IT-95-5/18-AR73.4
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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-AR73.4
		Date:	12 October 2009
		Original:	English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **12 October 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON KARADŽIĆ'S APPEAL OF TRIAL CHAMBER'S DECISION ON ALLEGED HOLBROOKE AGREEMENT

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

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 on Holbrooke Agreement ("Appeal"), filed by Radovan Karadžić ("Appellant") on 27 July 2009.

I. BACKGROUND

A. Procedural History

2. On 6 November 2008, the Appellant filed a motion requesting Trial Chamber III ("Trial Chamber"), pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), to order the Office of the Prosecutor ("Prosecution") to allow inspection and disclosure of numerous documents concerning an agreement that he allegedly made on 18-19 July 1996 with Mr. Richard Holbrooke ("alleged Agreement").[1] According to the Appellant, as detailed below, the alleged Agreement stipulated that in exchange for completely withdrawing from public life, he would not be subject to prosecution by the Tribunal.[2] In its decision rendered on 17 December 2008, the Trial Chamber ordered the Prosecution to disclose to the Appellant a portion of the requested documents on the basis, *inter alia*, that they were potentially relevant in sentencing.[3] The Trial Chamber further held that, apart from sentencing matters, the requested documents were not material to the preparation of the Appellant's defence, as 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",[4] and "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".[5] The Trial Chamber found that the Appellant's request for the remaining documents did not meet the relevant legal standards for an order compelling their disclosure, as they were not described with sufficient specificity.[6] On 6 April 2009, the Appeals Chamber dismissed the Appellant's appeal against the Decision on Disclosure as moot, considering that the Appellant had not appealed the Trial Chamber's findings in relation to

[1] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Inspection and Disclosure: Holbrooke Agreement, 6 November 2008 ("Motion for Disclosure"), para. 1.
[2] Motion for Disclosure, para. 3.
[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 ("Decision on Disclosure"), para. 23.
[4] Decision on Disclosure, para. 25.
[5] *Id.*
[6] Decision on Disclosure, para. 20.

the lack of specificity, and that the Prosecution had already been ordered to disclose the documents that met the specificity test.[7]

3. On 4 February 2009, the Appellant filed a further motion requesting that the Prosecution be ordered to disclose additional materials related to the alleged Agreement,[8] which the Trial Chamber granted with regard to those materials that met the specificity test, and on the basis that such materials could be relevant to any eventual sentence.[9] In order to gather evidence supporting his allegations, the Appellant filed three motions for extension of time to file a motion challenging jurisdiction.[10] All requests for extension of time were granted by the Trial Chamber.[11]

4. On 25 May 2009, the Appellant filed a motion requesting that the Trial Chamber dismiss the Indictment against him on the ground that, as a result of the alleged Agreement, the Tribunal lacks jurisdiction, or, alternatively, that the Trial Chamber exercise its discretion and decline to exercise jurisdiction under the abuse of process doctrine.[12] The Appellant also requested that the Trial Chamber hold an evidentiary hearing and make findings of fact on the existence of the alleged Agreement.[13] According to the Appellant, the Trial Chamber should turn to the question of the legal value of the alleged Agreement only after having pronounced on disputed factual issues such as whether the alleged Agreement was actually concluded and the circumstances surrounding its conclusion.[14]

5. In his Motion, the Appellant asserted that the facts surrounding the alleged Agreement are as follows: the alleged Agreement was made during the evening and early morning hours of 18 and 19 July 1996; Mr. Holbrooke, "the United States special negotiator"[15] acting with the authority of the Tribunal or of the United Nations Security Council ("UNSC"),[16] proposed that if the Appellant

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[7] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.1, Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009 ("Appeals Decision on Disclosure"), paras 15-17.
[8] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Third Motion for Disclosure: Holbrooke Agreement, 4 February 2009.
[9] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused Motion for Interview of Defence Witness and Third Motion for Disclosure, 9 April 2009, paras 19, 21-27.
[10] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Extension of Time – the Holbrooke Agreement Motion, 23 March 2009; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Extension of Time and to Exceed Word Limit, 20 April 2009; Motion for Further Extension of Time and for Ancillary Orders: Holbrooke Agreement Motion, 4 May 2009.
[11] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision in Respect of Motion for Extension of Time, 30 March 2009; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused Motion for Extension of Time and to Exceed Word Limit: Holbrooke Agreement Motion, 22 April 2009, para. 3. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Order, 20 May 2009, para. 8(f), where the Trial Chamber confirmed that the Accused's deadline for filing the Motion would be 25 May 2009.
[12] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Holbrooke Agreement Motion, 25 May 2009, with Annexes ("Motion"), paras 1, 3.
[13] Motion, para. 8.
[14] Motion, paras 80-83.
[15] Motion, para. 4.
[16] Motion, paras 48-49.

resigned from all his positions in the Republika Srpska government and withdrew completely from public life he "would not have to face prosecution in The Hague".[17] The aforementioned proposal was accepted by the Appellant.[18] While the Appellant was required to confirm his part of the alleged Agreement in writing, Mr. Holbrooke declined to provide a written guarantee of the alleged Agreement, explaining that it was politically impossible to do so.[19] Instead, he assured the Appellant that he could be trusted to ensure that the alleged Agreement was honoured.[20] The Appellant further submitted in his Motion that at the time of the alleged Agreement "there was ample reason for [the Appellant] to believe that Richard Holbrooke was acting on behalf of the international community, including the [UNSC]".[21]

6. On 8 July 2009, the Trial Chamber rendered its Decision denying the Motion in its entirety.[22] The Appeals Chamber deems it beneficial to recall at the outset the reasoning upon which the Trial Chamber based the Impugned Decision.

B. The Impugned Decision

7. In addressing the Appellant's request for an evidentiary hearing, the Trial Chamber considered that if the Appellant could not obtain the relief he sought as a matter of law, then the issue of whether the alleged Agreement was ever made would be irrelevant to any issue other than sentencing, on which evidence could be submitted at trial.[23] The Trial Chamber further stated that, in order to make its determination on the law, it would accept the evidence submitted by the Appellant *pro veritate*.[24]

8. In addressing the merits of the Appellant's submission, the Trial Chamber observed that "the parties seem to agree in their submissions that, whether or not the Agreement is binding on the Tribunal depends ultimately on the question of whether it can be attributed to the Prosecutor of this Tribunal."[25] It further observed that in order to demonstrate that the alleged Agreement is to be attributed to the Prosecution, the Appellant had to show that either representatives of the Prosecution or the UNSC, the Tribunal's parent body, was involved in making it.[26]

