Amnesty at the ICTY; an analysis of the Karadzic Immunity Decision

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On 17 December 2008 the ICTY promulgated its Decision on the Accused's Second Motion for Inspection and Disclosure: Immunity Issue, in which a Trial Chamber considered the legal significance of an alleged agreement to immunize Radovan Karadzic from prosecution before the ICTY. The Trial Chamber concluded that under customary international law an immunity agreement does not operate to remove the jurisdiction of an international court. This article examines the decision of the Court, and evaluates the current status of amnesties before the ICTY with reference to opinio juris, state practice, and the rules governing the functioning of the Court.

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Introduction

In Decision on the Accused's Second Motion for Inspection and Disclosure: Immunity Issue of 17 December 2008 a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “the Court” or “the Trial Chamber”) considered the legal significance of an alleged agreement between Richard Holbrooke and Radovan Karadzic to immunize the latter from prosecution before the ICTY. The Court granted the defendants Motion and ordered the Prosecution to disclose any notes, writings or recordings in its possession pertaining to the alleged agreement, but noted 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

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This decision is the second ruling of the ICTY adopting the position that an amnesty covering a crime prohibited by international law is invalid before an international court, and the first to consider the issue where the grant of immunity is allegedly attributable to the ICTY itself. After giving a brief summary of the legal background to the ICTY and the Karadzic Immunity Decision, the following comment will critically examine the legal reasoning employed by the Court in arriving at its conclusion.

**Legal Background of the ICTY**

The ICTY was established in 1993 by the Security Council acting under the Chapter VII powers to restore and maintain peace and security in the former Yugoslavia. It was the world’s first war crimes court since the Nuremberg and Tokyo tribunals and its mandate “is to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and thus contribute to the restoration and maintenance of peace in the region.” In accordance with its governing Statute, its jurisdiction *ratione materiae* and *ratione temporae* extends to grave breaches of the Geneva Conventions of 1949, violations of the law of war, genocide and crimes against humanity committed in the territory of the former Yugoslavia since 1 January 1991. It has personal jurisdiction over natural persons, but not States or organizations.

**Background to the Karadzic Immunity Decision**

Radovan Karadzic was a founding member of the Serb Democratic Party of Bosnia and Herzegovina, and served as sole President and Supreme Commander of the Armed Forces of the Serb Republic of Bosnia and Herzegovina (later the Republika Srpska) between December 1992 and July 1996. He was indicted by the ICTY in 1995 for crimes against the Bosnian Muslim and Bosnian Croat populations of Bosnian claimed Serb-territory in Bosnia and Herzegovina (BiH) preceding and during his presidency. According to its revised 2009 indictment the Prosecution is charging Karadzic with 11

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2 *Id.* at para. 25  
3 UNSC Resolution 827 (25 May 1993) UN Doc S/RES/827  
4 ’About the ICTY: Mandate and Jurisdiction’ <http://www.icty.org/sid/320>  
5 Statute of the International Tribunal for the Former Yugoslavia (ICTY Statute) art 2-5  
6 ICTY Statute art 9(1)
counts, including 2 counts of genocide, extermination and murder as crimes against humanity, and violations of the law of war. The accused evaded capture for 13 years but was arrested in Serbia and transferred to the custody of the ICTY in July 2008.

On 6 August 2008 Karadzic submitted to the court a statement regarding an “immunity agreement with the USA” in which it was alleged that “[i]n 1996, in the name of the USA, Richard Holbrooke made [to] the statesmen and ministers who were my authorized representatives an offer[, which] was as follows: I must withdraw not only from party offices and completely disappear from the public arena, not give interviews and not even publish literary works, in a word, disappear long enough for the Dayton agreement to be implemented in full.” In exchange for this, the defendant was to be granted immunity from trial before the ICTY. In a 23 September 2008 Motion for Inspection and Disclosure the defendant moved, pursuant to Rule 66(b) and 68 of the Rules of Procedure and Evidence, for an order requiring the prosecution to disclose *inter alia* any information it had regarding the alleged arrangement with Holbrooke. This submission also clarified Karadzic’s position with respect to applicability of the national grant of immunity to the ICTY; the motion argued that the “promise is attributable to the ICTY because it was made on behalf of, or in consultation with the member states of the United Nations Security Council, or was reasonably believed to be so made”.

