UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

Case No.: IT-95-5/18-PT

Date: 8 July 2009

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **8 July 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S HOLBROOKE AGREEMENT MOTION

Office of the Prosecutor

Mr. Alan Tieger
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 the Accused's "Holbrooke Agreement Motion", filed on 25 May 2009 ("Motion"), and hereby renders its decision thereon.

I. BACKGROUND

1. On a number of occasions since his arrest and transfer to The Hague, the Accused has indicated his intention to challenge the jurisdiction of the Tribunal to prosecute him on the basis of the existence of an agreement between himself and representatives of the Government of the United States of America ("U.S. Government"), primarily Richard Holbrooke, that he would be immune from such prosecution if he withdrew from public life in mid-1996. Thus, the background to this particular Motion is quite extensive, and is outlined, in brief, below.

2. The matter was first raised by the Accused in his written submission on 6 August 2008 where he referred to the existence of the agreement and stated that Holbrooke, when negotiating it, acted in his capacity as a representative of the United States of America ("U.S.").[1] The Office of the Prosecutor ("Prosecution" or "Prosecutor") responded, stating that such an agreement would be devoid of legal effect before the Tribunal.[2] At the Status Conference on 17 September 2008, the Accused requested the Chamber not to deal with his submission until he could provide additional material.[3]

3. On 6 October 2008, the Accused filed a "Motion for Inspection and Disclosure: Immunity Issue" seeking an order requiring the Prosecution to allow inspection of certain materials under Rule 66(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") and/or their disclosure under Rule 68. On 9 October 2008, the Trial Chamber issued a decision on this motion, informing the Accused that he should submit his request directly to the Prosecution pursuant to Rule 66(B), and ruling that the motion did not satisfy the test for establishing a breach of Rule 68 warranting an order thereunder.[4] Having directed his request to the Prosecution and been refused, the Accused filed, on 6 November 2008, another motion seeking an order requiring the Prosecution

[1] Official Submission Concerning My First Appearance and My Immunity Agreement with the USA, 6 August 2008.

[2] Prosecution's Response to Karadžić's Submission regarding Alleged Immunity, 20 August 2008, para. 2. The Accused filed a reply to this response on 26 August 2008.

[3] Status Conference, T. 52–54 (17 September 2008).

[4] Decision on Accused Motion for Inspection and Disclosure, 9 October 2008.

to allow inspection and disclosure of information relating to the existence of the agreement with Holbrooke. This time he argued that the alleged Holbrooke Agreement was attributable to the Tribunal because it was made on behalf of the member states of the United Nations Security Council ("UNSC").[5] The Chamber will throughout this decision refer to the alleged Holbrooke Agreement simply as the "Agreement".

4. The Trial Chamber issued its decision on 17 December 2008 ("Decision on Second Motion for Disclosure") in which it found that only a limited number of documents requested by the Accused were described with sufficient specificity and thus met the relevant legal standards for an order compelling their disclosure.[6] One of those documents was the signed undertaking by the Accused, dated 18 July 1996, that he would withdraw from politics. It was included in the order on the basis that it might mitigate any eventual sentence. The Chamber held that the same reasoning would apply to any other agreement made, and any notes taken and recordings made, at the alleged meeting on 18 and 19 July 1996.[7]

5. The Chamber also noted, however, that the Accused's submissions in relation to the Agreement were vague and inconsistent, given his initial position that Holbrooke was negotiating an agreement between the U.S. Government and the Accused, and his later position that the Agreement was attributable to the Tribunal. The Chamber further considered that the Accused had made no *prima facie* case showing the connection between the actions of Holbrooke and the Prosecution. It also considered that it was "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," and that "pursuant to the Statute and Rules of the Tribunal, neither its own mandate nor that of the Prosecutor is affected by any alleged undertaking" made by Holbrooke. Thus, in the absence of any material to link the alleged Agreement with the Prosecution and/or the UNSC, the Chamber held that the information that the Accused might intend to use in support of it was not material to the preparation of the defence in this respect.[8]

6. After having been informed that the Prosecution did not have in its possession any documents which fell within the scope of the order,[9] the Accused appealed the Trial Chamber's

[5] Motion for Inspection and Disclosure: Holbrooke Agreement, 6 November 2008. *See also* Prosecution's Response to Karadžić's Motion for Inspection and Disclosure, 19 November 2008; Motion for Leave to Reply and Reply Brief: Motion for Inspection and Disclosure: Holbrooke Agreement, 28 November 2008.

[6] Decision on Second Motion for Disclosure, paras. 20, 28.

[7] Decision on Second Motion for Disclosure, paras. 21, 23.

[8] Decision on Second Motion for Disclosure, paras. 24–26.

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

decision of 17 December 2008 on the basis, *inter alia*, that the Trial Chamber had erred in concluding that *any* immunity in respect to an Accused indicted for genocide, war crimes, and/or crimes against humanity before an international tribunal would be invalid as a matter of international law. He did not, however, appeal the Chamber's finding that some of the materials sought were not described with sufficient specificity.[10] The Appeals Chamber dismissed the appeal in its entirety on 6 April 2009 on the basis that the Accused had not appealed the Trial Chamber's findings in relation to the lack of specificity. Thus, considering that the Prosecution had already been ordered to disclose the documents that met the specificity test, the issues raised by the Accused in his appeal were held to be moot.[11]

7. The Accused then filed a motion seeking an order requiring the Prosecution to disclose additional items related to the Agreement.[12] The Trial Chamber granted the motion for certain materials for which the specificity test was met, again on the basis that these materials may be relevant to any eventual sentence.[13]

8. As he continued to seek information from states and other entities in relation to the Agreement, the Accused sought several extensions of time for the submission of his anticipated motion challenging jurisdiction.[14] The Trial Chamber granted those motions.[15] Likewise, it granted in part a motion requesting the extension of the word-limit of the Motion, by stating that it should not exceed 6,000 words in length.[16] Similarly, because the Motion contained a number of non-translated annexes which were awaiting translation, the Chamber granted to the Prosecution an extension of time to respond to the Motion, as well as an extension of the word limit.[17]

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[10] Appeal of Decision Concerning Holbrooke Agreement Disclosure, 28 January 2009, paras. 8–12. *See also* Application for Certification to Appeal Decision on Holbrooke Agreement Disclosure, 9 January 2009; Decision on Accused Application for Certification to Appeal Decision on Inspection and Disclosure, 19 January 2009.

[11] Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009, para. 17.

[12] Third Motion for Disclosure: Holbrooke Agreement, 3 February 2009.

[13] Decision an Accused Motion for Interview of Defence Witness and third Motion for Disclosure, 9 April 2009, paras. 21–27.

[14] Motion for Extension of Time, 23 March 2009; 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.

[15] Decision in Respect of Motion for Extension of Time, 30 March 2009; Decision on Accused Motion for Extension of Time and to Exceed Word Limit, 22 April 2009, para. 3. *See also* Order, 20 May 2009, where the Trial Chamber confirmed that the Accused's deadline for filing the Motion would be 25 May 2009.

[16] Decision on Accused Motion for Extension of Time and to Exceed Word Limit, 22 April 2009, para. 4.

[17] Decision on Prosecution Motion for Extension of Words and for Suspension of Time Limits and on Prosecution's Urgent Request for an Extension of Time to File Two Motions, 29 May 2009.

