



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-T

Date: 26 February 2014

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 26 February 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ADMISSION OF INFORMATION RELATING TO SENTENCING

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 the “Submission of Evidence Related to Sentencing: Holbrooke Agreement” filed on 8 January 2014 (“Holbrooke Submission”) and “Submission of Evidence Related to Sentencing: Good Behaviour in Detention” filed on 23 January 2014 (“Behaviour Submission”), and hereby issues its decision thereon.

I. Background and Submissions

1. Back in 2009, during the pre-trial stage of this case, the Accused attempted, and ultimately failed, to challenge the jurisdiction of this Tribunal to try him. The basis of that challenge was an agreement he had allegedly made with Richard Holbrooke, a representative of the United States of America, according to which he would be immune from prosecution by the Tribunal if he agreed to withdraw from public life (“Holbrooke Agreement”). The Pre-trial Chamber decided that, even if it existed, the Holbrooke Agreement was not binding on the Tribunal nor did it affect its jurisdiction to try the Accused for the crimes alleged in the Third Amended Indictment.¹ Having dismissed the Accused’s motion, the Pre-trial Chamber noted the following:

The Chamber is aware that the Accused is currently in the process of obtaining further information from Carl Bildt and the UN on this issue. Indeed, the Accused’s legal advisor is scheduled to meet with Carl Bildt on 14 July, and soon thereafter, with the representatives of the UN. The Chamber is of the view that these meetings should take place despite the issuance of this decision, as the information obtained therein may be relevant to any eventual appeal and any eventual sentence.²

2. The Appeals Chamber later upheld the Pre-trial Chamber’s decision on the binding nature of the Holbrooke Agreement, noting that:

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 the Motion, as such allegations could be considered for the purpose of sentencing, if appropriate.³

¹ Decision on the Accused’s Holbrooke Agreement Motion, 8 July 2009 (“Holbrooke Trial Decision”), paras. 49–89.

² Holbrooke Trial Decision, para. 90.

³ Decision on Karadžić’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement, 12 October 2009, paras. 54–55.

3. On 17 December 2013, the Chamber ordered that the Accused present evidence related to sentencing, if any, within the time allocated to him for his defence case.⁴ As a result, the Accused filed, pursuant to Rule 85(A)(vi) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Holbrooke Submission, arguing that given the limited amount of time he has left for the presentation of his case, the Chamber should admit into evidence a number of documents which relate to the issue of the Holbrooke Agreement.⁵ He lists 14 documents in total ("Material"). Eleven of those are declarations⁶ by 12 different individuals⁷ recounting what they knew about the Holbrooke Agreement and/or why the Accused entered into it.⁸ Another one is "that portion of the Holbrooke Agreement that contained [the Accused's] undertaking" ("Undertaking").⁹ The remaining two documents are (i) an excerpt from a book by Charles Ingrao who investigated the existence of the Holbrooke Agreement¹⁰ and (ii) a 2008 press interview with Ambassador Muhamed Sacirbey, as well as what appears to be an article or a book chapter he wrote, wherein he outlines what he knew about the Holbrooke Agreement, and provides reasons as to why it was made ("Sacirbey Material").¹¹ In support of the relief sought, the Accused cites a decision from the *Krajišnik* case where the Trial Chamber held that written evidence relevant to sentencing could be submitted without meeting the formal requirements of Rule 92 *bis* of the Rules.¹² Should the Chamber believe, however, that compliance with Rule 92 *bis* of the Rules is required, the Accused requests that it nevertheless admit the Material provisionally, pending the completion of the certification requirements.¹³

4. On 16 January 2014, the Office of the Prosecutor ("Prosecution") filed the "Prosecution Response to Karadžić's Submission of Evidence Related to Sentencing: Holbrooke Agreement" ("Holbrooke Response") objecting to the admission of the Material with the exception of the Undertaking.¹⁴ The Prosecution argues that the fact that the Accused signed the Undertaking is not in dispute and may be relevant to sentencing.¹⁵ As for the remaining documents, to the extent that they describe the terms of the Undertaking, the Prosecution argues that they are

⁴ Hearing, T. 45214–45215 (17 December 2013).