On 20 August 2008 the Prosecution responded to the Defendants claims. It denied the existence of any agreement between the USA and Karadzic, but did identify and turn over an “undertaking

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9 Id.
11 Id. at para 3. A later motion further refined this position, arguing that “whether such an agreement, if it exists, is attributable to the ICTY is a mixed issue of law and fact. It is a well established principle that an agreement is binding if made by a person with actual or apparent authority to do so. [. . .] Courts have also employed a test of “effective control” in determining whether actions of a member state are attributable to the United nations and vice versa. Motion for Inspection and Disclosure: Holbrooke Agreement, ICTY-2008-IT-95-18-PT (5 November 2008) para. 18-19 <http://www.un.org/icty/karadzic/trialc/submissions/081106.pdf>. For more on the alleged amnesty deal between Richard Holbrooke and Radovan Karadzic read Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press, 2008) 42-5
document of 18 July 1996” reflecting the accused's intention to leave politics.\(^\text{13}\) In its Response, the prosecution argued that even if the alleged agreement did exist, it would lack legal effect because it (1) would violate the peremptory norm of international law that “prohibits the granting of amnesty for serious violations of international law”\(^\text{14}\) and (2) could not be imputed to the Security Council, the only body capable of binding the Tribunal with regard to limiting prosecutions.\(^\text{15}\)

**The Trial Chamber's Decision**

As the starting point for its decision, the Court considered the obligations imposed by Rules 66(B) and 68 of the ICTY’s Rules of Procedure and Evidence.\(^\text{16}\) Rule 66(B) requires that “the Prosecutor shall, on request, permit the Defense to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control' which: (i) are material to the preparation of the defense, or (ii) are intended for use by the Prosecutor as evidence at trial, or (iii) were obtained from or belonged to the accused”,\(^\text{17}\) and Rule 68 “places an independent obligation upon the Prosecution to disclose to the Defense 'as soon as practicable...any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.”\(^\text{18}\) When the defendant believes that the Prosecution has not complied with the obligations of Article 68 or is unsatisfied with the results of its initial request under Rule 66(b) the defendant may request an order compelling disclosure. To obtain this order, the Defense must: (a) specifically identify the items sought; (b) demonstrate*prima facie* that the items are exculpatory in respect of the accused; and (c) demonstrate*prima facie* that the items are in the custody or control of the Prosecution.\(^\text{19}\)

With regard to (a) the Court found that only two categories of documents plead by the Defendant - “a copy of the written agreement made [on 18-19 July 1996 between Radovan Karadzic

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\(^{13}\) Decision, *supra* note 1, at para. 27

\(^{14}\) Response, *supra* note 12, para. 4

\(^{15}\) *Id.* para. 2


\(^{17}\) Decision, *supra* note 1, at para. 8

\(^{18}\) *Id.* at para. 12

\(^{19}\) *Id.* at para. 10, 16
and Richard Hokbrooke] and “any contemporaneous notes, [and] recordings”\textsuperscript{20} - had satisfied the specificity requirement imposed by the Rules. The remaining categories of documents, including those “concerning the actual or apparent authority of Richard Holbrook to make representations to Radovan Karadzic on behalf of the international community”\textsuperscript{21} and “showing the relationship between the United States of American and the Office of the Prosecutor of the [ICTY]”\textsuperscript{22} were overly broad and too vague for the Prosecutor to rely upon, and thus no order requiring their disclosure could be granted.\textsuperscript{23} Having parred down the categories of documents at issue, the Court made short work of the ‘custody and control’ criteria. Noting that the Prosecution had already handed over a document from the relevant time period, the Court considered the requirement met since the Prosecution “may well have custody or control of other items relating to . . .the alleged meeting in Belgrade [...].”\textsuperscript{24}

To determine materiality under Rule 66(B) the Trial Chamber applied the test developed by the Appeals Chamber in \textit{Bagosora}, which decided that documents will only be of relevance to the preparation of a defense when they are used to support “an argument that has some prospect of success.”\textsuperscript{25} Here, the Trial Chamber announced that “[a]ccording to customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals”,\textsuperscript{26} and concluded that because the requested information was material only to the extent that it would determine a sentence it was immaterial under \textit{Bagosora}.\textsuperscript{27} However, because the Court concluded that materiality to a determination of sentence was enough to bring the requested information under the coverage of Rule 68,\textsuperscript{28} the Court partially granted Karadzic’s motion with respect to disclosure of any notes, written agreements or recordings made during the alleged meeting of the 18-19 July 1996.\textsuperscript{28}

\textit{Analysis of the Decision}

\begin{enumerate}
\item \textit{Id.} at para. 20
\item \textit{Id.} at para. 4(b)
\item \textit{Id.} at para. 20
\item \textit{Id.} at para. 27
\item \textit{Id.} at para. 23
\item \textit{Id.} at para. 17
\item \textit{Id.} at para. 24
\item \textit{Id.} at para. 21
\end{enumerate}
The controversial aspect of the Tribunal's decision is its finding that customary international law renders invalid any grant of immunity intended to immunize an individual from prosecution before an international court. Although it is unlikely that this issue will come before the ICTY again, the Karadzic Immunity Decision has important ramifications for the developing international humanitarian law with respect to amnesties. No other international court has had occasion to consider the legal effect of an amnesty allegedly attributable to the international court itself, very few international courts have had to consider the validity of national grants of amnesty brought before them and a mere handful of national decisions have evaluated the issue. Bringing to mind as it does the perennial debate between the values of peace and justice, and considering the role that amnesties have traditionally played in peace-building efforts, Karadzic represents a milestone in an underdeveloped area of international jurisprudence that has the potential to shape international law and behavior from the design and implementation of peace negotiations involving the UN to the prosecution of individuals before the ICC. It therefore comes as somewhat of a surprise that the reasoning of the Trial Chamber is undeveloped, unsatisfying, and unpersuasive.

