

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-AR73.1

IN THE APPEALS CHAMBER

Before: Judge Mehmet Guney, Presiding
Judge Fausto Pocar
Judge Liu Daquin
Judge Andresia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Date Filed: 24 February 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REPLY BRIEF:
APPEAL OF DECISION CONCERNING
HOLBROOKE AGREEMENT DISCLOSURE

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark Harmon

The Accused:

Radovan Karadzic

1. On 28 January 2009, Radovan Karadzic filed his *Appeal of Decision Concerning Holbrooke Agreement Disclosure*. On 9 February 2009, the prosecution filed its *Prosecution's Response to Karadzic's Appeal of Decision Concerning Holbrooke Agreement Disclosure*. This document was served upon Dr. Karadzic on 20 February 2009. Dr. Karadzic now replies.¹

I. An Agreement not to Prosecute at the ICTY is not *per se* Invalid Under International Law

2. In his first ground of appeal, Dr. Karadzic contended that the Trial Chamber erred in denying disclosure of documents related to the Holbrooke agreement on the grounds that “it is well established that any immunity agreement in respect of an accused indicted for genocide, war crimes and/or crimes against humanity before an international tribunal would be invalid under international law.”

3. The prosecution has declined to defend the basis for Trial Chamber's conclusion, which relied on instruments and decisions pertaining to Head of State immunity.² It has instead suggested that customary international law requires that every person who is believed to have committed genocide, war crimes, or crimes against humanity must be prosecuted without exception.³

4. The prosecution's new argument is misconceived. The Holbrooke cooperation agreement is no more an amnesty than a reference to sovereign immunity. An amnesty provides for immunity from criminal and or civil legal consequences. The word derives from the Greek *amnestia* meaning oblivion and is generally understood to refer to a form of pardon or forgiveness, such that the offence is not sanctioned. North describes amnesty as ‘a law that no man should be called in question nor troubled for things past ...’.⁴ Wolff states that ‘amnesty is defined as complete and lasting forgetfulness of wrongs and offences previously committed.’⁵ Black's Law Dictionary describes amnesty as

¹ To the extent necessary, Dr. Karadzic seeks leave to file this reply brief within 4 days of his receipt of the prosecution's response, rather than 4 days after its filing. Good cause exists since Dr. Karadzic did not receive the response when it was filed, pursuant to the practice established by the Trial Chamber whereby the English and Serbian versions are served upon the accused simultaneously.

² *Response*, at para. 35

³ *Response* at para. 34

⁴ North, *Plutarch*, 1676, at 1020

⁵ Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, V. II. 1764, par 989

‘oblivion’,⁶ and this was the basis of the Special Court’s understanding of the concept, which the prosecution relies so heavily upon.

5. The Lomé agreement in Sierra Leone was a grant of amnesty to a group of people. The Holbrooke agreement was a bargain with one individual for his cooperation. Therefore, the separate opinion of Judge Robinson in the *Kondewa* case is inapplicable.⁷

6. As Professor Michael Scharf has noted:

During the past several years, Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay, and South Africa have each granted amnesty to members of the former regime that committed international crimes within their respective borders as part of a peace arrangement. With respect to four of these countries, Cambodia, El Salvador, Haiti, and South Africa, the United Nations pushed for, helped negotiate, and/or endorsed the granting of amnesty as a means of restoring peace and democratic government.⁸

7. The agreement not to prosecute the leaders of Haiti’s military junta, negotiated at Governor’s Island, New York in 1993, was explicitly criticized by ICTY Prosecutor Richard Goldstone, who expressed fears that those involved in the former Yugoslavia might seek to gain some precedent out of the Haitian amnesty as the price for a Balkans peace settlement.⁹ The Security Council went ahead and endorsed the amnesty agreement anyway.¹⁰

8. It can therefore hardly be said that the cooperation agreement made by Richard Holbrooke violated a duty to prosecute under customary international law when no such duty in fact existed and no amnesty was granted pursuant to the agreement.