II. SUBMISSIONS

Motion

9. In the Motion, the Accused moves the Chamber to dismiss, pursuant to Rules 72 and 73 of the Rules , the Third Amended Indictment ("Indictment") against him on the ground that the Tribunal lacks jurisdiction, or, alternatively, should decline to exercise jurisdiction, as a result of the Agreement.[18] Attached to the Motion are numerous supporting documents, including the statement of the Accused himself and the statements of those of his associates who were involved in negotiating the Agreement. The Accused claims that this Agreement was made during the evening and into the early morning hours of 18 and 19 July 1996. Holbrooke, who, according to the Accused, acted with the actual or apparent authority of the UNSC, proposed that, if the Accused resigned from all positions in the Republika Srpska government and withdrew completely from public life, he would not have to face prosecution at the Tribunal. This proposal was accepted and the Accused, as well as other representatives of the Bosnian Serbs, signed this undertaking. However, according to the Accused, Holbrooke declined to put his own obligation in writing, explaining that it was politically impossible to do so.[19]

10. Because the existence of the Agreement is a disputed factual issue, the Accused requests that the Trial Chamber hold an evidentiary hearing and make findings of fact concerning its existence. He lists all the documentary evidence which he submits goes to that existence, and refers to all the relevant figures, including himself, who could come to give evidence on the issue.[20]

11. According to the Accused, the Chamber should first determine the factual question of the existence of the Agreement and only then, assuming its existence is confirmed, move on to the question of the legal effect of such an agreement and whether or not it is binding on the Tribunal. If the Chamber finds that it is not binding, it should then consider whether it should dismiss the Indictment or stay the proceedings as an abuse of process "so as not to taint the integrity of the Tribunal by prosecuting someone who, through no fault of his own, relied upon an agreement which was based on deception."[21] The Accused claims that the Chamber should not skip the first

[18] Motion, paras. 1–3.

[19] Motion, paras. 4–7. *See also* Annex A to the Motion which contains the undertaking signed by the Accused, among others.

[20] Motion, paras. 8–35. *See also* Annexes to the Motion.

[21] Motion, paras. 79–85.

step of determining the existence of the Agreement because "to escape from this factual issue would be to do a disservice to [the Accused] and to history."[22]

12. As for his arguments about the legal effect of the Agreement, the Accused first attempts to distinguish the earlier finding of this Chamber in the Decision on Second Motion for Disclosure that any immunity with respect to an accused indicted for core international crimes before an international tribunal would be invalid as a matter of international law. He does so by arguing that for that finding the Chamber relied solely on authorities which provide that there is no immunity for heads of state simply by virtue of their position. However, he contends that he is not claiming such an immunity but, rather, that he benefits from a "specific cooperation agreement" of the kind that the Prosecution has entered into in prior cases before the Tribunal, and pursuant to which it dismissed serious charges such as genocide, war crimes, and crimes against humanity. He provides a list of 15 cases where this has happened and claims that the Agreement provided "the same kind of *quid pro quo* as those agreements which have been routinely approved by Trial Chambers of this Tribunal."[23]

13. The Accused also compares his situation to that of General Cédras in Haiti in 1994. He claims that, as a result of negotiations conducted by former United States President, Jimmy Carter, Cédras was promised immunity in return for withdrawing from power. He further claims that the UNSC "obviously believed that such a cooperation agreement was possible and lawful [because it] specifically approved [it]" and concludes that "it cannot be said that any agreement not to prosecute an individual for international crimes is invalid as a matter of law."[24] Furthermore, he claims that the only difference between the agreement reached in Haiti and the Agreement is that "President Carter was above-board and the agreement was endorsed by the Security Council while Holbrooke was duplicitous and insisted that the agreement remain a secret". As a result, the Accused never benefited from a UNSC Resolution, which, according to him, would have been binding on the Tribunal.[25]

14. In relation to the Chamber's earlier finding in the Decision on Second Motion for Disclosure that neither the Tribunal's mandate nor that of the Prosecution is affected by any alleged undertaking made by Holbrooke, he argues that the Trial Chamber erred when making this finding,

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[22] Motion, para. 86.

[23] Motion, paras. 37–40. *See also* Motion for Inspection and Disclosure: Holbrooke Agreement, 5 November 2008, footnote 14.

[24] Motion, paras. 41–43.

[25] Motion, para. 44.

since the Agreement is binding on the Tribunal under the doctrine of actual or apparent authority, on the basis that Holbrooke was an agent of either the UNSC or the Prosecution.

15. The Accused claims that he is unable to make submissions to the Chamber on whether Holbrooke was acting with the actual authority of the Tribunal or the UNSC because the Prosecution has refused to disclose documents which bear on that question and, in turn, the Chamber has, in its Decision on Second Motion for Disclosure, refused to order the Prosecution to do so.[26]

16. With regard to "apparent authority", the Accused argues that Holbrooke's undertakings may be found to be attributable to the Tribunal because he was acting on behalf of the international community, including the UNSC, when he entered into the Agreement. The Accused then outlines, in Annex AB to the Motion, the facts that, according to him, support his position. He refers primarily to the fact that, during Holbrooke's involvement leading to and in the Dayton peace negotiations, the United Nations ("UN") repeatedly ratified promises made by him. He also refers to agency law and notes that the consequence of the doctrine of apparent authority is that the principal is estopped from denying an agreement made by the agent and, instead, must honour it. In support, he cites to a number of academic articles and cases from the United Kingdom, the United States of America, and Australia.[27]

17. The Accused's alternative argument is that, even if the Agreement is considered not to be binding on the Tribunal, the Chamber should dismiss the Indictment on the basis of the abuse of process doctrine. He claims that this should be done so that the "hands of the Tribunal are not stained with Holbrooke's deception."[28] In support, he refers to Tribunal jurisprudence on the abuse of process doctrine, and also to decisions of other tribunals.[29]

18. As a side issue, the Accused acknowledges that Annex AB to the Motion, consisting of mainly factual arguments relating to Holbrooke's alleged apparent authority, should have been in the body of the Motion but submits that this was impossible due to the Chamber's order that the Motion should contain no more than 6,000 words. He then states:[30]

> If the Trial Chamber prefers to have the material in the body of this motion, it is respectfully requested to grant another 2735 words and Dr. Karadžić will file an amended motion.

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[26] Motion, paras. 45–49.
[27] Motion, paras. 50–65.
[28] Motion, para. 78.
[29] Motion, paras. 66–76.
[30] Motion, footnote 44.

19. The Chamber considers this to be an application for an extension of the word limit in excess of that already granted to the Accused.

Response

20. Having been given an extension of time, the Prosecution filed, on 16 June 2009, the "Prosecution Response to 'Holbrooke Agreement Motion'" ("Response"). It first submits that the Motion does not present a jurisdictional challenge, either under Rule 72(D)(i), or as an abuse of process claim. In support of the first of these arguments, the Prosecution notes that the Indictment against the Accused relates to the persons indicated in Articles 1, 6, 7, and 9 of the Statute, as required by Rule 72(D)(i), and refers to the Appeals Chamber Decision in the *Nzirorera* case.[31] In support of its second argument, the Prosecution refers to the Appeals Chamber's finding in the *Nikolić* case to the effect that an abuse of process claim is not a jurisdictional challenge falling under Rule 72(D).[32] Thus, it argues that the Accused's Motion should be considered under Rule 73.[33]

21. The Prosecution further argues that the Chamber should not hold an evidentiary hearing without first of all determining that the Agreement could have an impact on the Tribunal's jurisdiction over the Accused since this would be inefficient..[34]

22. On the substantive issues, the Prosecution opposes the Motion on the basis that (i) even if the alleged Agreement exists (which the Prosecution disputes), it could not be legally binding on the Tribunal; and (ii) the Accused has failed to set forth a *prima facie* case for a claim of abuse of process warranting a stay of the proceedings.[35]

23. With respect to (i), the Prosecution notes that the Statute of the Tribunal contains no provisions exempting any individual from prosecution, while Article 1 confers a general power to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia without further limitations. Thus, for the Agreement to be legally binding, it would have to be reflected in a UNSC resolution, the UNSC being the only body that could limit the Tribunal's Statute. However, the UNSC has never specified that the Accused would be exempt from prosecution or given any person or entity the power to grant him immunity, and has, in fact, repeatedly emphasised, both before and after the Agreement, that the Accused