Given the unsettled nature of the proposed norm, one would have expected the Trial Chamber to have engaged in a thoughtful and thorough analysis of the jurisprudence and scholarship supporting the existence of the rule before declaring its existence. Instead, the Trial Chamber declined to acknowledge the true nature of the immunity alleged by the Accused and puzzlingly based its decision on a variety of codes and conventions, jurisdictional mandates (including its own) and prior court decisions establishing that the defense of official capacity is not a bar to prosecution before an international court. Additionally, because the Decision is devoid of any discussion explaining the link

29 Decision, supra note 1, at para. 17 fn 21 citing [sic]Charter of the International Military Tribunal of Nuremberg, art. 7; Charter of the International Military Tribunal for the Far East, art. 6; Convention for the Prevention and the Punishment of the Crime of Genocide, art. IV; Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7(2); Statute of the International Criminal Tribunal for Rwanda, art. 6(2); Statute of the Special Court for Sierra Leone, art. 6(2); Rome Statute of the International Criminal Court, art. 27; Draft Code of Crimes against the Peace and Security of Mankind, art. 7; "Arrest Warrant of 11 April 2000" (Democratic Republic of the Congo v. Belgium), Judgement, ICJ Reports 2002 para. 61; Prosecutor v. Karadzic et al, Case No. IT-95-5-D, Decision in the matter of a proposal for a formal request for deferral to the competence of the tribunal addressed to the Republic of Bosnia and Herzegovina in respect of Radovan Karadzic, Ratko Mladic and Miéo Stanisic, 16 May 1995, paras. 23-24; Prosecutor v. Blaskic, Case
between the amassed materials and the Court's blanket rule regarding all immunities, the tension between the currently unsettled opinio juris and state practice with regard to amnesties and the issue of the inter-temporal problems associated with relying on sources that succeed the alleged immunity were unresolved. Finally, the Court mistakenly concluded that the Statute of the ICTY and Rules of Evidence and Procedure preclude the Prosecutor and Court from giving effect to a grant of immunity.

A. The Trial Chamber failed to recognize that the 'grant of immunity' at stake is an amnesty and analyze the issue accordingly

The breadth and varied nature of the materials collected by Trial Chamber in support of the proposition that “[u]nder [the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide] those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity” is certainly impressive, however it was not the defense of immunity ratione materiae that has been raised by the defendant, but the exculpatory nature and existence of an amnesty – a specific grant of immunity - that is at issue. The failure of the Trial Chamber to properly comprehend or give effect to this distinction and adjust its analysis accordingly is surprising since the alleged grant of immunity is referred to even by the Prosecutor as an amnesty, and the immunity at issue fits squarely within the definition of 'amnesty' as described by Blacks Law Dictionary.

It also represents the Trial Chambers most egregious error. Ten of the thirteen sources relied upon by the Court are completely silent regarding the issue of amnesties and may be dismissed as irrelevant, and the three that have some bearing on the status of international law with regard to grants

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30 Blaskic, supra note 29, at para. 41
31 Black's Law Dictionary (6th ed. 1990) 82-83 (defining an amnesty as an act of forgiveness that a sovereign state grants to individuals who have committed offensive acts); Response, supra note 12, at para. 4. See also Ronald C. Slye, Amnesty, Truth and Reconciliation: Reflections on the South African Amnesty Process, in Truth v. Justice (Robert I. Rothberg & Dennis Thompson eds., 2000) 170-171 (describing amnesties as official acts protecting persons from liability and asserting that there are many acts and processes falling under amnesty label); Michael P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court (1999) 32 Cornell Int'l L.J. 507, 508 (stating that in the present context [of discussing amnesties with respect to international criminal law], amnesty refers to an act of sovereign power immunizing person from criminal prosecution for past offenses”).
of immunity have so only in sections of the court opinion or Statute that were not cited by the Trial Chamber. In fact, had the Trial Chamber engaged in a proper examination of the *Furundzija* jurisprudence, the Statute of the Special Court for Sierra Leone and the Rome Statute of the ICC, it would have concluded that these three sources actually provide limited support the proposition that grants of immunity insulating an individual from prosecution before an international tribunal remain a legitimate tool of the global legal community.

