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: 28 January 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPEAL OF DECISION CONCERNING
HOLBROOKE AGREEMENT DISCLOSURE

The Office of the Prosecutor:
Mr. Alan Tieger
Mr. Mark Harmon

The Accused:
Radovan Karadzic

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Introduction

1. Dr. Radovan Karadzic contends that in a meeting in Belgrade, Serbia on 18-19 July 1996, United States Special Envoy Richard Holbrooke, acting on behalf of the international community, including the United Nations Security Council and its subsidiary organs, entered into an agreement that if Dr. Karadzic resigned his positions in Republika Srpska and withdrew from public life, he would not be prosecuted by the ICTY.

2. Dr. Karadzic kept his part of the bargain. Now he wants the international community to keep theirs.

Procedural History

3. After his arrest and transfer to the Tribunal, Dr. Karadzic set out to prove the existence of the agreement and that the ICTY was bound to honor it.

4. On 5 November 2008, he filed a *Motion for Inspection and Disclosure: Holbrooke Agreement*. The prosecution opposed the motion on 19 November 2008.[1] Dr. Karadzic replied on 28 November 2008.[2]

5. On 17 December 2008, the Trial Chamber issued its *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (hereinafter the "Impugned Decision").

6. On 9 January 2009, Dr. Karadzic filed his *Application for Certification to Appeal Decision on Holbrooke Agreement Disclosure*. The prosecution opposed certification.[3] However, on 19 January 2009, the Trial Chamber granted certification to appeal.[4]

7. This timely appeal follows.

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[1] *Prosecution's Response to Karadzic's Motion for Inspection and Disclosure*
[2] *Motion for Leave to Reply and Reply Brief: Motion for Inspection and Disclosure: Holbrooke Agreement*
[3] *Prosecution's Response to Karadzic's Application for Certification to Appeal Decision on Second Motion for Inspection and Disclosure* (16 January 2009)
[4] *Decision on Accused's Application for Certification to Appeal Decision on Inspection and Disclosure* (19 January 2009)

The Impugned Decision

8. Dr. Karadzic had requested inspection and/or disclosure of a number of items pursuant to Rules 66(B) ("items material to the preparation of his defence") and Rule 68 ("exculpatory material").[5]

9. In the Impugned Decision, the Trial Chamber held that "it is well established that any immunity in respect to an Accused indicted for genocide, war crimes and/or crimes against humanity before an international tribunal would be invalid as a matter of international law."[6] This is the subject of Dr. Karadzic's first ground of appeal.

10. The Trial Chamber went on to conclude that even if such immunity were valid "neither its own mandate nor that of the prosecutor is affected by any alleged undertaking made by Mr. Holbrooke."[7] This is the subject of Dr. Karadzic's second ground of appeal.

11. The Trial Chamber nevertheless found that the written agreement made during the meeting on 18-19 July 1996, and any notes or recordings of that meeting, could be items falling under Rule 68 in that it could mitigate an eventual sentence. It ordered disclosure of those items. Neither party has appealed this aspect of the Impugned Decision.

12. As to the remaining items, the Trial Chamber considered them overly broad and lacking in specificity. While Dr. Karadzic believes that the Trial Chamber erred by confusing the specificity requirement under Rule 66(B) with the prosecution's broad duty of disclosure under Rule 68, Dr. Karadzic has decided not to appeal from this aspect of the Impugned Decision. Instead, he intends to use the time while this appeal is pending to undertake investigation that would allow him to be more specific in his request if he prevails on the other grounds of appeal.

Grounds of Appeal

1. The Trial Chamber erred in concluding that "it is well established that any immunity in respect to an Accused indicted for genocide, war crimes and/or crimes against humanity before an international tribunal would be invalid as a matter of international law."[8]

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[5] See *Motion for Inspection and Disclosure: Holbrooke Agreement* (5 November 2008) at para. 1
[6] Impugned Decision at para. 25
[7] Impugned Decision at para. 25
[8] Impugned Decision at para. 25

II. The Trial Chamber erred in concluding that ""neither its own mandate nor that of the prosecutor is affected by any alleged undertaking made by Mr. Holbrooke."[9]

III. The Trial Chamber erred in denying disclosure which could have lead to the ICTY declining to exercise its jurisdiction for abuse of process, notwithstanding the validity or binding nature of the Holbrooke agreement

Standard of Review

13. Issues of disclosure are matters within the Trial Chamber's discretion. Therefore, a Trial Chamber decision will not be overturned unless it committed a discernable error in rendering the Impugned Decision such as an incorrect interpretation of governing law, a patently incorrect conclusion of fact, or where the Impugned Decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[10]

14. In this appeal, Dr. Karadzic argues that the Trial Chamber made a discernible error by incorrectly interpreting governing law.

Argument

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

A. The Nature and Scope of the Finding of the Trial Chamber

15. The Trial Chamber erred in its finding 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. It further erred in its finding that the Defence had no arguable position on this point, thus justifying the denial of disclosure.

16. This was a cooperation agreement, not a statutory or blanket immunity. There is no binding decision from the Appeals Chamber which would render Dr. Karadzic's reliance on the alleged cooperation agreement unarguable. Further, the Trial Chamber cited no authority which supports this purportedly 'well established' proposition. In paragraph 17 under the section 'Applicable Law' the Trial Chamber makes the assertion

[9] Impugned Decision at para. 25
[10] *Prosecutor v Karemera et al*, No ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Notice of Rule 68 Violation* (14 May 2008) at para. 6

that it is dealing with a principle of customary international law. However, it does not set out its reasons for this finding in terms of the state of customary international law, nor do the authorities referred to demonstrate the asserted principle to be general practice accepted as law,[11] that is: widespread, consistent and constant state practice and *opinio juris* as required for the formation of a rule of customary international law. Moreover, none of the instruments or decisions referred to by the Chamber actually express this principle as broadly stated by the Chamber.

