

**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: 16 February 2009

IN THE TRIAL CHAMBER

Before:

Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar:

Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S "THIRD
MOTION FOR DISCLOSURE: HOLBROOKE AGREEMENT"**

The Office of the Prosecutor:

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

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 "THIRD
MOTION FOR DISCLOSURE: HOLBROOKE AGREEMENT"**

I. INTRODUCTION

1. The Prosecution files its response to Karadžić's "Third Motion for Disclosure: Holbrooke Agreement" ("Third Motion") filed on 4 February 2009. The Third Motion should be dismissed because the Trial Chamber has already specified the Prosecution's Rule 68 of the Rules of Procedure and Evidence ("the Rules") disclosure obligations in relation to the alleged Holbrooke agreement, and the Prosecution has complied with them. In any event, none of the items listed in the Third Motion fall within the ambit of the Prosecution's disclosure obligations in relation to this matter.

II. DISCUSSION

**NONE OF THE ITEMS LISTED BY KARADŽIĆ FALL WITHIN THE AMBIT OF
THE PROSECUTION'S DISCLOSURE OBLIGATIONS IN RELATION TO THE
ALLEGED HOLBROOKE AGREEMENT**

2. Karadžić revisits the issue of the alleged Holbrooke agreement. He requests, pursuant to Rule 68, an order for the Prosecution to disclose three categories of items.¹ The Trial Chamber, in its decision of 17 December 2008 ("Decision"), has dealt with the question of

disclosure pursuant to Rule 68 concerning the alleged Holbrooke agreement and has specified the Prosecution's disclosure obligations in relation to the alleged agreement.² The Trial Chamber held:

In respect of Rule 68, the Prosecution states that a document dated 18 July 1996 reflecting an undertaking by the Accused to step down from politics...has been identified and disclosed to the Accused on the basis that it may mitigate any eventual sentence. In view of this submission, the Trial Chamber considers it possible that in the same way, a copy of any other existing written agreement made at the alleged meeting on 18-19 July 1996 in Belgrade, as well as any notes taken or recordings made during the alleged meeting, could shed light on the behaviour of the Accused after the fact, and, if so, would be items which may be taken into consideration in the determination of any eventual sentence.³

3. The Trial Chamber narrowly restricted the ambit of Rule 68 disclosure in relation to the alleged agreement. It considered that in view of the Prosecution's submission concerning the undertaking, the alleged agreement was relevant for the purposes of Rule 68 because it could shed light on the behaviour of the Accused after the fact, and may be taken into consideration in the determination of any eventual sentence. Of the numerous items requested in Karadžić's 5 November 2008 motion,⁴ only a copy of any other existing written agreement made at the alleged meeting on 18-19 July 1996 in Belgrade, as well as any notes taken or recordings made during the alleged meeting, was the subject of the Trial Chamber's disclosure order.⁵

4. The Trial Chamber dismissed the motion with respect to all of the other items listed by Karadžić, primarily due to the lack of specificity. The Trial considered, however, that the requested information is not material for any reason than its potential relevance in the determination of any eventual sentence.⁶ It further considered that there are some acts for which immunity from prosecution cannot be invoked before international tribunals.⁷ This Decision, currently under appeal, stands unless it is overturned on appeal.

¹ Third Motion, para.1.

² See Decision, para.29.

³ Decision, para.21 (references omitted).

⁴ Motion for Inspection and Disclosure: Holbrooke Agreement, 5 Nov. 2008, para.1 ("November Motion").

⁵ Decision, para.29.

⁶ Decision, para. 23.

⁷ Decision, para.17. See also Decision, para. 25.

5. The Prosecution refers to its recent submissions in its “Response to Karadžić’s Appeal of Decision Concerning Holbrooke Agreement Disclosure.”⁸ In particular, Karadžić has not alleged the existence of an agreement that could be legally binding on the Security Council or the Tribunal: he does not allege that an agreement was entered into on behalf of the ICTY Prosecutor, and he does not allege the existence of any agreement that could be binding on the Security Council.⁹ In connection with the latter, he 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, and demonstrating that his claims have no basis.¹⁰ Further, in order for any alleged agreement to be binding on the Tribunal, it would have to be reflected in a Security Council resolution; however, none exists.¹¹ In addition, there can be no allegation of abuse of process.¹² Even if the alleged agreement existed, it would conflict with a norm of customary international law.¹³

6. Apart from the narrowly confined ambit of Rule 68 disclosure in relation to the alleged agreement (see para. 3 above), any other materials related to the alleged immunity agreement are neither disclosable under Rule 68, or Rule 66(B) of the Rules. The Prosecution has already complied with the order of the Trial Chamber set out in the Decision. Therefore, it has met its Rule 68 disclosure obligations with respect to this matter.

7. For these reasons, neither of the first two items requested by the Accused in the Third Motion¹⁴ fall within the Prosecution’s disclosure obligations as determined by the Trial Chamber.

8. In relation to item 2 of the Third Motion,¹⁵ the Prosecution is in the process of disclosing transcripts of all OTP interviews and ICTY testimony of Biljana Plavšić, as they contain material that falls within Rule 68 of the Rules, for purposes unrelated to the alleged Holbrooke agreement. The Prosecutor will not actively search for and disclose any statements of Biljana Plavšić addressing the alleged Holbrooke agreement, as such statements are not disclosable under Rule 68, or Rule 66(B) for the reasons discussed above.

⁸ “Prosecution’s Response to Karadžić’s Appeal of Decision Concerning Holbrooke Agreement Disclosure,” 9 Feb. 2009 (“9 February Response”).

⁹ 9 February Response, pp.5 *et seq.*

¹⁰ 9 February Response, pp.6-8.

¹¹ 9 February Response, pp.8-10.

¹² 9 February Response, pp.10-12.

¹³ 9 February Response, pp.12-14.

¹⁴ Third Motion, para.1.

¹⁵ Third Motion, para.1.

9. As to item 3,¹⁶ it suffers from the same deficiency identified by the Trial Chamber in connection with most of the items listed in the November Motion.¹⁷ It is overly broad and lacks specificity.¹⁸ Indeed, item 3 resembles item 1(A)(4) in the November Motion.¹⁹ Item 1(A)(4) was one of the items rejected by the Trial Chamber for lack of specificity in its Decision. Item 3 should be dismissed for the same reason.

10. For all these reasons, the material that Karadžić seeks does not fall within the ambit of the Prosecution's disclosure obligations in relation to this matter.

III. CONCLUSION

11. Karadžić's Third Motion should be dismissed in its entirety.

Word Count: 1,172 words



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Dated this 16th day of February 2009,
At The Hague, The Netherlands

¹⁶ Third Motion, para.2.

¹⁷ See Decision, para.20.

¹⁸ Decision, paras.16, 20. The Trial Chamber's finding on specificity was not appealed by Karadžić in his "Appeal of Decision Concerning Holbrooke Agreement Disclosure" filed on 28 January 2009.

¹⁹ Item 1(A)(4) in the November Motion reads: "(A) all information in the possession of the prosecution concerning the agreement made with Radovan Karadzic on or about 18-19 July 1996 by Richard Holbrooke including...(4) any other document or recording which tends to show the existence of a promise, representation, or suggestion that Radovan Karadžić not be arrested, transferred, or prosecuted at the ICTY." November Motion, para.1(A)(4).