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[17] Motion, para. 4.
[18] *Id.*
[19] Motion, paras 5-6.
[20] Motion, para. 6.
[21] Motion, para. 57.
[22] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on The Accused's Holbrooke Agreement Motion, 8 July 2009 ("Impugned Decision"), para. 89.
[23] Impugned Decision, para. 46.
[24] Impugned Decision, para. 47.
[25] Impugned Decision, para. 50.
[26] *Id.*

9. In addressing the first alternative, the Trial Chamber considered whether the alleged Agreement would bind on the Tribunal if it were to be attributed to the Prosecution.[27] First, the Trial Chamber recalled that, pursuant to Rules 50 and 51 of the Rules, the Prosecution may decide to withdraw or amend an indictment after the confirmation thereof only with the leave of a Judge or a Trial Chamber.[28] In this respect, the Trial Chamber observed that, at the time the alleged Agreement was concluded, an indictment against the Appellant had already been confirmed and that the Prosecution did not request leave to have it withdrawn.[29] Second, the Trial Chamber dismissed the possibility that the Prosecution could renounce its case against an accused outside the provisions of the Statute or the Rules as being "at best, tenuous".[30] In this respect, the Trial Chamber considered that the alleged Agreement does not fall under the category of plea agreements, as the latter consist of guilty pleas tendered by accused on certain charges in return for the dismissal of others, while the alleged Agreement consists of immunity conceded by the Prosecution in return of the Appellant's withdrawal from public life.[31]

10. In addition, the Trial Chamber considered that the evidence relied upon by the Appellant did not show that Mr. Holbrooke was acting with either the actual or apparent authority of the Prosecution.[32] In this respect, the Trial Chamber observed that the evidence proffered by the Appellant, consisting of various books written on this subject, shows that a constant tension existed in 1995 and 1996 between the Prosecution and the U.S. negotiators, including Mr. Holbrooke.[33] The Trial Chamber pointed to the fact that the Prosecution issued a new indictment against the Appellant when it was informed that an amnesty was being considered by the U.S. negotiators as part of the Dayton negotiations in 1995.[34] The Trial Chamber considered this an example of the fact that the Prosecution attempted to thwart any action by the international community that could be interpreted as interference with its prosecutorial authority.[35]

11. Having excluded the possibility that the evidence presented by the Appellant demonstrated that the Prosecution was in any way involved in the making of the alleged Agreement, the Trial Chamber turned to analyze whether the alleged Agreement could be attributed to the UNSC.[36] The reasoning of the Trial Chamber on this question is three-fold.

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[27] Impugned Decision, paras 51-56.
[28] Impugned Decision, para. 52.
[29] Impugned Decision, para. 53.
[30] Impugned Decision, para. 54.
[31] *Id.*
[32] Impugned Decision, para. 55.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Impugned Decision, para. 56.

12. First, the Trial Chamber observed that the UNSC possesses the power to amend the Statute of the Tribunal and clarified that this includes any limitation or expansion of the Tribunal's jurisdiction.[37] It also recalled that in all instances when the jurisdiction of the Tribunal has been amended, it has been done by means of a resolution.[38] The Trial Chamber further noted that not only has the UNSC never passed a resolution calling the Prosecution to grant immunity to the Appellant or one amending the Statute to that effect, but that it has in fact adopted a number of resolutions demanding the arrest of the Appellant.[39]

13. Second, the Trial Chamber considered the Appellant's submission that Mr. Holbrooke was an agent of the UNSC, acting under its authority.[40] The Trial Chamber specified that it carried out such an analysis "assuming for the sake of argument that [...] the UNSC can limit its jurisdiction by entering into immunity agreements through its agents and without the knowledge of the representatives of the Tribunal or without passing a resolution affirming such agreements".[41] The Trial Chamber expressly made this assessment on the basis of the material provided to it by the Appellant, and concluded that the Appellant failed to advance any evidence in support of his submissions that Mr. Holbrooke was acting with the authority of the UNSC when he entered into the alleged Agreement.[42] This conclusion was bolstered by the observation that "had Holbrooke acted with the actual authority of the UNSC, the resulting agreement would eventually have been adopted, or at least acknowledged, by the UNSC".[43]

14. Third, the Trial Chamber considered the Appellant's submission that Mr. Holbrooke had the apparent authority of the UNSC when it entered into the alleged Agreement with him.[44] The Trial Chamber considered that the Appellant did not advance any arguments for asserting that apparent authority applies in the context of international criminal law.[45] However, the Trial Chamber assumed for the sake of argument that this authority applies.[46] The Trial Chamber further considered that "the Accused has failed to show that the UNSC acted in such a way as to indicate that Holbrooke was its authorised representative, with authority to grant immunity for the most

[37] Impugned Decision, para. 57.
[38] Impugned Decision, paras 57-58.
[39] Impugned Decision, para. 59.
[40] Impugned Decision, para. 62.
[41] *Id.* (emphasis omitted).
[42] Impugned Decision, para. 65.
[43] *Id.*
[44] Impugned Decision, para. 66.
[45] *Id.*
[46] *Id.*

serious international crimes".[47] The Trial Chamber reached this decision on the basis of the following considerations:

a) the Appellant contradicted himself by alleging in his initial submissions that Mr. Holbrooke acted on behalf of the U.S., and only subsequently claiming that Mr. Holbrooke acted on behalf of the UNSC;[48]

b) it is doubtful that the Appellant could discern on whose behalf Mr. Holbrooke was acting, as he was never personally in contact with Mr. Holbrooke;[49]

c) the Appellant admitted in his submissions that neither he nor his agents were convinced that Mr. Holbrooke would keep to his side of the alleged Agreement especially given that Mr. Hoolbroke "had resigned from the Department of State following Dayton and had not been involved in Bosnian matters since, until July 1996";[50]

d) in several statements, Mr. Holbrooke made reference to the need for the UNSC to pass resolutions legitimizing any eventual settlement of the conflict in Bosnia and Herzegovina;[51]

e) the acceptance by the UNSC of several promises made by Mr. Holbrooke during the negotiations concerning cease-fires in Sarajevo did not provide sufficient support for the proposition that the UNSC "was somehow bound to accept a subsequent immunity deal relating to allegations of the most serious international crimes";[52]

f) "the refusal by one party to commit to its part of the agreement in writing does not support the proposition that this party has the authority of any body to act on that body's behalf and, at best, is neutral on the matter";[53]

g) the cases from certain domestic jurisdictions submitted by the Appellant, showing that agreements not to prosecute have been upheld even when made by agents acting with apparent authority, were not directly applicable to the present case.[54]

15. Finally, the Trial Chamber considered that the Appellant failed to show that any abuse of process had occurred.[55] The Trial Chamber observed that, "even in light of the Agreement",

