

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: 6 April 2009
Original: English

IN THE APPEALS CHAMBER

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

Acting Registrar: Mr. John Hocking

Decision of: 6 April 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON APPELLANT RADOVAN KARADŽIĆ'S
APPEAL CONCERNING HOLBROOKE AGREEMENT
DISCLOSURE**

The Office of the Prosecutor:

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

The Appellant:

Mr. Radovan Karadžić

1. The Appeals Chamber of the 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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of the “Appeal of Decision Concerning Holbrooke Agreement Disclosure” (“Appeal”), filed by Radovan Karadžić (“Appellant”) on 28 January 2009. On 9 February 2009, the “Prosecution’s Response to Karadžić’s Appeal of Decision Concerning Holbrooke Agreement Disclosure” (“Response”) was filed. The Appellant’s “Reply Brief: Appeal of Decision Concerning Holbrooke Agreement Disclosure” (“Reply”) was filed on 24 February 2009.

A. Background

2. After having submitted a request for inspection and disclosure of certain documents to the Prosecution,¹ which was refused, the Appellant filed a “Motion for Inspection and Disclosure: Holbrooke Agreement” on 6 November 2008 (“Motion for Disclosure”), in which he requested the Trial Chamber, pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), to order the Prosecution to allow inspection and disclosure of numerous documents. The Appellant submitted that the documents were material to the preparation of his defence, because “[i]t is part of his defence that (a) he was promised on 18-19 July by Richard Holbrooke that he would not have to face prosecution in The Hague if he agreed to withdraw completely from public life; and (b) that this promise is attributable to the ICTY”.²

3. On 17 December 2008, the Trial Chamber issued a “Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue” (“Impugned Decision”), in which it held that, for the purposes of Rules 66(B) and 68 of the Rules, only a limited number of the documents requested by the Appellant met the relevant legal standards for their disclosure. Accordingly, the Trial Chamber granted the Accused’s motion in part, ordering the Prosecution to disclose to the Appellant:

¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Notice of Request for Inspection and Disclosure: Holbrooke Agreement, 16 October 2008. Previously, on 6 October 2008, the Accused filed a “Motion for Inspection and Disclosure: Immunity Issue”, requesting the Trial Chamber to order the Prosecution to provide inspection and disclosure of certain material pursuant to Rule 66(B) and Rule 68 of the Rules respectively. In its “Decision on Accused Motion for Inspection and Disclosure”, filed on 9 October 2008, the Trial Chamber found that it would be premature to assume jurisdiction in respect of Rule 66(B) of the Rules, and that the Motion did not meet the required criteria outlined for the issuance of an order under Rule 68 of the Rules, and therefore denied the motion, informing the Accused that he should submit his request directly to the Prosecution.

² *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Inspection and Disclosure: Holbrooke Agreement, 6 November 2008, para. 3. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Response to Karadžić’s Motion for Inspection and Disclosure, 19 November 2008. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Leave to Reply and Reply Brief: Motion for Inspection and Disclosure: Holbrooke Agreement, 28 November 2008.

(a) any written agreement made at the alleged meeting in Belgrade on 18-19 July 1996 (“alleged Holbrooke Agreement”); and

(b) any notes taken or recordings made on 18-19 July 1996 of proceedings at the alleged meeting in Belgrade on those days,

which were in the custody or control of the Prosecution.³ The Trial Chamber denied the Motion in all other respects, including in relation to the disclosure of the other items requested by the Appellant (“Remaining Items”).⁴

4. As regards the Remaining Items, the Trial Chamber considered that the Appellant had not described them with sufficient specificity, and that the categories of documents were “overly broad in scope”, and “framed in language too vague for the Prosecution to be able to determine in every case whether a particular document falls into a particular category”.⁵

5. Further, the Trial Chamber held that the documents requested for disclosure were only material with respect to their potential relevance in sentencing.⁶ apart from this, the documents could not support an argument that would have some prospect of success, as the Trial Chamber considered 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.”⁷ The Trial Chamber further considered “that, pursuant to the Statute and the Rules of the Tribunal, neither its own mandate nor that of the Prosecutor is affected by any alleged undertaking made by Mr. Holbrooke.”⁸

6. In a letter dated 2 January 2009, the Prosecution informed the Accused that the Prosecution had conducted a specific search to determine whether it was in possession of the documents ordered to be disclosed in the Decision. The Accused was advised that, apart from documents already disclosed, no such items were identified.⁹

7. On 9 January 2009, the Appellant applied for certification to appeal the Impugned Decision pursuant to Rule 73(B) of the Rules, arguing that the Impugned Decision prevents him from obtaining the documents he needs to factually support a motion to dismiss the indictment and

³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008, para. 29.

⁴ Impugned Decision, para. 29.

⁵ Impugned Decision, para. 20.

⁶ Impugned Decision, para. 23.

⁷ Impugned Decision, para. 25.