[31] Response, paras. 2–5.
[32] Response, para. 6.
[33] Response, para. 7.
[34] Response, paras. 8–11.
[35] Response, para. 1.

should be transferred to the Tribunal.[36] The Prosecution also points out that the Accused's analogy between his situation and that in Haiti in fact undermines his position as there the UNSC passed a resolution endorsing the agreement.[37]

24. The Prosecution further argues that the Accused has failed to provide a *prima facie* basis for concluding that Holbrooke acted with the apparent authority of the UNSC, since (i) agency principles should be applied with caution in the context of international criminal law because of the significant public interest in prosecuting universally condemned offences, (ii) the broad doctrine of apparent authority developed in the Motion is not supported by the authorities cited therein, and (iii) assuming that the doctrine of apparent authority applies, the Accused has failed to satisfy its requirements as he had no reasonable ground to believe that the UNSC had granted authority to anyone, including Holbrooke, to provide him with immunity. With respect to this last point, the Prosecution observes that the facts, as recounted by the Accused, give rise to serious uncertainty as to Holbrooke's authority, triggering the Accused's duty to inquire with the UNSC as to the existence and extent of that authority.[38]

25. According to the Prosecution, the Accused has also failed to allege a *prima facie* basis for concluding that Holbrooke was acting with the apparent authority of the Tribunal. To the limited extent that he "hints at direct consultation between the Tribunal and Holbrooke", this does not provide a *prima facie* basis for concluding that the Tribunal gave the Accused cause to believe that Holbrooke was authorised to exempt him from prosecution. Indeed, the facts provided by the Accused only serve to emphasise that the Prosecution insisted on the Accused's prosecution.[39]

26. As a last point relating to the binding, or otherwise, nature of the Agreement, the Prosecution argues that the Accused has failed to allege any basis for concluding that Holbrooke was acting with the actual authority of either the Tribunal or the UNSC. According to the Prosecution, even if unable to substantiate his claims with evidence, the Accused could have set out the facts on which he bases those claims.[40]

27. In support of its argument that the Accused has failed to allege a *prima facie* basis for an abuse of process claim, the Prosecution argues, first, that his right to a fair trial has not been compromised; and second, that his allegations reveal no serious and egregious violation of his

[36] Response, paras. 12–18.
[37] Response, para. 19.
[38] Response, paras. 20–27.
[39] Response, paras. 28–34.
[40] Response, paras. 35–36.

rights.[41] The Prosecution also argues that, to the extent that the Tribunal has residual supervisory powers to stay the proceedings, even in the absence of any violation of an accused's rights, this is a restricted category that is inapplicable to the circumstances as alleged by the Accused. Finally, the Prosecution contends that the remedy sought would be disproportionate to the circumstances here as they are alleged by the Accused.[42]

28. The Prosecution also, despite its position that the examination of the Accused's factual allegations is not warranted unless and until the Chamber determines that the Agreement could be legally binding, points out a number of deficiencies in the evidence which the Accused has presented in his Motion, including changes in his position as to the source of Holbrooke's authority, and the fact that much of the evidence does not support his claims but, instead, undermines them.[43]

29. The Prosecution finally notes that, in the event that the Trial Chamber orders an evidentiary hearing, it reserves its right to present contrary evidence. It therefore requests a schedule allowing sufficient time for it to conduct investigations into the Accused's allegations.

First Supplement

30. On 19 June 2009, the Accused filed his "First Supplement to Holbrooke Agreement Motion" ("First Supplement"), attaching additional statements of two witnesses on the basis that the witnesses were not available to his legal team before the original Motion was filed. The Accused also notes that further supplements may be filed depending on the outcome of interviews with other witnesses, mainly state officials.[44]

31. On 23 June 2009, the Prosecution filed "Prosecution Response to Karadžić's 'First Supplement to the Holbrooke Agreement Motion'" ("Response to First Supplement"), in which it opposes the Accused's attempt to supplement its original Motion on the basis that: (i) the Accused has failed to show that he could not have submitted the witnesses' statements at the time of the original Motion by exercising due diligence; and (ii) the Chamber need not examine the Accused's factual allegations unless and until it has determined the legal issues such as the binding nature of the Agreement and the abuse of process claim.[45]

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[41] Response, paras. 37–41.
[42] Response, para. 43.
[43] Response, paras. 47–48.
[44] First Supplement, paras. 1–2, 4.
[45] Response to First Supplement, paras. 1–3.

32. The Chamber has earlier indicated to the Accused that he could supplement his Motion with any further evidence going to the issues in it.[46] Having already indicated that it would do so, the Chamber accepts the First Supplement.

Reply

33. Having been granted leave to reply and an extension of time in which to do so,[47] the Accused filed his "Reply Brief: Holbrooke Agreement Motion" on 25 June 2009 ("Reply"). In the Reply, the Accused argues that he cannot reply fully to the Response until he has been able to interview a number of individuals and review documents he is still in the process of seeking from the UN and the Prosecution. He therefore requests that the Chamber should not decide the Motion until these efforts "have been seen to fruition."[48]

34. The Accused further argues that many of the Prosecution's arguments in its Response highlight the need for an evidentiary hearing. He emphasises, in particular, the arguments relating to the apparent authority of Holbrooke.[49] The Accused also alleges that the Prosecution's "allergic reaction" to an evidentiary hearing is motivated by avoiding the "embarrassing truth" about the Agreement rather than any desire to save time and resources.[50] Finally, he claims that the Prosecution's reliance on the *Nikolić* case in this regard is misplaced as there the parties stipulated to the facts and the Trial Chamber then decided the law on that basis. Here, however, the facts are "hotly disputed" according to the Accused. In support of his position that there should first be an evidentiary hearing, the Accused also refers to the *Todorović* case where the Chamber issued an order to SFOR to produce further information on the basis that the accused there could not challenge the legality of his arrest unless he had the information he believed was in the possession of the SFOR.[51]

35. With respect to the arguments surrounding actual and apparent authority, the Accused claims that the lack of a UNSC resolution accepting the Agreement is not an indication that there was no apparent authority. Rather, a resolution of the UNSC to that effect would mean that Holbrooke was acting with the actual authority of the UNSC. According to the Accused, the apparent authority doctrine exists to enforce promises which are not ratified by resolutions or

[46] Status Conference, T. 258–259 (3 June 2009).
[47] Order Regarding the Accused's Motion for Leave to Reply and for Extension of Time – Holbrooke Agreement Motion, 22 June 2009.
[48] Reply, para. 2.
[49] Reply, para. 3.
[50] Reply, para. 5.
[51] Reply, paras. 6–9.

written agreements.[52] Moreover, since the UNSC has, under article 24(1) of the UN Charter, the primary, but not sole, responsibility for the maintenance of international peace and security, it is difficult to see why a UNSC resolution is necessary for an act aimed at securing peace and security. In addition, a UNSC resolution would only be necessary if the aim were to bind member states, and not if the aim were to bind the UN itself, including its subsidiary organs. Thus, any other expression of will would be enough.[53] The Accused also submits that the fact that the UNSC made continuous calls for the prosecution of the Accused following July 1996 did not vitiate the apparent authority of Holbrooke to make that promise in July 1996, since the reasonableness of the third party's reliance on the agent's promise is to be assessed at the time the promise was made.[54]

36. The Accused then argues that his abuse of process claim requires an evaluation of all the circumstances in which the promise was made and an ultimate determination as to whether the facts warrant a stay of the proceedings. For that, the Accused argues, an evidentiary hearing is also necessary as the facts are "strongly disputed".[55] The Accused then claims that, contrary to the Prosecution's assertions that there was no serious and egregious violation of his rights, he did suffer harm as a result of entering into the Agreement, since he relinquished his political positions and spent more than a decade in hiding, without any contact with his family.[56]

37. As for the question of jurisdictional challenges, the Accused concedes that the part of the Motion dealing with the abuse of process is a jurisdictional challenge under Rule 73. However, he maintains that other parts of his Motion are challenges falling under both Rules 72 and 73. This is because the Agreement removed the power of the Tribunal to prosecute the Accused, thereby exempting him from the application of Article 1 of the Statute. In addition, according to the Accused, the distinction may not matter as the Trial Chamber has, having already certified one appeal relating to this issue, determined that it meets the criteria for certification under Rule 73(B).[57]

[52] Reply, paras. 11–13.
[53] Reply, paras. 14–15.
[54] Reply, para. 16.
[55] Reply, paras. 17–18.
[56] Reply, paras. 19–20.
[57] Reply, paras. 23–25.