[47] Impugned Decision, paras 66, 69.
[48] Impugned Decision, para. 70.
[49] *Id.*
[50] Impugned Decision, para. 71.
[51] Impugned Decision, para. 72.
[52] Impugned Decision, para. 73.
[53] Impugned Decision, para. 74.
[54] Impugned Decision, paras 75-78.

proceeding with the case against the Appellant would not affect his right to a fair trial.[56] It further found that the doctrine of abuse of process could not be triggered by a promise allegedly made by a third party, unconnected with the Tribunal, granting immunity to the Appellant years before his transfer to the Tribunal.[57]

C. The Appeal

16. On 15 July 2009, the Appellant filed an application for certification to appeal the Impugned Decision,[58] which the Trial Chamber granted on 17 July 2009.[59] On 24 July 2009, the Appellant filed a Motion before the Appeals Chamber requesting that the deadline to file his appeal of the Impugned Decision be extended until 17 August 2009, as he was in the process of obtaining further information concerning the alleged Agreement from Mr. Carl Bildt, the U.N. High Representative for Bosnia at the time of the conclusion of the alleged Agreement.[60] On 24 July 2009, the Duty Judge ordered the Appellant to file his appeal of the Impugned Decision no later than 27 July 2009.[61]

17. On 27 July 2009, the Appellant filed his Appeal. On 6 August 2009, the Prosecution filed its Response.[62] The Appellant filed his Reply on 10 August 2009.[63] On 13 August 2009, the Prosecution filed a motion requesting the Appeals Chamber's leave to file a sur-reply to the Appellant's Reply.[64]

18. On 17 August 2009, the Appellant filed a Motion pursuant to Rule 115 of the Rules for admission of additional evidence in support of his Appeal.[65] The Prosecution responded on 26 August 2009.[66] The Appellant replied on 31 August 2009.[67]

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[55] Impugned Decision, para. 84.
[56] *Id.*
[57] Impugned Decision, paras 84-85, 88.
[58] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Application for Certification to Appeal Decision on Holbrooke Agreement Motion, 15 July 2009.
[59] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Application For Certification To Appeal Decision on Holbrooke Agreement Motion, 17 July 2009 ("Decision to Appeal"), para. 8.
[60] Motion for Extension of Time, 24 July 2009.
[61] Decision on Radovan Karadžić's Motion for Extension of Time, 24 July 2009.
[62] Prosecution Response to Karadžić's "Appeal of Decision on Holbrooke Agreement", 6 August 2009 ("Response").
[63] Reply Brief: Appeal of Decision on Holbrooke Agreement, 10 August 2009, with public annex A and confidential annex B ("Reply").
[64] Prosecution Motion for Leave to File Sur-Reply and Sur-Reply to Karadžić's Reply Brief, 13 August 2009 ("Prosecution Motion to File Sur-Reply and Sur-Reply").
[65] First Motion for Admission of Additional Material: Holbrooke Agreement Appeal, 17 August 2009 ("First Rule 115 Motion").
[66] Prosecution Response to Karadžić's "First Motion for Admission of Additional Material: Holbrooke Agreement Appeal", 26 August 2009.
[67] Reply Brief: First Motion For Admission of Additional Material: Holbrooke Agreement Appeal, 31 August 2009.

19. On 30 September 2009, the Appellant filed a Motion requesting that the Appeals Chamber delay its decision on the Appeal until the Appellant obtained additional evidence to be submitted before the Appeals Chamber pursuant to Rule 115 of the Rules.[68] The Prosecution responded to the Motion for Delay on 1 October 2009, opposing it.[69] On 5 October 2009, the Appellant filed a further Motion pursuant to Rule 115 of the Rules for admission of additional evidence in support of his Appeal.[70] The Prosecution did not respond.[71] However, the Appeals Chamber considers that in rendering the present decision, absent a response from the Prosecution, there is no prejudice to the Prosecution's rights.

II. SUBMISSIONS OF THE PARTIES

20. In his Appeal, the Appellant submits that the Trial Chamber committed discernible errors on several grounds.[72] Specifically, the Appellant contends that the Trial Chamber erred:

> (A) in refusing to hold an evidentiary hearing professing to accept the facts proffered by Dr. Karadzic as true, but then discounting them;
>
> (B) in taking into account irrelevant considerations such as (1) Dr. Karadzic's inconsistent positions on the source of Holbrooke's authority, (2) that the agreement was concluded without face-to-face consultations, (3) that Dr. Karadzic wanted the agreement to be in writing, (4) the fact that the agreement was not consummated by a United Nations Security Council resolution, and (5) the length of time between the agreement and the transfer of Dr. Karadzic to the Tribunal;
>
> (C) in failing to take into account relevant considerations such as (1) manifestations of the U.N. Security Council granting authority to Holbrooke, (2) the fact that it was the Dayton Agreement provision prohibiting an ICTY fugitive from holding public office that was the basis for the agreement, (3) the fact that Holbrooke was threatening the imposition of U.N. Security Council sanctions if Dr. Karadzic did not resign, and (4) the fact that Holbrooke was back in the region with the blessing of the Contact Group, comprised of the permanent members of the U.N. Security Council;
>
> (D) in giving insufficient weight to the relevant consideration of the effect of previous ratification of Holbrooke's promises by the U.N. Security Council;
>
> (E) in making errors as to the facts that (1) Dr. Karadzic's agents did not believe that Holbrooke was acting on behalf of the U.N. Security Council and (2) Holbrooke had resigned from the Department of State following Dayton and had not been involved in the Bosnian matters since;
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> (F) in applying a dual standard for abuse of process on the basis that the alleged misconduct was committed by a third party.[73]

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[68] Request for Delay in Decision Pending Second Motion for Admission of Additional Material: Holbrooke Agreement Appeal, 30 September 2009, with "Confidential Annex A" ("Motion for Delay"), paras 1, 4.
[69] Prosecution Response to Karadžić's "Request for Delay in Decision Pending Second Motion for Admission of Additional Material: Holbrooke Agreement Appeal ", 1 October 2009.
[70] Second Motion for Admission of Additional Material: Holbrooke Agreement Appeal, 5 October 2009 ("Second Rule 115 Motion").
[71] The Prosecution's Response is due by 19 October 2009.
[72] Appeal, para. 15.
[73] *Id.*

21. The Appellant submits that based on the abovementioned errors committed by the Trial Chamber, the Appeals Chamber should reverse the Impugned Decision and remand the matter to the Trial Chamber for reconsideration, following an evidentiary hearing, and in application of the standard for abuse of process recommended by the Appellant.[74]