**B. Customary international law has not evolved to the point where a grant of amnesty for violations of international humanitarian law is invalid before an international court**

Customary international law, whether developed over a long period of time or springing into being “instantly”, is the result of a sense of legal obligation that results in a general and consistent practice amongst states and international institutions.\(^{32}\) To determine generality, consistency and the existence of the requisite *opinio juris* one may examine the jurisprudence of international and national judicial courts, international treaties, UN Resolutions and national and international state practice.\(^{33}\)

According to the ICTY in *Prosecutor v. Furundzija*, the *jus cogens* nature of the prohibition on torture “delegitimize[s] any legislative, administrative, or judicial act authorizing torture”\(^{34}\) at the inter-state level because “[i]t would be senseless to argue... that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.”\(^{35}\) Regarding national grants of amnesty, the Court took note of General Comment No. 20 on Art. 7 of the ICCPR, which declares that “[a]mnesties are generally incompatible with the duty of States to investigate [torture]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.\(^{36}\)

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32 Restatement (Third) of the Foreign Relations Law of the United States, Section 102(2) (1987)
34 *Furundzija, supra* note 29, at para. 155
35 Id.
36 Id. at footnote 172 citing 1994 the United Nations Human Rights Committee, in its General Comment No. 20 on Art. 7 of the ICCPR (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994)).
Furundzija limited itself to considering the lawfulness of national amnesties for the international crime of torture. It can therefore be distinguished from Karadzic, which involves an alleged grant of amnesty extended by the USA but “attributable to the ICTY.” Further, by declining to establish a general precedent regarding national amnesties, the Furundzija Tribunal left its citation to the General Comment of the ICCPR open to interpretation. Article 7 is silent with regard to grants of amnesty ascribable to international courts, but even if it could be read to cover such amnesties the Human Rights Committee's use of the word 'generally' implies that some amnesties might be compatible with international law. Moreover, its insistence that an amnesty not interfere with a States duty to 'investigate' (as opposed to its duty to 'prosecute') suggests that the current state of opinio juris is that only amnesties that seek to suppress the truth are impermissible or disfavored. Because the alleged amnesty extended by the USA would only immunize the defendant from prosecution before the ICTY and Karadzic “does not claim to be the beneficiary of a general amnesty agreement”, he may be transferred to any state exercising universal jurisdiction or the courts of BiH by virtue of the principle of concurrent jurisdiction. At any one of those courts prosecutors may bring claims against Karadzic based on the same indictment and with substantially the same opportunity for evidence gathering, witness participation, and truth-seeking throughout the trial process that would exist if proceedings carried on at the Hague. It is therefore difficult to sustain any argument that the purpose or effect of

40 Motion, supra note 38, at para. 16
41 ICTY Statute, supra note 5, at art. 9; Rules, supra note 16, at Rule 11bis (providing that after an indictment has been confirmed but prior to the commencement of trial, a bench of three judges may refer the case to the authorities of a State: “(i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case.”).
42 In *Prosecutor v. Todovic* the ICTY confirmed that “once cases have been referred by the International Tribunal to the State of Bosnia and Herzegovina pursuant to Rule 11bis of the Rules, the Prosecutor’s Office of Bosnia and Herzegovina (“BiH Prosecutor”) may only initiate criminal prosecution in the State Court of Bosnia and Herzegovina on the basis of an indictment that has already been confirmed by the International Tribunal.” *Prosecutor v. Savo Todovic* (Decision on Rule 11bis Reference) ICTY-2006-IT-97-25/1-AR11bis.1 (23 February 2006) para. 15
the amnesty was or will be to suppress the truth.

Although Article 6(2) of the Statute of the Court of Sierra Leone, cited by the Trial Chamber, is not germane to the question of amnesty before international tribunals, Article 10 of the Statute and case-law interpreting relate directly to this issue. Article 10 of the Statue provides that that “[a]n amnesty granted to any person falling within the jurisdiction of the Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.”\(^43\) Because Article 9 of the precedent Lome Agreement had guaranteed that the Government of Sierra Leone would grant “absolute and free pardon and reprieve to all combatants and collaborators [of the Revolutionary United Front] in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement”\(^44\) the legality of Article 10 was challenged several times before the Appeals Chamber of the Special Court, and the outcomes of these cases have direct bearing on the current state of customary international law regarding amnesties.

In the *Lome Amnesty Decision* the Appeals Chamber of the Court declared that “[a]ny amnesty that encompasses crimes against humanity, serious war crimes, genocide or torture would be of doubtful validity under international law”\(^45\) and that “[e]ven if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity.”\(^46\) However, in the

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\(^{43}\) Statute of the Special Court for Sierra Leone, *supra* note 29.

\(^{44}\) Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (‘Lomé Accord’), 7 July 1999 <www.sierra-leone.org/lomeaccord.html>. The UN Special Representative attached a disclaimer to Article 9 stating that the amnesty provision would not apply to violations of serious international crimes. However Professor Schabas has argued that the Security Council accepted Article 9 of the Lome Agreement, and the Secretary General’s comments on amnesty was “little more than a perfunctory nod that criticized amnesty ‘for the record’ but went no further.” William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone* 11 U.C. DAVIS J. INT’L L & POLICY 145, 149-150 (2004).


