
**MEMORANDUM OF UNDERSTANDING
BETWEEN THE OFFICE OF THE PROSECUTOR OF THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER
YUGOSLAVIA (“ICTY”)**

AND

**THE SPECIAL DEPARTMENT FOR WAR CRIMES OF THE
PROSECUTOR’S OFFICE OF BOSNIA AND HERZEGOVINA**

(“The Parties”)

PREAMBLE

Considering that the Office of the Prosecutor (“OTP”) of the ICTY is committed to supporting the work of the Court of Bosnia and Herzegovina (hereinafter: BiH).

Acknowledging that many of the events with which this court will be concerned have been extensively investigated by, and litigated at, the ICTY and that in many instances ICTY is the sole repository of “document collections” which are vital to the prospects of successful prosecutions at the Court of BiH.

Considering that the “Completion Strategy” of ICTY prevents it from carrying out fully, the mandate given to it by Resolution 808 of the UN Security Council to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991” and that in respect of the events in BiH, (the scene of the most serious, widespread and systematic crimes), that mandate has been ceded to the relevant institutions in BiH in respect of intermediate and lower-ranked suspects.

Acknowledging that the Special Department for War Crimes of The Prosecutor’s Office of Bosnia and Herzegovina (hereinafter: POBH) will be unable to carry out its function in this process without the assistance of the OTP.

Noting that on 6 April 2005, the President of the ICTY publicly reiterated the principle that the “Tribunal is committed to assisting other judicial institutions in the prosecution of persons responsible for breaches of international humanitarian law in the former Yugoslavia, and in particular the Special War crimes Chamber of the Bosnia and Herzegovina court...”¹

Acknowledging that as ICTY must complete its activities, it is essential that effective co-operation be established between the OTP and POBH, so as to ensure that those persons who have committed serious, widespread and systematic crimes do not enjoy impunity.

Noting that Article 227(1)(e) of the Criminal Procedure Code (“CPC”) requires the Indictment to contain a “proposal of evidence to be presented, including the list of the names of witnesses and experts, documents to be read and objects serving as evidence”.

Noting further that by the terms of Article 225(3) of the CPC, an official investigation must be completed within 6 months of its commencement.

Noting further that the Court of BiH has the power to grant witnesses protective measures by the terms of the Law on the Protection of Vulnerable Witnesses and Witnesses Under Threat.

Noting further that on 6 April 2005, the President of ICTY issued a decision which precluded the POBH from filing Motions to ICTY Trial and Appeals Chambers.

The parties note and agree the following:

Article 1

Written Requests for Assistance (“RFA”)

- (1) The POBH will put all requests for assistance to the OTP into writing. The POBH requests from the Chief Prosecutor will be addressed to the ICTY Chief Prosecutor. The OTP will make all requests for assistance in writing from the ICTY Chief Prosecutor to the Chief Prosecutor of the POBH.
- (2) If the request is originally transmitted via e-mail or fax, hard copies will be provided to the other party within a reasonable time thereafter.

¹ See: Case No. IT-05-85-Misc.2, “*Decision on Registrar’s Submission on a Request from The Office of The Chief Prosecutor of Bosnia and Herzegovina Pursuant to Rule 33(B)*”, 6 April 2005, at para. 16.

Article 2

Access to Documents

- (1) The OTP will provide primary access to their “document collections” via the Electronic Disclosure Suite (“EDS”), in accordance with the note verbal of the ICTY Registrar to the Court of BiH Registrar dated 27 April 2005 and the response of the Court of BiH Registrar dated 6 May 2005.
- (2) In the event that there are documents material to a POBH investigation and/or indictment,, which are not contained in EDS, access to such and copies thereof, will be provided upon request.
- (3) Notwithstanding the previous provisions, the OTP is prohibited from providing documents falling within the provisions of Rule 70 of the ICTY Rules of Procedure and Evidence (“RPE”) and is under no obligation to provide “work product” (i.e. written analyses, memoranda and records of conversations) or any other material determined by the OTP to be confidential.
- (4) Material disclosed to the POBH by the ICTY and its OTP will be treated as confidential, and will be released to no one except members of the Special Department for War Crimes Unit of the POBH and the court of BiH as necessary for the purposes of criminal investigations and proceedings, and to persons required under the law of procedure to receive such information in the course of such investigations and litigation.

Article 3

Access to Witness Statements

- (1) The OTP will provide primary access to their collection of “redacted witness statements” via the EDS.
- (2) If the POBH decides that the evidence in the statement is material to the case and therefore wish to interview the witness, subject to any order for protective measures which may have been made,² the OTP will supply the names and current whereabouts of the witness, subject to any concerns expressed by the witness to the OTP regarding disclosure of identity or fears for his/her safety and security.

² See below: Articles 4 & 7.

- (3) If the request relates to an ICTY statement which was obtained after a witness had already made a statement to a Bosnian investigative agency, (subject to an order which may have been made for protective measures), the ICTY statement may be provided without redactions, subject to any order for protective measures which may have been made,³ and any concerns expressed by the witness to the OTP regarding disclosure of identity or fears for his/her safety and security.
- (4) Notwithstanding the previous provisions, the OTP is under no obligation to provide statements of witnesses it deems confidential.
- (5) In the event that the collection of “redacted witness statements” are not available via the EDS, upon request by the POBH for the provision of ICTY statements (where the witness has not previously made a statement to an investigative agency in BiH and the witness has not previously authorized disclosure of the statement to other law enforcement agencies), which are, or may be, relevant to an investigation and/or pending indictment in BiH, the OTP will provide copies, redacted to remove the name, current whereabouts of the witness and all identifying information.
- (6) Material disclosed to the POBH by the OTP concerning witnesses without protective measures will be treated as confidential, and will be released to no one except members of the Special Department for War Crimes Unit of the POBH and the court of BiH as necessary for the purposes of criminal investigations and proceedings, and to persons required under the law of procedure to receive such information in the course of such investigations and litigation. The POBH will take all necessary legal and practical measures within its powers, as provided for in the Law on Protection of Witnesses under Threat and Vulnerable Witnesses and the Criminal Procedure Code of BiH, to ensure the safety and security of the witnesses.