⁵ Holbrooke Submission, paras. 2, 5–7.

⁶ These declarations have been uploaded to e-court under the following 65 *ter* numbers: 1D05915, 1D05921, 1D05926, 1D05927, 1D05928, 1D05929, 1D05931, 1D05932, 1D05935, 1D05936, and 1D20079.

⁷ One of the declarations, namely 1D05935, is a joint declaration by Walter Hein and Victor Ben-Cnaan. See Holbrooke Submission, para. 5.

⁸ Holbrooke Submission, paras. 5–6.

⁹ Holbrooke Submission, para. 7. The Undertaking has been uploaded to e-court as 1D05916.

¹⁰ Holbrooke Submission, para. 5. The excerpt of the Ingrao book has been uploaded to e-court as 1D05922.

¹¹ Holbrooke Submission, para. 5. This document has been uploaded to e-court as 1D05930.

¹² Holbrooke Submission, para. 3, citing to *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Defence Motion Pursuant to Rule 85(a)(iv) [*sic*], 24 August 2006, para. 9.

¹³ Holbrooke Submission, para. 9.

¹⁴ Holbrooke Response, para. 1.

¹⁵ Holbrooke Response, para. 2.

unnecessarily cumulative and repetitive, and to the extent that they address the existence of the Holbrooke Agreement they are not capable of mitigating the sentence and thus are not admissible under Rule 85(A)(vi).¹⁶ In fact, according to the Prosecution, the remaining documents “undercut the mitigating effect of the Undertaking itself” as they suggest that the Accused entered into the Holbrooke Agreement in the belief that he would obtain a personal benefit.¹⁷

5. In the Behaviour Submission the Accused offers for admission, also pursuant to Rule 85(A)(vi), a letter from the commander of the United Nations Detention Unit attesting to his good behaviour in detention (“UNDU Letter”).¹⁸ In support, the Accused submits that good behaviour in detention is a mitigating circumstance that is relevant to the issue of sentencing, should there be a conviction.¹⁹

6. On 23 January 2014, the Prosecution informed the Chamber and the Accused, via email, that it would not be responding to the Behaviour Submission.

7. On 14 February 2014, the Chamber ordered the Accused to file a supplemental submission in relation to the Holbrooke Submission and explain further how the Material is relevant to sentencing and/or mitigation of sentence.²⁰ As a result, on 17 February 2014, the Accused filed the “Supplement to Submission of Evidence Related to Sentencing: Holbrooke Agreement” (“Supplemental Submission”), whereby he explains that the Material is capable of mitigating his sentence because it goes to (i) his conduct and character after the conflict, such as stepping down from the office and furthering peace in the region, and (ii) the violation of his rights due to his reliance on the Holbrooke Agreement, which the Tribunal has failed to honour.²¹

¹⁶ Holbrooke Response, para. 3.

¹⁷ Holbrooke Response, para. 4.

¹⁸ Behaviour Submission, paras. 5–6. The letter has been uploaded to e-court as 1D09628.

¹⁹ Behaviour Submission, para. 4.

²⁰ T. 47078 (14 February 2014).

²¹ Supplemental Submission, paras. 2–8.

II. Applicable Law

8. Rule 85(A) provides as follows:

Rule 85 Presentation of Evidence

- (A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
- (i) evidence for the prosecution;
 - (ii) evidence for the defence;
 - (iii) prosecution evidence in rebuttal;
 - (iv) defence evidence in rejoinder;
 - (v) evidence ordered by the Trial Chamber pursuant to Rule 98;
and
 - (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

9. Rule 89(C) in turn provides that a Chamber may admit any relevant evidence which it deems to have probative value, while Rule 89(F) states that a Chamber may receive the evidence of a witness orally, or where the interests of justice allow, in written form.