III. DISCUSSION

Extension of Word Limit

38. As mentioned above,[58] Annex AB attached to the original Motion contains several pages of factual argument, totalling 2375 words. The Accused seeks an extension of the already enlarged word limit. The Chamber, having noted the terms of the Annex in question and having also allowed the Prosecution to exceed the word limit in its Response partially on account of the said Annex, considers that this extension of the word limit is appropriate.

Challenges to Jurisdiction under Rule 72

39. Article 1 of the Statute provides as follows:

> **Article 1**
> **Competence of the International Tribunal**
>
> The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

40. Rules 72 and 73 provide, in relevant part, as follows:

> **Rule 72**
> **Preliminary Motions**
>
> (A) Preliminary motions, being motions which
>
> (i) challenge jurisdiction;
> ...
>
> shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66(A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. ...
> ...
>
> (D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:
>
> (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
> (ii) the territories indicated in Articles 1, 8 and 9 of the Statute;
> (iii) the period indicated in Articles 1, 8 and 9 of the Statute;
> (iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

[58] *See* para. 18.

Rule 73
Other Motions

(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber.

41. In 1995 the Appeals Chamber in the *Tadić* case held that a challenge to the very legality of the Tribunal is jurisdictional in nature and therefore one that must be brought as a preliminary motion before the commencement of the trial.[59] However, five years later, the Tribunal adopted paragraph (D) of Rule 72, which provides that a motion challenging jurisdiction is a preliminary motion in terms of that Rule only if it challenges an indictment on one or more of the four grounds specified. Thus, in the *Nikolić* case, the Appeals Chamber held that a motion challenging jurisdiction due to alleged illegality of arrest was a challenge to jurisdiction that fell outwith the definition of a preliminary motion and was thus an "other motion" under Rule 73. The significance of this distinction is that parties require certification by a Trial Chamber to appeal a decision on the "other motion", whereas a decision on a motion falling under Rule 72 may be appealed as of right.[60]

42. In the *Nzirorera* case, the accused argued before the Appeals Chamber that the continued exercise of the ICTR Statute was unlawful in the situation where new charges had been added to the indictment in 2004 relating to events in Rwanda in 1994, because there was no longer a threat to peace and security in Rwanda and therefore no grounds to exercise Chapter VII of the UN Charter.[61] In dismissing this appeal filed under Rule 72, the Appeals Chamber confirmed that Rule 72 does not authorise an interlocutory appeal of every "jurisdictional" argument; rather, it is narrow in scope and permits interlocutory appeal as of right only in a very limited set of challenges to an indictment.[62] Therefore, "[w]hether the Statute itself is subject to external restrictions, such as Chapter VII of the Charter of the UN, does not fall within this limitation on interlocutory appellate

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[59] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision"), para. 6.

[60] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR72, Decision on Notice of Appeal, 9 January 2003, p. 3. Judge Mohamed Shahabuddeen dissented, holding that Rule 72 was able to encompass the accused's challenge as one properly going to the jurisdiction of the Tribunal, Dissenting Opinion of Judge Shahabuddeen, paras. 7–18. Later, when considering the substance of this appeal under Rule 73, the Appeals Chamber confirmed that the issue was one of jurisdiction *ratione personae*, the main consideration of which is to look at whether there are any circumstances that would warrant setting aside jurisdiction and releasing the accused. *See Prosecutor v. Nikolić*, Case No. IT–94–2–AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 ("*Nikolić* Appeal Decision"), para. 19.

[61] *Prosecutor v. Joseph Nzirorera*, 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 ("*Nzirorera* Appeal Decision"), paras. 1, 4, 7–9.

[62] *Nzirorera* Appeal Decision, para. 8.

jurisdiction."[63] As in *Nikolić*, the Appeals Chamber adopted a restrictive interpretation to Rule 72(D).[64]

43. The Accused acknowledges this restrictive approach implicitly by arguing that, because of the Agreement, he is not one of the persons referred to in Articles 1, 6, 7, and 9, as required by Rule 72(D)(i). However, the Chamber considers that, in light of the *Nikolić* and *Nzirorera* cases, the Motion to the effect that Articles 1, 6, 7, and 9 of the Statute are subject to an "external restriction", manifested as here through either the Agreement or the circumstances surrounding the abuse of process claim, does not fall under Rule 72. Instead, as in *Nikolić*, it is a motion challenging the jurisdiction of the Tribunal that falls under Rule 73.

44. Ultimately, however, whether this Motion falls under Rule 72 or Rule 73 is of minor significance, as indeed the Accused himself submits.[65] It clearly raises a fundamental challenge to the jurisdiction of the Chamber and it is difficult to conceive of circumstances in which the Chamber would not grant an application for certification to appeal its decision thereon, should one be made by either party.

Evidentiary Hearing

45. As stated above, the Accused argues that an evidentiary hearing should be held to determine the existence of the Agreement before the Chamber addresses the legal issues surrounding its legal effect. The Prosecution, on the other hand, suggests that the Chamber should look at the legal issues first.

46. The Chamber considers that there is no reason to hold an evidentiary hearing if the Prosecution's submissions on the law are correct and the Accused cannot succeed even if the evidence on which he relies is proved. If the Accused cannot obtain the relief he seeks as a matter of law, then the issue of whether the Agreement was ever made is irrelevant to any issue other than sentence, on which evidence may be led at trial. The Trial Chamber rejects the Accused's submission that not having an evidentiary hearing at this stage would be a disservice to history. The Chamber's purpose is not to serve the academic study of history. If the review of the law on the foregoing basis indicates a need to hear evidence, then a hearing will be held.

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[63] *Nzirorera* Appeal Decision, para. 10.

[64] *See also Prosecutor v. Milutinović*, Case No. IT-05-87-T, Decision on Nebojša Pavković's Motion for a Dismissal of the Indictment Against Him on Grounds That the United Nations Security Council Illegally Established the International Criminal Tribunal for the Former Yugoslavia, 21 February 2008, paras. 14-15.

[65] Reply, para. 25.

