



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

TRIAL CHAMBER III

**Case No. ICTR-98-44-T
FRANÇAIS
Original : ANGLAIS**

Before : Judge Andréia Vaz, presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registry: Adama Dieng

Decision of: 9 March 2004

THE PROSECUTOR

v.

**EDOUARD KAREMERA,
MATHIEU NGIRUMPATSE,
JOSEPH NZIRORERA, and
ANDRE RWAMAKUBA**

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**DECISION ON THE EX PARTE DEFENCE MOTION FOR ORDER TO UNITED
NATIONS DEPARTMENT OF PEACE-KEEPING OPERATIONS FOR
PRODUCTION OF DOCUMENTS**

(Article 28 of the Statute and Rule 54 of the Rules of Procedure and Evidence)

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CIII04-035 (E)

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),
SITTING in Trial Chamber III composed of Judge Andréia Vaz, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey ("the Chamber"),

BEING SEIZED of the motion entitled "*Ex Parte Motion for Order to United Nations Department of Peace-keeping Operations for Production of Documents*" filed by the Defence Counsel of Joseph Nzirorera on 5 January 2004 ("the Motion" and "the Accused"),

CONSIDERING that, even though the Motion was characterized as *ex parte* by the Defence, the Chamber deemed it necessary to seek the opinion of the Prosecution, in view of its potential interest in the production of the documents requested by the Defence,¹

CONSIDERING the Response subsequently filed by the Prosecution on 1 March 2004 entitled "*Prosecutor's Response to Nzirorera's Ex-Parte Motion for Order to United Nations Department of Peace-keeping Operations for Production of Documents*",

CONSIDERING the Statute of the Tribunal ("the Statute") and its Rules of Procedure and Evidence ("the Rules") and, in particular, Article 28 of the Statute and Rule 54 of the Rules,

NOW DECIDES as follows solely on the basis of the written briefs of the parties, pursuant to Rule 73(A) of the Rules.

Submissions of the Parties

The Motion

1. The Defence seeks an order, pursuant to Article 28 of the Statute and Rule 54 of the Rules, for the United Nations Department of Peace-keeping Operations to produce the documents and categories of documents specified in the Annex to this Decision.²
2. The Defence relies on the jurisprudence of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to submit that Article 28 of the Statute, which refers only to the obligation of States to cooperate with the Tribunal, applies also to peace-keeping bodies of the United Nations.³

¹ See facsimile from the Court Management Section, Ref. ICTR/JUD-111-6-3-04/017, of 25 February 2004.

² Article 28 of the Statute (Cooperation and Judicial Assistance): "1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to: (a) The identification and location of persons; (b) The taking of testimony and the production of evidence; (c) The service of documents; (d) The arrest or detention of persons; (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda." Rule 54 of the Rules: "At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

³ Citing ICTY, *Prosecutor v. Simic*, Case No. IT-95-9, "Decision on Motion for Judicial Assistance to be Provided by SFOR and Others" (Trial Chamber), 18 October 2000 (the "*Simic* Decision of 18 October 2000"). (SFOR is the acronym for the Stabilization Force in Bosnia and Herzegovina.)

3. The categories of documents requested are said to be adequately specified with regard to time and content. These documents are stated to be needed for the cross-examination of prosecution witnesses and former members of the United Nations Assistance Mission for Rwanda (UNAMIR), namely Roméo Dallaire, Frank Claeys and Marc Nees, and for the preparation of the Defence case. Some of these documents are supposedly exculpatory.⁴ Lastly, the Defence states that it tried on two occasions to obtain the documents but without success.⁵

4. The Defence states that it will allow the Prosecution to inspect the documents upon receipt, pursuant to Rule 67(C) of the Rules.⁶

Response

5. The Prosecution responds that the Motion lacks a legal basis in two respects:

(i) Article 28 of the Statute is not ambiguous, and is not open to the broad interpretation given to it by the ICTY Trial Chamber in the *Simic* case referred to earlier. The Statute contains numerous references to United Nations organs and United Nations officials. Had it wished to, Security Council would have included the United Nations in Article 28;

(ii) The *Simic* Decision cited by the Defence, which refers only to SFOR, is not relevant with regard to peace-keeping bodies of the United Nations. Unlike SFOR, the United Nations Department of Peace-keeping Operations is not an enforcement arm of the Tribunal, and individual States do not act collectively through this Department.

6. The Prosecution also submits that the Chamber should not accede to the requests for the documents to be produced because they are too broad; they are not relevant to the trial, and the Defence has not established that it has itself sought production of these documents.

7. If the Chamber should nevertheless grant the Motion, the Prosecution urges the Chamber, in the alternative:

(i) To make a further order to the effect that the Department of Peace-keeping Operations could challenge the order before the Chamber, within fifteen days of its service if United Nations security interests are affected;

(ii) If necessary to conduct an *in camera* inspection of all the documents that the Department of Peace-keeping Operations may be required to produce and to determine on a case by case basis, prior to their disclosure, that they are relevant to the cross-examination of the witnesses who are members of the department.

⁴ The Defence notes in this respect that the Accused participated in several meetings with Mr. Booh Booh and General Dallaire during the period covered by the Indictment where the issues cited in the Indictment were discussed.

⁵ The Defence refers to two letters it sent in November 2003 to the United Nations Department of Peace-keeping Operations, New York. Copies of the letters in question are attached to the Motion.