⁸ *Ibid.*

⁹ Letter from Senior Trial Attorney to Radovan Karadžić dated 2 January 2009, filed 15 January 2009.

foreshadows a decision on the merits of such a motion.¹⁰ The Trial Chamber granted the Application for Certification on 19 January 2009.¹¹

B. Submissions

8. The Appellant submits the following grounds of appeal:

i. The Trial Chamber erroneously concluded 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” (“first ground of appeal”);¹²

ii. The Trial Chamber erroneously concluded that “neither its own mandate nor that of the prosecutor is affected by any alleged undertaking made by Mr. Holbrooke” (“second ground of appeal”);¹³ and

iii. The Trial Chamber erroneously denied disclosure which could have led to the Tribunal “declining to exercise its jurisdiction for abuse of process, notwithstanding the validity or binding nature of the Holbrooke agreement” (“third ground of appeal”).¹⁴

9. With respect to the first ground of appeal, the Appellant submits that the alleged Holbrooke Agreement is a cooperation agreement, not a statutory immunity, and that the Trial Chamber erred in confusing head of state immunity with such a cooperation agreement.¹⁵ He further alleges that none of the instruments or decisions referred to by the Trial Chamber express the purportedly “well established” proposition as broadly as stated by the Trial Chamber.¹⁶

10. In relation to the second ground of appeal, the Appellant argues that the Trial Chamber ignored the well-established doctrines of “actual authority” and “apparent authority” when it concluded, before allowing any disclosure, that neither its own mandate nor that of the Prosecutor is affected by any alleged undertaking made by Mr. Holbrooke.¹⁷

¹⁰ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Application for Certification to Appeal Decision on Holbrooke Agreement Disclosure, 9 January 2009 (“Application for Certification”), para. 7; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution’s Response to Karadžić’s Application for Certification to Appeal the Decision on Accused’s Second Motion for Inspection and Disclosure, 19 January 2009.

¹¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeal Decision on Inspection and Disclosure, 19 January 2009.

¹² *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.1, Appeal of Decision Concerning Holbrooke Agreement Disclosure, 28 January 2009 (“Appeal”), para. 12.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Appeal, paras 16, 67. See also *ibid.*, paras 15-68.

¹⁶ Appeal, para. 16.

¹⁷ Appeal, para. 69. See also *ibid.*, paras 70-98.

11. With respect to the third ground of appeal, the Appellant submits that even if the Trial Chamber was correct in finding that the alleged Holbrooke Agreement was invalid under international law, this agreement may potentially constitute an abuse of process on the basis of which the Tribunal may choose to decline to exercise jurisdiction and stay the present case.¹⁸ The Appellant argues that the Appeals Chamber has recognized that the abuse of process doctrine may be invoked even where a violation of rights was committed by a third party unrelated to the Tribunal.¹⁹

12. The Appellant submits in particular that he does not appeal the Impugned Decision's denial of his request for disclosure of the Remaining Items.²⁰

13. The Prosecution responds that the Appeal can be dismissed summarily because the Appellant has not appealed the Appeals Chamber's finding concerning the lack of specificity of his disclosure request.²¹ In the alternative, the Prosecution argues that the Appellant has not alleged the existence of an agreement that could be legally binding on the Security Council or the Tribunal, and cannot support his abuse of process claim.²² The Prosecution further responds that even if the alleged Holbrooke Agreement existed, it would conflict with a norm of customary international law prohibiting the granting of amnesty to persons responsible for serious violations of international humanitarian law.²³

C. Applicable Law

14. Decisions by Trial Chambers on disclosure are discretionary decisions to which the Appeals Chamber must accord deference.²⁴ In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a "discernible error" resulting in prejudice to that party.²⁵ 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.²⁶

¹⁸ Appeal, para. 99.

¹⁹ Appeal, paras 100-109.

²⁰ Appeal, para. 12. *See also* Impugned Decision, para. 20.

²¹ Response, para. 1.

²² Response, paras 1, 11-32.

²³ Response, paras 33-37.

²⁴ *Cf. 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 January 2009, para. 5.

²⁵ *Ibid.*

²⁶ *Ibid.*

D. Discussion

15. In the Impugned Decision, the Trial Chamber granted in part the Motion for Disclosure in which the Appellant requested the Trial Chamber to issue an order requiring the Prosecution to disclose to him specifically defined material relating to the alleged Holbrooke Agreement. The Impugned Decision denied, however, the Appellant's request to have the Remaining Items disclosed to him for lack of specificity, as their description was "overly broad in scope, and [...] framed in a language too vague for the Prosecution to be able to determine in every case whether a particular document falls into a particular category."²⁷ The Appellant has decided not to appeal this part of the Impugned Decision.²⁸

16. In addition, the Trial Chamber considered in the Impugned Decision that the information it ordered the Prosecution to disclose to the Appellant is not material for the preparation of his defence "for any other reason than its potential relevance in the determination of any eventual sentence."²⁹ With respect to the Appellant's submissions in relation to the alleged Holbrooke Agreement, the Trial Chamber held "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", and that "pursuant to the Statute and Rules of the Tribunal, neither its own mandate nor that of the Prosecutor is affected by any alleged undertaking made by Mr. Holbrooke."³⁰

17. The Appeals Chamber notes that all three grounds of appeal raised by the Appellant relate to the Trial Chamber's above-referenced specifications with respect to the status of immunity agreements. However, the Prosecution was ordered to disclose all material these specifications related to. Therefore, for the purposes of the present decision, the issues raised in the three grounds of appeal are moot. The Appeals Chamber further recalls that the Trial Chamber's findings in relation to the lack of specificity with which the Remaining Items were described in the Motion for Disclosure have not been appealed.³¹ Consequently, the present appeal fails.

E. Disposition

For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in its entirety.

²⁷ Impugned Decision, para. 20.

²⁸ Appeal, para. 12. In fact, the Appellant appears to accept that his previous request in relation to the Remaining Items was insufficiently specific, because he states that he intends to undertake a further investigation that would allow him to be more specific in his request if he prevails on the other grounds of appeal submitted by him. *Ibid.*


²⁹ Impugned Decision, para. 23.

³⁰ Impugned Decision, para. 25.

³¹ Appeal, para. 12.

Done in English and French, the English text being authoritative.

Done this sixth day of April 2009,
At The Hague,
The Netherlands



Judge Mehmet Güney
Presiding

[Seal of the Tribunal]