

**UNITED
NATIONS**

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No. IT-95-5/18-PT
Date: 19 November 2008

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Pre-Trial Judge
Judge Michèle Picard
Judge Christoph Flüggé

Registrar: Mr. Hans Holthuis

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S MOTION
FOR INSPECTION AND DISCLOSURE**

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark Harmon
Ms. Uertz-Retzlaff

Counsel for the Accused:

Mr. Radovan Karadžić

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

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

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S MOTION
FOR INSPECTION AND DISCLOSURE**

I. INTRODUCTION

1. The Prosecution files this response opposing Karadžić's Motion for Inspection and Disclosure (Motion).¹
2. Pursuant to Rules 66 (B) and 68, Karadžić requests inspection and disclosure of documents relating to an immunity agreement that he alleges he entered into with Richard Holbrooke (alleged immunity agreement). The Prosecution opposes this Motion on the following two grounds:
 - (a) even if material concerning the alleged immunity agreement existed, it would be legally irrelevant to the present proceedings. Consequently it would not fall within the scope of Rules 66 (B) or 68; and
 - (b) alternatively, the categories of documents listed in 1(A)(4)-(6), 1(B) and 1(C) of the Motion are formulated too broadly. Karadžić has failed to demonstrate that these broad categories of documents meet the requirements of Rule 66 (B).

¹ Motion for Inspection and Disclosure: Holbrooke Agreement, 5 November 2008.

3. By letter dated 23 October 2008,² the Prosecution informed Karadžić that his request, dated 14 October 2008, for inspection and disclosure of documents related to the alleged immunity agreement³ was without foundation on the above-two grounds. A copy of that letter is attached as Appendix A.

II. THE ALLEGED IMMUNITY AGREEMENT IS LEGALLY IRRELEVANT TO THE PRESENT PROCEEDINGS

4. The alleged immunity agreement, even if proved, would be devoid of legal effect before this Tribunal.⁴ Therefore, information concerning the alleged immunity agreement is not material to the preparation of Karadžić's defence and it could not suggest Karadžić's innocence or mitigate his guilt. Even if the Prosecution was in possession of material concerning the alleged immunity agreement, there would be no obligation under Rules 66 (B) and 68 to provide it to Karadžić.

5. The Prosecution further notes that the categories of documents requested by Karadžić in the Motion, do not match Karadžić's explanation of his alleged immunity defence as set out in his submission regarding the alleged immunity agreement of 6 August 2008 (August Motion).⁵ The issue presently pending before the Trial Chamber from the August Motion is Karadžić's assertion that Holbrooke, acting on behalf of the United States of America, gave him immunity from prosecution before this Tribunal. In his reply to the Prosecution's response to his August Motion, Karadžić reiterated his position that Holbrooke granted him immunity on behalf of the United States of America.⁶

6. In the present Motion, Karadžić attempts to revise his position and he implicitly makes a series of new allegations:

- that Holbrooke was acting on behalf of the "international community";⁷ or
- that Holbrooke's alleged promise "is attributable to the ICTY";⁸ or
- that the actions of the United States "are attributable to the United Nations".⁹

² The letter was sent on 27 October 2008.

³ Motion, para. 14.

⁴ Prosecution's Response to Karadžić's Submission Regarding Alleged Immunity Agreement, 20 August 2008.

⁵ Official Submission Concerning My First Appearance and My Immunity Agreement with the USA, 6 August 2008 (August Motion).

⁶ Re: Prosecution's Response to My Submission Regarding Immunity Agreement with the USA, 24 August 2008.

⁷ E.g. Motion, p.2

⁸ Motion, paras.3, 18.

⁹ Motion, para.19.

7. These arguments are irrelevant to the Trial Chamber's decision on the August Motion.¹⁰ However, even allowing for Karadžić's various new claims as to the source of Holbrooke's authority, the alleged immunity agreement would still be without legal effect before this Tribunal. For example, as set out in the Prosecution's response to Karadžić's August Motion, customary international law prohibits granting an amnesty to an individual accused of the most serious violations of international criminal law.¹¹ The crimes charged against Karadžić in the present case fall within this category.¹²

8. The Prosecution recognises that the legal effect of the alleged immunity agreement is an issue pending before the Chamber in the August Motion. Should the Tribunal take a different view to the Prosecution concerning the legal effect of the alleged immunity agreement, the Prosecution will modify its approach to disclosure accordingly. However, unless and until that happens, Karadžić's Motion should not be granted. It would be an inefficient use of resources to require the Prosecution to trawl through its voluminous evidence collection in search of the broad categories of documents that Karadžić requests if the alleged immunity agreement would, in any event, be legally irrelevant to the proceedings.