Article 4

Contact with Witnesses and Witnesses with Protective Measures

- (1) The Parties understand that there may be witnesses with whom the OTP has an established relationship and whom the POBH wishes to interview, but either the witnesses have not given authority for disclosure of their statements or other information to a prosecuting authority other than the OTP, and/or the witness is the subject of an Order for Protective Measures by an ICTY Trial or Appeals Chamber.⁴

³ See below: Articles 4 & 7.

⁴ See above: Article 3(2) & (3); and below: Article 7.

- (2) If a witness has indicated in the statement approval to the OTP of disclosure of his/her name and current whereabouts to a prosecuting authority other than the OTP, then the OTP will supply the name and current whereabouts to the POBH.
- (3) If a witness has not indicated approval for disclosure of his/her name and current whereabouts and the POBH wishes to contact the witness, the OTP or the ICTY Victim and Witness Section (“VWS”), as appropriate, will contact the witness to ascertain whether he/she will consent to being contacted by the POBH.
- (4) Notwithstanding the previous provisions, where the witness is the subject of an Order for Protective Measures, the OTP agrees to file a motion on behalf of the POBH with the appropriate Chamber(s), attaching the BiH RFA and the list of witnesses which will be contacted by the ICTY VWS, and details of their statements, testimony, and/or exhibits under seal.⁵ The POBH will provide to the Prosecutor of the ICTY two written undertakings which may accompany the OTP motions filed for protected witnesses:
 - (a) An undertaking from the Chief Prosecutor of the POBH indicating:
 - (i) The information disclosed by the OTP will be treated as confidential, and will be released to no one except members of the Special Department for War Crimes of the POBH and the Court of BiH except as necessary for the purposes of proceedings involving the suspect, and to that suspect and his counsel as specified in paragraph (b) below.
 - (ii) The information disclosed concerning protected witnesses will not be released to the suspect and/or his counsel unless the Chief Prosecutor of the POBH obtains assurances that the suspect and/or his counsel will strictly maintain the confidentiality of the information under threat of criminal sanction.
 - (iii) The POBH will take all necessary legal and practical measures within its powers, as provided for in the Law on Protection of Witnesses under Threat and Vulnerable Witnesses and the Criminal Procedure Code of BiH, to ensure the safety and security of the witnesses.
 - (b) An undertaking from the Minister of Justice of BiH indicating:
 - (i) To respect the Orders and Decisions of Appeals and Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) that concern

⁵ See below: Article 7.

the variation of protective measures granted to witnesses and whose confidential personal data, information, evidence and/or testimony is provided to the Prosecutor's Office of Bosnia and Herzegovina and/or the Court of Bosnia and Herzegovina; and

- (ii) To take all necessary measures within its authority, both legal and practical, to ensure the safety and security of these witnesses.

Article 5

Access to Expert Reports

- (1) Upon request by the POBH, the OTP will provide a list of public reports made by experts for the purposes of cases at ICTY which have been filed with the ICTY Registry, and/or admitted into evidence in any case.
- (2) The POBH will make a request to the ICTY Registry for certified copies of the listed reports, together with certified copies of any documents referred to therein which may have been exhibited.
- (3) If the ICTY Registry is not in possession of electronic copies of the reports and/or documents referred to in the reports (either through filing or the "Judicial Data Base"), the OTP undertakes to provide the POBH with electronic copies of the reports, and electronic copies of documents referred to in the reports only if these documents are readily available in a single electronic folder on OTP's network.

Article 6

Searches

- (1) The OTP will provide facilities for a member of the POBH to carry out such searches of OTP electronic databases, not included in EDS, for the purposes of establishing the whereabouts of suspects or for any other relevant purpose.
- (2) Alternatively, upon request by the POBH, the OTP may conduct the searches referred to in paragraph (1) above.

Article 7

Filing of Motions to ICTY Chambers

- (1) The OTP will file Motions to ICTY Trial Chambers and Appeals Chambers, on behalf of the POBH, on matters relevant to investigations and/or pending indictments in BiH.
- (2) Such matters include, but are not limited to, authorisation from a Chamber for disclosure of un-redacted copies of transcripts (and audio tapes if the witness testified in the Bosnian language),⁶ of witnesses who were granted protective measures and/or who testified, wholly or in part, in closed or private session and disclosure of exhibits placed under seal.⁷

Article 8

Co-ordination between Teams

In the event that the POBH is proposing to conduct an investigation with a view to indicting a person(s) whose alleged crimes are the subject of, or closely allied with, a trial or pending trial or appeal at ICTY, the team responsible for the investigation in the POBH will liaise with the relevant team in the OTP to maximise exchange of information and minimise both the risks of conflicting case theories and conflicting testimony by witnesses.

⁶ Subject to any Rule 70 information contained therein.

⁷ See above: Article 5.

Article 9

“Category II” Cases

The OTP will provide POBH with copies of all relevant and available witness statements, documentary and demonstrable evidence in relation to “Category II” cases, as defined by the OTP. The OTP will file all necessary motions with the Trial and Appeal Chambers relating to the aforesaid material.

SIGNED:

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Carla Del Ponte

Chief Prosecutor, ICTY

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Marinko Jurčević

Chief Prosecutor of BiH