19 July 1996 by Richard Holbrooke including
 - (1) a copy of the written agreement made on those days
 - (2) memoranda, correspondence, reports, or recordings with individuals who have knowledge or were asked about their knowledge of the agreement
 - (3) any contemporaneous notes, recordings, or memoranda or correspondence reflecting what took place during the meeting on 18-19 July 1996 in Belgrade among Richard Holbrooke, Slobodan Milosevic, and others
 - (4) any other document or recording which tends to show the existence of a promise, representation, or suggestion that Radovan Karadzic not be arrested, transferred, or prosecuted at the ICTY
 - (5) any memoranda, correspondence, reports, public statements or recordings reflecting a concern by the Office of the Prosecutor or any other individual that representations had or would be made to Dr. Karadzic that would affect his prosecution at the ICTY, or that he would claim the existence of such an agreement
 - (6) any information in the possession of the prosecution concerning the failure to arrest Radovan Karadzic after 18 July 1996 and/or the reasons therefore

- (B) all information in the possession of the prosecution concerning the actual or apparent authority of Richard Holbrooke to make representations to Radovan Karadzic on behalf of the international community on 18-19 July 1996 including
 - (1) any correspondence, public statements, resolutions, reports, recordings, or memoranda from United Nations personnel or entities reflecting support for, consultation with, knowledge of, or requests from, the United States concerning efforts to negotiate peace in Bosnia from August 1995 to August 1996
 - (2) any correspondence, public statements, reports, recordings, or memoranda from United States personnel or entities to the United Nations or any of its personnel or entities, requesting support for, providing knowledge of, or demonstrating consultation with the United States' efforts to negotiate peace in Bosnia from August 1995 to August 1996

- (3) any correspondence, public statements, reports, recordings or memoranda concerning Richard Holbrooke's visit to the former Yugoslavia region in July 1996 generated by, or received by, any United Nations personnel or entity
 - (4) any correspondence, public statements, reports, recordings, or memoranda from United Nations Security Council member States personnel or entities, including the Contact Group, NATO, IFOR, Peace Implementation Council and its Steering Committee, or the Office of High Representative for Bosnia, reflecting support for, consultation with, knowledge of, or requests from, the United States concerning efforts to negotiate peace in Bosnia from August 1995 to August 1996
 - (5) any correspondence, public statements, reports, recordings, or memoranda from United States personnel or entities to a member State or any of its personnel or entities, requesting support for, providing knowledge of, or demonstrating consultation with the United States' efforts to negotiate peace in Bosnia
 - (6) any correspondence, public statements, reports, recordings or memoranda concerning Richard Holbrooke's visit to the former Yugoslavia region in July 1996 generated by, or received by, any Member State personnel or entity
- (C) all information in the possession of the prosecution showing the relationship between the United States of America and the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia as of 18-19 July 1996 including:
- (1) any memoranda, correspondence, or reports reflecting any agreements by the United States to facilitate or provide personnel and resources to the Office of the Prosecutor,
 - (2) any memoranda, correspondence, public statements, or reports generated by the Office of the Prosecutor concerning the United States' negotiations for peace in Bosnia and its implications upon the ICTY
 - (3) any correspondence, public statements, reports, recordings or memoranda concerning Richard Holbrooke's visit to the former Yugoslavia region in July 1996 generated by, or received by the Office of the Prosecutor

2. Rule 66(B) provides:

The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, **which are material to the preparation of the defence**, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. (emphasis added)

3. Dr. Karadzic contends that the documents described above are material to the preparation of his defence. It is part of his defence that (1) he was promised on 18-19 July 1996 by Richard Holbrooke that he would not have to face prosecution in The Hague if he agreed to withdraw completely from public life; and (2) that this promise is attributable to the ICTY because it was made on behalf of, or in consultation with the member States of the United Nations Security Council, or was reasonably believed to be so made.

4. In order to pursue a motion to dismiss the indictment on these grounds, it is necessary that Dr. Karadzic be given access to the items described above.

5. The ICTR Appeals Chamber has held that the phrase ‘material to the preparation of the defence’ in Rule 66(B) is broader than items related to the prosecution’s case-in-chief.¹ The Appeals Chamber rejected the prosecution’s narrow construction of its disclosure obligations under Rule 66(B), noting that the language of the Rule was broader than a similar provision found in the United States Federal Rules of Criminal Procedure.²

6. The Appeals Chamber has affirmed in a more recent case that ‘preparation of the defence’ under Rule 66(B) is a broad concept.³ It has recognized that a request under Rule 66(B) is one of the methods available to the defence for carrying out investigations.⁴ Indeed, requesting inspection from the prosecution under Rule 66(B) is a prudent starting point to the defence effort to prove the existence of the agreement and the binding nature of the agreement on the ICTY.