47. The Chamber notes that the Trial Chamber in *Nikolić* followed the same approach: the parties there agreed to proceed without an evidentiary hearing and, instead, submitted a list of agreed facts on which the Chamber was to rely while making its determination on the law.[66] The fact that in this case there is no such agreement, nor any agreed facts, does not preclude the Chamber from taking a similar approach. Instead of relying on agreed facts, the Chamber will make its determination on the basis that the evidence submitted by the Accused is accepted *pro veritate* for this purpose. Thus, the Accused's argument that the facts surrounding the Agreement are all disputed does not prevent the Chamber from deciding the legal issues first. The Chamber considers that the Accused's reliance on the *Todorović* case is misplaced, since the issue there was not the feasibility of holding an evidentiary hearing. Rather, the *Todorović* Chamber had to consider whether to issue a binding order to SFOR requesting it to provide certain information to the accused in order to enable him to make his challenge to the jurisdiction.[67]

48. The Chamber considers that it is now appropriate to determine the Motion on the basis of the material presented to it by the Accused. The Chamber has a duty to ensure that the Accused receives a fair and expeditious trial. He cannot expect the Chamber 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. In any event, the Accused has not displayed diligence in trying to obtain material relevant to the issues raised in the Motion. For example, even though he has been in the custody of the Tribunal since 30 July 2008, and has from day one raised the issue of Holbrooke's intervention, he did not contact the UN for any relevant materials it has until 11 May 2009.[68]

Legal Effect of the Agreement

49. The Chamber notes that its Decision on Second Motion for Disclosure does not prevent it from assessing the issues raised in the current Motion. As stated above,[69] the Chamber's refusal to order disclosure in that instance was based on the lack of specificity in description of the relevant material, and on the Accused's vague submissions relating to the link between the Agreement and the UNSC and/or the Prosecution. The circumstances are now quite different. In the current Motion, the Accused provides much more factual material and detailed argumentation in relation to the latter issue. Accordingly, it is now for the Chamber to address the issue of the legal effect of

[66] *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"), paras. 4–9.

[67] *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000.

[68] *See* Motion for Request for Cooperation to United Nations: Holbrooke Agreement, 21 May 2009, para. 1.

[69] *See* paras. 4–5.

the Agreement in light of the circumstances which now prevail and on the basis of the material and submissions now presented.

50. The Chamber also notes 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. In order to attribute this Agreement to the Prosecutor, the Accused has to show that either (i) the Prosecution and/or its representatives were involved in making it or (ii) the UNSC, the Tribunal's parent-body, was.[70] Thereafter, both parties focus their arguments on the connections between Holbrooke and either the UNSC or the Prosecution itself. Accordingly, for the purposes of this Motion, the Chamber will approach the issue of the legal effect of the Agreement on the same basis.

A. Involvement of the Prosecution

51. The Chamber is mindful that the Accused does not explicitly claim that the Prosecution was involved in the making of the Agreement. Nevertheless, he cites to cases where the Prosecution has in the past exercised its discretion to dismiss certain charges and, in some cases, even its discretion not to prosecute, all of which, according to him, show that such agreements could be binding on the Tribunal, so long as they are attributable to the Prosecution.[71] He also refers to close consultations in 1995 and 1996 between the Prosecutor and Holbrooke and thus hints at some involvement of the Prosecution in the Agreement.[72]

52. As outlined above, Article 1 of the Statute of the Tribunal gives the Prosecution a broad jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Articles 16 and 18 of the Statute provide the Prosecutor with wide discretion when investigating and prosecuting such persons. Rule 51 of the Rules provides that the Prosecutor may withdraw an indictment before and after confirmation, and even after the assignment of the case to a Trial Chamber, while Rule 50 allows the Prosecutor to amend an indictment at any one of those three stages. In cases where the withdrawal or amendment takes place before confirmation of the indictment, the Prosecutor need not involve a Judge or a Trial Chamber. However, following the confirmation of an indictment, the Prosecutor's decision not to proceed against an accused, or to proceed on an amended indictment, is subject to the leave of a Judge or a Trial Chamber.

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[70] Motion, para. 46, Annex AB, paras. 17, 26; Response, para. 1.
[71] Motion, para. 39.
[72] Motion, Annex AB, paras. 5, 17, 25–26.

53. While the Prosecutor's discretion on whether or not to continue with proceedings on a confirmed indictment is not entirely unfettered, the role of a Judge or a Trial Chamber in this process is limited. At the time the Agreement was allegedly made, there was already a confirmed indictment in force against the Accused. However, there is no indication that the Prosecution took any steps under the relevant Rules to withdraw that indictment and abandon the case against the Accused. Indeed, the contrary is the case. For example, in July 1996, Rule 61 review of the indictment against the Accused was held, following which, on 12 July 1996, an international arrest warrant for the Accused was issued.[73]

54. The Chamber also notes that the Accused's attempt at drawing an analogy between the Tribunal cases he relies on and the facts surrounding the Agreement is misplaced because none of those cases concerned immunity from prosecution. The cases relied upon all involved plea agreements, made under relevant Rules. In none of the cases did the Prosecution withdraw an indictment completely on the basis of an agreement between the Prosecution and the accused. In fact, quite the opposite is true; in all these cases guilty pleas were tendered to certain charges in return for the dismissal of others.[74] Accordingly, none of these cases is even remotely similar to the facts surrounding the Agreement. Thus, the Accused's contention that they show that it would be possible for the Prosecution to essentially give up on a case outside of the provisions of the Statute and the Rules listed above is, at best, tenuous.

55. In addition, even though the Accused alleges that certain consultations between the Prosecutor and the U.S. Govemment/Holbrooke took place in 1995 and 1996, these consultations do not establish that Holbrooke was acting with either actual or apparent authority of the Prosecutor. Indeed, the evidence presented by the Accused, from various books written on the subject, shows that the opposite was the case. It illustrates the constant tension between the Prosecutor and the U.S. negotiators, including Holbrooke, and also shows the attempts of the Prosecutor to thwart any action by the international community that could be interpreted as interference with his prosecutorial authority. For example, having been told by U.S. Government representatives that amnesties were being considered as part of the Dayton negotiations in 1995, the

[73] *See* Rule 61 of the Rules. *See also* International Arrest Warrant and Order for Surrender, 12 July 1996.

[74] *See e.g. Prosecutor v Bralo*, Case No. IT-95-17-T, Sentencing Judgement, 7 December 2005, para 6; *Prosecutor v Zelenović*, Case No. IT-96-23/2-T, Sentencing Judgement, 4 April 2007 para. 11; *Prosecutor v. Plavšić*, Case No. IT-00-40-T, Sentencing Judgement, 27 February 2003, para. 5; *Prosecutor v Nikolić*, Case No. IT-02-60/1-T, Sentencing Judgement, 2 December 2003, paras. 11–13. *See also* other similar cases mentioned in the Accused's Motion for Inspection and Disclosure: Holbrooke Agreement, 5 November 2008, footnote 14.

Prosecutor issued a new indictment against the Accused, in order to avoid the sidelining of the Tribunal by the peace process.[75]

56. Since the evidence presented by the Accused does not show that the Prosecutor was in any way involved in the making of the Agreement, the Chamber turns to the question of whether the UNSC was involved therein.

B. Involvement of the UNSC

57. As seen above, the Statute of the Tribunal contains no provisions limiting the Prosecutor's discretion under Article 1 to investigate and/or prosecute persons responsible for serious violations of international humanitarian law on the territory of the former Yugoslavia. By way of distinction, article 16 of the Statute of the International Criminal Court ("ICC") specifically allows for deferral of investigations and/or prosecutions for a year in cases where the UNSC passes a resolution under Chapter VII of the UN Charter requesting the Court to do so. However, it is well established that the UNSC has the power to amend the Statute of the Tribunal, and it has indeed done so on several occasions, acting under Chapter VII.[76] Thus, the UNSC could, through statutory amendments, limit or expand the Tribunal's jurisdiction, including *jurisdiction personae*, if it deemed it appropriate.

58. In addition, the UNSC has provided guidance to the Tribunal on the exercise of its jurisdiction, short of an amendment to the Statute. However, that also was the subject of a formal resolution. Thus, in 2004, it passed Resolution 1534 calling on the Prosecutor to concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal.[77] What action to take was for the organs of the Tribunal to determine. Rather then leading to impunity for some of those charged by the Prosecutor, this measure simply led to a number of referrals of lower level indictees to the domestic and/or internationalised courts in the former Yugoslavia. No question arose of any person suspected of serious violations of international humanitarian law benefiting from this Resolution by escaping prosecution. What is important to note is that, in both those examples, a UNSC resolution was necessary before the UNSC was able to limit the jurisdiction of the Tribunal. Thus, the Accused's assertion, citing no

[75] Motion, Annex AB, para. 27; Gary Jonathan Bass, *Stay the Hand of Vengeance* (2000), pp. 242–244. Other examples of this tension can also be seen in *e.g.*, Carla Del Ponte, *Madame Prosecutor*, (2009), pp. 214–217; Richard Holbrooke, *To End a War*, 2nd Edition (1999), pp. 190, 332–333.

