UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No. IT-95-5/18-I Date: 20 August 2008

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Christine Van den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Date: 20 August 2008

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC FILING

PROSECUTION'S RESPONSE TO KARADŽIĆ'S SUBMISSION REGARDING ALLEGED IMMUNITY AGREEMENT

The Office of the Prosecutor:

Mr Mark Harmon
Mr Alan Tieger

The Accused:

Mr Radovan Karadžić

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-95-5/18-I

THE PROSECUTOR

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I. OVERVIEW

1. The Prosecution files this Response opposing Karadžić's submission concerning his first appearance and alleged immunity agreement with the United States of America ("USA") ("Submission").[1]

2. As explained in further detail below, the Trial Chamber should reject the two arguments that Karadžić raises to challenge the "legality of the proceedings"[2] against him:

- Even if it existed (and the Prosecution does not accept that it does), the alleged agreement between Karadžić and Holbrooke (on behalf of the USA) granting Karadžić immunity from prosecution before this Tribunal ("alleged agreement") would be devoid of legal effect before this Tribunal because: (1)

[1] "Official submission concerning my first appearance and my immunity agreement with the USA", filed on 6 August 2008, ("Submission").
[2] Submission, p.3.

the alleged agreement would violate a peremptory norm of international law; (2) any grant of immunity purportedly made by the USA could not bind this Tribunal; (3) the only body with the power to limit prosecutions is the Security Council, which has never exempted Karadžić from Prosecution. Karadžić's request for an evidentiary hearing into the factual issues regarding the existence of the alleged agreement is consequently misconceived in law. None of the factual allegations made in the Submission, even if proved, could provide a basis for a legal remedy.

- The Trial Chamber is not the appropriate body to address issues concerning Karadžić's conditions of detention.

3. Karadžić's request for an evidential hearing should be refused *in limine* because it can have no legal consequence. However, if the Chamber determines that the alleged agreement would be capable of having legal effect before this Tribunal, the Prosecution will address the factual issues surrounding the alleged agreement at that time. As noted above, the Prosecution disputes the existence of the alleged agreement.

II. THE ALLEGED AGREEMENT HAS NO LEGAL RELEVANCE TO THE PRESENT PROCEEDINGS

A. The alleged agreement would be invalid because it conflicts with a peremptory norm of customary international law

4. Even if it exists, the alleged agreement would be invalid because it conflicts with a peremptory norm of customary international law. This norm prohibits the granting of amnesty for serious violations of international criminal law.[3] Judge

[3] *See e.g.*, *Prosecutor v. Kallon and Kamara*, Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para.82 (referring to an understanding appended by the SRSG at the time of the signature of the Lomé Agreement (1999), stating that Article IX (on pardon and amnesty) shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This understanding was restated in the preamble to S/RES/1315(2000). The Appeals Chamber found that "[t]he interpretative declaration appended by the Secretary-General's representative at the signing of the Lomé Agreement is in accordance with international law."); Statute of the Special Court for Sierra Leone, Article 10 ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, paras. 153-157 (ruling that amnesties granted for the crime of torture are void and will

Robertson of the Appeals Chamber of the Special Court of Sierra Leone, after canvassing state practice and *opinio juris*, concluded that:[4]

> the rule against impunity which has crystallized in international law is a norm which denies the legal possibility of pardon to those who bear the greatest responsibility for crimes against humanity and for widespread and serious war crimes – certainly those which involve "serious violations" of the Common Article 3 of the Geneva Conventions [...] In the sphere of international law, the acts of these perpetrators (if capable of proof beyond reasonable doubt) must always remain amenable to trial and punishment.

5. The norms prohibiting the commission of genocide, crimes against humanity and war crimes and the resulting obligation to prosecute or extradite persons accused

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not receive international recognition); Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council on 4 October 2000, p.22, S/2000/915, ("the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."); Amnesty International Report on the Ivory Coast, 2004, p.3, http://www.peacewomen.org/resources/Cote_d'Ivoire/amnesty.pdf (noting that, in 2002, the Ivory Coast passed an Amnesty Law which excludes serious violations of human rights and humanitarian law); NATO Update March 2002 at http://www.nato.int/docu/update/2002/03-march/e0306b.htm (noting that, on 11 March 2002, Macedonia passed an "amnesty law", which excluded crimes under the jurisdiction of this Tribunal); Human Rights Watch, "Iraq: No Amnesty for Mass Murders", 3 July 2003, http://www.hrw.org/press/2003/07/iraq070303.htm (stating that offering amnesty to those responsible for the worst crimes is inconsistent with international law); Faustin Z. Ntoubandi, "Amnesty for Crimes Against Humanity under International Law" (Martinus Nijhoff, November 2007), page 185 (arguing that "[o]n the basis of recent developments in international law and practice [...] amnesty for crimes against humanity is legally invalid under international law.")