¹ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Rules of Procedure and Evidence* (25 September 2006) at para 8

² *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Rules of Procedure and Evidence* (25 September 2006) at fn. 30

³ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor’s Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at para. 14; See also *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Motion for Inspection: Michel Bagaragaza* (10 July 2008) at para. 3

⁴ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor’s Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at para 15; *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence* (25 September 2006) at para 11; See also *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007) at para. 10

7. In addition, Rule 68 provides a separate basis for disclosure of this material.

That Rule provides in pertinent part:

Subject to the provisions of Rule 70,

- (i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence

8. The Appeals Chamber has held that the obligation to disclose under Rule 68 is as important as the obligation to prosecute,⁵ and that the prosecution's obligation to disclose exculpatory material is essential for a fair trial.⁶ A Trial Chamber has said that 'in pursuit of justice, the disclosure of Rule 68 material to the defence is of paramount importance to ensure the fairness of proceedings before the Tribunal.'⁷

9. It has been recognized by the Appeals Chamber that Rule 68 has an important function as it requires the Prosecution to disclose exculpatory material because of its superior – and sometimes even sole – access to this material.⁸ This is particularly applicable to the items requested by this motion, which are not accessible to the defence or members of the public. Like Rule 66(B), the prosecution's Rule 68 obligation is to be interpreted broadly.⁹

10. The existence of an agreement that the accused will not have to face prosecution at the ICTY, and facts tending to show that the agreement is attributable to the ICTY, if established, might suggest the legal innocence of the accused or mitigate his

⁵ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183, 242; *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004); *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 72

⁶ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 6

⁷ *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005) at para. 20

⁸ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules* (11 February 2004) at para. 17

⁹ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 6

punishment if convicted. Therefore, the items sought fall squarely within the scope of Rule 68.

11. Should the prosecution claim that any of the items sought are exempt from disclosure pursuant to Rule 70(A), it is requested that it set forth the nature of the items, the reason for the claim of exemption, and the volume of material being withheld pursuant to this Rule.

12. Should the prosecution claim that any of the items sought be covered by an agreement under Rule 70(B), it is requested that the prosecution notify the defence and Trial Chamber of the existence of such material and its volume, and take immediate steps to obtain the consent of the provider to disclose such information to the defence.¹⁰

13. A motion for substantially similar documents was filed on 6 October 2008. Without waiting for a response from the prosecution, the Trial Chamber dismissed the motion on 9 October 2008, suggesting that the request should first be directed to the prosecution.¹¹

14. On 14 October 2008, Dr. Karadzic dutifully requested inspection and disclosure directly from the prosecution.¹² On 23 October 2008, as expected, the prosecution refused to allow inspection or disclosure of the material, save for the undertaking of Dr. Karadzic to step down from politics.¹³ The prosecution has not yet provided that document, although undertaking to do so.

15. The prosecution, citing its *Prosecution's Response to Karadzic's Submission Regarding Alleged Immunity Agreement* (20 August 2008), takes the position that "an alleged immunity agreement, even if proved, is devoid of legal effect before this Tribunal" and therefore it is not obligated to allow inspection or disclosure of the material sought.

16. Dr. Karadzic respectfully contends that the prosecution's response concerning the Holbrooke agreement misses the point. He does not claim to be the beneficiary of a general amnesty agreement, but a specific agreement to not prosecute him as an individual. The duty to prosecute serious offences such as genocide and crimes against

¹⁰ Rule 68(iii)

¹¹ *Decision on Accused Motion for Inspection and Disclosure*. If the Trial Chamber had waited for the response of the prosecution, more than one month delay would have been avoided.

