



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: 9 April 2009

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Decision of: 9 April 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED MOTION FOR INTERVIEW OF DEFENCE WITNESS
AND THIRD MOTION FOR DISCLOSURE**

Office of the Prosecutor

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

The Accused

Mr. Radovan Karadžić

THIS TRIAL 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 (“Tribunal”) is seised of a Motion for Interview of Defence Witness, filed by the Accused on 11 December 2008 (“Motion for Interview”), and a Third Motion for Disclosure: Holbrooke Agreement, filed by the Accused on 4 February 2009 (“Motion for Disclosure”), and hereby renders its decision thereon.

I. Background and Submissions

1. Both the Motion for Interview and the Motion for Disclosure (“Motions”) are related to the issue of the alleged agreement in 1996 between the Accused and U.S. Ambassador Richard Holbrooke that the former would withdraw from public life in exchange for immunity from prosecution by this Tribunal, and the related contention that the present proceedings amount to an abuse of process, both of which have been raised on a number of occasions by the Accused since his arrest and transfer to The Hague. It is for this reason that the Chamber issues its decision on the Motions together. In addition, the Chamber suspended its consideration of the Motions until after the issuance of the Appeals Chamber decision pertaining to the Accused’s “Motion for Inspection and Disclosure: Holbrooke Agreement”, filed on 6 November 2008 (“Motion for Inspection and Disclosure”), and this Chamber’s partial denial thereof on 17 December 2008 (“Decision of 17 December 2008”).¹ That decision was issued on 6 April 2009, dismissing the appeal brought by the Accused.²

2. The Accused has indicated his intention to file a preliminary motion challenging jurisdiction on the basis of the alleged immunity agreement, and has sought, and been granted, an extension of the normal time limit for the filing of preliminary motions for this purpose.³ The Chamber indicated at the Status Conference held on 2 April 2009 that it would set the new deadline for the filing of this preliminary motion following the issuance of the above-mentioned Appeals Chamber decision.⁴

3. In the Motion for Interview, the Accused requests the Chamber to order the Tribunal’s Registry to provide transportation for “defence witness” Alexa Buha (“Witness”) to The Hague, so that the Accused can interview him in relation to two matters. First, the Accused submits that the

¹ Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008.

² Decision on Appellant Radovan Karadžić’s Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009.

³ Motion for Extension of Time – The Holbrooke Agreement Motion, 23 March 2009; Decision in Respect of Motion for Extension of Time, 30 March 2009.

⁴ T. 146 (2 April 2009), Status Conference.

Witness was present on 18 and 19 July 1996 during negotiations between representatives of the Republika Srpska and U.S. Ambassador Richard Holbrooke, which led to the alleged immunity agreement. Second, the Accused states that the Witness has detailed and valuable information about the events alleged in the Indictment. He states that on 28 November 2008 the Registry denied his request for the transportation of the Witness to The Hague and submits that this denial raises an issue affecting his right to a fair trial.⁵

4. On 24 December 2008, the Registry filed a "Submission Pursuant to Rule 33(B) of the Rules Regarding the Accused's motion for Interview of Defence Witness" ("Registry Submission"), asserting that the Accused had misrepresented the position of the Registry on this matter, and that he had not been denied the right to meet potential witnesses. The Office of the Prosecutor ("Prosecution") has not responded to the Motion for Interview.

5. On 12 January 2009, the Accused filed a "Motion for Leave to Reply to Registry Submission on Motion for Interview of Defence Witness", containing the substance of the proposed Reply, which does not raise any new arguments to those contained in the Motion for Interview.

6. In the Motion for Disclosure, the Accused, pursuant to Rule 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), "seeks an order from the Trial Chamber applying the uncontested portion of the Trial Chamber's [Decision of 17 December 2008] that evidence of the existence of an agreement by which [the Accused] relinquished his posts and withdrew from public life in exchange for a promise that he would not be prosecuted at the ICTY is exculpatory material which must be disclosed pursuant to Rule 68".⁶ He submits that "[t]he Trial Chamber has determined that the existence of the agreement ... may be relevant to [the Accused's eventual] sentencing. Evidence of the existence of the agreement is not limited to notes and recordings of the meeting. The existence of the agreement may also be proven by other evidence".⁷

7. The Accused states that he requested three categories of items from the Prosecution by letter on 12 January 2009,⁸ all of which were refused by the Prosecution on 16 January 2009.⁹ The Accused therefore moves the Chamber for an order pursuant to Rule 68 requiring the Prosecution

⁵ Motion for Interview, paras 6, 8.