B. Scope and Meaning of Sources Referred to by the Trial Chamber

1. Statute of the ICTY and Similar Provisions in Other Statutes

17. Article 7(2) of the ICTY Statute provides that 'the official position of any accused person, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

18. This kind of provision is only found in the statutes of international criminal tribunals. Such a provision was first included in the Charter of the International Military Tribunal at Nuremberg (Article 7) and repeated in slightly different terms in the Charter of the International Military Tribunal for the Far East (Article 6).[12] These statutes were specifically aimed at the prosecution of the leaders of Nazi Germany and Japan respectively.

19. It is submitted that the scope of the provisions in the statutes of the Nuremburg and Tokyo tribunals, as well as that of the ICTY, are limited and do not, contrary to the finding of the Trial Chamber, embrace all agreements not to prosecute.

20. First, the scope of these provisions is not nearly as wide as asserted by the Trial Chamber. It appears that these provisions were designed to confront claims of immunity from criminal responsibility as a defence. This certainly would have covered claims of immunity provided for under national laws and constitutions.

21. The provisions may also have been aimed at excluding the defence of sovereign immunity from the exercise of jurisdiction. This was done by specific

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[11] See Article 38 of the Statute of the International Court of Justice

[12] *Responsibility of Accused.* Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

agreement between the Allies as the occupying powers of Germany and Japan. This is recognised in the *Yerodia* case where ICJ confirms that an international criminal tribunal might be able to exercise jurisdiction over an incumbent Head of State or Minister of Foreign Affairs.[13] Sovereign immunity is a right of the state under customary international law. Therefore, it was within the prerogative of the affected occupying states that set up the IMT and IMFE to waive Head of State immunity as an occupying power in the State.

22. It is far from clear that this type of provision was designed to create an exception to sovereign immunity under customary international law, let alone agreements not premised on that law. The Allies were afforded the most competent advice of international lawyers and academics. It is a truism that a small group of states cannot alter the state of customary international law through an agreement in a manner which would bind the whole world. In agreeing to this provision, these states would be affecting the protections under international law accruing to the states whose territory they were occupying. This would only be done in the most express and clearest of terms, particularly when one considers how this could have rendered vulnerable the leaders of the USSR.

23. Article 7(2) is clearly borrowed from the Nuremberg and Tokyo statutes and as such its meaning and scope should be understood in that context. It is not any more than those Statutes intended to violate or change ordinary and settled principles of international law.

24. An international criminal tribunal may differ from a national tribunal in its composition and purpose, but it is essentially no more than a collective exercise of sovereign power and as such can only interfere with immunities with the consent of the beneficiary states in explicit terms. In our submission, the Holbrooke agreement was a cooperation agreement, and was not based upon sovereign immunity of states. In that event, since the immunity in question is premised on agreement rather than upon the principle of sovereign immunity under customary international law or any other principle

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[13] *Case Concerning the Arrest Warrant of April 2000 (Democratic Republic of Congo v Belgium)*, Judgment of 14 February 2002 at para. 61

of law premised on Karadzic's position as a head of government, Article 7 is inapplicable.

25. Second, international tribunals have consistently permitted the non-prosecution of individuals accused of serious international crimes which demonstrates that there cannot be an overarching prohibition on immunity agreements of limited scope resulting from such provisions. The fact that the Emperor of Japan was not prosecuted before the Tokyo Tribunal or anywhere else, suggests that the Allied powers did not exclude the possibility of prosecutorial discretion not to prosecute being exercised even in respect of a Head of State. Thus, it was still possible for a cooperation agreement between the prosecution and an individual to lead to them not being prosecuted. In fact it would appear that the choice of defendants before both tribunals was severely limited as compared to the number of alleged war criminals identified by the United Nations War Crimes Commission.[14]

26. At the ICTY, prosecutors have dismissed charges of genocide, war crimes, and crimes against humanity pursuant to cooperation agreements not fundamentally different than that made with Dr. Karadzic.[15]

27. Article 53 of the Rome Statute of the International Criminal Court clarifies the circumstances in which prosecutorial discretion not to prosecute may be exercised. Article 53(2)(c) provides that the Prosecutor may decide not to prosecute if "a prosecution is not in the interests of justice taking into account all of the circumstances.". No restrictions are placed upon the exercise of this discretion and the circumstances to which it may apply are wide ranging. For instance, an agreement to provide immunity from prosecution before the ICC might be reached in exchange for agreeing to testify against another individual. Other statutes, including that of the ICTY, place absolutely no definition or limit on the exercise of prosecutorial discretion. Nothing in international law indicates that a promise from a prosecutor or an institution or state not to prosecute in exchange for immunity from process before a *particular* court contravenes customary law.