22. In its Response, the Prosecution submits that the Trial Chamber correctly concluded that the alleged Agreement, irrespective of any question of its existence, could not bind the Tribunal. It argues that the Appellant failed to demonstrate that the conclusions reached by the Trial Chamber are erroneous.[75] First, the Prosecution asserts that the Appellant has not established that the Tribunal's jurisdiction could be limited without a UNSC resolution.[76] Second, the Prosecution avers that the Appellant failed to provide arguments which support the application of the doctrine of apparent authority in international criminal law and that, in any event, the Appellant has not adduced evidence of unequivocal representation that Mr. Holbrooke was authorized to grant him immunity from Tribunal proceedings.[77] Third, the Prosecution submits that the Trial Chamber correctly concluded that the Appellant had not established any basis for an abuse of process claim.[78] Therefore, the Prosecution submits that the Appeals Chamber should dismiss the Appeal.[79]

III. STANDARD OF REVIEW

23. The Appeals Chamber will only overturn the Impugned Decision if it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[80]

IV. DISCUSSION

A. Whether the Trial Chamber Erred in not Granting an Evidentiary Hearing

24. The Appellant submits that the Trial Chamber erred in refusing to hold an evidentiary hearing, as it professed to accept all of the facts asserted by the Appellant as true, but then inappropriately sought to determine the credibility of his factual assertions.[81] The Appellant also

[74] Appeal, paras 113-114.
[75] Response, para. 1.
[76] Response, para. 3.
[77] Response, para. 4.
[78] Response, paras 1, 5, 44, 47.
[79] Response, para. 53.
[80] *See Prosecutor v. Ante Gotovina et al.*, Case Nos IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 6.
[81] Appeal, paras 15(A), 21-23.

reiterates his position that the Trial Chamber should have addressed the legal relevance of his arguments only after having made factual findings as to the existence of the alleged Agreement following an evidentiary hearing.[82] The Prosecution responds that, having determined that the alleged Agreement could not bind the Tribunal, the Trial Chamber was right in concluding that an evidentiary hearing was unnecessary.[83] The Prosecution further emphasizes that the evidentiary hearing requested by the Appellant would require a substantial amount of court time, divert the limited resources of the parties from trial preparation, and "significantly burden third parties for no rational reason".[84]

25. The Appeals Chamber finds some merit in the Appellant's argument that the approach adopted by the Impugned Decision appears contradictory. The Trial Chamber stated at the outset of the Impugned Decision that it would address the validity of the Appellant's arguments as a matter of law.[85] However, inconsistent with such a premise, in several instances throughout the Impugned Decision, the Trial Chamber did not confine itself to assessing the law applicable to the allegations submitted by the Appellant, but rather analyzed the evidence available to the Trial Chamber concerning those allegations. In doing so, the Trial Chamber dismissed some of the allegations advanced by the Appellant as a matter of fact.

26. For example, when addressing the issue of the alleged involvement of the Prosecution in the making of the alleged Agreement, the Trial Chamber considered, *inter alia*, that the evidence presented by the Appellant, comprising of various books written on the subject, did not establish that Mr. Holbrooke was acting with the actual or apparent authority of the Prosecution, but rather that there was a "constant tension between the Prosecutor and the U.S. negotiators, including Holbrooke"[86] and that the Prosecution attempted "to thwart any action by the international community that could be interpreted as interference with his prosecutorial authority".[87] Similarly, the Trial Chamber addressed the issue of whether Mr. Holbrooke was acting with the authority of the UNSC when he allegedly entered the alleged Agreement, and considered that the Appellant had failed to bring any evidence in support of this submission.[88] In addition, when addressing the Appellant's claims under the doctrine of apparent authority, the Trial Chamber concluded, based on an assessment of the evidence submitted by the Appellant, that "it cannot be said that the Accused could reasonably believe that Holbrooke had any authority to grant him immunity from prosecution

[82] Appeal, paras 18-20, 24-25.
[83] Response, para. 48.
[84] Response, paras 49-50, 52.
[85] Impugned Decision, paras 45-47.
[86] Impugned Decision, para. 55.
[87] *Id.*
[88] Impugned Decision, para. 61.

by this Tribunal".[89] Finally, when addressing the Appellant's arguments on abuse of process, the Trial Chamber based its analysis on its previous factual findings that Mr. Holbrooke did not act on behalf of the UNSC.[90]

27. The Appeals Chamber considers the Trial Chamber's approach in the Impugned Decision to be inherently inconsistent. Dismissing an argument as a matter of law means that, even if the factual allegations submitted by a party were proven, they would not justify the relief sought by that party. Hence, if the Trial Chamber intended to address the Appellant's argument as a matter of law only, it should have accepted the Appellant's *factual allegations* as if they were true (*i.e. pro veritate*). Instead, the Trial Chamber asserted that it would accept the *evidence* presented by the Appellant *pro veritate*,[91] dismissing some of the Appellant's argument on the basis that the available evidence was insufficient to establish the factual allegations submitted by the Appellant. This approach is not consistent with a dismissal as a matter of law, and denies the Appellant the opportunity to set out all of his evidence.

28. The Appeals Chamber acknowledges that the Impugned Decision offers an additional reason for denying an evidentiary hearing. In particular, the Trial Chamber stated that it was appropriate to determine the Motion on the basis of the evidence already presented by the Appellant, in light of the fact that the Trial Chamber has a duty to ensure that the Appellant receives a fair and expeditious trial and that the Trial Chamber is not supposed "to wait indefinitely for him to gather all the evidence he deems necessary before determining the question of whether the Agreement could affect the Tribunal's exercise of jurisdiction over him".[92]

29. The Appeals Chamber is not persuaded that this reasoning is sufficient to justify the denial of the Appellant's request to prove the allegations he submitted in the Motion. The Appeals Chamber observes that the Trial Chamber qualified the Motion as a "motion challenging the jurisdiction of the Tribunal that falls under Rule 73" of the Rules.[93] In particular, the Trial Chamber considered that the notion of "preliminary motions challenging jurisdiction" under Rule 72 is narrow in scope, and only includes the very limited set of challenges to an indictment listed in Rule 72(D).[94] It further observed that the Appellant alleged in the Motion the existence of an "external

[89] Impugned Decision, para. 74.
[90] Impugned Decision, para. 84.
[91] Impugned Decision, para. 47.
[92] Impugned Decision, para. 48.
[93] Impugned Decision, paras 41-43.
[94] *Id.*

restriction" to the jurisdiction of the Tribunal, that is, a submission falling under the category of "other motions" addressed in Rule 73.[95]

30. The Appeals Chamber concurs with the Trial Chamber's qualification of the Motion, which is grounded on well-established Appeals Chamber jurisprudence.[96] However, the Appeals Chamber disagrees with the Trial Chamber that whether the Motion falls under Rule 72 or Rule 73 of the Rules "is of minor significance".[97] While preliminary motions are subject to the strict time-limits as set out in Rule 72 and cannot be validly submitted once the relevant deadline has lapsed, motions falling under Rule 73 may be submitted by a party "at any time" after a case has been assigned to a Trial Chamber. In light of the fact that the Rules do not impose any time limit for motions falling under Rule 73, if the Trial Chamber deemed it necessary, as it did, to assess whether the allegations submitted by the Appellant were supported by evidence, it should have balanced the need to ensure an expeditious trial with the Appellant's right to present evidence supporting his case. Rather than deciding the Motion as a preliminary matter, solely in light of the available evidence, and preventing the Appellant from further substantiating his allegations, the Trial Chamber should have either held an evidentiary hearing or directed the Appellant to present his evidence during the course of the trial.