⁶ Motion for Disclosure, para. 6.

⁷ Motion for Disclosure, para. 9.

⁸ Motion for Disclosure, Annex A, p. 6.

⁹ Motion for Disclosure, Annex B, p. 9

to disclose two categories of items which he believes “would tend to establish the existence of this agreement”, and to search for and disclose material in a third residual category, as follows:¹⁰

- (a) “The transcript or report of a meeting between Louise Arbour and General Wesley Clark at NATO headquarters in which Clark referred to the existence of an agreement by which [the Accused] would never end up in The Hague”.¹¹ In a footnote, the Accused cites “an interview with former OTP spokesperson Florence Hartmann on 11 October 2007, entitled ‘Behind the Curtains of International Justice’ [in which] the following was said:

“SA: In your book you also talk about the meeting between Wesley Clark and Louise Arbour at NATO’s headquarters during which they were discussing Karadžić’s surrender and Wesley Clark was supposed to say that if Karadžić was brought to justice he would allege a deal with Warren Christopher that Karadžić would never end up in The Hague ...

“[FH:] ... I have the transcript of that conversation and Wesley Clark did say exactly what I quoted in my book and it has been certified by those from the ICTY at the meeting”.¹²

The Accused submits that this interview “tends to establish the existence of an agreement” because Wesley Clark “purportedly confirmed to the OTP the existence of this agreement even before [the Accused] was arrested”.¹³

- (b) “All statements or reports of interviews of Biljana Plavšić in which she was asked or spoke about the existence of an agreement by which [the Accused] would never end up in The Hague or the circumstances of [his] resignation in July 1996”.¹⁴ In a footnote, the Accused states “Ms. Plavšić is a signatory to the written agreement which resulted from those negotiations and is known to have been interviewed by the Prosecution”.¹⁵
- (c) “Any other items in the possession of the OTP which tend to support the contention that Richard Holbrooke represented that [the Accused] would not be arrested and prosecuted during the meeting of 18–19 July 1996”.¹⁶

¹⁰ Motion for Disclosure, paras 7, 11.

¹¹ Motion for Disclosure, para. 1.1.

¹² Motion for Disclosure, para. 1.1, footnote 1. The Chamber notes that Warren Christopher was the U.S. Secretary of State in 1996.

¹³ Motion for Disclosure, para. 7.

¹⁴ Motion for Disclosure, para. 1.2.

¹⁵ Motion for Disclosure, para. 1.2.

¹⁶ Motion for Disclosure, para. 1.3.

8. On 16 February 2009 the Prosecution filed its Response to Karadžić's "Third Motion for Disclosure: Holbrooke Agreement" ("Response"), arguing that the Motion should be dismissed.¹⁷ The Prosecution avers that "the Trial Chamber has already specified the Prosecution's Rule 68 ... disclosure obligations in relation to the alleged Holbrooke agreement", that "the Prosecution has complied with them", and that, in any event, "none of the items listed in the ... Motion fall within the ambit of the Prosecution's disclosure obligations".¹⁸ The Prosecution notes that the Chamber, in its Decision of 17 December 2008, "narrowly restricted the ambit of Rule 68 disclosure in relation to the alleged agreement",¹⁹ and that its ruling limiting the relevance of such an agreement to the mitigation of any potential sentence "stands unless it is overturned on appeal".²⁰

II. Applicable law

9. It is established jurisprudence that a Trial Chamber may intervene in a matter that is within the primary competence of the Registry where that matter goes to the fairness of the trial.²¹

10. In *Prosecutor v. Kvočka et al.*, the Appeals Chamber set out the standard, deriving from "general principles of law", for review by a Trial Chamber of a decision of the Registry. According to this standard, an administrative decision will be quashed if the Registry, in making the decision:

- (a) has failed to comply with the requirements of the relevant legal authorities; or
- (b) has failed to observe the basic rules of natural justice and procedural fairness towards the person affected by the decision; or
- (c) has taken into account irrelevant material or failed to take into account relevant material; or
- (d) has reached a conclusion that is unreasonable, in the sense that it is a conclusion which no sensible person who has properly applied his mind to the issue could have reached.²²

¹⁷ Response, para. 1.