II. The Trial Chamber Ignored the Doctrines of Actual and Apparent Authority

9. In his second ground of appeal, Dr. Karadzic contended that the Trial Chamber erred in concluding, before even allowing any disclosure, that “neither its own mandate

⁶ Black’s Law Dictionary, 5th ed., 1983, at p 76, quoted by the Appeals Chamber of the Special Court for Sierra Leone

⁷ *Prosecutor v Kondewa*, No. SCSL-2004-14-AR72(E), *Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lome Accord* (25 May 2004)

⁸ Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Cornell International Law Journal 507 (1999)

⁹ Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 Texas International Law Journal 1 (1996) at 11

¹⁰ United Nations Security Council resolution 948 (15 October 1994)

nor that of the prosecutor is affected by any alleged undertaking made by Mr. Holbrooke.”

10. Dr. Karadzic has been very consistent about the fact that on 18-19 July 1996, he was promised by Richard Holbrooke that if he resigned his positions in Republika Srpska and with the SDS political party, and withdrew from public life, he would not be prosecuted in The Hague. He knows this from his personal knowledge.

11. The prosecution attempts to create a “strawman” by claiming that Dr. Karadzic has not been consistent in his statements concerning the relationship between Richard Holbrooke and the ICTY, United Nations Security Council, Contact Group, and government of the United States of America.¹¹ The fact is that Dr. Karadzic was not privy to the communications among those bodies and their representatives. That is precisely why he needs disclosure.

12. The prosecution contends that Dr. Karadzic does not claim that Holbrooke was acting on behalf of the ICTY Prosecutor.¹² That is incorrect. At this stage, Dr. Karadzic has requested disclosure of information in the possession of the prosecution on the issue of whether Mr. Holbrooke was acting with the actual authority of the ICTY prosecutor. It is only after he receives such disclosure that he will be in a position to make representations to the Trial Chamber, in his preliminary motion challenging jurisdiction, as to whether Mr. Holbrooke was acting with the actual authority of the ICTY Prosecutor.

13. It is no justification to deny disclosure that the accused is not in possession of the very information which is the subject of his disclosure request. Under this kind of circuitous reasoning, no one would be entitled to disclosure unless they were already privy to its contents. Given that there is unequivocal evidence of the existence of the agreement, Dr. Karadzic is entitled to information concerning the actual authority of the person making it.

14. The situation is the same with respect to Mr. Holbrooke’s apparent authority. Dr. Karadzic has requested disclosure of evidence in the possession of the prosecution to determine whether Mr. Holbrooke was acting with the apparent authority of the United

¹¹ *Response* at paras. 12-20

¹² *Response* at paras. 12,14

Nations Security Council. It is only after he receives such disclosure that he will be in a position to make full representations to the Trial Chamber, in his preliminary motion challenging jurisdiction, as to the facts which demonstrate that Mr. Holbrooke was acting with the apparent authority of the United Nations Security Council.

15. Given that the information sought is not generally in the public domain, and was not within Dr. Karadzic's personal knowledge, he cannot be expected to know precisely with whom Mr. Holbrooke consulted before making the agreement and the extent to which the Security Council, its employees or representatives of its member States, gave him the express or implied authority to make such an agreement. All he knows is that at the time Mr. Holbrooke made the agreement, Dr. Karadzic reasonably believed that Mr. Holbrooke had the authority to do so.

16. The prosecution's argument that any agreement with Dr. Karadzic would have to have been the subject of a Security Council resolution is equally without merit.¹³ Did the prosecution obtain a Security Council resolution when it made an agreement to dismiss genocide charges against Biljana Plavsic in 2003?¹⁴ Did the prosecution obtain a Security Council resolution when it agreed not to prosecute Marinko Katava in the *Kupreskic* case, or Admiral Zec in the Dubrovnik cases?¹⁵ There is no support in practice or principle for the contention that the Security Council must pass a resolution before an agreement not to prosecute an individual for international crimes can be entered into.

17. The prosecution's argument is also inconsistent with its position that no one, not even the Security Council, can refuse to prosecute a person alleged to have committed serious international crimes.¹⁶ And it fails to account for the doctrine of apparent authority, which operates to bind a principal even in the absence of a resolution or express grant of authority to the agent.