31. However, the Appeals Chamber observes that the Impugned Decision was not only grounded on findings of fact, but also on considerations of the applicable law. The Appeals Chamber will now turn to consider whether the conclusions reached by the Trial Chamber can be upheld regardless of the Trial Chamber's findings of fact. In particular, the Appeals Chamber will consider (i) whether the jurisdiction of the Tribunal can be limited solely by means of UNSC resolution; (ii) whether the Tribunal would be bound if the alleged Agreement were concluded on behalf of the Prosecution; and (iii) whether the alleged Agreement would prevent the Tribunal from exercising jurisdiction pursuant to the doctrine of abuse of process. Should the Appeals Chamber find that the relief sought by the Appellant could not be warranted even if his allegations of fact were proven, it will dismiss the first ground of appeal as moot.

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[95] Impugned Decision, para 43.
[96] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR72, Decision on Notice of Appeal, 9 January 2003, p. 3; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, ("*Nikolić* Appeal Decision") para. 19; *Joseph Nzirorera v. The Prosecutor*, Case No. ICTR-98-44-AR72, Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on Validity of Appeal of Joseph Nzirorera Regarding Chapter VII of the Charter of the United Nations, 10 June 2004, paras 1,4,7-13.
[97] Impugned Decision, para. 44. *See also ibid.*, para. 41.

B. Whether the jurisdiction of the Tribunal can be limited solely by means of UNSC resolution

32. In the Impugned Decision, the Trial Chamber found unpersuasive the Appellant's argument that UNSC resolutions are not required to bind the Tribunal to an agreement limiting the jurisdiction of the Tribunal.[98] The Trial Chamber observed that the UNSC has the power to amend the Statute of the Tribunal and clarified that this includes any limitation of the Tribunal's jurisdiction.[99] It further recalled that in all instances when the jurisdiction of the Tribunal has been amended, the change has been achieved by means of UNSC resolution.[100]

33. In his Appeal, the Appellant submits that the non-existence of a UNSC resolution adopting the alleged Agreement "is an irrelevant consideration when determining whether the doctrine of apparent authority applies" as "a resolution would constitute actual authority".[101] The Prosecution responds that, contrary to the Appellant's submissions, the absence of a UNSC resolution is determinative in assessing whether the Appellant has been excluded from the jurisdiction of the Tribunal, as "[t]he only way to limit the Tribunal's jurisdiction –including *ratione personae*– is by UNSC resolution".[102] The Prosecution further notes that the UNSC has always acted by resolution or presidential statements in all matters directly concerning the Tribunal, including the establishment of the Tribunal, the appointment of the Prosecutor, the extension of judges' terms of office, and the definition of a completion strategy.[103] In his Reply, the Appellant contests that in the Impugned Decision the Trial Chamber clearly stated that a UNSC resolution would be indispensable for excluding the jurisdiction of the Tribunal over him.[104] He concedes however that, if accepted, this finding would be determinative of the appeal, and addresses the matter accordingly.[105] First, the Appellant argues that a UNSC resolution is not required when the Prosecution "decides not to prosecute someone, whether for cooperation, insufficient evidence, lack of senior position, ill health, or any other reason".[106] In the Appellant's view, this demonstrates that an agreement excluding a person from prosecution at the Tribunal would be enforceable without a resolution of the UNSC.[107] Second, the Appellant claims that, if the doctrine of apparent authority

[98] Impugned Decision, para. 58.
[99] Impugned Decision, para. 57.
[100] Impugned Decision, para. 58.
[101] Appeal, para. 43.
[102] Response, paras 6, 7-12.
[103] Response, para. 11.
[104] Reply, paras 2-3.
[105] Reply, para. 4.
[106] Reply, para. 5.
[107] *Id.*

were to be considered applicable, a resolution by the UNSC would not be necessary by definition.[108]

34. The Appeals Chamber recalls that the UNSC, acting under Chapter VII of the UN Charter, has adopted the Statute by means of resolution and established the Tribunal as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.[109] The Statute, as the constitutive instrument of the Tribunal, defines the scope and limits of the Tribunal's substantive jurisdiction.[110] In particular, Articles 1 to 9 of the Statute define the Tribunal's jurisdiction *ratione materiae*, *personae, loci* and *temporis*. Article 1 of the Statute 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". There is no provision of the Statute which excludes any specific individual from the jurisdiction of the Tribunal.

35. The Appeals Chamber considers that the Statute of the Tribunal can only be amended or derogated by means of UNSC resolution. This plainly derives from the *actus contrarius* doctrine, is established in the jurisprudence of the Tribunal,[111] and is confirmed by the practice of the UNSC.[112]

36. As the ambit of the Tribunal's primary jurisdiction is defined in the Statute, it follows that the only basis for limiting or amending the Tribunal's jurisdiction is a UNSC resolution. Therefore,

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[108] Reply, para. 6.

[109] UNSC Resolution 808, S/RES/808(1992), 22 February 1993. *See also, Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*"Tadić* Decision on Jurisdiction"), paras 37-38; *Prosecutor v. Momčilo Krajišnik,* Case No. IT-00-39-AR73.2, Decision on Krajišnik's Appeal Against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling that Judge Canivell is Unable to Continue Sitting in This Case, 15 September 2006, (*"Krajišnik* Decision"), para. 15.

[110] For the distinction between the notions of "substantive" and "inherent" jurisdiction, *see Tadić* Decision on Jurisdiction, para. 14.

