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-AR73.1 Date: 9 February 2009

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

PROSECUTION'S RESPONSE TO KARADŽIĆ'S APPEAL OF DECISION CONCERNING HOLBROOKE AGREEMENT DISCLOSURE

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon
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The Accused:

Mr. Radovan Karadžić

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-95-5/18-AR73.1

THE PROSECUTOR

v.

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I. INTRODUCTION

1. Radovan Karadžić's "Appeal of Decision Concerning Holbrooke Agreement Disclosure" filed on 28 January 2009 ("Appeal") can be dismissed summarily because he has not appealed the Trial Chamber's holding concerning the lack of specificity of his disclosure request. His Appeal fails to state any claim upon which relief can be granted to him. To the extent that he has stated grounds unrelated to his disclosure request, they should be dismissed because they are based on a hypothetical agreement which could not be legally binding on the UN Security Council or the Tribunal and cannot support his abuse of process claim. Even assuming the theoretical possibility of any immunity agreement, it would conflict with customary international law norms.

II. BACKGROUND

2. Karadžić's Appeal results from his "Motion for Inspection and Disclosure: Holbrooke Agreement" ("Motion") filed on 6 November 2008, requesting an order requiring the

Prosecution to permit inspection and to disclose several large categories of items in connection with an alleged agreement he made with Richard Holbrooke.[1]

3. The Trial Chamber's decision of 17 December 2008 ("Decision")[2] largely rejected the Motion for lack of specificity. Both the vague nature of Karadžić's submissions in relation to the alleged agreement and the changing nature of his submissions characterising the agreement were taken into account by the Trial Chamber.[3] The Trial Chamber also considered that customary international law bars immunity from prosecution before international tribunals for some crimes.[4]

4. The Trial Chamber ordered the Prosecution to disclose to Karadžić only: (i) any written agreement made at the alleged meeting in Belgrade on 18-19 July 1996; and (ii) any notes taken or recordings made on 18-19 July 1996 of proceedings at the alleged meeting in Belgrade on those days, which are within the custody or control of the Prosecution. The Trial Chamber denied the Motion in all other respects.

5. Karadžić submits three issues for determination on appeal.[5] The issues do not relate to disclosure, the subject matter of his original Motion and the Trial Chamber's Decision. Instead, they appear to relate to another motion currently pending before the Trial Chamber: Karadžić's "Official submission concerning my first appearance and my immunity agreement with the USA" filed on 6 August 2008 ("Official Submission"). In his motion, Karadžić argues that "...because of the fact that an agreement between the USA and me has been breached ... I wish to challenge the legality of the proceedings in their entirety as well as any individual step thereof."[6] Although he couched the issues in different terms in the Official Submission, Karadžić does raise similar issues to those in the present Appeal.

III. STANDARD OF REVIEW

6. The Decision concerned disclosure.[7] It was a discretionary decision to which the Appeals Chamber must accord deference. As held by the Appeals Chamber, in order to successfully challenge a discretionary decision, a party must demonstrate that the Trial

[1] Motion, pp.2-3.
[2] Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 Dec. 2008.
[3] Decision, para.24.
[4] Decision, para.17.
[5] *See* Appeal, pp.5-6.
[6] Official Submission, p.3.
[7] *See* Appeal, para.13.

Chamber has committed a "discernible error" resulting in prejudice to that party.[8] The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[9]

IV. DISCUSSION

A) KARADŽIĆ HAS NOT APPEALED THE TRIAL CHAMBER'S HOLDING CONCERNING LACK OF SPECIFICITY AND DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

7. Karadžić has not appealed the finding that his disclosure request lacked specificity.[10] He acknowledges that the specificity requirement must be met before a request under Rules 66(B) and/or 68 will be granted. Appeals Chamber case law states that the requirements for requests – under both Rule 66(B) and Rule 68 – are cumulative.[11] Karadžić appears to concede that his request lacked the requisite specificity, stating that while this appeal is pending, he intends to "undertake investigation that would allow him to be more specific in his request if he prevails on the other grounds of appeal."[12]