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[14] History of the United Nations War Crimes Commission and the Development of the Laws of War. United Nations War Crimes Commission. London: HMSO, 1948

[15] See cases cited *Motion for Inspection and Disclosure: Holbrooke Agreement* (5 November 2008) at para. 16, fn. 17

28. Third, the Trial Chamber wrongly conflates immunity from process before the ICTY with impunity for responsibility under international law. Immunities are a procedural bar, whereas criminal responsibility is a question of substantive law.[16] The principle involved in the ICTY statutory provisions on immunity is that responsibility under international law cannot be evaded, not that the Tribunal itself could not waive the exercise of jurisdiction in favour of another competent jurisdiction. So, it is not immunity before the Tribunal which is in issue in the provisions on immunity, but immunity from criminal responsibility under international law.

29. Fourth, the offending immunity was immunity by virtue of one's position as a Head of State or government official. This was clearly aimed at provisions of law designed to shield the top officials of a state from criminal prosecution. It does not speak to other forms of immunity contained in agreements based on grounds other that the mere position of the accused as a top government official. In particular it is not concerned with the effect of peace treaties or agreements.

30. The agreement in question is not premised on any immunity which any national law of Serbia, BiH or even the former Republika Srpska might have afforded Dr. Karadzic, or on his position as a head of state. It is not even premised on the existence of rules of sovereign immunity under international law. It is merely an agreement not to prosecute him made by a representative of the international community establishing this Tribunal in exchange for him agreeing to leave power. Insofar as it constitutes a bar to the exercise of jurisdiction, this is not by virtue of Dr. Karadzic's official position but by virtue of an agreement not to do so designed to secure peace in the region. Article 7(2) is therefore inapplicable. It does not govern agreements not to prosecute, but rather on national immunities or arguably reliance on the rules of sovereign immunity under international law.

31. A distinction must be drawn between on the one hand immunities afforded generally under customary international law to protect the official status of an individual, and on the other, cooperation agreements entered into by a representative of the

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[16] *Case Concerning the Arrest Warrant of April 2000 (Democratic Republic of Congo v Belgium)*, Judgment of 14 February 2002 at para. 60

international community establishing the Tribunal, in order to secure a peace agreement. There is no indication that Article 7(2) was designed to cover the latter situation.

32. In conclusion, none of the provisions cited in the Statutes of the Nuremberg, Tokyo, Rwanda or Yugoslav Tribunals support the finding of the Chamber invalidating all immunity or cooperation agreements with respect to proceedings before international tribunals. This is confirmed by the fact that the first statement on this by the ICJ in the *Yerodia* case, albeit obiter, did not claim that all immunity agreements were invalid, but was rather making the proposition that sovereign immunity under customary international law *may* not apply before certain international tribunals.

2. Draft Code of Crimes against Peace and Security of Mankind

33. The Draft Code of Crimes against Peace and Security of Mankind is of limited value as a source of law but provides a source of the highest standard of expert opinion on the state of international law. Article 3[17] restates the position of the Statutes of the *ad hoc* tribunals that a person may not rely on his or her position as a Head of State or government official to relieve him of responsibility under international law. As stated in respect of the provisions of *ad hoc* tribunals, this is a different point from, and has little bearing upon, the question of a procedural bar to prosecution before a particular forum based upon a cooperation agreement.

3. Statute of the International Criminal Court

34. Article 27 of the Statute of the International Criminal Court provides that:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

35. Article 27 of the Rome Statute differs from the provisions in the other instruments discussed above, and can be viewed as a development of them. The first subheading is a repetition of the principle enunciated in other *ad hoc* tribunals to the

[7] The Chamber refers to Article 7; it is assumed this was a mistake.

effect that official status cannot be a means of evading individual responsibility (as discussed in section A, above).

35. The second sub-heading addresses procedural immunities. In fact, it is submitted that this breakdown clearly demonstrates an understanding on the part of the drafters of the Rome Statute that the provisions in *ad hoc* tribunals did not sufficiently cover within their scope procedural immunities of a Head of State or government official. This is further confirmation that the provisions of the *ad hoc* Tribunals cannot be cited in order to support the wide proposition as enunciated by the Trial Chamber in the Impugned Decision.

36. The second part of Article 27 may not be invoked to invalidate agreements not to exercise jurisdiction per se. It addresses procedural immunities attaching to official capacity whether under national or international law. It is evident that it is referring to the immunities which normally attach to a person's diplomatic status as a head of state or government official under the Vienna Convention on Diplomatic Relations (1961) or under customary law. It is not intended to be an all embracing prohibition on agreements not to prosecute or exercise jurisdiction in particular cases. This is almost evident from a plain reading of the provision.

4. Judicial Decisions

37. Save for Appeals Chamber decisions, decisions of courts are secondary sources of international law which assist in the interpretation and understanding of the primary sources of law. In the absence of a decision from the Appeals Chamber establishing the proposition as defined by the Trial Chamber in the clearest terms, the Trial Chamber is not in a position to rely on isolated references which are not even on point as demonstrating that the principle of law which it propagates is well-established. An examination of the authorities cited demonstrates that the Chamber's interpretation of the current state of the law is misconceived.

38. The Appeals Chamber has never been asked to decide the issue before it. In the *Blaskic* case, cited by the Trial Chamber, it stated:

> '...norms of international criminal law prohibit...war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes

cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.'[18]

39. This obiter statement in the *Blaskic* case must be viewed in its context. It was simply setting out general principles in the context of a discussion about the prerogatives of states with respect to its state officials.

