

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

IN TRIAL CHAMBER No. 3

Before: Judge Iain Bonomy, Presiding
Judge Michele Picard
Judge Christoph Flugge

Registrar: Mr. Hans Holthuis

Date Filed: 28 November 2008

THE PROSECUTOR

v.

RADOVAN KARADZIC

MOTION FOR LEAVE TO REPLY and REPLY BRIEF:
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 126 *bis*, for leave to reply to a portion of the *Prosecution's Response to Karadzic's Motion for Inspection and Disclosure* (19 November 2008). The response was served on Dr. Karadzic in Serbian on 21 November 2008.

Motion for Leave to Reply

2. In its response, the prosecution raises two issues. First, it contends that the agreement with Richard Holbrooke is irrelevant and therefore there is no duty of disclosure. Because this argument simply relies upon the prosecution's earlier submissions and adds no new elements, Dr. Karadzic does not seek leave to reply to it.

3. Second, the prosecution contends that a portion of the motion fails to provide the required specificity under Rule 66(B). Dr. Karadzic contends that the Trial Chamber would be aided by an explanation of what motivated those particular requests and why they meet the specificity requirement. He therefore seeks leave to reply to that portion of the prosecution's response.

Reply—Specificity Issue

4. The documents sought in paragraph (A) of Dr. Karadzic's request are designed to obtain inspection of material which proves the *existence* of the agreement that he would not be arrested or prosecuted at the ICTY.

5. The prosecution claims that paragraphs (A)(4)(5) and (6) is insufficiently specific. The prosecution complains that "it would therefore include any material relating to the failure to arrest Karadzic, whether or not the material had any bearing on this alleged agreement."¹ However, the prosecution has simply misread the request. Items (4)(5) and (6) come under the umbrella of "(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." Therefore, if the material described under (A)(4)(5) and (6) has no bearing on the alleged agreement, it need not be provided.

6. In an interview with former OTP spokesperson Florence Hartmann on 11 October 2007, entitled "Behind the Curtains of International Justice" the following was said:

¹ *Response* at para. 12

SA: In your book you also talk about the meeting between Wesley Clark and Louise Arbour at NATO's headquarters during which they were discussing Karadzic's surrender and Wesley Clark was supposed to say that if Karadzic was brought to justice he would allege a deal with Warren Christopher that Karadzic would never end up in the Hague. Were you present during this conversation?

No, I was not present during this conversation because I was not with the Tribunal at that time. But I have the transcript of that conversation and Wesley Clark did say exactly what I quoted in my book and it has been certified by those from the ICTY present at the meeting.

9. This is the type of material being sought by paragraphs (A)(4)(5) and (6)—information which would tend to confirm the existence of the agreement—either by after the fact information such as that received from General Clark, or before-the-fact concerns that such an agreement would be made—such as letters from Prosecutor Goldstone to American officials in the run-up to the Dayton Agreement.²

10. The documents sought in paragraph (B) of Dr. Karadzic's request are designed to obtain inspection of material which establishes the *attribution* of the agreement to the ICTY through the doctrine of actual or apparent authority. Items (B)(3) and (6) are highly specific to Holbrooke's mission during which he made the alleged promise. The remaining items seek to establish the close coordination and relationship between the United States and the United Nations and Security Council members with respect to the Bosnia peace negotiations that led to the agreement between Holbrooke and Dr. Karadzic in July 1996. They are each under the umbrella of paragraph (B). Therefore, items which have no bearing on Holbrooke's actual or apparent authority need not be provided.

11. Trial Chambers of the ICTY have upheld requests from the prosecution to third parties which are much broader than those sought by Dr. Karadzic's motion.³ And the specificity requirement is inapplicable to the prosecution's duty to disclose the requested items pursuant to Rule 68. Since the agreement if proved to *exist* and be

² See Bass, *Stay the Hand of Vengeance* (Princeton University Press 2000) at p. 244-45

³ *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108bis, *Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para.39; *Prosecutor v Milosevic*, No. IT-02-54-T, *Second Decision on Prosecution Motion for Orders Pursuant to Rule 54 bis Against Serbia and Montenegro* (12 June 2003)

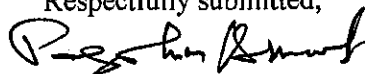
attributable to the ICTY could result in dismissal of the indictment, all of the requested material is subject to an overarching duty of disclosure in Rule 68.

12. The documents sought in paragraph (C) of Dr. Karadzic's request are designed to obtain inspection of material which demonstrates an alternative means of attribution of the Holbrooke agreement to the ICTY through the doctrines of *effective control* and *common purpose*. The prosecution's objection to this paragraph is based on relevance.⁴ However, evidence of the close relationship between the ICTY and U.S. government at the time of the agreement would make it more likely that Holbrooke's agreement could be attributed to the ICTY if it could be shown that the United States had effective control over the Bosnian peace process, including the ICTY, or that the agreement was made by a person or entity acting in a common purpose with the ICTY.

13. The motion for inspection and disclosure should be granted.

Word Count: 1000

Respectfully submitted,



Radovan Karadzic

Witnessed and attested:

Notary Public for the District of Columbia

Notary Public for the District of Columbia

⁴ Response at para. 15