\(^{46}\) *Id.* at para 84. Sarah Williams has noted the following problems with the reasoning of the SCSL in *Lome*: “First, the Court’s assertion that the offenses in Articles 2 to 4 of the Statute give rise to universal jurisdiction requires more detailed analysis than the Court provided. […] Second, the Court suggests that because it has jurisdiction in relation to
subsequent Kondewa Amnesty Decision Justice Robertson rejected the approach of the Court in the Lome Amnesty Decision and drafted a separate opinion analyzing the scope and effect of Article 10. Justice Robertson concluded that the Article 9 amnesty could only be interpreted as “a blanket amnesty for all crimes, however heinous and however individually or collectively characterised”. Nonetheless, he argued, “the rule against impunity which has crystallized in international law is a norm which denies the legal possibility of pardon to those who bear that greatest responsibility for crimes against humanity and for widespread and serious war crimes…” Thus while Karadzic would be unable to take advantage of the greater leeway permitted by Justice Robertson, even were his narrower articulation of the norm to be adopted by the ICTY, his Opinion is reflective of the fact that opinio juris as to the scope and application of national and de facto international amnesties before international tribunal remains unsettled.

Between Furundzija and Kondewa the international community was forced to consider the effects of immunities in another context, that of prosecution before the ICC. As the Trial Chamber correctly (but myopically) points out, Article 27 of the Rome Statute establishes the irrelevance of the defense of official capacity as far as prosecutions before the ICC are concerned. However, because the drafting committee of the Rome Statute was unable to reach a consensus on the legal effect of amnesty agreements it adopted a “creatively ambiguous” approach that many have argued sanctions various de international crimes that give rise to universal jurisdiction for prosecution by the courts of third States, it too must be exercising universal jurisdiction. […] The Court’s analysis appears to confuse the specific obligation owed by States that are parties to a treaty with general obligations owed to the international community as a whole.” Amnesties in in International Law; The Experience of the Special Court for Sierra Leone, 5 HUM. RTS. L. REV. 271 287-291(2005). For additional criticisms of Lome read Meisenberg, supra note 37, p 845-850 1

48 Id. at para. 10. His comments imply that the amnesty applies to courts constituted at the national and international level. Id. para. 11 (“As the United Nations was not a party to the Lomé Accord…I cannot interpret the Lomé Accord Amnesty in any other way or to regard its meaning as any way changed by the statement of Ambassador Okelo. His was a statement reflecting the position of the UN, to the effect that international crimes should not be amnestied. Whether or not that reflects international law, it cannot alter the obvious meaning and intent of Article IX”).
49 Id. at para. 49
50 Rome Statute (n 29)
facto amnesty arrangements. Article 53, for example, allows the Prosecutor to decline prosecution when “[t]aking into account the gravity if the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” This provision would seem to encompass precisely the situation alleged by Karadzic, the extension of a politically expedient grant of immunity in exchange for the peaceful relinquishment of power. Article 16 is also relevant, as it permits the Security Council to defer an investigation if there is a threat to peace and the resolution that requests deferral “is consistent with the purposes and principles of the United Nations with respect to maintaining international peace and security, resolving threatening situations in conformity with principles of justice and international law, and promoting respect for human rights and fundamental freedoms under Article 24 of the U.N. Charter.” Strictly speaking, the deferral of an investigation does not amount to an 'amnesty', but because a deferral is


53 Rome Statute, supra note 29, art. 53(1)(c).

54 Round Table: Prospects for the Functioning of the International Criminal Court in The Rome Statute of the International Criminal Court: a challenge to impunity (Mauro Politi & Giuseppe Nesi eds., 2001) 300 (noting that Beatrice le Fraper du Hellen, a member of the French negotiating time, stated of Article 53, “[t]here was a] very important provision because it allows the Prosecutor to take into account the existence of a post crisis situation; that is, to say, like the South African situation today, the Guatemala, El Salvador situations a few years ago ... There were[sic] the Truth Commission in Guatemala, there is the Truth Commission in South Africa. And we have tried to give the Court the possibility to take into account the existence of such attempts at finding a solution.”). Additionally, one of the Interpretive Declarations made by Columbia upon Ratification of the Rome Statute bears out this flexible reading of Article 53. Paragraph 1 reads that “[n]one of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties... provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.” Id. at Declaration of Colombia, para. 1 (Aug. 5, 2002). No member states objected to Colombia’s interpretive declarations. Id. at Objections.

perpetually renewable on a yearly basis repeated deferrals by the Security Council under Article 16 would have the effect of operating as a permanent grant of immunity.

The aforementioned case-law and Statutes demonstrates clearly that opinio juris with respect to amnesties remains split, albeit arguably trending towards invalidation before international courts. But opinio juris is only one component of customary international law. Evidence of widespread practice consistent with the rule must also be apparent, and the Trial Chamber failed to examine this component entirely. Although there exists no precedent involving precisely the same set of circumstances alleged by Karadzic – namely an offer of immunity from prosecution attributable to an international court - that it could have examined for its direct applicability, there have been a number of domestic grants of amnesty to which the United Nations has granted its imprimatur and 'international' amnesties for which the UN has been directly responsible that speak to the ongoing acceptability of amnesties more broadly that the Court should have take into account. For example:

- After peace talks between the African National Congress and the National Party stalled in 1992-93 the UN recommended instituting an amnesty program under which members of the South African apartheid government would receive blanket immunity in an effort to kick-start the democratization process.

