

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

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

Registrar: Mr. John Hocking

Date: 7 February 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

SUBMISSION ON INVIOLABILITY
OF UNITED NATIONS ARCHIVES

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Office of Legal Affairs:
United Nations, NY

The Accused:
Radovan Karadzic

1. On 2 February 2011, the Trial Chamber requested the prosecution and defence to address the following issue related to the pending *Motion for Binding Order: United Nations* (1 November 2010):

Does Article 29 of the Tribunal's Statute and Rule 54 *bis* of its Rules apply vis-à-vis the UN, the organisation of which the Tribunal is a part, or does the UN Convention affect the application of those provisions to the UN?¹

2. The short answer is that the *Convention on the Privileges and Immunities of the United Nations* has no applicability to requests for documents from UN archives by the Tribunal. The Convention is an agreement between the United Nations and its Member States, and does not apply to requests for documents by organs of the United Nations such as the Tribunal.

3. This is evidenced by sections 31 through 34 of the Final Article to the Convention, which requires accession to the agreement by the other parties—specified to be Member States. The Tribunal or other UN organs have never acceded, nor been asked to accede to, the Convention.

4. The Trial Chamber in the *Simic* case, led by President Robinson, has held that:

the principle of the inviolability of the archives of the United Nations (Article II, section 4, of the 1946 Convention, referred to in Article 30 of the Statute of the International Tribunal) is directed *primarily at national authorities and bodies external to the United Nations*, and is not applicable to the International Tribunal in respect of information and material in the possession of the Registry relevant to the discharge of its fundamental purpose.² (emphasis added)

5. While the documents in the *Simic* case were those of the ICTY's own Registry, the principle that the Convention applied only to bodies external to the United Nations is equally applicable to documents in the custody of other UN organs. In the *Karemera* case, a Trial Chamber at the ICTR, which included our own Judge Lattanzi, held that a binding order could properly be directed at documents in the custody of the United Nations Department of Peacekeeping Operations.³

6. The United Nations claimed that the *Karemera* decision “recognized and upheld the inviolability of the archives and documents of the United Nations.”⁴

¹ *Order Inviting Submissions on Accused's Motion for Binding Order to United Nations*

² *Prosecutor v Simic et al*, No IT-95-9-R77, *Order for Limited Access to Registry Files* (1 November 1999) at p. 3

³ *Prosecutor v Karemera et al*, No ICTR-98-44-T, *Decision on the Ex Parte Defence Motion for Order to United Nations Department of Peace-Keeping Operations for Production of Documents* (9 March 2004) at para. 12

⁴ Response of the United Nations (12 November 2010) at p. 2, para. 2

citing paragraph 18 of that decision. What the United Nations failed to point out is that the Chamber said in paragraph 19 of that decision:

Nevertheless, like States, intergovernmental organizations should not *a priori* invoke a general right to refuse disclosing documents necessary for the proceedings. To paraphrase the ICTY Appeals Chamber in the *Blaskic* case, such a position could lead to the stultification of international criminal proceedings, and the very *raison d'être* of the Tribunal would be undermined. This would be the case in particular where the documents needed to be produced might prove crucial in establishing the guilt or innocence of the accused

7. The *Karemera* Chamber also cited Article 56 of the United Nations Charter, which provides that:

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.⁵

8. The documents that Dr Karadzic has requested from the UN are 'relevant to the discharge of [the Tribunal's] fundamental purpose'.⁶ This purpose requires that when making a finding of guilt or innocence, the Trial Chamber 'has all the relevant evidence before it when making its decisions'.⁷ It would violate Article 56 of the Charter if the "Organization" was not subject to the same joint obligations that is imposed upon its Members and thus was able to frustrate the very purpose of the Tribunal.

9. Application of the Convention to the Tribunal would also violate the independence granted to the Tribunal by the United Nations Security Council. The Tribunal is mandated to 'perform its functions independently of political considerations' and is not 'subject to the authority or control of the Security Council with regard to the performance of its judicial functions'.⁸

10. For all of the above reasons, the Trial Chamber should hold that the Convention cannot operate to prevent production of documents by the United Nations and its organs to the Tribunal.

⁵ *Karemera* at fn. 8

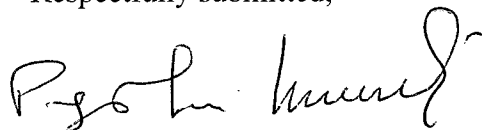
⁶ *Simic Order* at page 3.

⁷ *Blaskic Decision on Objection of the Republic of Croatia* at para 31.

⁸ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704 (3 May 1993) at para 28.

Word count: 921

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', with a stylized flourish at the end.

Radovan Karadzic⁹

⁹ The contribution to the research and drafting of this submission of Legal Intern Julia Kretzenbacher of the University of Melbourne (Australia) is gratefully acknowledged.