40. Immunity here must be understood as meaning the immunities attaching to a person by virtue of his official position under national constitutions or international law. In so far as the statement might appear to be suggesting that it extends to incumbent heads of state and government officials before the national courts of another state, this would be incorrect in the light of the *Yerodia* case before the ICJ.[19]

41. In the *Yerodia* case, the International Court of Justice confirmed that immunities can apply even with respect to the commission of international crimes. This demonstrates the danger in asserting an overarching prohibition on any kind of exclusion from jurisdiction and illustrates how competing international norms and values can lead to differing results in different scenarios. The principle of international law being protected by the customary international law norm on procedural immunity in the courts of another state is that of the equality of states. This is what led the ICJ to state that the position *may* be different with respect to certain international tribunals, as has been explained above under the section on the ICTY Statute and similar provisions.

42. Other decisions by Trial Chambers in the *Furundzija* and *Milosevic* cases, cited by the Trial Chamber, did nothing more than state that Article 7(2)'s Head of State immunity is consistent with customary international law.[20] They provide no support for the Trial Chamber's conclusion that **any** agreement not to prosecute an individual for genocide, war crimes, or crimes against humanity at an international tribunal, even those based on a cooperation agreement instead of on a customary immunity, is invalid.

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[18] *Prosecutor v Blaskic*, No. IT-95-14-AR108*bis*, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997) at para. 41

[19] *Case Concerning the Arrest Warrant of April 2000 (Democratic Republic of Congo v Belgium)*, Judgment of 14 February 2002

[20] *Prosecutor v Furundzija*, No. IT-95-17/1-T, *Judgement* (10 December 1998) at para. 140; *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Preliminary Motions* (8 November 2001) at para. 28

C. The Nature of the Holbrooke Agreement

43. The Trial Chamber has both failed to appreciate the proper parameters of developing norms against impunity under international law and how the nature of the Holbrooke agreement brings it outside those norms. The former aspect will be briefly addressed in the next section.

44. The norms arising out of the sources cited by the Trial Chamber are designed to ensure that responsibility under international law is not evaded by reliance on the superior position of an individual within the state structure. International law could never be enforced if that were the case.

45. The Holbrooke agreement does not purport to contest individual responsibility under international law. Nor does it seek to assert Head of State immunity. It is essentially a cooperation agreement where a state representative acting in the interests of and with the mandate of the international community of states, agreed that Dr. Karadzic would not be prosecuted by the ICTY in exchange for Dr. Karadzic taking steps that the international community perceived at the time to be in the interests of peace and justice.

46. Therefore, the Holbrooke agreement is a specific example of an agreement which can serve to prevent the ICTY from exercising jurisdiction. Significantly, the terms of the Holbrooke agreement are unrelated to the provisions cited by the Trial Chamber which are designed to prevent blanket immunity from international legal responsibility based on the official position of an individual. Such provisions are designed to avoid impunity, but cannot radically change the dynamics of international legal relations, alter the effect of legally binding agreements, or prevent the non-pursuit of procedures before specific tribunals in the interests of peace or justice when legitimate legal grounds exist.

47. Finally, the Holbrooke agreement relates to events taking place prior to 1995 and is dated 1996. Accordingly, it is the state of international law at those times which must be assessed and not the state of international law in 2008.

D. The Jurisdiction of International Tribunals is not Immutable With Respect to International Crimes

48. It goes without saying that there are circumstances where, while possessing *prima facie* jurisdiction, an international tribunal like the ICTY can be prevented legally from exercising jurisdiction. Being given the benefit of an agreement that a particular

jurisdiction will not prosecute is not the same thing as enjoying impunity for responsibility.

49. This has been demonstrated in the jurisprudence of the Appeals Chamber, for instance in the *Barayagwiza* case.[21] In that case it was held that the Chamber would refrain from exercising jurisdiction which it otherwise possessed on grounds that the accused's fundamental rights had been violated, and it would undermine the integrity of the judicial process to proceed.

50. It is open to Dr. Karadzic to argue something similar where an agreement has been reached not to exercise jurisdiction, assuming that the agreement is attributable to the United Nations in some way.

51. Moreover, this kind of abuse of process argument is not the only basis upon which a specific international or national court could find itself refusing to exercise jurisdiction or where the prosecution authorities of such a tribunal agreeing not to seek that it does exercise jurisdiction. A customary international norm against statutes of limitations for crimes under international law, while in a process of development, has not yet crystallized. An individual accused of international crimes could thus find himself not prosecuted in a particular state by virtue of a limitation period prescribed by law.

52. Some states that have introduced laws excluding international crimes from the purview of limitation periods have done so only with respect to some specific international crimes, but not with respect to others.

53. Even international tribunals have time limitations on prosecutions before them which afford a form of immunity from their jurisdiction. For example, the ICTY, the ICTR and the Special Court for Sierra Leone all have both mandates for and limitations on the time periods within which crimes must have been committed for them to have jurisdiction. It has never been suggested that some principle of international legal obligation against impunity is violated by such restrictions. Furthermore, individuals benefiting from these time mechanisms may still be prosecuted before other courts.

54. Most significantly, prosecutors often refrain from prosecuting certain individuals otherwise subject to the jurisdiction of a court in the interests of justice and expediency. Such exercise of prosecutorial discretion is sometimes contained in

[21] *Barayagwiza v Prosecutor*, No. ICTR-97-19-AR72, *Decision* (3 November 1999) at paras. 72-73

agreements with potential accused in exchange for other forms of cooperation such as testimony. This is discussed more extensively above.