18. Therefore, it is indeed possible that the mandate of the prosecution and the Trial Chamber could be affected by an agreement entered into by Richard Holbrooke, acting with either actual or apparent authority. Dr. Karadzic should have a full and fair

¹³ *Response* at para. 21-27

¹⁴ *Prosecutor v Plavsic*, No. IT-00-40-T, *Sentencing Judgement* (27 February 2003)

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);

¹⁶ *Response* at para. 34

opportunity to uncover the facts relating to the actual or apparent authority of Mr. Holbrooke to make the agreement with him.

III. Disclosure Was Warranted for an Abuse of Process Claim

19, Dr. Karadzic may prevail on an abuse of process claim even if the Holbrooke agreement was entered into without the requirements of actual or apparent authority being met. In the opinion cited by the prosecution from the Special Court of Sierra Leone, Judge Robertson drew this very distinction between reliance on amnesty for the purpose of evading prosecution and invoking it to enforce a promise from the prosecution, which if ignored would bring the judicial process into disrepute.¹⁷

20. The prosecution complains that “hypothetical facts” cannot provide a foundation for a finding of abuse of process.¹⁸ Once again, its argument highlights the need for disclosure. The full information concerning contacts and relationships between Mr. Holbrooke and the ICTY, Security Council, Contact Group, and U.S. government is not available to Dr. Karadzic absent disclosure. Therefore, disclosure is needed to allow Dr. Karadzic to obtain additional facts to support his request that the Trial Chamber decline to exercise jurisdiction over him as a result of abuse of process.

21. The prosecution also fails to make a logical distinction between an accused whose rights are violated in connection with an illegal arrest and an accused whose rights are violated in connection with an illegal prosecution. If it were found, for example, that Mr. Holbrooke made the agreement with Dr. Karadzic with the full knowledge and acquiescence of the ICTY prosecutor, or the Security Council, and then those bodies reneged on the agreement after Dr. Karadzic fulfilled his side of the agreement, a court may well conclude that those facts were sufficiently egregious to justify declining to exercise its jurisdiction.

22. In any event, the abuse of process doctrine is not limited to allegations of illegal arrest.¹⁹ In the *Barayagwiza* case, the Appeals Chamber recognized that the doctrine could apply to delays in bringing an accused to court.²⁰ If the abuse of process doctrine can be invoked in a situation where an accused is not brought to court on time,

¹⁷ CDF Amnesty Decision, note **Error! Bookmark not defined.** *supra*, at para 56

¹⁸ *Response* at para. 30

¹⁹ *Response* at para. 31

²⁰ *Barayagwiza v Prosecutor*, No. ICTR-97-19-AR72, *Decision* (3 November 1999)

surely it can apply to a situation where an accused had an agreement that he not be brought to court at all.

23. By denying disclosure of facts showing the existence of the agreement and the relationship between Holbrooke and the United Nations and ICTY, the Trial Chamber deprived Dr. Karadzic of information which he needs to support a claim for abuse of process. The prosecution has failed to demonstrate why Dr. Karadzic would not be entitled to such disclosure.

IV. Failure to Appeal Specificity Issue

24. The prosecution contends that the entire appeal should be dismissed because Dr. Karadzic has not appealed the Trial Chamber's decision on specificity.²¹

25. Dr. Karadzic's decision not to appeal the Trial Chamber's findings on the specificity of his request does not inhibit the ability of the Appeals Chamber to rule on his three grounds of appeal, and remand with directions to the Trial Chamber. The Appeals Chamber has held in relation to appeals from judgement that "arguments which do not have the potential to cause the impugned decision to be reversed **or revised** may immediately be dismissed by the Appeals Chamber and need not be considered on the merits."²² (emphasis added)

26. It must firstly be recalled that the Appeals Chamber is not required to affirm or quash an impugned decision in its entirety. Nor is the Appeals Chamber restricted to affirming or quashing the disposition of an impugned decision. The Appeals Chamber's role extends to reviewing each of the findings challenged by a party to the appeal, and rendering a ruling on each, depending on whether they are based on an abuse of the Trial Chamber's discretion or an error of law or fact. The quashing of findings may, or may not, lead to a reversal of an impugned decision.