- In 1993 UN-appointed negotiator Dante Caputo mediated an agreement between the military government of Haiti and the democratically elected President-in-exile Jean-Bertrand Aristide. The subsequent deal called for the reinstatement of President Aristide and amnesty for members of the military junta. The Security Council approved the arrangement, noting that it represented “the only valid framework for ending the crisis in Haiti” and “commend[ed] the efforts by . . .Mr. Dante Caputo to establish

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56 Rome Statute, supra note 29, art. 16
57 Yasmin Navqi, Amnesty for war crimes: Defining the limits of international recognition, 851 IRRC 583, 593 (2003)
60 Statement of the President of the Security Council of 15 July 1993, reprinted in Resolutions and Decisions of the
a political dialogue with the Haitian parties with a view to resolving the crisis in Haiti.”

- The “Mexico Agreements” of 27 April 1991 provided for the establishment of a truth commission consisting of three individuals appointed by the Secretary-General to investigate “serious acts of violence” committed in El Salvador between 1980 and 1991. The sweeping amnesty law passed by the Assembly of El Salvador just one week after the Commission presented its final report in March 1993 immunized those mentioned by the Commission. UN Secretary-General Boutros Boutros Ghali tacitly accepted the legitimacy of the amnesty, noting only that “it would have been preferable if the amnesty had been promulgated after creating a broad degree of national consensus in its favour.”

- In 1996 the United Nations assisted in the conclusion of the Guatemalan Peace Accords, which granted amnesty to persons who committed political crimes against the state, the institutional order, and certain common crimes, but not crimes of genocide, torture, and forced disappearances. The legislation did not, however, exclude other serious violations of international law that the Guatemalan government was not obliged by treaty to prosecute. The UN Mission to Guatemala failed to object to this arrangement, and publicly stated that a determination as to the appropriate scope of the amnesty should be made “exclusively [by] the Guatemalan people.”

- In 1999 the Lusaka Ceasefire Agreement was signed in the Democratic Republic of Congo. The agreement provides that the parties “together with the UN” shall create “a mechanism for disarming militias and armed groups, including the genocidal forces” which “may include the granting of amnesty and political asylum, except for genocidaires”. In 2001 the UN Security Council acknowledged their unreserved support for the ceasefire.

- In August 2003 a peace agreement was signed between the government of Liberia, headed by President Charles Taylor and the anti-Taylor Liberians United for Reconciliation and Democracy and Movement for Democracy in Liberia. The agreement provided that “[t]he NTGL (National Transitional Government of Liberia) shall give consideration to

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65 Cassel (n 63) 223-24 footnote 74 (citing Declaracion Publica del Director de MINUGUA, Dec. 20,1996, para. 5)
66 Lusaka Ceasefire Agreement of 10 July 1999 UN Doc. S/1999/815 para. 9.2
a recommendation for general amnesty to all persons and parties engaged or involved in military activities during the Liberian civil conflict. . . . Days later 2003 the UN Security Council announced it preparedness to “to support the transitional government and assist in implementation of the Agreement.” The UN and US also brokered a deal with President Taylor wherein he agreed to give up power, seek asylum in Nigeria, and refrain from involvement in politics. Taylor is currently standing trial before the SCSL only because he violated the extradition agreement by “training and arming a small but potent force that poses a significant threat to West African stability.”

In October 2004 the UN consented and incorporated Article 40 of the Law on the Establishment Extraordinary Chambers in the Courts in Cambodia, which gives the Chambers leeway to determine the coverage of any amnesty a granted prior to the enactment of the Law. The United Nations agreed to this provision “based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide.”

Security Council Resolution 1593, passed in March 2005, “[d]ecides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.”

Article 105 Section 1 of the UN Charter, in reference to the UN, reads “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.” Article II, paragraph 2 of the Convention on the Privileges and Immunities of the United Nations establishes that “[t]he United Nations […] shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. […]”.

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68 Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) (18 August 2003) art. 34
70 ‘eXile’, supra note 52, at p 3
74 UNSC Res 1593 (31 March 2005) UN Doc SC/Res/1593 para. 6
July 2008 the Hague District Court decided that survivors of a 1995 Serb attack that killed 8,000 Muslims in the Bosnian town of Srebrenica - an attack described as 'genocide' by the ICJ and ICTY - cannot sue the UN in the Netherlands for failing to protect their relatives. In their decision the judges noted that “[t]he court's inquiry into a possible conflict between the absolute immunity valid in international law of the U.N. and other standards of international law does not lead to an exception to [Article 105(1)] immunity.”