55. More generally, it is the practice of states and tribunals to defer to other states in circumstances where prosecution is not undertaken within the relevant jurisdiction. States work on the principle that they can extradite as well as prosecute and international tribunals have recognized that they do not have an exclusive role in the prosecution of international crimes. Thus, the ICTR, for example, has referred cases to national jurisdictions originally under its purview and this practice is endorsed by the ICTR Appeals Chamber in its decisions on appeals relating to transfer. Similarly, Article 17(1)(b) of the Rome Statute requires the Court to hold a case admissible where "[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."

56. Accordingly, in light of all these practices for opting not to exercise jurisdiction in respect of individuals responsible for international crimes it would be difficult to assert an overarching prohibition on agreements of cooperation involving a form of jurisdictional bar before one court or tribunal.

E. Significance of the Duty to Prosecute International Crimes

57. The Trial Chamber based its opinion on what it claimed to be the invalidity of immunity agreements before international tribunals. It appears to have confined its position based upon the principle under international law that immunities may not be relied upon to evade responsibility under international law – the principle against impunity which is contained in various provisions of international criminal tribunals.

58. It is submitted that the Trial Chamber correctly did not premise its finding on a duty to prosecute under international law, as argued by the prosecution.

59. First, such a duty rests upon states and not upon the ICTY as an international tribunal. If the ICTY does not prosecute an individual perpetrator for crimes under international law the duty to prosecute resting on states remains intact. This is confirmed by all relevant statements of *opinio juris* by states, whether one refers to General Assembly resolutions or the preamble to the ICC Statute.

60. Second, the duty to prosecute in 1995 and 1996 was in a state of development and had not reached its current status. The first ever statement in a binding treaty of a general duty upon states to prosecute 'international crimes' is to be found in the preamble to the ICC Statute. Insofar as this is a statement of the states parties' understanding of the current state of international law, or of how it should be, international crimes are not defined. The Statute was drafted in 1998, entered into force in 2002, and can only now arguably be said to have attracted sufficient ratifications to have any significant impact on the development of customary international law.

61. In 1995 and 1996, based upon treaty practice and accompanying state practice, there was a foundation for a duty to prosecute or extradite with respect to certain but not all international crimes. While grave breaches of the Geneva conventions and genocide were subject to such a duty, it is doubtful whether it was well established in 1995 and 1996 that such a duty attached to **all** war crimes and crimes against humanity.[22]

62. Third, the duty to prosecute is not a duty to prosecute but a duty to prosecute or extradite.[23] Thus, the Genocide Convention provides that:

> Article VI: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

63. Accordingly, there can be no assertion that a cooperation agreement confined to the issue of prosecution before a single jurisdiction could be in violation of such a principle.

64. Finally, a duty to prosecute in terms of customary international law is founded upon state practice which implies that the duty is subject to a margin of appreciation in the interests of peace and justice. The duty to prosecute must be balanced against the long standing customary right to provide for amnesty/immunity from prosecution clauses in peace treaties,[24] and the exercise of prosecutorial discretion before national courts and

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[22] See, for example, United Nations Security Council resolution 948 (15 October 1994) approving amnesty for leaders of Haitian government.
[23] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ, Judgment of 26 February 2007
[24] This practice is summarized in Andreas O'Shea, *Amnesty for Crime in International Law and Practice*, 2002, pp 7-23

international tribunals in dismissing charges for serious international crimes in exchange for cooperation. These rights can only be reversed in the face of the clearest state practice.

65. While it is arguable that with respect to the crime of genocide the duty to prosecute or extradite is virtually absolute, the long established practice of amnesty in peace treaties cannot be reversed by the inconclusive state practice with regard to war crimes and crimes against humanity.

F. Conclusion

66. The issue of the validity of the Holbrooke agreement is an important issue in international criminal and humanitarian law. The decision of the Appeals Chamber will influence the management of international crises, guide the behavior of world leaders, and shape the negotiations of diplomats.

67. The Trial Chamber erred in law in its sweeping statement that "**any** immunity in respect to an Accused indicted for genocide, war crimes and/or crimes against humanity before an international tribunal would be invalid as a matter of international law." Specifically, it confused Head of State immunity with a cooperation agreement.

68. The Appeals Chamber must correct the error of the Trial Chamber, not only to prevent an injustice to Dr. Karadzic, but to untie the hands of those seeking to bring peace to war torn regions of the world.

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

69. By concluding, before even allowing any disclosure, that "neither its own mandate nor that of the prosecutor is affected by any alleged undertaking made by Mr. Holbrooke," the Trial Chamber ignored the long and well-established doctrines of "actual authority" and "apparent authority".

A. Actual Authority

70. Suppose that Richard Holbrooke obtained written authorisation from ICTY Prosecutor Richard Goldstone to make the agreement on 18 July 1996 with Dr. Karadzic that Dr. Karadzic would not be prosecuted at the ICTY in exchange for resigning from public office and withdrawing from public life?

71. Under the Trial Chamber's blanket ruling that "neither its own mandate nor that of the prosecutor is affected by any alleged undertaking made by Mr. Holbrooke,"[25] that document would not be required to be disclosed.

72. This fact alone demonstrates that the Trial Chamber erred in its sweeping statement which slammed the door on the issue before any disclosure could be obtained.

73. It is, of course, black letter law that when a principal authorizes its agent to take action on its behalf, actual authority is created for that agent to enter into agreements that will be binding on the principal.[26] Therefore, the Trial Chamber's statement that Holbrooke's undertaking could not bind the prosecutor under any circumstances is clearly wrong. What needs to be determined is the relationship between Holbrooke and the ICTY, and what is needed to determine that relationship is disclosure.