[111] *See Krajišnik* Decision, where the Appeals Chamber considered that a UNSC resolution is necessary for altering the norms contained in the Statute. In this instance Krajišnik argued that *ad litem* Judge Canivell should not continue sitting in his case; paras 1, 4. Although Judge Canivell's four-year mandate was due to expire, the UNSC Resolution 1581/2005 of 18 January 2005 and the General Assembly by its 20 January 2005 Decision decided that Judge Canivell could finish the case to which he was assigned before the expiry of his term of office; para. 5. When it became clear that the case could not be completed before the expiration of Judge Canivell's cumulative three-year term, the Security Council further adopted Resolution 1668/2006 which confirmed that Judge Canivell could continue to sit on the case; para. 6. In dismissing the appeal, the Appeals Chamber noted that the Security Council is not required to amend the Tribunal's Statute in order to reflect all of its resolutions; para. 17. The Appeals Chamber held that the Security Council can address an administrative matter either by amending the Statute or simply adopting a resolution; para. 17. The Appeals Chamber further considered the UNSC Resolution 1668/2006 was directed to administrative matters and did not interfere with the Tribunal's judicial function; para. 16. In other words, the Appeals Chamber distinguished between the matters interfering within the Tribunal's judicial functions and those of a mere administrative character. The Appeals Chamber clearly stressed that in case of the latter, the UNSC can address such an issue by either formal amendment of the Statute or merely by way of issuing a resolution. It follows that the form of UNSC resolution is in any event indispensable for ruling on matters disciplined by the Statute. The Appeals Chamber further observes that the issue of jurisdiction is not merely an administrative matter.

[112] The UNSC has always acted by resolution when intervening in matters addressed in the Statute. *See* UNSC Resolution 827, S/RES/827, 25 May 1993 (establishing the Tribunal); UNSC Resolution 1534, S/RES/1534, 26 March 2005, para. 5 (calling on the Prosecution to focus on the most senior leaders responsible for crimes within the Tribunal's jurisdiction); UNSC Resolution 1786, S/RES/1786, 28 November 2007 (appointing the Prosecutor); UNSC Resolution 1837, S/RES/1837, 29 September 2008 (extending terms of office of Judges).

contrary to what the Trial Chamber appears to concede,[113] the mere involvement of the UNSC in concluding the alleged Agreement, without a ratification of the alleged Agreement by a UNSC resolution, could not limit the jurisdiction of the Tribunal. The Appeals Chamber notes that there is no UNSC resolution excluding the Appellant from the ambit the Tribunal's jurisdiction.

37. In light of the foregoing, the Appeals Chamber finds that under no circumstance would the alleged Agreement in and of itself, even if its existence was proved, limit the jurisdiction of the Tribunal.

38. The Appellant's argument that the applicability of the doctrine of apparent authority would prove that no UNSC resolution is necessary to amend the jurisdiction of the Tribunal is misplaced. As explained above, in the absence of a UNSC resolution, the alleged Agreement could not have any impact on the Tribunal's jurisdiction, even if it were made with the *actual* authority of the UNSC. *A fortiori*, even if one considered that the alleged Agreement was made with the apparent authority of the UNSC could not affect in any event the ambit of the Tribunal's jurisdiction. In his submissions, the Appellant attempts to rely on analogy with jurisdictional matters in international criminal law a theory typical of contract law protecting the legitimate expectations of a contracting party believing without fault that a contract was validly concluded with a legitimate representative of the other party.[114] However, the Appellant ignores that one of the requirements for applying a doctrine by analogy is the existence of an *eadem ratio*, that is, the existence of sufficient similarities between two cases. The field of contract law is so distant from the question of jurisdiction in international criminal law that the two are effectively incomparable. Jurisdiction of criminal courts is not a negotiable matter. The power of a court to decide a criminal matter is defined by law rather than private contracting parties, and thus the expectation of a party on the validity of an agreement on criminal jurisdiction cannot have any impact on jurisdiction. The Appeals Chamber considers that the Appellant's submissions on apparent authority fall more squarely under the question of the applicability of the doctrine of abuse of process.[115]

39. Additionally, the Appeals Chamber considers that the Appellant is not advancing an argument concerning the scope of the Tribunal's jurisdiction when he claims that the Prosecution's discretion not to prosecute an individual demonstrates that no UNSC resolution is necessary in

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[113] *See, e.g.* Impugned Decision, para. 61, where the Trial Chamber observes that "there is no evidence that the UNSC was involved directly in the making or implementation of the Agreement"; *see also ibid,* para. 62, where the Trial Chamber assumes "for the sake of argument that [...] the UNSC can limit its jurisdiction by entering into immunity agreements through its agents and without the knowledge of the representatives of the Tribunal or without passing a resolution affirming such agreements" (emphasis omitted).
[114] Appeal, para. 44; Reply, paras 10-11.
[115] *Infra,* Section D.

order to limit the jurisdiction of the Tribunal.[116] The Appellant confuses the two distinct notions of jurisdiction and prosecutorial discretion. The scope of the substantive jurisdiction of the Tribunal is entirely contingent upon the constitutive instrument of the Tribunal itself, that is, its Statute. On a different level, in systems of criminal law not based on the rule of compulsory prosecution, like that of the Tribunal, prosecutors possess the discretion not to bring before the court cases that theoretically fall within the court's jurisdiction. In other words, the fact that the Prosecution may decide not to prosecute an individual does not necessarily mean that, had the Prosecution decided to prosecute that individual, the Tribunal would not have jurisdiction over him or her. Jurisdiction and prosecutorial discretion are two independent issues.

C. Whether the Tribunal would be bound if the alleged Agreement were concluded on behalf of the Prosecution

40. In the Impugned Decision, the Trial Chamber observed that, at the time when the alleged Agreement was concluded, there was already an indictment in force against the Appellant.[117] The Trial Chamber recalled in this respect that, pursuant to Rule 51 of the Rules, the Prosecution may withdraw an indictment against an accused, after the indictment has been confirmed, only with the leave of a Judge or a Trial Chamber.[118]

41. The Appeals Chamber considers that, as a logical consequence of the two premises above, it follows that the alleged Agreement could not bind the Tribunal even if it were to be attributed to the Prosecution. The Appeals Chamber recalls that, while "[i]t is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments",[119] this discretion is not unlimited and must be exercised within the restrictions imposed by the Statute and the Rules.[120] Pursuant to the restrictions to the Prosecution's discretion provided by Rule 51 of the Rules, the Prosecution was not in a position, at the time of the alleged Agreement, to withdraw the indictment against the Appellant without the leave of a Judge of the Tribunal.[121] Consequently, even if the involvement of the Prosecution in the making of the alleged

[116] Reply, para. 5.
[117] Impugned Decision, para. 53.
[118] Impugned Decision, para. 52.
[119] *Prosecutor v. Zejnil Delalić et al.*, Case. No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 602.
[120] *Čelebići* Appeal Judgement, paras 602-603.
[121] At the time of the alleged Agreement, Rule 51(A) of the Rules read as follows: "[t]he Prosecutor may withdraw an indictment, without leave, at any time before its confirmation, but thereafter only with the leave of the Judge who confirmed it or, if at trial, only with the leave of the Trial Chamber"; UN Doc. IT/32/Rev. 8, 23 April 1995. The current version of Rule 51 of the Rules maintains the same requirements.