9. The Prosecution has identified an 18 July 1996 document that reflects an undertaking by Karadžić to step down from politics. Whether or not this document falls within the ambit of Karadžić's request, it may tend to support the mitigation of any eventual sentence, and was disclosed to Karadžić on that basis on 7 November 2008.¹³

III. REQUESTED CATEGORIES OF DOCUMENTS IN PARAGRAPHS 1(A), 1(B) AND 1(C) DO NOT MEET THE REQUIREMENTS OF RULE 66 (B)

10. Even if information regarding the alleged immunity agreement were relevant to these proceedings, Karadžić's request is not articulated with sufficient specificity. In addition to documents directly concerning the alleged immunity agreement, Karadžić also requests documents falling into the following three categories:

- documents relevant to (i) any promise, representation or suggestion that Karadžić not be arrested, transferred, or prosecuted; (ii) any "concern" by the Office of the Prosecutor or

¹⁰ Karadžić has not been granted leave to supplement or modify the August Motion with these new arguments and the Prosecution has not responded to them.

¹¹ Prosecution's Response to Karadžić's Submission Regarding Alleged Immunity Agreement, 20 August 2008, paras.2-7.

¹² See also Prosecution's Response to Karadžić's Submission Regarding Alleged Immunity Agreement, 20 August 2008, fn. 10 concerning the requirements of Article 102 of the UN Charter.

¹³ See reference Motion, para. 14.

any other individual that representations had or would be made to Karadžić that would affect his prosecution at the ICTY, or that he would claim the existence of the alleged immunity agreement; and (iii) the failure to arrest Karadžić after 18 July 1996 and/or the reasons therefore (Paragraph 1(A)(4)-(6) Documents);

- documents relevant to Holbrooke’s “actual or apparent authority” and facts demonstrating the “effective control of the United States over the peace process in Bosnia”¹⁴ (Paragraph 1(B) Documents); and
- documents relevant to the relationship between the United States and the Office of the Prosecutor¹⁵ (Paragraph 1(C) Documents).

11. These categories of documents are framed too broadly.¹⁶ Karadžić has failed to establish *prima facie* the materiality of the documents he seeks and he has also failed to identify the documents he seeks with sufficient specificity.¹⁷ Accordingly, he has failed to meet the requirements of Rule 66 (B) in respect of these two categories of documents.

12. The Paragraph 1(A)(4)-(6) Documents, the Paragraph 1(B) Documents and the Paragraph 1(C) Documents are formulated so broadly that they would scoop up large volumes of material that would be irrelevant to Karadžić’s claim concerning the alleged immunity agreement. For example, in paragraph 1(A)(4), Karadžić requests all material evidencing any “promise, representation, or suggestion that Radovan Karadžić not be arrested, transferred, or prosecuted at the ICTY.” This category is not limited to the alleged immunity agreement; it would therefore include any material relating to the failure to arrest Karadžić, whether or not the material had any bearing on this alleged agreement. Paragraphs 1(A)(5) and 1(A)(6) are overly-broad for the same reason.

13. Similarly, in paragraph 1(B)(1), Karadžić requests all material evidencing communications between the United Nations and the United States regarding the peace negotiations in Bosnia and Herzegovina between August 1995 to August 1996. This would potentially include material that has no bearing on the apparent subject of Karadžić’s interest, namely Holbrooke’s “actual or apparent authority” and the control of the United States over the peace process in Bosnia and Herzegovina. The same form of objection applies to the documents listed in paragraph 1(B)(2)-(6).

¹⁴ Motion, paras.18-19.

¹⁵ Motion, para.19.

¹⁶ Motion, paras. 1(B) (1)-(6), 1(C) (1)-(3).

¹⁷ *E.g. Prosecutor v Karemera et al*, Case No.: ICTR-98-44-AR73.11, Decision on the Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para.12; *Prosecutor v Boškoski et al*, Case No. IT-04-82-T, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66 (B), 31 January 2008 (Boškoski Decision), para.7.

14. Regarding the Paragraph 1(C) Documents, Karadžić has failed to establish that all documents showing any kind of relationship between the United States and the Office of the Prosecutor are sufficiently relevant to his claims concerning the alleged immunity agreement. For example, in Paragraph 1(C)(1), Karadžić requests material documenting any assistance the United States has provided to the Office of the Prosecutor, in the form of either personnel or resources. Whether or not the United States provided staff or resources is not sufficiently material to the issue as to whether Holbrooke had authority to grant Karadžić immunity from prosecution before the Tribunal. The same form of objection applies to the documents listed in paragraph 1(C)(2)-(3).