III. Discussion

A. Holbrooke Submission

10. Two issues arise from the Holbrooke Submission, namely (i) the relevance of the Material to the issue of sentencing in this case and (ii) if the Material, or a part thereof, is deemed relevant, the Rule through which it should be admitted by the Chamber. In the Holbrooke Submission, the Accused addresses both issues and offers Rule 85(A)(vi) as a mode of admission, or alternatively, Rule 92 *bis*. However, the Prosecution fails to address (ii) and focuses mainly on (i).

11. The Chamber will first consider whether the Material is relevant to the issue of sentencing, should there be a conviction. As recounted above, both the Pre-trial Chamber and the Appeals Chamber have noted in the past that information going to Holbrooke Agreement may be relevant to sentencing.²² In addition, the Accused has now elaborated in the

²² See *supra* paras. 1–2.

Supplemental Submission on the relevance of such information to sentencing and how the Material should be used for sentencing purposes. Accordingly, the Chamber considers that the Material is *prima facie* relevant to sentencing and should be admitted into evidence. As for the Prosecution's argument that most of the Material in fact undercuts the mitigating effect of the Undertaking, the Chamber notes that this is a matter of weight to be given to the Material and considered during sentencing deliberations, if any.

12. In terms of the appropriate mode for admission, the Chamber recalls that Rule 85(A)(vi) is broad in scope as it concerns "any relevant information that may assist the Trial Chamber in determining an appropriate sentence". Given its view on the relevance of the Material expressed in the preceding paragraph, the Chamber considers that it is appropriate to admit it under Rule 85(A)(vi), so long as the requirements of Rule 89(C) are also satisfied. Since the Chamber is of the view that Rule 85(A)(vi) is the appropriate tool for admission of the Material, the issue of the applicability, or otherwise, of Rule 92 *bis* is moot.

13. The Chamber further considers that, with the exception of a part of the Sacirbey Material (1D05930), the Material satisfies the requirements of Rule 89(C) and shall be admitted into evidence. As outlined above,²³ the Sacirbey Material consists of (i) what appears to be Sacirbey's statement from 2008 in an article or a chapter of a book and (ii) a written interview he gave to a Teheran media outlet called Press TV on 1 August 2008. With respect to (i), the Chamber notes that it contains only a date and no indication as to where or how it was published, if at all, or if Sacirbey really is the author. Accordingly, in the absence of any information about its provenance, the Chamber cannot be satisfied of this document's *prima facie* probative value and shall not admit it into evidence. The Chamber orders the Accused to remove that document from e-court as soon as possible, following which the remainder of 1D05930 will be admitted into evidence.

B. Behaviour Submission

14. The Chamber agrees with the Accused that information relating to his good behaviour in detention is a mitigating factor relevant to sentencing, should there be a conviction at the end of this case.²⁴ Accordingly, the Chamber deems it appropriate to admit the UNDU Letter into evidence for that purpose, pursuant to Rule 85(A)(vi) of the Rules.

²³ See *supra* para. 3.

IV. Disposition

15. Accordingly, the Trial Chamber, pursuant to Rules 54, 85(A)(vi), and 89(C) of the Rules, hereby:

- (a) **GRANTS** in part, the relief sought in the Holbrooke Submission, and admits into evidence, for the limited purpose of sentencing deliberations (if any), the following documents: 1D05915, 1D05916, 1D05921, 1D05922, 1D05926, 1D05927, 1D05928, 1D05929, 1D05930 (as per discussion in paragraph 13), 1D05931, 1D05932, 1D05935, 1D05936, and 1D20079;
- (b) **GRANTS** the relief sought in the Behaviour Submission and admits into evidence, for the limited purpose of sentencing deliberations (if any), the UNDU Letter which bears 65 *ter* number 1D09628;
- (c) **ORDERS** the Registry to assign exhibit numbers to the documents listed in (a) and (b) above; and
- (d) **DENIES** the remainder of the relief sought in the Holbrooke Submission.

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



Judge O-Gon Kwon
Presiding

Dated this twenty sixth day of February 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁴ See e.g. *Prosecutor v. Krajišnik*, Case No IT-00-39-A, Judgement, 17 March 2009, para. 816; *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008, para. 325; *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, para. 266.