8. The Trial Chamber found that the specificity requirement was not met for most of the categories of items listed by the Karadžić in his Motion.[13] The deficiencies identified by Trial Chamber were: categories which were overly broad in scope, categories described using vague language, and categories encompassing an enormous variety of documents.[14] Applying Appeals Chamber case law,[15] the Trial Chamber recognised that although a request

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[8] *Prosecutor v. Gotovina et al*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 26 Jan. 2009, para.5 ("Gotovina Appeal Decision").
[9] Gotovina Appeal Decision, para.5.
[10] Appeal, para.12.
[11] *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 Jan. 2008 ("First Karemera Appeal Decision"), para.12; *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion," 14 May 2008 ("Second Karemera Appeal Decision"), para.9.
[12] Appeal, para.12.
[13] Decision, para.20. *See also* Prosecution's Response to Karadžić's Motion for Inspection and Disclosure, 19 Nov. 2008, pp.4-6 (discussing the overly broad nature of the request).
[14] Decision, para.20.
[15] Decision, para.20 (referring to *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 Sept. 2000, para.40, and *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B), 25 Sept. 2006).

may refer to a category of documents, it should be made in as precise wording as possible, rather than in sweeping catch-all phrases. Thus, the Trial Chamber rejected the request for most of the categories of items in the Motion.

9. Karadžić's failure to appeal the lack of specificity finding means that his Appeal from the disclosure Decision must fail. Moreover, Karadžić has failed to state a claim upon which relief can be granted to him. Further, Karadžić has abandoned his right to address the lack of specificity issue in this appeal.[16]

10. Karadžić's failure to appeal the lack of specificity finding alone is sufficient to dismiss this appeal.

B) SHOULD THE APPEALS CHAMBER CONSIDER KARADŽIĆ'S GROUNDS OF APPEAL, THEY SHOULD BE DISMISSED BECAUSE KARADŽIĆ HAS NOT ALLEGED THE EXISTENCE OF AN AGREEMENT THAT COULD BE LEGALLY BINDING ON THE SECURITY COUNCIL OR THE TRIBUNAL

11. The Prosecution nevertheless addresses Karadžić's arguments in the event that they are considered by the Appeals Chamber.

(a) Karadžić does not allege that an agreement was entered into on behalf of the ICTY Prosecutor

12. In his Appeal, Karadžić does not claim that Holbrooke was acting on behalf of the ICTY Prosecutor or that he believed that Holbrooke was acting on behalf of the ICTY Prosecutor.[17] Karadžić instead engages in speculation, stating: "Suppose that Richard Holbrooke obtained written authorization from ICTY Prosecutor Goldstone to make the agreement on 18 July 1996 with Dr. Karadžić that Dr. Karadžić would not be prosecuted at the ICTY in exchange for resigning from public office and withdrawing from public life?"[18]

13. Underscoring the speculative aspect of the Appeal is the fact that the assertion was contradicted by Karadžić a short time earlier. At his Initial Appearance on 31 July 2008, Karadžić claimed that Goldstone threatened to resign rather than withdraw the indictment against Karadžić:

> I want to show why I'm appearing before this court only now rather than in 1996, 1997, or 1998, when I had the intention of appearing here but at that time I was in

[16] *See Prosecutor v. Blaškić,* Case No. IT-95-14-A, Judgement, 29 July 2004 ("Blaškić Appeal Judgment"), para.222.
[17] Appeal, paras. 45, 46, 73, 81, 90.
[18] Appeal, para.70.