[76] The most recent amendment took place on 28 February 2006 and concerned the amendment of Articles 12 and 13 *quater* regarding appointment of *ad litem* Judges. *See* UNSC Resolution 1660, S/RES/1660, 28 February 2006.

[77] UNSC Resolution 1534, S/RES/1534, 26 March 2004, para. 5.

authorities in support, that UNSC resolutions are not required before binding the Tribunal to an agreement limiting its jurisdiction is not persuasive.

59. Given that there is no material before the Chamber indicative of circumstances where the UNSC has created a situation leading to impunity for those alleged to have committed serious violations of international humanitarian law, it is no surprise that, as argued by the Prosecution and conceded by the Accused, the UNSC never passed a resolution calling on the Prosecution to grant immunity to the Accused or to any other person.[78] Nor has the UNSC passed a resolution amending the Tribunal's Statute to that effect. To the contrary, the Accused has been the subject of a number of UNSC resolutions, passed after the Agreement, demanding his arrest.[79] In addition, on 8 August 1996, only three weeks after the Accused signed the undertaking to withdraw from office, the President of the UNSC issued a statement noting this undertaking but, at the same time, condemning the failure of the authorities in the region to execute the warrant for his arrest.[80]

60. As stated above,[81] the Accused draws an analogy between the negotiations surrounding the Agreement and the negotiations in Haiti in 1994, conducted by former U.S. President Jimmy Carter, which resulted in immunity from criminal prosecution in domestic courts for General Cédras and his associates. He claims that the only difference between the two is that, following the successful negotiations, Carter went back to the UNSC to obtain approval for the agreement that was reached, whereas Holbrooke failed to do so.[82] However, this is not the only difference. An amnesty for Cédras and others had been brokered by the UN and accepted by both Cédras and by exiled President Aristide 14 months prior to the agreement negotiated by Carter.[83] Thus, it was not a new idea offered by Carter.[84] Furthermore, in addition to Aristide agreeing to the accord granting the amnesty, this amnesty also depended on certain action being taken by Haitian Parliament, since the accord provided that "certain military officers of the Haitian Armed Forces" will retire "when a general amnesty will be voted into law by the Haitian parliament, or October 15, 1994, whichever is earlier."[85] Accordingly, unlike the Holbrooke Agreement, this agreement was negotiated with the knowledge of the authorities in Haiti, including Aristide, and the UNSC, and was immediately

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[78] Response, para. 17; Motion, para. 44.

[79] *See* UNSC Resolution 1503, S/RES/1503, 28 August 2003, para. 2; UNSC Resolution 1534, S/RES/1534, 26 March 2004, para. 1;

[80] President's Statement, S/PRST/1996/34, 8 August 1996, pp. 2–3.

[81] *See* para. 13.

[82] Motion, para. 44.

[83] *See* Report of the Secretary General, The Situation of Democracy and Human Rights in Haiti, S/26063, 12 July 1993, A/47/975.

[84] Report of the Secretary-General, The Situation of Democracy and Human Rights in Haiti, S/26063, 12 July 1993. A/47/975.

[85] The Carter Center, Assessment Mission to Haiti, January 1995, Appendix 1 (An Agreement Reached in Port-Au-Prince, Haiti, 18 September 1994), para. 3.

followed by the authorities' formal attempts to implement it.[86] In contrast to that, the facts here show that the President of the UNSC issued the statement of 8 August 1996 referred to in the preceding paragraph only a few weeks after the Agreement. Another vital difference between the cases, is that the authorities there did not have to consider criminal prosecutions by an international tribunal, as there was no such tribunal that would have jurisdiction over Cédras and others.

61. Having regard to all of the above, there is no evidence that the UNSC was involved directly in the making or implementation of the Agreement. That is consistent with the fact that no steps were taken to indicate to the Prosecution that the UNSC wanted the Accused not to be prosecuted.

C. Involvement of the UNSC through Holbrooke as its agent

62. As outlined above, the Accused argues that Holbrooke was an agent of the UNSC, acting with either actual or apparent authority, when he negotiated the Agreement. For that reason, the UNSC, as the principal, is bound by the Agreement and so are, by extension, its organs, including the Tribunal.[87] Assuming for the sake of the argument that, even though the Tribunal is an independent judicial body with authority to determine its own jurisdiction,[88] 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*, the Chamber turns to the issue of whether Holbrooke was an agent of the UNSC. The Chamber makes that assessment on the basis of the material provided to it by the Accused.

(i) Actual Authority

63. Although hinting at the position that Holbrooke may have had actual authority to act on behalf of the UNSC, the Accused claims that he is unable to present any evidence on this issue because the Prosecution has "categorically refused to provide" documents in its possession which have a bearing on that question, and the Chamber has "categorically refused" to order the Prosecution to do so in its Decision on Second Motion for Disclosure.[89] However, as described above,[90] the Chamber found, *inter alia*, that the Accused's request for disclosure of documents dealing with Holbrooke's actual or apparent authority was not specific enough to justify an order for disclosure.

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[86] U.S. Department of State, Haiti Human Rights Practices, 1994, para. 7.
[87] Motion, para. 46.
[88] *Tadić* Jurisdiction Decision, paras. 15–19.
[89] Motion, para. 49.
[90] *See* para. 4.

64. In addition, the Chamber has already pointed out to the Accused that he should, when submitting the Motion, outline all the facts for which there is some evidential basis on the assumption that he will eventually obtain the evidence establishing those facts.[91] In other words, if the Accused has some information that an individual did something in particular, or attended a meeting, he should indicate the evidence he believes exists to support that position and the Trial Chamber will accept that evidence *pro veritate* for the purpose of this Motion. The Trial Chamber did not, however, have in mind that it would be appropriate to accept as fact any assertion for which the Accused provides no evidential basis whatsoever.

65. Accordingly, in light of the fact that the Accused has failed to bring any evidence in support of the skeletal submissions he makes relating to Holbrooke's actual authority, the Chamber is of the view that he has failed to establish that Holbrooke was acting with such authority of the UNSC when he entered into the Agreement. The Chamber is further reinforced in its view by the Accused's position that, had Holbrooke been acting with the actual authority of the UNSC, the resulting Agreement would eventually have been adopted, or at least acknowledged, by the UNSC.[92]

(ii) Apparent Authority

66. The only remaining question then is whether Holbrooke had the apparent authority of the UNSC to enter into an agreement with the Accused. Although he fails to point to any basis for his claim that the agency principle of apparent authority applies in the context of international criminal law, the Chamber will, for the sake of the argument, assume that it does.

67. The Accused relies on the following definition of apparent authority, taken from the American Law Institute's Restatement of Agency:

> Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.[93]

68. The same document provides that apparent authority is created "by a person's manifestation that another has authority to act with legal consequences for the person who makes the

[91] Status Conference, T. 234--235 (6 May 2009).
[92] Reply, para. 11.
[93] American Law Institute, Restatement of Agency 3rd, 2006, section 2.03.

manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation."[94] In addition:

> When an agent for a disclosed or unidentified principal makes a false representation about the agent's authority to a third party, the principal is not subject to liability *unless the agent acted with actual or apparent authority* in making the representation *and the third party does not have notice that the agent's representation is false.*[95]

Thus, the principal will be subject to liability if the agent acts with actual or apparent authority. However, he will not be so liable if it can be shown that the third party had notice that the agent's representation was false.