B. Apparent Authority

74. Even if actual authority is determined not to have existed, Holbrooke's undertakings may, after disclosure, be found to be attributable to the ICTY under the doctrine of apparent authority.

75. The American Law Institute's Restatement of Agency defines apparent authority as "the power held by an agent or another actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority

[25] Impugned Decision at para. 25

[26] An example of this principle can be found in U.S. law: *Restatement of Agency 3d,* American Law Institute (2006) at section 3.01

to act on behalf of the principal and that belief is traceable to the principal's manifestations."[27]

76. It goes on to state that "Apparent authority...is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation."[28]

77. The consequences of the doctrine of apparent authority is that the principal is estopped from denying an agreement entered into by the person with apparent authority and must honor the terms of the agreement with a third party who detrimentally relied upon it.[29]

79. It was said in 1958 by a leading scholar that "there is a modern tendency to consider estoppel as one of the general principles of law recognized by civilized nations."[30] Over thirty years ago, the ICTY's own Judge Meron, after analyzing cases from international tribunals in existence at that time, concluded that States have been held to be under an obligation to ratify contracts made by those purporting to act on their behalf, even where the agents did not have the actual authority to make such contracts.[31]

80. He wrote that:

> It is submitted that under the soundest theory expounded by the tribunals is that under which the conduct of the State in repudiating a contract made between an agent and an official acting within his apparent authority is considered as internationally wrongful. Certainly, the security of international trade and investment can be considerably fostered by holding States bound internationally by the apparent authority which they themselves have conferred on their officials.[32]

81. In the case at bar, there was ample reason for Dr. Karadzic to believe that Richard Holbrooke was acting on behalf of the international community, including the United Nations Security Council, when he made the agreement with Holbrooke in July 1996 that he would not be prosecuted at the ICTY.

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[27] See, e.g., *Restatement of Agency 3d,* American Law Institute (2006) at section 2.03
[28] See, e.g., *Restatement of Agency 3d,* American Law Institute (2006) at section 3.03
[29] See, e.g., *Restatement of Agency 3d,* American Law Institute (2006) at section 2.05
[30] I.C. MacGibbon, *Estoppel in International Law,* 7 Int'l & Comp L.Q. 468 (1958)
[31] Meron, *Repudiation of Ultra Vires States Contracts and the International Responsibility of States,* 6 Int'l & Comp L.Q.273, 281,286, (1957)
[32] Meron, *Repudiation of Ultra Vires States Contracts and the International Responsibility of States,* 6 Int'l & Comp L.Q.273, 289 (1957)

82. According to a study by Bookings Institute fellow Ivo Daalder, the United States "took over" the peace negotiations on Bosnia from the Europeans in August 1995. Richard Holbrooke was appointed lead negotiator.[33] Holbrooke refused to deal directly with the Bosnian Serb leaders and insisted that FRY President Slobodan Milosevic "speak for Pale."[34]

83. Holbrooke told his boss, United States Secretary of State Warren Christopher, that it was necessary to work closely with the member states of the United Nations, some of whom had formed a Contact Group on Bosnia, as well as the United Nations itself, as they would need "the UN for legitimizing resolutions..."[35]

84. Over the course of the rest of 1995, Holbrooke shuttled between the United States, Western European capitals, and the Balkans, negotiating an end to the war in Bosnia. Those negotiations led to the Dayton Agreement.

85. Every portion of the agreement negotiated by Holbrooke at Dayton which involved the United Nations was ratified by the UN Security Council. When Holbrooke wanted the UN to modify its arms embargo and sanctions against FRY after the signing of the Dayton Agreement on 21 November, the Security Council did so the next day.[36] When Holbrooke wanted the UN to extend the mandate of UNPROFOR until 31 January 1996 before giving way to a NATO led force, the Security Council promptly did so.[37] When Holbrooke wanted the UN to establish IFOR to implement the Peace Agreement, the Security Council promptly did so.[38]

86. In his address at the Peace Implementation Conference held in London in December 1995, UN Secretary General Boutros Boutros Ghali saluted the "brilliant diplomacy" that had been seen at Dayton and paid tribute to the negotiators. He pledged that the United Nations would do all it could to support the agreement.[39]

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[33] Ivo H. Daalder, *Getting to Dayton: The Making of America's Bosnia Policy* (Brookings Institution 2000) at p. 110-14
[34] Richard Holbrooke, *To End a War* (Modern Library 1998) at p. 5
[35] Richard Holbrooke, *To End a War* (Modern Library 1998) at p. 84
[36] United Nations Security Council Resolutions 1021, 1022 (22 November 1995)
[37] United Nations Security Council Resolution 1026 (30 November 1995)
[38] United Nations Security Council Resolution 1031 (15 December 1995)
[39] Report of the United Nations Secretary General (13 December 1995)

87. On 15 December 1995, after signing of the Peace Agreement at Paris, the UN Security Council passed a resolution "authorizing member States to take all steps necessary to assure compliance with the Peace Agreement."[40]

88. Thereafter, according to High Representative for Bosnia Carl Bildt, "it was to a large extent the Americans who called the shots when it came to setting up the peace implementation operation."[41] In April 1996, the UN Security Council issued a statement expressing "its full support for...international institutions and organizations involved in the implementation of the Peace Agreement."[42]