Although there is a countervailing trend that is just starting to gain traction at the international level, “to the extent any state practice in this area is widespread, it is the practice of granting amnesties or fact impunity to those who commit crimes against humanity.” The reality is that the international community continues to elevate the priorities of political convenience and peace above those of justice, and the Court erred by failing to even consider practice at the state and international level. Had it done so, it would have had to dramatically reassess its assertion that customary international law has developed to the point where grants of immunity are invalid before an international tribunal.

**C. The Inter-temporal Principle requires the Court to have applied international law as it existed in 1996**

An additional error of the Trial Chamber is its failure to account for the generally accepted inter-temporal principle of international law. Although, as the Prosecution points out, the Vienna Convention on the Law of Treaties (1969) states at Article 64 that “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and

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terminates.”\textsuperscript{78} the more generally accepted approach requires that an international tribunal examine a
situation “according to the conditions and rules in existence at the time...and not [those made] at a later
date.”\textsuperscript{79} This principle is enshrined in the ICTY Statute itself; on the issue of jurisdiction \textit{ratione materiae} the Report of the Secretary General Pursuant to Resolution 808 on the ICTY notes that “the
application of the principle \textit{nullum crimen sine lege} requires the international tribunal should apply
rules of international humanitarian law which are beyond any doubt part of customary law so that the
problem of adherence of some but not all States to specific conventions does not arise. This would
appear to be particularly important in the context of an international tribunal prosecuting persons
responsible for serious violations of international humanitarian law.”\textsuperscript{80}

It is thus important to note that of the thirteen sources cited by the Trial Chamber only four were
in existence before the offer of amnesty was allegedly made.\textsuperscript{81} Moreover, as recently as 2004 the
Special Court for Sierra Leone declared with regard to the closely-related issue of national grants of
amnesty for international crimes “that there is a crystalizing international norm that a government
cannot grant amnesty for serious violations of crimes under international law. . .[but the view] that it
has crystallized may not be entirely correct”.\textsuperscript{82} Based on the above it is clear that any rule of customary
international law had not formed in time to preclude the alleged grant of the amnesty.

\textsuperscript{78} Response, \textit{supra} note 12, at para. 7 fn 9
\textsuperscript{79} Malcolm Nathan Shaw \textit{International Law} (5th ed., Cambridge University Press, 2003) 429; Hersch Lauterpacht, Elihu
Lauterpacht \textit{International Law: Being the Collected Papers of Hersch Lauterpacht} (CUP Archive, 1970) 133 (“It is clear
that in these spheres [the law of tortious and criminal responsibility] a State cannot properly be made accountable for
acts and omissions which at the time of the alleged injury were not prohibited by international law. The same applies to
cases in which international law imposes direct responsibility upon individuals, as for instance, in the matter of the
observance of the law of war.”); \textit{The Intertemporal Problem in Public International Law} in \textit{56 ANN. DE L'INSTITUT DE
DROIT INT'L} 537 (1975) (resolution adopted by the Institute, stating in part: “Unless otherwise indicated, the temporal
sphere of application of any norm of public international law shall be determined in accordance with the general
principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are
contemporaneous with it.”); ILC, \textit{'Draft Articles on State Responsibility: Part 1, Articles 1-35'} (1999) UN Doc
A/CN.4/L.574 art. 18 (“An act of the State which is not in conformity with what is required of it by an international
obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in
force for that State”). Cf. Rosalyn Higgins \textit{Some Observations on the Inter-temporal Rule in International Law} in
\textit{Theory of international law at the threshold of the 21st century} (T.M.C. Asser, 1996) 173, 174 (“There are good reasons
for thinking that treaties that guarantee human rights – whether expressly or in an incident of their subject matter – fall
into a special category so far as intertemporal law is concerned”).
\textsuperscript{80} \textit{Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808} (3 May 1993) Un Doc.
\textsuperscript{81} Charter of the International Military Tribunal of Nuremberg (n 29); Charter of the International Military Tribunal for the
Far East (n 29); Convention for the Prevention and the Punishment of the Crime of Genocide (n 29); Statute (n 5)
\textsuperscript{82} \textit{Lomé Amnesty Decision}, supra note 46 at para. 82
D. Neither the Statute nor Rules of the ICTY do not prohibit the Trial Chamber from giving legal effect to an amnesty

The Court also made an argument based on the Statute and Rules of the ICTY, noting that the Tribunal is unaffected by “any alleged undertaking...by Mr. Holbrooke” and it is in fact empowered “to prosecute persons responsible for serious violations of intentional humanitarian law”. The Prosecutor has the “responsibility to carry out investigations and prosecutions pursuant to this power” in an independent manner and “as a separate organ of the Tribunal”. Having already announced that customary international law precludes immunity from prosecution before an international tribunal, it is reasonable to assume that the Trial Chamber's further analysis of its governing Statute and Rules are obiter dictum with limited precedential value. Nonetheless, the Court's argument that a grant of immunity conflicts with the central mandate and structural arrangement of the ICTY would benefit from further scrutiny.