> danger of being liquidated because I had made a deal that although Mr. Holbrooke tried to honour, Mr. William Stabner [phoen] testified that attempts were made to persuade the chief Prosecutor to withdraw the indictment, but *Richard Goldstone threatened to resign if that was done.*[19]

14. Karadžić cannot and does not claim the existence of an agreement entered into with or on behalf of the ICTY Prosecutor. Thus, his theoretical arguments concerning the dismissal of charges by ICTY prosecutors pursuant to cooperation agreements[20] and a prosecutorial discretion not to prosecute[21] are irrelevant.

(b) Karadžić does not allege the existence of any agreement that could be binding on the UN Security Council

1) Karadžić constantly shifts his characterisation of the alleged agreement, demonstrating that he has no "good faith" basis to claim that Holbrooke was acting on behalf of the Security Council or that he reasonably believed this to be the case

15. Between his Initial Appearance and the Appeal, Karadžić has markedly transformed his characterisation of the Holbrooke agreement. His shifting characterisation demonstrates the highly speculative nature of his arguments. In the days following his arrest, he made repeated claims that the alleged agreement was entered into by Holbrooke on behalf of the United States, not the UN Security Council.

16. Commenting on the contradictory nature of his submissions, the Trial Chamber stated:

> ... in the Official Submission the Accused states repeatedly and emphatically that "there is no doubt that this offer was made in the name of the USA" and refers to the alleged agreement as being "between the USA and me", but in the Motion he argues he is "the beneficiary of...a specific agreement not to prosecute him as an individual" and that the alleged agreement is attributable to the ICTY. The Accused does not specify in what form the agreement was made. The Accused indicates that he intends to demonstrate "the effective control of the United States over the peace process in Bosnia from August 1995...[and] the relationship between the United States and the ICTY OTP" in order to draw a connection between the actions of Mr. Holbrooke in his capacity as a representative of the United States and either the United Nations, its member states or the Office of the Prosecutor of the Tribunal. The Trial Chamber

[19] T.23-24, 31 July 2008 (emphasis provided).
[20] Appeal, para.26.
[21] Appeal, paras.27, 54.

considers that the Accused makes no *prima facie* showing of that connection, and appears to have misinterpreted the law on this point.[22]

17. Karadžić's shifting characterisations of the alleged agreement are set out chronologically below:

- **Initial Appearance, 31 July 2008**: "...in 1996 my plenipotentiary representatives, statesmen and ministers, were presented with an offer on behalf of Mr. Richard Holbrooke on behalf of the United States of America, according to which I had to withdraw from public life, I had to make certain gestures, and in return, the USA would fulfil their commitments. This was on behalf of the United States of America. Mr. Holbrooke didn't say that on his own behalf because when I mentioned to him my meetings with President Carter, he told me that he represented President Carter, but he was at that moment working for President Clinton."[23]
- **Official Submission, 6 August 2008**: "In 1996, in the name of the USA, Richard Holbrooke made the statesmen and ministers who were my authorized representatives an offer.... There is no doubt that this offer was made in the name of the USA..." and "...Mr. Holbrooke undertook on behalf of the USA that I would not be tried before this Tribunal..."[24]
- **Status Conference, 17 September 2008**: "...Mr. Holbrooke wasn't speaking only in the name of America, but it was agreed upon by all the members of the Security Council. So he was speaking on behalf of the Contact Group as well. So it was an agreement that he made with me together with the agreement of the Contact Group..."[25] and "...everything that was done by Mr. Holbrooke led to a Security Council resolution. He was working on behalf of the Contact Group and the Security Council. [...] Everything that Holbrooke did led to resolutions and activity on the part of the Security Council, that is to say he did act on behalf of the permanent members of the Security Council."[26]

[22] Decision, para.24 (references omitted).
[23] T.22-23, 31 July 2008.
[24] Official Submission, pp.1-2.
[25] T.52-53, 17 Sept. 2008.
[26] T.55, 17 Sept. 2008.