69. The Accused claims that there was ample reason for him to believe that Holbrooke was acting on behalf of the international community and the UNSC, when he negotiated the Agreement.[96] However, the Chamber considers, for the reasons outlined below, 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 serious international crimes.

70. First, the Accused's early submissions contradict his assertion that Holbrooke acted with the apparent authority of the UNSC. For example, the Accused's initial submissions to the Chamber on this issue explicitly alleged that Holbrooke acted on behalf of the U.S. alone.[97] Furthermore, the Accused admits that he was never personally in contact with Holbrooke, which brings into doubt his ability to gauge on whose behalf Holbrooke was acting on this particular occasion.[98]

71. Second, with respect to the issue of apparent authority, the real emphasis in the Accused's own statement is contrary to his position in the Motion, because he himself admits that he was not convinced Holbrooke would keep to his side of the Agreement. He recounts how, once he heard that Holbrooke did not want to put his part of the undertaking in writing for political reasons, he became mistrustful and insisted that this be done.[99] Indeed, his own associates also had doubts about Holbrooke's involvement and willingness to keep to his side of the deal.[100] The Accused also recounts how he was eventually persuaded by Slobodan Milošević to sign the Agreement

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[94] American Law Institute, Restatement of Agency 3rd, 2006, section 3.03.
[95] American Law Institute, Restatement of Agency 3rd, 2006, section 6.11(1).
[96] Motion, para. 57.
[97] Official Submission Concerning My First Appearance and My Immunity Agreement with the USA, 6 August 2008, p. 1.
[98] Motion, Annex B, paras 2–8.
[99] Motion, Annex B, paras. 5–6.
[100] Motion, Annex E, Statement of Aleksa Buha, pp. 2–3; Annex F, U.S. Government Cable, para. 6.

without such an undertaking.[101] In other words rather than signing the Agreement on the basis of his full faith in Holbrooke, the Accused capitulated to persuasion by Milošević. His reliance on Holbrooke on the basis of Holbrooke's earlier involvement in Dayton is even more questionable considering that Holbrooke had resigned from the Department of State following Dayton and had not been involved in Bosnian matters since, until July 1996.[102]

72. Third, the Accused refers to a number of statements by Holbrooke and Carl Bildt which, according to him, indicate that the former was acting on behalf of the UNSC during the negotiations in Dayton.[103] However, the Chamber is of the view that these statements, such as Holbrooke's references to the need for the UNSC to pass resolutions legitimising any eventual settlement, in fact prove that contrary was the case; and Bildt has confirmed that the U.S. was "calling the shots" and not the UNSC.[104]

73. Fourth, the Accused catalogues a number of instances during the negotiations relating to the cease-fire in Sarajevo in September 1995, and then follow-up negotiations in Dayton, where Holbrooke made certain promises that were later implemented by the UNSC.[105] However, this catalogue of events does not indicate a consistency of behaviour that would justify the notion of apparent authority. Rather, it is an indication of a case by case approach to different negotiations. Furthermore, both negotiations resulted in the cessation of armed hostilities in the region. The acceptance of these deals by the UNSC does not provide any support for the notion that the UNSC was somehow bound to accept a subsequent immunity deal relating to allegations of the most serious international crimes.

74. Fifth, the Accused compares the circumstances surrounding the Agreement to the negotiations with Holbrooke relating to the cease-fire in Sarajevo, in September of 1995, in which he personally participated. On that occasion, after the cease-fire agreement was negotiated, Holbrooke also failed to put his part of the undertaking in writing. The Chamber is of the view that the Accused's reliance on this previous negotiation does not help his case, but rather undermines it. The refusal by one party to commit to its part of the agreement in writing does not support the notion that this party has the authority of any body to act on that body's behalf and, at best, is neutral on the matter. The Trial Chamber sees in these circumstances no basis to entitle the Accused to assume, not having been in personal contact with Holbrooke in July 1996 and

[101] Motion, Annex B, paras. 6-8.
[102] Motion, Annex AB, paras. 46, 50.
[103] Motion, Annex AB, paras. 10–15, 22.
[104] Motion, Annex AB, para. 15.
[105] Motion, Annex AB, paras. 18–37.

Holbrooke having been out of the office between February and July 1996, that Holbrooke was entering into an agreement on behalf of the UNSC. As pointed out by the Prosecution, accepting the Accused's position would mean that the UNSC, by giving approval to activities conducted by a representative of a state on one or more occasions, could give that representative *carte blanche* to make subsequent binding representations of any sort and at any time.[106] Given all the circumstances, it cannot be said that the Accused could reasonably believe that Holbrooke had any authority to grant him immunity from prosecution by this Tribunal.

75. Sixth, the Accused also relies on a number of cases in certain domestic jurisdictions, which he claims illustrate that agreements not to prosecute have been upheld even when made by agents acting with apparent authority.[107] However, not a single one of these cases is directly applicable to the situation here. For example, in the English case of *R v Croydon Justices, Ex Parte Dean*, the court held that the prosecution of a person who, having received a representation from the police that he would be treated as a prosecution witness and would not be prosecuted, then implicated himself by making certain admissions, is capable of being an abuse of the process of the court, and stayed the prosecution.[108]

76. This and other cases involving the police making similar promises do not assist the Accused here. First and foremost, in those cases reliance on police promises led to persons giving statements to the police, without being cautioned, and thus to self-incrimination on serious crimes.[109] Thus, the actions of the police resulted in a serious breach of one of the most fundamental fair trial rights of an individual, the right not to incriminate him or herself. The Accused does not suggest that his fair trial rights have been violated.

77. Another major difference between the police abuse of process cases and the situation here is that the "agent" in those cases, namely the police, was an organ operating within a well established domestic system of investigation and prosecution of crimes, and, as such, was in a position to make certain representations to persons suspected of crimes. In these circumstances, it was considered to be an abuse of process to prosecute following representations relied upon by the suspect that there

[106] Response, para. 25.

[107] Motion, paras. 59-63.

[108] *R v Croydon Justices, Ex Parte Dean* [1993] QB 769. *See also R v Mohi* [2000] SASC 384 and *Jones v Whalley* [2007] 1 A.C. 63 for similar representations made by the police.

[109] *See R v Croydon Justices, Ex Parte Dean* [1993] QB 769 and *R v Mohi* [2000] SASC 384.

would be no prosecution. The circumstances in some of the other cases cited by the Accused were broadly similar.[110]

78. The Accused's reliance on *Geisser v. United States*,[111] and *Margalli-Olivera v. INS*,[112] is also misplaced, as both those cases involved plea bargains entered into by authorities explicitly authorised to make them, but who then failed to comply with their parts of the agreement.[113] In addition, in *United States v. McKeel,* a promise not to prosecute made by an unauthorised body was not enforced.[114] Finally, in *U.S. v. Churnovic*, the U.S. Court of Military Appeals held that a person suspected of murder or some other grave offence could not reasonably rely on a promise of immunity, even when that promise is made by a source authorised to make immunity deals.[115] These authorities also do not support the Accused's Motion but rather the Prosecution's Response.

79. For these reasons, the Chamber is of the view that, even assuming the principles of the doctrine of apparent authority apply in the context of international criminal law, the Accused has failed to show that Holbrooke acted with the apparent authority of the UNSC in July 1996.

Abuse of Process

80. Because the Chamber does not accept the Accused's contention that the Tribunal is bound by the Agreement, it now moves to consider the Accused's alternative claim, that of the abuse of process. In the *Barayagwiza* case, the Appeals Chamber of the ICTR defined the abuse of process doctrine as follows:

> [T]he abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases 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.[116]

The Chamber continued:

> [T]he abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances

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[110] *See e.g. United States v. Carter*, 454 F. 2d 1058 (4th Cir. 1972) where the promisor was a U.S. Attorney for one District while the prosecution was commenced by the U.S. Attorney in another district; *Cooke v. Orser*, 12 M.J. 335, 354 (C.M.A. 1982), and *United States v. Brown*, 13 M.J. 253 (C.M.A. 1982) where the promises were made by staff judge advocates who act as prosecutors in the military.