Both the UN and ICTY view the Court as more than a tool for carrying out prosecutions for violations of international humanitarian law. Resolution 827 establishing the Court makes it clear that the Court was expected to “contribute to the restoration and maintenance of peace”, and in the Stakic case the Trial Chamber accepted that “the Tribunal can make a significant contribution to this process.” Aware of the complicated interplay between these two directives, Justice Richard Goldstone, the first Prosecutor of the ICTY, stated that the role of an external political situation could not be ignored and noted that a decision to indict “may well cause problems and might interfere, for example, with a peace process.” Although Justice Goldstone generally favored taking action despite potentially negative consequences to the political situation, there is nothing that would prevent a future

83 Decision, supra note 1, at para 25
84 Id. at para 18
85 The implication of the Court is two-fold: (1) that the amnesty is invalid because it conflicts with the central mandate and structural arrangement of the Court, and (2) that Mr. Holbrooke cannot bind the ICTY as the result of statutory prohibitions. The issue of when an individual state or person may bind the UNSC or an international court is too lengthy to take up in this comment, but would benefit from further scrutiny.
86 Resolution 827, supra note 3
88 Richard J. Goldstone & Sandra Day O’Connor For Humanity: Reflections of a War Crimes Investigator (New Haven Yale University Press, 2000) 132
89 Id.
Prosecutor from striking a different balance in the interests of achieving the other policy goals of the UN mandate.

The Trial Chamber also erred by examining the effect of an amnesty in light of whether its grant infringes on the independence of the Prosecutor and instead should have examined the issue through the lens of prosecutorial discretion. Paragraph 85 of the Report of the Secretary General Pursuant to Resolution 827 reaffirms the absolute independence of the Prosecutor from the influence of States, but neither the Statute, the Rules or Resolution 827 restricts the Prosecutor from exercising discretion on the basis of legal or political criteria. Justice Louise Arbour, former Prosecutor of the ICTY and ICTR, has acknowledged that “the criteria upon which such Prosecutorial discretion is to be exercised [as] ill-defined, and complex” and in fact “it is quite conceivable that the Prosecutor would take the results of [amnesties] into consideration.”

This author is not unaware of the emphasis the Office of the Prosecutor places on bringing to justice the 'big fish' most responsible for violations of international humanitarian law, and acknowledges that any Prosecutor is unlikely to forgo issuing an indictment based on an amnesty. Judicial discretion at the pre-trial and trial stages, however, provide a second opportunity for a grant of amnesty to play a role before the ICTY. Article 20(1) requires that before an indictment is approved a Trial Chamber determines that the trial is 'fair' and will be conducted “with full respect for the rights of the accused.” If customary international law has not developed to the point where an amnesty is automatically invalid for purposes of voiding the jurisdiction of an international court, the argument can be made that substantial unfairness would result were their grant of immunity not respected by any court covered by its terms (conditional on the amnesty having been extended by one recognized by the court as possessing the requisite authority).

91 'Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court' (8 December 1997) in M2 PRESSWIRE, at 3 (LEXIS)
93 Kerr, *supra* note 91, at 185
Moreover, application of the “abuse of process” doctrine at the trial stage may prevent a case against an immunized individual from moving forward. The International Criminal Tribunal For Rwanda has determined that its 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.” The ICTY incorporated this decision into its jurisprudence through Nikolic and noted that the Court must always maintain the balance “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.”

Conclusion

For thirteen years Radovan Karadzic has frustrated the attempts of the international community to hold him accountable for violations of international humanitarian law, and it is understandable that in its eagerness to promote justice and accountability the Trial Chamber would draw a firm line with respect to amnesties. But in its efforts to secure its jurisdiction the Court has failed to comprehend the nature of the immunity at stake, as well as the position of customary international law and the governing rules of the ICTY with respect to his immunity. The resulting overwhelmingly undeveloped assertion that no immunities are available to a defendant accused of certain international crimes before an international court promulgated in the Decision will dissatisfy everyone. Those who advocate for a customary rule of international law that prohibits amnesties will be frustrated that that the Trial Chamber decision can be so easily dismissed as the product of flawed legal reasoning. Those who maintain that a prohibition on amnesties before international courts has not yet crystallized will find their thirst for clarification on the status of the law unsated for the same reason. The international legal community as a whole will be disappointed that the Court has failed to make a meaningful contribution to the patois of international law, especially while questions remain as to what role amnesties ought and will play before the ICC and what position the Court will occupy in the global legal and political order.

95 Prosecutor v. Barayagwiza (Judgment) ICTR-97-19 (3 November 1999) para. 74
It is unlikely that this issue will come before the ICTY again, but future courts should be encouraged to ignore the Karadzic Immunity Decision, engage in their own balanced legal and philosophical analysis of the law, and in the process perhaps make a more meaningful contribution to international jurisprudence.