Agreement were proved, the alleged Agreement would not be binding on the Tribunal, as an indictment against the Appellant had already been confirmed at the time.[122]

D. Whether the alleged Agreement would prevent the Tribunal from exercising jurisdiction pursuant to the doctrine of abuse of process

42. In the Impugned Decision, the Trial Chamber considered that, even if the alleged Agreement existed, the abuse of process claim of the Appellant would be unsubstantiated.[123] First, the Trial Chamber considered that the alleged Agreement "would not affect any of the Accused's fair trial rights, including as a suspect or an accused".[124] Second, the Trial Chamber recalled its factual findings that Mr. Holbrooke did not act with actual or apparent authority of the UNSC, and on this basis observed that "he was essentially a third party, unconnected to the Tribunal, promising immunity years before the Accused's transfer to the Tribunal".[125] The Trial Chamber further noted an *obiter dictum* in the *Nikolić* Trial Decision,[126] according to which the Tribunal should not exercise its jurisdiction over persons who have been "seriously mistreated" by a party not acting for the Tribunal and before being handed over to the Tribunal.[127] Having observed that the *Nikolić* Trial Decision limited the notion of "serious mistreatment" to situations of torture or cruel or degrading treatment, the Trial Chamber considered that the Accused did not suffer any such mistreatment, nor "any other *egregious* violation of his rights, including his right to political activity".[128] Finally, the Trial Chamber expressed its position that "it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed".[129]

43. The Appellant argues that the Trial Chamber erred in law by applying a dual standard for abuse of process claims depending on whether the misconduct is carried out by Tribunal actors or non Tribunal actors.[130] The Appellant observes that the *Barayagwiza* Appeal Decision[131] clearly states that, under the abuse of process doctrine, it is irrelevant which entity was responsible for the alleged violations of an accused's rights.[132] According to the Appellant, the Trial Chamber relied

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[122] *Prosecutor v. Radovan Karadžić and Ratko Mladić,* Case No. IT-95-5-I, Indictment, 24 July 1995; *Prosecutor v. Radovan Karadžić and Ratko Mladić,* Case No. IT-95-18-I, Indictment, 15 November 1995.
[123] Impugned Decision, paras 80-88.
[124] Impugned Decision, para. 84.
[125] *Id.*
[126] *Prosecutor v. Nikolić,* Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002 ("*Nikolić* Trial Decision").
[127] Impugned Decision, para. 85.
[128] *Id.*
[129] *Id.*
[130] Appeal, paras 101, 112.
[131] *Jean-Bosco Barayagwiza v. The Prosecutor,* Case No. ICTR-97-19-AR72, Decision, 3 November 1999 ("*Barayagwiza* Appeal Decision").
[132] Appeal, para. 102.

instead on the *Nikolić* Trial Decision, which set an erroneous dual standard, limiting the relevance of the misconduct by a third party to a narrow range of acts akin to torture and cruel or degrading treatment.[133] He avers that such a differentiated standard would be particularly inappropriate for international tribunals as decentralized structures, where a number of unrelated actors often intervene in different stages of the proceedings such as investigations or enforcement.[134] The Appellant further claims that the abuse of process doctrine is a residual remedy empowering a court with the discretionary authority "to look at all the events that have led to the proceedings and decide, regardless of whom they are attributable, whether on the whole they breach the Accused's rights or contravene the Court's sense of justice".[135] Finally, the Appellant argues that the lapse of time between the alleged Agreement and the transfer of the Appellant to the Tribunal is an irrelevant factor within the framework of the abuse of process doctrine, and therefore the Trial Chamber should not have taken it into consideration.[136]

44. The Prosecution responds that the Trial Chamber's finding on the abuse of process issue is consistent with the jurisprudence of the Appeals Chamber, notably with the *Nikolić* Appeal Decision.[137] It further argues that the other submissions of the Appellant in this respect focus on peripheral matters, failing to show any error on the part of the Trial Chamber.[138] The Appellant reiterates his position in the Reply.[139]

45. As the parties note, the jurisprudence of the Tribunal has relied in several instances on the common law rooted doctrine of abuse of process.[140] In the *Barayagwiza* case, the Appeals Chamber recalled that under the doctrine of abuse of process "proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process".[141] The Appeals Chamber specified that the doctrine of abuse of process may be relied on by a court, as a matter of discretion, in two distinct situations: (i) where a fair trial for the accused is impossible, usually for reasons of delay; and (ii) 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.[142] The applicable standard was further clarified by stating that a court may discretionally decline to exercise

[133] Appeal, para. 103.
[134] Appeal, paras 108-11.
[135] Appeal, paras 106, 111 (emphasis omitted).
[136] Appeal, paras 48-50.
[137] Response, para. 46.
[138] Response, para. 47.
[139] Reply, paras 31-32.
[140] *Barayagwiza* Appeal Decision; *Jean-Bosco Barayagwiza v. The Prosecutor,* Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, ("*Barayagwiza* Review Decision"); *Nikolić* Appeal Decision.
[141] *Barayagwiza* Appeal Decision, para. 74.
[142] *Barayagwiza* Appeal Decision, paras 74, 77.

jurisdiction "where to exercise that jurisdiction in light of *serious and egregious violations of the accused's rights* would prove detrimental to the court's integrity".[143] The *Barayagwiza* Review Decision confirmed the applicable law on abuse of process as stated in the *Barayagwiza* Appeal Decision.[144]

46. In the *Nikolić* Appeal Decision, the Appeals Chamber contextualised the doctrine of abuse of process by the Tribunal in the following conceptual framework:

> Universally Condemned Offences[145] are a matter of concern to the international community as a whole. There is a legitimate expectation that those accused of these crimes will be brought to justice swiftly. Accountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts.[146]

It then considered how this legitimate expectation should be addressed in two distinct hypotheses, relevant to the case before it: (i) under what circumstances a violation of State sovereignty requires jurisdiction to be set aside, when the violation is brought about by the apprehension of fugitives from international justice;[147] and (ii) under what circumstances a human rights violation requires jurisdiction to be set aside.[148] As to the former question, the Appeals Chamber did not identify any hypothesis justifying that jurisdiction be set aside.[149] As to the latter, the Appeals Chamber considered that, apart from "exceptional cases" of serious violations of human rights, the remedy of setting aside jurisdiction will usually be disproportionate, as "the correct balance must be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law".[150]

47. The Appeal Chamber considers that the Appellant correctly submitted that the jurisprudence of the Appeals Chamber did not introduce a dual standard for the abuse of process doctrine, depending on the nature of the entity which carried out the alleged misconduct. The Appeals Chamber also notes however that, in addressing the Appellant's submission, the Trial Chamber adopted the common standard established by the Appeals Chamber in the *Barayagwiza* Decision and in the *Nikolić* Appeal Decision, and not a higher one, by considering whether the Appellant suffered a serious mistreatment or if there was any other egregious violation of his rights. The

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[143] *Barayagwiza* Appeal Decision, para. 74.
[144] *Barayagwiza* Review Decision, para. 51.
[145] For the definition of "Universally Condemned Offences", *see Nikolić* Appeal Decision, para. 24 referring to crimes such as genocide, crimes against humanity and war crimes "which are universally recognised and condemned as such".
[146] *Nikolić* Appeal Decision, para. 25.
[147] *Nikolić* Appeal Decision, paras 20-27.
[148] *Nikolić* Appeal Decision, paras 28-33.
[149] *Nikolić* Appeal Decision, para. 26.
[150] *Nikolić* Appeal Decision, para. 30.

jurisprudence of the Appeals Chamber does not allow the abuse of process doctrine to deploy a standard lower than this, irrespective of the author of the alleged misconduct.