27. Even if the Appeals Chamber accepts the prosecution argument that Dr. Karadzic's decision not to appeal the specificity finding means that a reversal of the Impugned Decision is not open to the Chamber, this does prohibit a revision of the Impugned Decision, or the granting of any relief. Should the Appeals Chamber find that

²¹ *Response* at paras. 7-10

²² *Prosecutor v Gacumbitisi*, ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 9 (emphasis added).

the Trial Chamber has indeed erred on any of the three grounds of appeal, it can grant the defence request in part, and remand the decision to the Trial Chamber for a *de novo* adjudication.²³ The Trial Chamber would then be required to take into account the Appeals Chamber's findings as to its errors.

28. Dr. Karadzic was prudent and responsible to appeal that part of the decision which creates a total bar to disclosure, and to seek to cure the alleged specificity problems with more investigation in the meantime.²⁴ It is clear that any request made by Dr. Karadzic in the future, now matter how specific, would be denied by the Trial Chamber on the grounds which are the subject of this appeal—invalidity of any such agreement and incapacity of Holbrooke to bind the ICTY.

29. Therefore, failing to reach the merits of this appeal would cause unwarranted delay in the proceedings. Dr. Karadzic would be forced to make a more specific request, have it denied on the same grounds that are the subject of this appeal, and then appeal anew. Such a process is likely to take months, and delay the filing of Dr. Karadzic's preliminary motion challenging jurisdiction and hence, the commencement of the trial.

30. In granting certification, the Trial Chamber expressed its preference that "this issue would be best settled at this early stage."²⁵ At a recent status conference, the Pre-Trial Judge repeatedly urged the accused to expedite the appeal so that this issue can be resolved.²⁶ The prosecution's suggestion that the appeal be dismissed and the parties return to "square one" is contrary to the interests of justice.

31. The prosecution's position is also contrary to its own practice before the Appeals Chamber. On numerous occasions, it has launched appeals on issues which would not result in reversal of the Trial Chamber's judgement. For example, in the *Brdjanin* appeal, the prosecution appealed the Trial Chamber's decision concerning

²³ See, for example, *Prosecutor v Popovic et al*, IT-05-88-AR65.4, *Decision on Consolidated Appeal against Decision on Borovcanin's Motion for Custodial Visit and Decisions on Gvero's and Miletic's Motions for Provisional Release During the Break in Proceedings* (15 May 2008) at para. 34

²⁴ See, for example, *Third Motion for Disclosure: Holbrooke Agreement* (3 February 2009); *Motion for Order Pursuant to Rule 70* (6 February 2009)

²⁵ *Decision on Accused's Application for Certification to Appeal Decision on Inspection and Disclosure* (19 January 2009) at para. 14

²⁶ Transcript of 19 January 2009 at pp. 78, 89

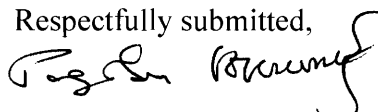
whether a perpetrator must be a member of the joint criminal enterprise. Not only did the Appeals Chamber entertain the ground of appeal, it granted it.²⁷

32. The issues presented in this appeal are not only important to the progress of Dr. Karadzic's case, but they are of general importance to the jurisprudence of this Tribunal and to the international community's ability to negotiate with world leaders suspected of committing serious international crimes. Therefore, as it has done for the prosecution, the Appeals Chamber should reach the merits of these important questions in the instant appeal, rather than cause further delay in the case.

Conclusion

33. For any and all of the above reasons, it is respectfully requested that the decision of the Trial Chamber be reversed or revised.

Word count: 2985

Respectfully submitted,

 Radovan Karadzic

²⁷ *Prosecutor v Brdjanin*, No. IT-98-36-A, *Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal* (5 May 2005) at pg. 3; *Prosecutor v Brdjanin*, No. IT-98-36-A, *Judgement* (3 April 2007). See also *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at paras. 6-7; *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement* (27 September 2007) at para. 8