¹² *Notice of Request for Inspection and Disclosure: Holbrooke Agreement*

¹³ Letter of Alan Tieger

humanity does not exclude that certain individuals may not be prosecuted at this Tribunal for a variety of reasons, such as pleading guilty to lesser charges¹⁴, there being a lack of evidence¹⁵, or not being high-ranking enough¹⁶. Indeed, the United Nations Security

¹⁴ *Prosecutor v Sikirica et al*, No. IT-95-8-T, *Sentencing Judgement* (13 November 2001)(Kolundzija—plea to persecution (Count 3), charges of inhumane acts (Count 4) and murder (Count 6) (crimes against humanity); and outrages upon personal dignity (Count 5), and murder (Count 7) (violations of the laws or customs of war) dismissed; Dosen-- plea to persecution (Count 3), charges of inhumane acts (Count 4) and outrages upon personal dignity (Count 5) dismissed; Sikirica, plea to persecution (Count 3), charges of inhumane acts (Count 4) and murder (Count 8) or, in the alternative, inhumane acts (Count 10) (crimes against humanity); and outrages upon personal dignity (Count 5) and murder (Count 9) or, in the alternative, cruel treatment (Count 11) (violations of the laws or customs of war) dismissed; *Prosecution v Todorovic*, No. IT-95-9/1-T, *Sentencing Judgement* (31 July 2001)—plea to persecution, charges of deportation, murder, inhumane acts, rape and torture (crimes against humanity); unlawful deportation or transfer, wilful killing, wilfully causing great suffering and torture or inhuman treatment (grave breaches of the Geneva Conventions); and murder, cruel treatment, humiliating and degrading treatment and torture (violations of the laws or customs of war) dismissed; *Prosecutor v Simic*, No. IT-95-9/2-T, *Sentencing Judgement* (17 October 2002)—plea to torture, charges of persecution (count 1), inhumane acts, a crime against humanity (counts 5 and 8), cruel treatment, (counts 6 and 9) dismissed; *Prosecutor v Rajic*, No. IT-95-12-S, *Sentencing Judgement* (8 May 2006)—plea to grave breaches; charges of violations of the laws or customs of war: murder (count 2); outrages upon personal dignity; in particular humiliating and degrading treatment, (count 4); cruel treatment, (count 6); plunder (count 8) and wanton destruction of a city or devastation not justified by military necessity, (count 10) dismissed; *Prosecutor v Bralo*, No. IT-95-17-T, *Sentencing Judgement* (7 December 2005)—plea to persecutions; charges of Grave Breaches and violations of the laws or customs of war dismissed.; *Prosecution v Erdemovic*, No. IT-96-22-T, *Sentencing Judgement* (5 March 1998)—plea to crime against humanity, violation of the laws or customs of war dismissed; *Prosecutor v Zelenovic*, No. IT-96-23/2-T, *Sentencing Judgement* (4 April 2007)—plea to torture and rape, other counts of torture and rape dismissed; *Prosecutor v Plavsic*, No. IT-00-40-T, *Sentencing Judgement* (27 February 2003)—plea to presecutions, charges of genocide, complicity in genocide, extermination, deportation, and inhumane acts dismissed; *Prosecutor v Jokic*, No. IT-01-42/1-T, *Sentencing Judgement* (18 March 2004)—plea to 6 counts of violations of laws or customs of war, 9 counts dismissed; *Prosecutor v Mrdja*, No. IT-02-59-S, *Sentencing Judgement* (31 March 2004)—plea to murder and inhumane acts, charges of extermination dismissed; *Prosecutor v Nikolic*, No. IT-02-60/1-T, *Sentencing Judgement* (2 December 2003)—plea to persecutions; charges of genocide, complicity, extermination, murder, and forcible transfer dismissed; *Prosecutor v Obrenovic*, No. IT-02-60/2-T, *Sentencing Judgement* (10 December 2003)—plea to persecutions; charges of genocide, complicity, extermination, murder, and forcible transfer dismissed; *Prosecutor v Deronjic*, No. IT-02-61-T, *Sentencing Judgement* (30 March 2004)—plea to persecutions; charges of crimes against humanity and violations of the laws or customs of war dismissed; *Prosecutor v Banovic*, No. IT-02-65-S, *Sentencing Judgement* (28 October 2003)—plea to persecutions, charges of murder, inhumane acts, and cruel treatment dismissed; *Prosecutor v Babic*, No. IT-03-72-S, *Sentencing Judgement* (29 June 2004)—plea to persecutions, charges of murder, cruel treatment, wanton destruction of villages or devastation not justified by military necessity, and destruction or wilful damage to institutions dedicated to education or religion dismissed;

¹⁵ *Prosecutor v Kupreskic et al*, No. IT-95-16-I, *Decision on Motion by the Prosecutor for Withdrawal of the Indictment Against Marinko Katava* (19 December 1997); *Prosecutor v Zec*, No. IT-01-42-I, *Decision Authorizing the Withdrawal of Charges Against Milan Zec Without Prejudice* (26 July 2002); *Prosecutor v Banovic*, No. IT-95-8/1-PT, *Decision on Motion of the Prosecutor for Withdrawal of Indictment Against Nenad Banovic* (10 April 2002);