48. However, the Appeals Chamber notes that the Trial Chamber's conclusions concerning the inapplicability of the doctrine of the abuse of process to the Appellant's case were based on the Trial Chamber's previous findings of fact that Mr. Holbrooke "was essentially a third party, unconnected to the Tribunal".[151] For the reasons discussed above regarding the absence of an evidentiary hearing,[152] the Appeals Chamber will evaluate whether the conclusions reached by the Trial Chamber on the doctrine of abuse of process can be upheld as a matter of law, regardless of factual findings concerning whether the alleged Agreement was concluded by a third party, unconnected to the Tribunal.

49. The Appeals Chamber recalls that the Appellant is charged with genocide, crimes against humanity and war crimes.[153] The public interest in the prosecution of an individual accused of such offences, universally condemned, is unquestionably strong. Against the legitimate interest of the international community in the prosecution of the Appellant for Universally Condemned Offences stands the alleged violation of the Appellant's expectation that he would not be prosecuted by the Tribunal, pursuant to the alleged Agreement.

50. The Appeals Chamber recalls in particular that, according to the Applicant's allegations, the Appellant resigned from all his positions in the Republika Srpska government in July 1996 and withdrew completely from public life in exchange for the promise made by Mr. Holbrooke that the Appellant would not be prosecuted before the Tribunal. The Applicant further alleges that Mr. Holbrooke was acting on behalf of either the UNSC or the Prosecution, or in the alternative that Mr. Holbrooke appeared to act with the authority of the UNSC or the ICTY.[154] In light of its previous findings that the jurisdiction of the Tribunal can only be limited by means of UNSC resolution,[155] and that any agreement entered by the Prosecution to withdraw an indictment after its confirmation could not be binding on the Tribunal, the Appeals Chamber considers that any alleged expectation of the Appellant not to be tried before the Tribunal would be grounded on a flawed reading of the applicable law.

51. The Appeals Chamber observes at the outset that none of the Appellant's allegations qualify as a situation making a fair trial impossible, pursuant to the first prong of the test set out in the

[151] Impugned Decision, para. 84.
[152] *Supra*, paras 24-31.
[153] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution's Third Amended Indictment, 27 February 2009.
[154] *Supra*, para. 5.
[155] *Supra*, paras 35-36.

Barayagwiza Decision.[156] The Appellant's allegations point instead to the second prong of the test set out in the *Barayagwiza* Decision.[157] In other words, the question before the Appeals Chamber is whether, assuming that the Appellant's factual submissions are accepted, proceeding with the trial of the Appellant would contravene to the Tribunal's sense of justice or would be detrimental to the Tribunal's integrity, due to pre-trial impropriety or misconduct amounting to serious and egregious violations of the Appellant's rights.

52. The Appeals Chamber recalls that one of the fundamental aims of international criminal courts and tribunals is to end impunity and ensure that serious violations of international humanitarian law are prosecuted and punished.[158] Individuals accused of such crimes can have no legitimate expectation of immunity from prosecution. The Appeals Chamber considers that the facts that allegedly gave rise to the Appellant's expectations of impunity do not constitute an exception to this rule.

53. In light of the foregoing, the Appeals Chamber considers that the Appellant's allegations, even if proved, would not trigger the doctrine of abuse of process justifying a stay of the proceedings against the Appellant.

E. Conclusion

54. The Appeals Chamber finds that, even if the alleged Agreement were proved, it would not limit the jurisdiction of the Tribunal, it would not otherwise be binding on the Tribunal and it would not trigger the doctrine of abuse of process. As the conclusions reached in the Impugned Decisions are upheld as a matter of law, the Appeals Chamber dismisses the Appellant's first ground of appeal as moot. For analogous reasons, the Appeals Chamber dismisses the Appellant's remaining grounds of appeal,[159] as they challenge the Trial Chamber's findings of fact, which the Appeals Chamber did not take into consideration in the context of the present Decision.

55. The Appeals Chamber emphasises that the present Decision does not impact the Appellant's right to present at trial evidence supporting the allegations submitted in his Motion, as such allegations could be considered for the purpose of sentencing, if appropriate.

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[156] *Supra*, para. 45(i).
[157] *Supra*, para. 45(ii).
[158] The UNSC Resolution establishing the Tribunal expressed a determination "to put an end to [flagrant violations of international humanitarian law] and to take effective measures to bring to justice the persons who are responsible for them"; UNSC Resolution 827 (1993), 25 May 1993; see also Rome Statute Preamble, which affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" and further emphasises the determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".
[159] *Supra*, para. 20(B)(C)(D)(E).

F. Motions related to the Appeal

56. Both in his Reply and in his Motion for Delay, the Appellant requested that the Appeals Chamber delay its decision on the Appeal until the Appellant obtained additional evidence to be submitted before the Appeals Chamber pursuant to Rule 115 of the Rules.[160] In its Request for Leave to File a Sur-Reply and Sur-Reply, the Prosecution requested the Appeals Chamber's leave to file a submission opposing such a request.[161] Considering that the Appellant filed his Rule 115 Motion prior to the rendering of the present Decision, the Appeals Chamber dismisses the Appellant's requests to delay the Appeals Chamber's decision on the Appeal and the Prosecution's Request for Leave to File a Sur-Reply as moot.

57. Having dismissed the Appeal as a matter of law, the Appeals Chamber further dismisses the Appellant's First Rule 115 Motion and Second Rule 115 Motion as moot.

V. DISPOSITION

58. For the foregoing reasons, the Appeals Chamber

DISMISSES the Appeal in its entirety; and

DISMISSES the Motion for Delay, the First Rule 115 Motion, the Second Rule 115 Motion and the Prosecution's Motion to File a Sur-Reply and Sur-Reply as moot.

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

Done this 12th day of October 2009,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

[160] Reply, para. 30; Motion for Delay, paras 1, 4.
[161] Prosecution Motion to File Sur-Reply and Sur-Reply, para. 6.