[4] *Prosecutor* v *Kondewa*, Case No. SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, 25 May 2004, Separate Opinion of Justice Robertson paras.49-51.

of these crimes have a peremptory character.[5] This rules out the possibility of any international recognition of amnesties for these crimes.[6]

6. The Dayton Agreement, which brought an end to the conflict in Bosnia and Herzegovina, reflects the customary law norm prohibiting amnesties. It specifically excludes amnesties for the serious violations of international criminal law set out in Articles 2-5 of the Tribunal's Statute.[7]

7. If the customary law norm prohibiting amnesties as described above had crystallised by the time the alleged agreement was made, then the alleged agreement would have been immediately invalid.[8] If the customary law norm crystallised some time after the alleged agreement was made, then the alleged agreement would have become invalid at the time when the norm emerged.[9] Either way, at the present time, the alleged agreement would be invalid. It could not now be raised as a barrier to this Tribunal proceeding with the case against Karadžić.

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[5] J. Pictet (ed.), The Geneva Conventions of 12 August 1949, Commentary: IV Geneva Convention, ICRC, Geneva, 1960, pp.597-602 (Arts 147-148) (noting that the "repression of grave breaches was to be universal [...with those reasonably accused] sought for in all countries [...] the obligation to prosecute and punish [... is] absolute."); M. Cherif Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes* , 59 Law & Contemp. Probs. (1996) (Bassiouni), 63 ("Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite"); J. J. Paust, Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals, Houston Journal of International Law, 11 (1989) 337 ("Today it is generally recognised that customary international law of a peremptory nature places an obligation on each nation-state to search for and bring into custody and to initiate prosecution of or to extradite all persons within its territory or control who are reasonably accused of having committed, for example, war crimes, genocide, breaches of neutrality, and other crimes against peace"); A. Cassese, On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, Eur J Int Law 9 (1998) 2, 6 ("Arguably, the prohibition of such crimes and the consequent obligation of states to prosecute and punish their authors should be considered a peremptory norm of international law (*jus cogens*): hence, states should not be allowed to enter into international agreements or pass national legislation foregoing punishment of those crimes").

[6] Bassiouni, p.65 ("the implications of *jus cogens* are those of a duty and not of optional rights: otherwise *jus cogens* would not constitute a peremptory norm of international law.")

[7] The General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto (S/1995/999, annex), reached at Wright-Patterson Air Force Base near Dayton, Ohio in November 1995, was formally signed in Paris on December 14, 1995. The Security Council endorsed the Dayton Agreement. *See* S/RES/1031(1995), 15 December 1995.

[8] Vienna Convention on the Law of Treaties, 1969 (VCLT), Article 53 ("A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law [...]")

[9] VCLT, Article 64 ("If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.").

B. The USA could not unilaterally grant Karadžić immunity from prosecution before this Tribunal

8. Even if the USA had purported to enter into an international agreement granting Karadžić immunity from prosecution before this Tribunal, it had no power to do so. Accordingly, any such undertaking by the USA could not bind this Tribunal.

9. First, it should be noted that the alleged agreement does not constitute a valid international agreement governed by international law.[10] However, even if it did constitute an international agreement, it would nevertheless be legally irrelevant before this Tribunal.

10. The USA cannot enter into international agreements that impose obligations on third parties, such as other UN member states, a collection of such states or the Security Council. At most,[11] the USA could confer upon Karadžić immunity from prosecution within its own jurisdiction. It has no power to confer upon Karadžić immunity from prosecution by other states or by a UN organ, such as this Tribunal.

11. It is a fundamental principle of international law that a treaty applies only between the parties to it.[12] A treaty cannot impose binding obligations upon a third

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[10] *See e.g.* M. Dixon, Textbook on International Law 4th Ed. (2000), p.51 ("Treaties are [...] legally binding agreements, governed by international law, made between those international legal persons recognized as having treaty-making capacity"); Jennings & Watts (eds) Oppenheim's International Law, Vol 1 Parts 2-4 (Oppenheim), p.1217-1220 (states and international organizations have the capacity to enter into binding international agreements); D. J. Harris, Cases and Material on International Law, 5th Ed. (1998), p.770 ("Individuals have never been recognised as having the capacity to make treaties, whether with states, or with other international persons with treaty making capacity."); Oppenheim, p.1200 ("Where the agreement is concluded between parties who have no international legal personality it will not be governed by international law."). *See also Prosecutor* v *Kallon et al*, Case No. SCSL-2004-15-AR72 (E) & SCSL-2004-16-AR72 (E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, paras.48-49 (noting that the RUF had no treaty-making capacity and so the Lomé Agreement could not be regarded as an international agreement and created no obligation in international law.) *Further*, if the alleged agreement constitutes an international agreement, it could not be invoked before this Tribunal unless it was registered with the UN Secretariat. *See* Article 102, UN Charter.

[11] *See however, above* paras.4-7. *Further*, Article 103 of the UN Charter (in the event of a conflict between the obligations of the USA under the Charter and their obligations under any other international agreement, the obligations under the Charter prevail.) *See also* Rule 58 of the Tribunal's Rules of Procedure and Evidence.