¹⁶ *Prosecutor v Sikirica et al*, No. IT-95-8-I, *Order Granting Leave for Withdrawal of Charges Against Nikica Janjic, Dragan Kondic, Goran Lajic, Dragomir Saponja, and Nedjeljko Timarac* (5 May 1998); *Prosecutor v Mejacic et al*, No. IT-95-4-I, *Order Granting Leave for Withdrawal of Charges Against Zdravko Govedarica, Gruban, Nikica Janjic, Pedrag Kostic aka Kole, Nedjeljko Paspalj, Milan Pavlic, Milutin Popovic, Drazenko Predojevic, Zeljko Savic, Mirko Babic, and Dragomir Saponja* (8 May 1998)

Council has itself ratified such agreements¹⁷, and the statute of the International Criminal Court explicitly provides for non-prosecution of individuals in the interest of justice.¹⁸ There is nothing in international customary or treaty law which prevents the exercise of discretion not to prosecute an individual, no matter how serious the crime.

17. Whether such an agreement exists in this case is a factual issue for which disclosure is sought by item (A) of the request.

18. Whether such an agreement, if it exists, is attributable to the ICTY, is a mixed issue of law and fact. It is a well established principle that an agreement is binding if made by a person with actual or apparent authority to do so.¹⁹ The actual or apparent authority of Richard Holbrooke is the object of the disclosure sought by item (B) of the request.

19. Courts have also employed a test of “effective control” in determining whether actions of a member State are attributable to the United Nations and vice versa.²⁰ Facts demonstrating the effective control of the United States over the peace process in Bosnia from August 1995 are also the object of the disclosure sought by item (B). The relationship between the United States and the ICTY OTP is also relevant to a showing of effective control, and common purpose, and is the object of the disclosure sought by item (C).²¹

20. The prosecution cannot be allowed to sweep the agreement with Richard Holbrooke under the rug. The disclosure sought by Dr. Karadzic is material to the

Prosecutor v Stankovic, No. IT-96-23/2-T, *Decision on Referral of Case Under Rule 11 bis* (17 May 2005); *Prosecutor v Jankovic*, No. IT-96-23/2-T, *Decision on Referral of Case Under Rule 11 bis* (22 July 2005); *Prosecutor v Racevic and Todovic*, No. IT-97-25/1-T, *Decision on Referral of Case Under Rule 11 bis* (8 July 2005); *Prosecutor v Ljubcic*, No. IT-00-41-T, *Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 bis* (27 April 2006); *Prosecutor v Kovacevic*, No. IT-01-42/2-T, *Decision on Referral of Case Pursuant to Rule 11 bis* (17 November 2006); *Prosecutor v Mejakic et al*, No. IT-02-65-PT, *Decision on Prosecutor's Motion for Referral of case Pursuant to Rule 11 bis* (20 July 2005); *Prosecutor v Ademi and Norac*, No. IT-04-78-PT, *Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis* (14 September 2005);

¹⁷ United Nations Security Council resolution 948 (15 October 1994) approving amnesty for leaders of Haitian government

¹⁸ Article 53(2)(c)

¹⁹ *Restatement of Agency 3d*, American Law Institute (2006) at sec. 2.03

²⁰ *Behrami v France*, ECHR No. 78166/01, *Decision on Admissibility* (2 May 2007); *Al-Jedda v. Secretary of State for Defence*, [2007] UKHL 58; *H. N. v. Netherlands*, District Court of The Hague, No. 265615 / HA ZA 06-1671 (10 September 2008)

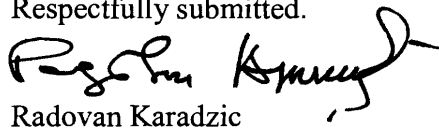
²¹ See, for example, *Cooperation Service Agreement for the Contribution of Personnel to the ICTY*, UN Doc 31268 (18 October 1994)

preparation of his defence, and may lead to the dismissal of all charges against him. It is therefore critical to the interest of justice that the agreement with Richard Holbrooke be fully aired during the pretrial motion proceedings, and the prosecution be required to disclose all relevant information in its possession.

21. For all of the above reasons, Dr. Karadzic respectfully requests that the Trial Chamber order the prosecution to provide inspection and disclose any information in its possession which fall within the description provided above.

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Respectfully submitted.

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', written in a cursive style.

Radovan Karadzic