¹⁸ Response, para. 1.

¹⁹ Response, para. 3.

²⁰ Response, para. 4.

²¹ *Prosecutor v. Delalić et al.*, Order on Esad Landžo's Motion for Expedited Consideration, Case No. IT-96-21-A, 15 September 1999, cited by the Appeals Chamber in *Prosecutor v. Blagojević*, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, Case No. IT-02-60-AR73.4, 7 November 2004; see also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Concerning Court-Assigned Counsel's Terms of Engagement, 8 April 2005, p. 4.

²² *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigic", 7 February 2003 ("*Kvočka et al.* Appeal Decision"), para. 13.

11. The person seeking review bears the onus of persuading the Trial Chamber conducting the review both “(a) that an error of the nature described has occurred, and (b) that such error has significantly affected the Registrar’s decision to his detriment”.²³
12. Rule 68(i) of the Rules, subject to the provisions of Rule 70, places an independent obligation upon the Prosecution to disclose to the defence, “as soon as practicable ... any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”.
13. The Prosecution’s obligation under Rule 68 is one of its most onerous responsibilities, and has been considered as important as the obligation to prosecute.²⁴ The Prosecution must, within its own discretion, make a fact-based assessment as to whether any materials in its possession are exculpatory as to the accused, and must expeditiously disclose any such materials.²⁵ The general practice of the Tribunal has been to respect the Prosecution’s execution of this function in good faith.²⁶
14. Nevertheless, if the defence believes that the Prosecution has not complied with Rule 68, it may make a submission to the Trial Chamber alleging a breach of the Rule, and requesting an order compelling disclosure thereunder. An order of this type should only be contemplated where the defence can satisfy the Trial Chamber that the Prosecution has failed to meet its obligations under Rule 68.²⁷
15. The Appeals Chamber has held that, to warrant such an order, the defence must:
- a. identify specifically the materials sought;
 - b. provide *prima facie* proof of the likelihood that the materials are in the custody or control of the Prosecution; and

²³ *Kvočka et al.* Appeal Decision, para. 14.

²⁴ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 (“*Blaškić* Appeal Judgement”), para. 264; *Prosecutor v. Kordić and Čerkez*, Case No. IT-65-14/2-A, Appeal Judgement, 17 December 2004 (“*Kordić* Appeal Judgement”), para. 183; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (“*Brđanin* Decision”), p. 3.

²⁵ *Blaškić* Appeal Judgement, para. 264; *Kordić* Appeal Judgement, para. 183; *Brđanin* Decision, p. 3; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 34; *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 (“*Karemera* Decision”), para. 9.

²⁶ *Kordić* Appeal Judgement, para. 183; *Prosecutor v. Blaškić*, 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 September 2000 (“*Blaškić* Decision”), para. 45.

²⁷ *Blaškić* Decision, para. 50.2; *Brđanin* Decision, p. 3.

- c. provide *prima facie* proof of the likelihood that the materials are exculpatory or would mitigate the guilt of the accused.²⁸

16. As to the standard for determining the exculpatory nature of material, the Appeals Chamber held as follows in the *Krstić* Judgement: “material to be disclosed under Rule 68 is not restricted to material which is in a form which would be admissible in evidence. Rather, it includes all information which in any way tends to suggest the innocence or mitigate the guilt of an accused or may affect the credibility of Prosecution evidence, as well as material which may put an accused on notice that such material exists”.²⁹

III. Discussion

A. Motion for Interview

17. As a preliminary matter, the Chamber reminds the Accused that there is no right to reply to a submission made by the Registry pursuant to Rule 33(B), and that leave to reply to a response to a motion, under Rule 126 *bis*, is at the discretion of the Chamber. This Chamber will only grant leave to reply in exceptional cases, when it considers that a reply is warranted, and will not take into account replies that merely reiterate arguments made in the initial motion or application. Since the proposed Reply adds nothing material to the Motion, leave is refused.