- **Motion of 6 October 2008**[27]: "...he was promised on 18-19 July 1996 by Richard Holbrooke that he would not have to face prosecution in The Hague if he agreed to withdraw completely from public life; and ... that this promise is attributable to the ICTY because it was made on behalf of, or in consultation with the member States of the United Nations Security Council, or was reasonably believed to be so made."[28]
- **Appeal, 28 January 2009**: "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. Karadžić would not be prosecuted by the ICTY in exchange for Dr. Karadžić taking steps that the international community perceived at the time to be in the interests of peace and justice."[29]

18. Karadžić's submissions shift in response to Prosecution submissions. In its response on 20 August 2008, the Prosecution pointed out that only the UN Security Council can limit the Tribunal's jurisdiction and that the Security Council has not exempted Karadžić from prosecution before the Tribunal. His statements following his arrest did not even include mention of the Security Council, and they demonstrate that he did not believe that Holbrooke was acting on behalf of the Security Council. Yet, in Karadžić's next submission on 17 September 2008, he changed his claim. Now he alleged that Holbrooke acted – not on behalf of the USA – but on behalf of the UN Security Council.

19. Karadžić has been moulding his submissions to fit the arguments presented by the Prosecution. He demonstrates no good faith basis to claim that Holbrooke was acting on behalf of the Security Council or that he believed that Holbrooke was acting on behalf of the Security Council.[30]

20. In constantly shifting his characterisation of the alleged agreement, Karadžić demonstrates that his claims have no basis and should not be entertained by any Chamber.

(2) In order for any alleged agreement to be binding on the Tribunal, it would have to be reflected in a Security Council resolution

[27] Although the cover page of this filing states: "Date Filed: 23 September 2008", the Registry filing date is 6 October 2008.
[28] Motion for Inspection and Disclosure: Immunity Issue, 23 Sept. 2008, para.3.
[29] Appeal, para.45.
[30] See Appeal, paras.45, 81.

21. The Security Council created the Tribunal under Chapter VII of the UN Charter.[31] The Tribunal's Statute contains no provisions granting immunity or amnesty to any individual. 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.

22. The UN Security Council is the only body that has the power to limit the Tribunal's jurisdiction. However, the Security Council has never specified that Karadžić, or any other named person, will be exempted from prosecution by this Tribunal.[32] No Security Council resolution grants immunity to Karadžić or confers on any person or entity the power to grant him immunity. A Security Council resolution is required to immunize Karadžić from prosecution at the Tribunal. None exists.

23. Given that the Security Council is not a natural person, the only way that it can act or confer authority to an agent is by resolution. This is reflected in Articles 27 and 28 of the UN Charter which circumscribe the methodology for the Security Council to adopt procedural decisions and "decisions on all other matters."[33] Karadžić implicitly concedes this in his argument by pointing out that when the Security Council ratified anything allegedly done by Holbrooke, it did so by resolution.

24. The Security Council has always acted by resolution in all matters concerning the Tribunal. These resolutions cover such wide-ranging matters as the ICTY's establishment, the appointment of judges and the prosecutor, the extension of their terms, and the establishment of *ad litem* judges. The Security Council has never passed a resolution granting Karadžić any form of immunity. On the contrary, the Security Council has repeatedly emphasised that Karadžić should be brought to justice before the Tribunal.

25. In August 1996, the Security Council specifically noted that "Karadžić had handed over his executive powers in Republika Srpska on 30 June and had agreed to cease all political and official activities." The Security Council expressly condemned the failure of Republika Srpska and the Federal Republic of Yugoslavia (Serbia and Montenegro) to execute the arrest warrant against Karadžić.[34] Even prior to August 1996, the Security

[31] S/RES/808(1993), 22 February 1993.
[32] 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.
[33] Arts. 27-28, UN Charter.
[34] SC/6253, 8 August 1996 (Press Release).

Council in Resolution 1031 (1995) required all States to cooperate fully with the Tribunal and its organs in accordance with the provisions of Resolution 827 (1993) and the Statute of the Tribunal. In 2003, the Security Council called on all states to render all necessary assistance to the Tribunal, particularly to bring the remaining fugitives, including Karadžić, to the Tribunal.[35] 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.[36] The Security Council never granted immunity or entered into any other form of non-prosecution agreement with Karadžić.