89. One aspect of implementing the Dayton Agreement was the holding of elections in Bosnia scheduled for September 1996. The Dayton Agreement prohibited indicted war criminals from holding elected office. On 12 July 1996, Richard Holbrooke, by now a private citizen, was asked to return to the region immediately on a special mission. As he describes it "calls to capture Karadzic and Mladic were mounting. The Administration was facing growing international criticism".[43]

90. On 17 July 1996, Holbrooke met with FRY President Slobodan Milosevic and threatened to recommend United Nations sanctions be imposed on FRY if Dr. Karadzic was not removed from power in Republika Srpska.[44] At Holbrooke's urging, Milosevic convened a meeting on the evening of 18 July 1996 in Belgrade at which Holbrooke and other United States officials negotiated Dr. Karadzic's future with President Milosevic, other representatives of the FRY, and two representatives of Republika Srpska. It was in this context, and at this meeting, that Holbrooke agreed that in exchange for Dr. Karadzic's resignation as President of Republika Srpska and the SDS Party, and complete withdrawal from public life, he would not be prosecuted in The Hague.

91. Subsequently, Dr. Karadzic kept his end of the bargain. Mr. Holbrooke and the international community did not.

92. These are only some of the facts which show that it was reasonable for Dr. Karadzic to have believed that Holbrooke had the authority to make such a promise. Other facts can only be developed through disclosure. The Trial Chamber's decision

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[40] United Nations Security Council Resolution 1031 (15 December 1995)
[41] Carl Bildt, *Peace Journey*, (Weidenfield & Nicolson 1998) at p. 384
[42] United Nations Security Council Statement (4 April 1996)
[43] Richard Holbrooke, *To End a War* (Modern Library 1998) at p. 340
[44] Richard Holbrooke, *To End a War* (Modern Library 1998) at p. 341-42

completely blocks Dr. Karadzic from pursuing his colorable claim that the Holbrooke agreement is binding upon the ICTY through the doctrine of apparent authority.

C. Apparent Authority in Criminal Cases

93. Agreements made by a person lacking actual authority, but having apparent authority, have been enforced in the criminal justice system of national jurisdictions when an accused has justifiably relied upon the agreement.

94. In the United Kingdom case of *R v Croydon Justices, Ex parte Dean,* police officers promised the accused immunity in exchange for his testimony against two co-accused. The Crown prosecuted him anyway. The Court dismissed the case, finding that the accused was entitled to believe that the officers had authority to make the promises that they made, and that it would be an abuse of process to allow the prosecution to proceed. [45]

95. The case was followed by the House of Lords in *Jones v. Whalley*, where police issued a caution to an accused on the form that stated the accused would not be prosecuted. The form incorrectly represented the law in force at that time. In dismissing the prosecution, the Justices found that the Crown was bound by the representation which had been made to the accused by the police.[46]

96. In the United States, the following promises were enforced even though the agent did not have actual authority:

--promises made by an administrative agency (Securities and Exchange Commission) that the accused would not be criminally prosecuted.[47]

--promises made by U.S. Attorney for one district, and where prosecution was initiated by U.S. Attorney in a different district.[48]

--promises by a military officer granting immunity from criminal prosecution[49]

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[45] *R v Croydon Justices, Ex Parte Dean* [1993] QB 769; [1993] 3 WLR 198; [1993] 3 All ER 129, DC
[46] *Jones v. Whalley*, 2006 WL 2049652 (HL), [2007] 1 A.C. 63, [2006] 4 All E.R. 113, [2007]
[47] *United States v. Rodman*, 519 F.2d 1058 (1st Cir. 1975)
[48] *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972)
[49] *Cooke v. Orser*, 12 M.J. 335, 354 (C.M.A.1982) (citing United States v. Hardin, 7 M.J. 399 (C.M.A.1979)); *United States v. McKeel*, 63 M.J. 81 at 83 (citing United States v. Kimble, 33 M.J. 284, 289-92 (C.M.A.1991); *United States v. Churnovic*, 22 M.J. 401 at 405 (C.M.A.1986); *United States v. Brown*, 13 M.J. 253 (C.M.A.1982)

--promises by a criminal prosecutor that the accused would not be deported by immigration officials[50]

97. In the Australia case of *R v Mohi,* the Supreme Court of South Australia held that a promise made by a police officer that an accused would not be prosecuted would be enforced even in the absence of actual authority by the police officers to make such a promise. The Court said:

> The administration of justice will be brought into disrepute if, without good reason, the investigating and prosecuting authorities are permitted to decline to comply with the undertakings or assurances given to such persons that they will not be charged and to pursue prosecutions against those to whom such undertakings or assurances have been given.[51]

98. Therefore, the Trial Chamber erred in concluding that an agreement entered into by Mr. Holbrooke could never be binding on the ICTY. Whether the circumstances of the Holbrooke agreement meets the requirements of actual or apparent authority is a question for another day, after the accused has had an adequate opportunity to obtain the disclosure necessary to make his case.

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[50] *Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975), after remand, 554 F.2d 698 (5th Cir. 1977), after remand, 627 F.2d 745 (5th Cir. 1980), cert. denied sub nom (the government must live up to its promise to use its "best efforts" to prevent extradition to France or Switzerland); *Margalli-Olivera v. INS*, 43 F.3d 345 (8th Cir. 1994); *Thomas v. INS*, 35 F.3d 1332 (9th Cir. 1994)

[51] *R v Mohi*, 78 SASR 55, 2001 WL 13476; [2000] SASC 384, Supreme Court of South Australia at paras. 46-47

III. Disclosure Was Warranted for an Abuse of Process Claim

99. Even if the Trial Chamber was correct in finding that the Holbrooke agreement was invalid under international law and not under any circumstances binding on the ICTY, the agreement may potentially constitute an abuse of process for which the ICTY may, in the exercise of its discretion, decline to exercise jurisdiction and stay Dr. Karadzic's case.