[111] *Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975).

[112] *Margalli-Olivera v. INS*, 43 F.3d 345 (8th Cir. 1994).

[113] Similar issue arose in *United States v. Rodman*, 519 F. 2d 1058 (1st Cir. 1975).

[114] *United States v. McKeel*, 63 M.J. 81.

[115] *United States v. Churnovic*, 22 M.J. 401 at 405 (C.M.A. 1986).

[116] *Prosecutor v. Barayagwiza*, Case No. ICTR–97–19–AR72, Decision, 3 November 1999 ("*Barayagwiza* Decision"), para. 74.

> 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.[117]

81. The abuse of process doctrine was also raised in the *Nikolić* case, where the accused argued that his "kidnapping" from the then Federal Republic of Yugoslavia ("FRY") and hand-over to NATO's Stabilisation Forces ("SFOR") in Bosnia and Herzegovina, resulting thus in his extradition to the Tribunal, necessitated a dismissal of the indictment against him. The Chamber, referring to the *Barayagwiza* Decision, repeated that, before the abuse of process doctrine can be invoked, it has to be clear that the rights of the accused have been egregiously violated.[118] The Trial Chamber found that Nikolić was allegedly illegally arrested and abducted from the territory of FRY by unknown individuals and transferred by them to the territory of Bosnia and Herzegovina, and that neither SFOR nor the Prosecution was involved in these acts. It then found that, despite the abduction and the level of violence allegedly used against Nikolić during his transfer to Bosnia and Herzegovina, there was no egregious violation of Nikolić's rights or the fundamental principle of due process of law.[119]

82. On appeal, the Appeals Chamber looked at whether a violation of an accused's human rights requires the setting aside of jurisdiction by the Tribunal.[120] The Appeals Chamber then held as follows:

> Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of these abuses. Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must, therefore 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.[121]

83. The Appeals Chamber went on to find that Nikolić had failed to show that his rights had been egregiously violated in the process of his arrest.[122] It held that jurisdiction would not have been set aside even if the conduct of Nikolić's captors had been attributed to SFOR and, by extension, to the Prosecution.[123]

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[117] *Barayagwiza* Decision, para. 77.
[118] *Nikolić* Trial Decision, para. 111.
[119] *Nikolić* Trial Decision, paras. 114, 116.
[120] *Nikolić* Appeal Decision, paras. 18–19.
[121] *Nikolić* Appeal Decision, para. 30 (footnote omitted).
[122] *Nikolić* Appeal Decision, paras. 32–33.
[123] *Nikolić* Appeal Decision, paras. 18, 33.

84. The Chamber considers that the Accused, other than making a number of allegations relating to the duplicity of Holbrooke, has failed to show that any abuse of process has taken place. First, proceeding with his case, even in light of the Agreement, would not affect any of the Accused's fair trial rights, including as a suspect or an accused. In addition, the Chamber recalls its finding that Holbrooke did not act with actual or apparent authority of the UNSC. Thus, he was essentially a third party, unconnected to the Tribunal, promising immunity years before the Accused's transfer to the Tribunal. It is difficult to see how, in those circumstances, to proceed with the case can be said to be such an abuse of process that the Tribunal would be obliged to stay the proceedings.

85. The Chamber acknowledges that the Trial Chamber in *Nikolić* held, *obiter dicta*, that 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. The Chamber, however, expresses some doubt that this statement is applicable to every situation involving a third party not connected to the Tribunal. The *Nikolić* Trial Chamber based this part of its decision on two examples, namely (i) the events in *Barayagwiza*, where there was a considerable delay by state authorities before the accused's transfer to the Tribunal, and (ii) a hypothetical situation of torture or cruel or degrading treatment of the accused by a third party just before his transfer to the Tribunal.[124] However, those two situations are hardly applicable to a case such as the one before the Chamber. First, in *Barayagwiza*, the prosecution was stayed partly also because of the delays caused by the ICTR's Prosecutor upon the transfer to the Tribunal, which compounded the serious delays caused by the state authorities that captured Barayagwiza.[125] In addition, the state authorities in question were explicitly held to have been acting on behalf of the ICTR Prosecutor and thus were not completely unconnected to the Tribunal.[126] As for the example of "serious mistreatment" of the accused by a third party, such as torture or cruel and/or degrading treatment, there is no indication that the Accused suffered such serious mistreatment or that there was any other *egregious* violation of his rights, including his right to political activity. In any event, in the opinion of this Chamber, 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. Where an accused is seriously mistreated by such a third party, that mistreatment is unlikely to be a barrier to a fair trial which can be secured in various other ways, for example, by excluding any evidence obtained by torture at the hands of the third party.

[124] *Nikolić* Trial Decision, para. 114.
[125] *Barayagwiza* Decision, paras. 35–37, 71.
[126] *Barayagwiza* Decision, paras. 54, 61.

86. The Chamber also finds that the Accused's reliance on the decision of the Special Court for Sierra Leone ("SCSL") in *Prosecutor v. Kondewa*[127] is misguided as he ignores the context in which the relevant part relied upon by him was pronounced. The Accused argues that Judge Robertson "recognized that prosecution of an accused who complied with the conditions of a cooperation agreement would constitute a 'literal abuse of process which, as national court decisions show, affect the conscience of the court and may incline it to hold the prosecutor to his word if the defendant has performed his side of the bargain.'"[128] However, the whole portion of Judge Robertson's ruling merits consideration here:

> [T]he performance of a condition in order to obtain an amnesty does not obliterate the guilt irrevocably attached to the commission of a crime against humanity for which the amnesty is given. There can be no basis for the abuse [of process] argument, (namely that an international criminal court would confound its own mission by denying a defendant, accused of bearing greatest responsibility for inhuman crimes, the benefit of an invalid promise on which he relied) when international law denies such persons the benefit even of a valid amnesty. Amnesty compliance may, however, be invoked ... when the prosecutor in the process of pre-trial proceedings offers a pardon to an indictee – e.g. in return for a guilty plea and "queen's evidence" against accomplices-and then reneges on the deal. This is a literal abuse of process which, as national courts decisions show, affects the conscience of the court and may well incline it to hold the prosecutor to his word if the defendant has performed his side of the bargain. But the Special Court Prosecutor is in no way concerned with or affected by the Lome amnesty, and is obliged by statute to disregard it. That disregard cannot amount to an abuse of process.[129]

87. Thus, Judge Robertson's separate opinion clearly shows that the "conscience of the court" will usually be affected in scenarios where the prosecution makes a deal with an accused and then reneges on it, rather than cases where an immunity agreement of the kind alleged in this case may be at issue. Indeed, the amnesties at issue there were specifically excluded by the Chamber as the basis for Kondewa's abuse of process claim.[130]

88. For all the reasons outlined above, the Chamber is of the view that the Accused has failed to establish his abuse of process claim.

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[127] *Prosecutor v. Kondewa*, Case No. SCSL-2004-14-AR 72 (E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, 25 May 2004, Separate Opinion of Judge Robertson ("*Kondewa* Decision").

[128] Motion, para. 74.

[129] *Kondewa* Decision, para. 56.

[130] As for the Accused's reliance on *Lubanga*, it is also misplaced as its facts are similar to the *Barayagwiza* case, rather than to the facts at issue here. *See Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute, 3 October 2006.

IV. DISPOSITION

89. For the reasons mentioned above, the Trial Chamber pursuant to Rule 73 of the Rules, hereby:

(a) **GRANTS** the extension of word limit to the Accused; and

(b) **DENIES** the Motion.

90. 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.

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

Judge Iain Bonomy, Presiding

Dated this eighth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]