26. On appeal, Karadžić contends that Holbrooke was acting "in the interests of and with the mandate of the international community of states"[37] and that "there was ample reason for Dr. Karadžić to believe that Richard Holbrooke was acting on behalf of the international community, including the [Security Council]..."[38] The absence of any Security Council resolution undermines his assertion that there was ample reason for him to believe that Holbrooke was acting on behalf of the Security Council.

27. It follows that Karadžić's arguments on apparent authority[39] equally lack any foundation and must also fail.

(c) If Karadžić does not allege the existence of an agreement entered into on behalf of the ICTY Prosecutor, and if there was no basis for Karadžić to believe that Holbrooke was acting on behalf of the Security Council, there can be no allegation of abuse of process

28. Karadžić's speculative submissions include the alternative argument that even if the alleged agreement was invalid and not binding on the Tribunal, it may potentially constitute an abuse of process for which the Tribunal may decline to exercise jurisdiction. On this basis, he argues that the Decision deprived him of information which he needs to support this claim.[40] For his abuse of process claim to warrant consideration, Karadžić would have to allege the existence of an agreement entered into on behalf of the ICTY Prosecutor. He makes no such claim. Moreover, as Karadžić did not in fact believe that Holbrooke was

[35] S/RES/1503(2003), 28 August 2003.
[36] 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.
[37] Appeal, para.45.
[38] Appeal, para.81.
[39] Appeal, paras.74-98.
[40] Appeal, paras.99-100.

acting on behalf of the Security Council, he cannot validly claim that he reasonably believed Holbrooke was acting pursuant to authority conferred upon him by the Security Council. The alleged agreement, even if it existed, could not be attributed to either the Tribunal or the Security Council and would be unconnected to these proceedings. Therefore, it cannot constitute an abuse of process in relation to these proceedings.

29. The authorities which Karadžić cites in support of his abuse of process argument do not assist him. The Appeals Chamber case law on abuse of process doctrine limits its application to two distinct situations: 1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.[41]

30. Only the second situation, which concerns court proceedings being tainted by serious and egregious violations of an accused's rights, need be considered here. Hypothetical facts cannot provide a foundation for a finding of the serious and egregious violation of Karadžić's rights.[42]

31. Karadžić relies on the *Todorović* and *Nikolić* decisions.[43] However, these decisions are inapposite and his reliance on them is misplaced. Both these cases concerned challenges to the legality of arrest. Karadžić does not challenge the legality of arrest and detention or conduct attributable to the Prosecution or the ICTY. *Nikolić* was a decision concerning the merits of a motion challenging the Tribunal's jurisdiction based on a claim of illegal arrest.[44] *Todorović* dealt with a motion for an order to provide documents and witnesses to the Defence in connection with the transfer and arrest of the accused for use in ongoing evidentiary hearings concerning the legality of arrest.[45]

32. The accused in these cases claimed that the court proceedings were tainted by an egregious violation of their rights stemming from the illegality of their arrest. In this case, Karadžić cannot claim a serious and egregious violation of his rights, because even if the alleged agreement existed, Karadžić has no right to rely on an agreement that cannot be

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[41] *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, 3 Nov. 1999 ("Barayagwiza Appeal Decision I"), para.77.
[42] Barayagwiza Appeal Decision I, para.74.
[43] Appeal, para.104, 107.
[44] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 Oct. 2002 ("Nikolić Trial Decision").
[45] *Prosecutor v. Simić et al*, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 Oct. 2000.

binding on or attributed to the Tribunal or the Security Council and is otherwise unconnected to his arrest or to any other aspect of these proceedings.