100. 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 this claim.

101. The Appeals Chamber has established that the Tribunal has an inherent power to stay proceedings which are an abuse of process, such a power arising from the need for the Tribunal to be able to exercise effectively the jurisdiction which it has to dispose of the proceedings.[52]

102. A Chamber may decline – as a matter of discretion – to exercise its jurisdiction in cases "where to exercise that jurisdiction in light of serious and egregious violations of the accused's right would prove detrimental to the court's integrity."[53] The abuse of process doctrine may be relied on if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice.[54]

103. The Appeals Chamber has recognized that the abuse of process doctrine may be invoked even where the violation of rights was committed by a third party unrelated to the Tribunal.[55] Therefore, while the relationship between Holbrooke and the Security Council and the ICTY is relevant, Holbrooke's acts do not have to be binding on the ICTY for the abuse of process doctrine to apply.

104. The abuse of process doctrine has been raised at the ICTY in the *Todorovic* case, in which the accused alleged that he had been illegally arrested by SFOR. The accused sought an order for production by SFOR of material which would assist him in his motions challenging the legality of his arrest The Trial Chamber said:

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[52] *Prosecutor v Bobetko*, No. IT-02-62-AR54*bis*, *Decision on Challenge by Croatia to Decision and Orders of Confirming Judge* (29 November 2002) at para. 15
[53] *Barayagwiza v Prosecutor*, No. ICTR-97-19-AR72, *Decision* (3 November 1999) at para. 74
[54] *Barayagwiza v Prosecutor*, No. ICTR-97-19-AR72, *Decision* (3 November 1999) at para. 75
[55] *Barayagwiza v Prosecutor*, No. ICTR-97-19-AR72, *Decision* (3 November 1999) at para. 73

> The main contention of both SFOR and the Prosecution in opposing this Motion is that the Motion should be dismissed because Todorovic is not entitled to the relief he seeks, even if his allegations were to be accepted. This argument proceeds on the assumption that the evidence is complete. That assumption is erroneous, as what Todorovic is seeking is further evidence from SFOR which will assist him to obtain the relief which he seeks. Only when Todorovic has had the opportunity to present all the available evidence will it be possible for the Trial Chamber to determine whether he is entitled to the relief he seeks.[56]

105. In a separate opinion, Judge Robinson found that "there is clearly a strong functional, although not organic, relationship between SFOR and the Tribunal, through one of its organs, the Office of the Prosecutor."[57]

106. Similarly, the Trial Chamber in this case erred in concluding that Dr. Karadzic was not entitled to disclosure of materials related to the Holbrooke agreement and Holbrooke's connection to the United Nations Security Council and ICTY on the grounds that he was not entitled to a remedy even if the agreement were made. That decision, as in *Todorovic*, is to be made on the merits after disclosure is obtained.

107. Todorovic pled guilty before the issue of the ICTY's responsibility for his arrest by SFOR was determined. But the issue arose again in *Nikolic*. In that case, the Trial Chamber, upon a factual stipulation by the parties, found that the circumstances of his arrest by SFOR were not so egregious as to warrant declining to exercise jurisdiction. The Trial Chamber found that SFOR was not involved in the illegality, and therefore did not reach the question of whether the ICTY could be responsible for the acts of SFOR.[58]

108. Two relevant principles arise from these decisions. First, an accused is entitled to disclosure of information that might help him make out a claim upon which the Tribunal might decline to exercise its jurisdiction over him. Second, if it was open to question whether the acts of SFOR, an organization not under the United Nations, could be binding on the ICTY, it is equally open to question whether the acts of Richard Holbrooke, also working to implement the Peace Agreement, could be binding on the

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[56] *Prosecutor v Simic et al*, No. IT-95-9-PT, *Decision on Motion for Judicial Assistance to be Provided by SFOR and Others* (18 October 2000) at para. 59

[57] *Prosecutor v Simic et al*, No. IT-95-9-PT, *Separate Opinion of Judge Robinson* (18 October 2000) at para. 6

[58] *Prosecutor v. Nikolic*, No. IT-94-2-PT, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal* (9 October 2002) at para. 69

ICTY as well. Both were non-UN employees acting in furtherance of the same agreement. If disclosure was warranted for the SFOR conduct, it must certainly be warranted for the Holbrooke agreement.

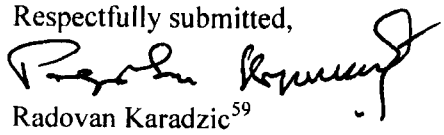
109. Therefore, it is respectfully submitted that the Trial Chamber erred in denying disclosure even if it was correct that the agreement was invalid and not legally binding on the ICTY.

Conclusion

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

Word count: 8922

Respectfully submitted,



Radovan Karadzic[59]

[59] The contribution of Andreas O'Shea, author of *Amnesty for Crime in International Law and Practice* (2002) to the research and drafting of the argument for the first ground of appeal is gratefully acknowledged. The contribution of Legal Intern Anatoly Vlasov of the University of Toronto to this appeal is also gratefully acknowledged.