[12] *E.g.* I. Brownlie, Principles of Public International Law, 6th Ed. (2003) (Brownlie), p. 598 ("The maxim *pacta tertiis nec nocent nec prosunt* expresses the fundamental principle that a treaty applies only between the parties to it); Dixon, p.72 ("As a general rule, treaties are binding only on the parties").

party unless that third party expressly consents to the obligation.[13] As international law scholar Brownlie points out, this fundamental principle "is a corollary of the principle of consent and of the sovereignty and independence of states",[14] which are foundational principles of international law. As explained below, the Security Council has never accepted any obligation, purportedly conferred by the USA, to exempt Karadžić from prosecution by this Tribunal.[15]

C. The Security Council has not exempted Karadžić from prosecution before this Tribunal

12. The Security Council of the United Nations (UN) is the only body that has the power to limit the Tribunal's jurisdiction.[16] However, the Security Council has never specified that Karadžić, or any other named individual, will be exempted from prosecution by this Tribunal.[17] To the contrary, the Security Council has repeatedly emphasized that Karadžić, along with all other persons indicted by the Tribunal, should be brought to justice.[18]

13. The Security Council created the Tribunal under Chapter VII of the UN Charter and circumscribed its jurisdiction.[19] The Tribunal's Statute contains no provisions granting immunity or amnesty to any individual. To the contrary, Article 1 confers a general power for the Tribunal to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" without further limitation.

14. Consistent with this, the Security Council has repeatedly called upon member states to ensure that all indicted persons, including Karadžić, are tried before the Tribunal. In particular, in August 1996, the Security Council specifically noted that "Karadžić had handed over his executive powers in Republika Srpska on 30 June and

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[13] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), Article 35 (obligations can only arise for a third state or third organization from a treaty if that third state or third organization expressly accept the obligation in writing). *See also* VCLT, Article 35; Brownlie, p. 599.

[14] Brownlie, p. 598.

[15] *Below*, paras.12-15.

[16] *Although see above*, paras.4-7.

[17] The only limitation the Security Council has placed on the categories of individuals tried before this Tribunal is its 2004 direction for the Prosecution to ensure that new indictments focused on "the most senior leaders suspected of being most responsible for crimes [...]" S/RES/1534(2004), 26 March 2004, para.5.

[18] *Below*, para.14.

had agreed to cease all political and official activities." The Security Council nevertheless condemned the failure of Republika Srpska and the Federal Republic of Yugoslavia (Serbia and Montenegro) to execute the arrest warrant against Karadžić.[20] Again, in 2004, the Security Council specifically asked states to intensify their co-operation with the Tribunal to ensure that, among others, Radovan Karadžić was brought to the Tribunal.[21]

15. In his Submission, Karadžić's does not claim that the Security Council exempted him from prosecution. He relies exclusively on his allegation that the USA granted him immunity before this Tribunal. That argument is of no legal relevance to this Tribunal's capacity to prosecute him. Now that Karadžić has been transferred to The Hague, the Tribunal is obliged, under the mandate imposed by the Security Council, to try his case.

III. THE TRIAL CHAMBER IS NOT THE APPROPRIATE BODY TO DEAL WITH KARADŽIĆ'S CONCERNS ABOUT DETENTION

16. The second ground upon which Karadžić challenges the validity of the present proceedings is that he is fearful of his safety in the UN Detention Unit. This argument, which raises an issue concerning the conditions of his detention,[22] is not a matter for the Trial Chamber. Karadžić's concerns should first be raised with the commanding officer of the UN Detention Unit.[23]

17. The ICTR Appeals Chamber in *Nahimana* set out the appropriate process for an accused person to raise matters concerning detention. The Chamber noted that, if a satisfactory response is not received from the commanding officer, a written notice may be directed to the Registry who shall forward the complaint to the President of

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19 S/RES/808(1993), 22 February 1993.

20 SC/6253, 8 August 1996 (Press Release).

21 S/RES/1534(2004), 26 March 2004, para.1. *See further*: SC/8163 4 August 2004 (Press Release) ("The Council called on all States [...] to intensify cooperation with the Tribunal, particularly in apprehending Radovan Karadžić..."); S/RES/1639(2005), 21 November 2005, para.3; S/RES/1423(2002), 12 July 2002, para.3; S/RES/1088 (1996), 12 December 1996, para.7.

22 Submission, p.3.

23 Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal (IT/38/Rev.9, 10 October 2005).

the Tribunal, who is the competent person to deal with the issue if it is closely related to the fairness of the proceedings.[24]

IV. CONCLUSION

18. For the reasons stated above, the Submission should be rejected.

Word Count: 2713

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Dated this Twentieth day of August 2008
At The Hague,
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[24] *See Ferdinand Nahimana et al. v. Prosecutor,* Case No. ICTR-99-52-A, Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005, p.3.