(C) EVEN IF THE ALLEGED AGREEMENT EXISTED, IT WOULD CONFLICT WITH A NORM OF CUSTOMARY INTERNATIONAL LAW

33. Karadžić also claims that the Trial Chamber erred in relying on provisions aimed at preventing the evasion of international criminal responsibility or jurisdiction on the basis of the official position of an individual.[46] He submits that the Trial Chamber "confused Head of State immunity with a cooperation agreement."[47]

34. Under customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals,[48] in particular, genocide, war crimes and/or crimes against humanity.[49] Karadžić cannot invoke immunities to evade criminal responsibility for these crimes. Implicitly recognizing this customary international norm, Karadžić has re-characterized the alleged agreement as "essentially a cooperation agreement"[50] and argues that the Trial Chamber failed to draw this distinction. In any event, even if there was a cooperation agreement with the Security Council, the result is the same, namely, a bar to prosecution before the ICTY for serious violations of international humanitarian law.

35. Should the Appeals Chamber consider that the authorities referred to by the Trial Chamber have a narrow ambit, the alleged agreement would in any event be invalid because it conflicts with a norm of customary international law prohibiting the granting of amnesty to persons responsible for serious violations of international humanitarian law.[51]

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[46] Appeal, para.46.
[47] Appeal, para.67.
[48] Decision, para.17.
[49] Decision, para.25.
[50] Appeal, para.45.
[51] *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.81 (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 at para. 89 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, Art. 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 (amnesties granted for the crime of torture are void and will 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, para.22,

36. Justice Robertson of the Appeals Chamber of the Special Court of Sierra Leone, after canvassing state practice and *opinio juris*, concluded that:

> ... 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.[52]

37. The resulting obligation to prosecute or extradite persons accused of serious violations of international humanitarian law has been described as having a peremptory character.[53] Thus, an argument based on what would amount to an international recognition

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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 Murderers", 3 July 2003, http://www.hrw.org/en/news/2003/07/02/iraq-no-amnesty-mass-murderers (stating that offering amnesty to those responsible for the worst crimes is inconsistent with US and UK international legal obligations); La Fontaine, No Amnesty or Statute of Limitations for Enforced Disappearances: The Sandoval Case Before the Supreme Court of Chile, 3 J. Int'l Crim. Just. 469, 473-474 (discussing a 2004 decision of the Chilean Supreme Court; it found that amnesty laws were inconsistent with Chilean obligations in the conduct of internal armed conflict and recalled common Article 3 to the Geneva Conventions); Faustin Ntoubandi, "Amnesty for Crimes Against Humanity under International Law" (Martinus Nijhoff, Nov. 2007), p.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."); Report to the Secretary General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, 26 May 1005, paras.329, 338 (S/2005/458) ("Referring to relevant international standards crystallized over time, the *reconciliation practice* of the [Commission on Truth and Friendship (CFT) which the Indonesian and East Timorese governments agreed to establish] should bar access to amnesty procedures for cases of genocide, crimes against humanity, grave breaches of the Geneva Conventions...and of Additional Protocol I thereto, and other violations of international humanitarian law and international human rights that are crimes under international law..."). *See also* S/1995/999, Annex 7, Art. VI. 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. 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 humanitarian law set out in Articles 2-5 of the Tribunal's Statute.

[52] *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 ("Kondewa Appeal Decision"), Separate Opinion of Justice Robertson, paras.49-51.

[53] J. Pictet (ed.), The Geneva Conventions of 12 August 1949, Commentary: IV Geneva Convention, ICRC, Geneva (1994), 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

of amnesties for these crimes is unsound.[54] As Justice Robertson stated, these persons must always remain "amenable" to being brought before a court for trial and punishment.

V. CONCLUSION

38. For the reasons set forth above, Karadžić's appeal should be dismissed in its entirety.

Word Count: 5072

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Hildegard Uertz-Retzlaff
Senior Trial Attorney

Dated this 9th day of February 2009,
At The Hague, The Netherlands

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").

[54] 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.")