18. The Registry’s position is that it does not pay for the travel expenses of potential defence witnesses to The Hague at this stage of the proceedings. The Registry submits that this position does not amount to a denial of access to the Witness, but rather that the Accused’s request is premature and he has several other means at his disposal of contacting the Witness and gathering any necessary information from him.³⁰

19. In the Decision of 17 December 2008, the Chamber found that any agreement of the nature claimed by the Accused between him and U.S. Ambassador Richard Holbrooke is only material to the preparation of his defence insofar as it is potentially relevant to the determination of any sentence imposed upon him.³¹ In the same Decision, the Chamber noted that “neither its own mandate nor that of the Prosecutor is affected by any alleged undertaking made by Mr. Holbrooke.”³² Therefore, insofar as the Accused seeks to interview the Witness in relation to the

²⁸ *Blaškić* Appeal Judgement, para. 268; *Kordić* Appeal Judgement, para. 179; *Brđanin* Decision, p. 3; *Karemera* Decision, para. 9.

²⁹ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004, para. 178 (footnotes omitted).

³⁰ Registry Submission, para. 5.

³¹ Decision of 17 December 2008, para. 23.

³² Decision of 18 December 2008, para. 25.

existence of the alleged agreement, any information given by the Witness with regard to it could only potentially be relevant to the issue of sentencing.

20. The Victims and Witnesses Section of the Registry (“VWS”) is ordinarily responsible for making the necessary travel arrangements for both Prosecution and Defence witnesses who are being brought to The Hague to testify either to matters of guilt or innocence, or to matters relevant to sentencing. When the Accused submits his list of witnesses pursuant to Rule 65 *ter*(G) of the Rules, the VWS will then be in a position to begin the process of arranging their travel to, and stay in, The Hague for the period necessary to prepare for and give their evidence. Thus, should the Accused wish to bring the Witness to testify at trial in relation to the alleged immunity agreement and/or the matters alleged in the Indictment, he should include his name on the Rule 65 *ter*(G) list to be filed in due course. The Chamber does not consider that the Accused’s fair trial rights are affected by the Registry’s refusal to arrange for and fund the travel of the Witness to The Hague at this stage of the proceedings, nor have the standards for judicial review of an administrative decision of the Registrar been met.

B. Motion for Disclosure

21. Each of the three categories of documents sought by the Accused in the Motion for Disclosure relate either to material that might suggest the existence of the alleged immunity agreement between the Accused and Mr. Holbrooke, or to the content of that agreement. In its Response, the Prosecution takes the position that none of this material falls within its Rule 68 disclosure obligations, as set out by the Chamber in the Decision of 17 December 2008, as that Decision ordered disclosure only of the agreement itself, and of notes or recordings of the meeting at which it was made, if in the possession of the Prosecution.

22. However, the reason for the denial of the Accused’s request for an order compelling disclosure of a range of material, in the Decision of 17 December 2008, was that he had failed to identify that material with sufficient specificity. This does not suggest that, should the Accused sufficiently identify other material that indicates the existence of the alleged agreement, this material could not also fall within the Prosecution’s Rule 68 disclosure obligations, as that material would also be potentially relevant to the issue of sentencing.

23. The Chamber will therefore consider the three categories of documents sought by the Accused in the Motion for Disclosure in light of the test set out by the Appeals Chamber for an order compelling disclosure under Rule 68.

24. Regarding the materials requested under sub-paragraph 7(a) above, i.e. the transcript or report of a meeting between former Tribunal Prosecutor Louise Arbour and General Wesley Clark at NATO headquarters in which Clark referred to the existence of an alleged agreement between the Accused and Warren Christopher, the Chamber considers that the Accused has described with sufficient specificity the material sought, and that, consequently, this category of materials meets the specificity test. With regard to the requirement that the Accused provide *prima facie* proof of the likelihood that the referred materials are in the custody or control of the Prosecution, the Chamber notes that the Motion for Disclosure refers to an interview with the former Prosecution spokesperson, Florence Hartmann, in which the meeting and comments made by Clark at it, are discussed. Ms. Hartmann claims to have a transcript of the meeting and that “it has been certified by those from the ICTY present at the meeting.”³³ Despite these claims by one of its former employees, the Prosecution has not stated in its Response, whether or not it has the transcript referred to. Rather, it simply asserts that it has met its Rule 68 disclosure obligations and that any other materials relating to the alleged agreement do not fall within such obligations, as discussed above. In these circumstances, the Trial Chamber is satisfied that there is *prima facie* proof of the likelihood that the Prosecution has the transcript or report referred to by the Accused.