15. In addition, many of the requested categories would encompass internal work product of the Prosecution, in the event such material existed (for example, under paragraph 1(C)(2), “any memoranda, correspondence, ... or reports generated by the Office of the Prosecutor concerning the United States’ negotiations for peace in Bosnia and its implications upon the ICTY”). Rule 70 (A) protects such material from disclosure pursuant to Rule 66 (B). Moreover, the fact that Karadžić has included internal Prosecution work product under many categories of his request for material that relates to an alleged agreement to which the Prosecution was not a party is a further indication of the overly-broad nature of the request.

16. As the Appeals Chamber has confirmed, “Rule 66 (B) is only triggered by a sufficiently specific request by the defence”¹⁸ and the defence will not be permitted to rely on very general descriptions of the information sought.¹⁹ Accordingly, chambers have dismissed defence requests under Rule 66 (B) where, as here, the categories of documents sought are described too broadly and the defence has not established that all documents in the requested category would meet the materiality requirement under Rule 66 (B).²⁰

IV. CONCLUSION

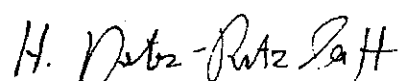
17. The Prosecution requests that the Trial Chamber dismiss the Motion in its entirety.

¹⁸ *Prosecutor v Bagosora et al*, Case 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, 26 September 2006, para. 10.

¹⁹ *Prosecutor v Delalić et al*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence, 26 September 1996, paras.9-10.

²⁰ *E.g.* Boškoski Decision, paras.10-12, particularly, para. 11 (“While in this broad list of items there may be documents or groups of documents which may meet the *prima facie* materiality test established by the jurisprudence, these documents are not defined with sufficient specificity to trigger the Prosecution’s disclosure obligations pursuant to Rule 66 (B)”). *See also* *Prosecutor v Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Defence Motion for Disclosure Under Rule 66 (B) of the Rules, 21 February 2007, para.9 (finding that a defence request for “other impeachment material” was insufficiently precise to trigger the Prosecution’s obligations under Rule 66 (B)); *Prosecutor v Sesay et al*, Case No. SCSL-2004-15-T, Sesay-Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, para. 30 (finding that a request for disclosure of documents falling into general categories such as “the role of ECOWAS in the disarmament of the RUF, AFRC and CDF pursuant to the peace

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Dated this 19th day of November 2008
At The Hague, The Netherlands

agreement” and “the role played by Charles Taylor in the conflict” were insufficiently precise to trigger the Prosecution’s disclosure obligations.”)

Appendix A

23 October 2008



United Nations
Nations Unies



International
Criminal Tribunal
for the former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

Office of the
Prosecutor

Bureau du
Procureur

Re: The Prosecutor v. Radovan Karadžić (Case No.: IT-95-5/18-I)

Dear Mr. Karadžić

We refer to your memorandum to us requesting inspection and disclosure of documents relating to an immunity agreement that you allegedly entered into with Richard Holbrooke (alleged immunity agreement).

Apart from the overbreadth of your request, which seeks inspection and disclosure of materials insufficiently related to the alleged immunity agreement, the Prosecution considers that an alleged immunity agreement, even if proved, is devoid of legal effect before this Tribunal.¹ Therefore, information concerning an alleged immunity agreement as such is not material to the preparation of your defence and it could not suggest your innocence or mitigate your guilt. Accordingly, the Prosecution considers that, even if it was in possession of material concerning the alleged agreement, it would have no obligation under Rules 66 (B) and 68 to provide that information to you.

The Prosecution recognises that the legal effect of the alleged agreement is an issue pending before the Chamber. Should the Chamber take a different view to the Prosecution concerning the legal effect of the alleged agreement, the Prosecution will modify its approach to disclosure accordingly.

However, the Prosecution considers that your undertaking to step down from politics may fall within the ambit of Rule 68 as arguably mitigating in determining any sentence that may ultimately be handed down by this Tribunal. The Prosecution is taking the necessary steps to ensure its provision as soon as possible. More generally, the Prosecution will continue to carry out its ongoing obligations under Rule 68 to disclose to you any material in its possession that would suggest your innocence, mitigate your guilt or affect the credibility of Prosecution evidence.

Yours sincerely


Alan Tieger

¹ Prosecution's Response to Karadžić's Submission Regarding Alleged Immunity Agreement, 20 August 2008.