25. With regard to the requirement that the Accused provide *prima facie* proof of the likelihood that the requested material is exculpatory or mitigating, the Chamber notes once again its determination that the existence of the alleged immunity agreement could be potentially relevant to the issue of sentencing. Thus, a transcript or recording of a meeting in which the alleged agreement is referred to should be considered as evidence that might mitigate the guilt of the Accused. The Chamber therefore considers that the third prong of the test for an order compelling Rule 68 disclosure is also met with regard to the first category of material sought by the Accused.

26. Regarding the materials requested under sub-paragraph 7(b) above, i.e. statements or reports of interviews of Biljana Plavšić in which she addresses the existence of an agreement by which the Accused would not be prosecuted, the Chamber notes that the Prosecution has agreed to disclose to the Accused “transcripts of all OTP interviews and ICTY testimony of Biljana Plavšić, as they contain material that falls within Rule 68 of the Rules. . .”³⁴ Although the Prosecution has specifically stated that it “will not actively search for and disclose any statements of Biljana Plavšić addressing the alleged Holbrooke agreement”,³⁵ the Accused could conduct specific searches within the materials’ contents, as he deems relevant for his case. Thus, without addressing the

³³ Motion for Disclosure, footnote 1.

³⁴ Response, para. 8.

³⁵ *Ibid.*

question of whether the three-prong test for an order compelling Rule 68 disclosure has been met, since the Prosecution has already disclosed, or is in the process of disclosing, to the Accused all transcripts of interviews with, and testimony from, Biljana Plavšić, the Accused's request in relation to this category of documents is now moot.

27. The third category of material referred to by the Accused and described in sub-paragraph 7(c) above, refers to *any* items in the possession of the Prosecution supporting the Accused's contention that U.S. Ambassador Richard Holbrooke represented to him that he would not be arrested and prosecuted during the July 1996 meeting. This general request is similarly lacking in specificity to the description of items sought in the Accused's earlier Motion for Inspection and Disclosure that were denied by the Chamber in its Decision of 17 December 2008. Insofar as the request might be considered to include the alleged agreement itself and any notes or recordings of the meeting at which it was allegedly made, the Prosecution has already informed the Accused that it has conducted a specific search to determine whether it is in possession of these documents, and that no such items were identified.³⁶ The Chamber therefore considers that the three prong test for an order compelling Rule 68 disclosure has not been met with regard to this category of material sought by the Accused

IV. Disposition

28. Accordingly, the Trial Chamber, pursuant to Rules 54 and 68 of the Rules, hereby:

(a) **DENIES** leave to Reply to the Registry Submission;

(b) **DENIES** the Motion for Interview;

(c) **ORDERS** the Prosecution to disclose to the Accused any transcript or report of a meeting between Louise Arbour and General Wesley Clark at NATO headquarters in which Clark referred to the existence of an agreement by which the Accused would not be prosecuted by this Tribunal, which are within the custody or control of the Prosecution, or to file notice that it has no such material;

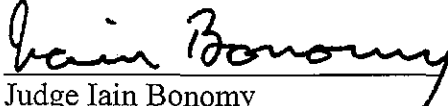
(d) **ORDERS** the Prosecution to confirm that it has disclosed to the Accused all transcripts of Prosecution interviews with Biljana Plavšić and of her testimony before this Tribunal;

(e) **DENIES** the Motion for Disclosure in all other respects; and

³⁶ Letter from Senior Trial Attorney to Radovan Karadžić dated 2 January 2009, filed 15 January 2009.

(f) **ORDERS** the Accused to file his preliminary motion challenging jurisdiction on the basis of the alleged immunity agreement by 23 April 2009.

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


Judge Iain Bonomy
Presiding

Dated this ninth day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]