⁶ Rule 67(C) of the Rules: "If the defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial."

Deliberations

8. The Defence requests the issue of a *subpoena*, that is to say an injunction accompanied by penalties in the event of non-compliance, to the United Nations Department of Peace-keeping Operations. In line with the general principles laid down by the ICTY Appeals Chamber in the *Blaskic* Decision with regard to States and State officials acting in their official capacity, the Chamber considers that the Tribunal should in no case issue orders accompanied by penalties in the event of non-compliance to intergovernmental organizations in general, and to the United Nations in particular.⁷

9. However, the fact that Article 28 of the Statute refers only to States as being under the obligation to cooperate with the Tribunal does not mean that the Tribunal cannot request the cooperation of intergovernmental organizations by means of an order having binding force.

10. That such an order may be issued is confirmed by the fact that Rule 54 of the Rules does not specify the addressees of "orders, summonses, *subpoenas*, warrants and transfer orders [...] necessary for the purposes of an investigation or for the preparation or conduct of the trial" which a Trial Chamber may issue at the request of either party or *proprio motu*. Indeed, this provision has, in this respect, been given a broad interpretation by the Trial Chamber and the Appeals Chamber of the two *ad hoc* Tribunals.

11. It should be noted that intergovernmental organizations are instruments of inter-State cooperation, and that they are created by States, precisely to enhance that cooperation. Article 28 of the Statute thus implicitly refers to these organizations.

12. With regard to the United Nations, Article 56 of the Charter of the United Nations, which relates to the joint and separate action of Member States and their cooperation with the Organization "for the achievement of the purposes set forth in Article 55," strengthens the Chamber in this opinion.⁸ The purposes pursued by the United Nations which render this cooperation indispensable include universal respect for, and observance of, human rights and fundamental freedoms for all. This objective forms part of the Tribunal's task. Indeed, through the punishment of serious violations of international humanitarian law committed in the territory of Rwanda between 1 January and 31 December 1994, the Tribunal should contribute, through the work of justice assigned to it, to dissuading any future perpetration of similar violations of human rights and international humanitarian law throughout the world.

13. The same requirement is affirmed in Article 89 of Additional Protocol I to the Geneva Conventions of 1949 which codify international humanitarian law. This Article provides that "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter." Article 4 of the Statute

⁷ *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-AR108 (Appeals Chamber) of 29 October 1997, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (the "*Blaskic* Judgement"), para. 38.

⁸ Charter of the United Nations, Article 56: "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."

empowers the Tribunal to prosecute persons accused in particular of violations of Article 3 common to the Geneva Conventions.

14. Admittedly, the jurisprudence of the Tribunal as well as that of ICTY is not unequivocal.⁹ Nevertheless, the ICTY Trial Chamber in *Simic* took the opportunity to affirm, using a purposive construction of the Statute, that "On its terms, Article 29 applies to all States, whether acting individually or collectively."¹⁰ This Chamber concluded therefrom that "In principle, there is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organisations and, in particular, their competent organs...", and that it had the power to issue certain binding orders to an organ such as SFOR, which the Trial Chamber regarded as sufficiently organized and structured to receive and implement orders of the International Tribunal made pursuant to Article 29 of the Statute of ICTY.¹¹

15. Most important, the ICTY Appeals Chamber, in the *Blaskic* Appeal Judgement of 29 October 1997, ruled on the production of a memorandum by an official of an international peacemaking or peace making force such as UNPROFOR or SFOR while performing his duties. The ICTY Appeals Chamber stated that it would be "more proper" to address the international organization on behalf of which he was to produce the document, and not the official himself. In plain language, the Appeals Chamber established that ICTY may request the cooperation of intergovernmental organizations pursuant to Rule 54 of the Rules, on the same basis as for States.¹²

16. Furthermore, several Trial Chambers of the *ad hoc* Tribunals have affirmed that it is possible to issue orders to the United Nations organs (to mention only this inter-governmental organization), and have gone on to issue such orders to them.¹³ Moreover, when the Trial Chamber in the *Akayesu* case summoned General Roméo Dallaire to appear, it requested the Secretary-General of the United Nations to lift General Dallaire's immunity in his capacity as former Commander-in-Chief of UNAMIR.¹⁴

⁹ See for example, ICTY, *Prosecutor v. Milan Kovacević*, Case No. IT-97-24-PT, "Decision Refusing Defence Motion for *Subpoena*," Trial Chamber, 23 June 1998 (the Trial Chamber rejected a motion for *subpoena* directed at the Organization for Security and Cooperation in Europe (OSCE) on grounds that "the International Tribunal has no authority to issue such *subpoena* to the OSCE, it being an international organization and not a State").

¹⁰ Article 28 of the Statute is equivalent to Article 29 of the Statute of the International Criminal Tribunal for the former Yugoslavia (the "ICTY").

¹¹ *Simic* Decision of 18 October 2000.

¹² *Blaskic* Appeal Judgement, para. 50; footnote 68.

¹³ See in this Tribunal (Trial Chamber): *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR 99 54A- T, "Decision on Kamuhanda's Motions for Extension of Judicial Cooperation to Certain States and to the UNHCR pursuant to Article 28 of the Statute and Resolution 955 of the Security Council," 9 May 2002; *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-99-44A-T, Decision on Kajelijeli's Motion for Extension of Judicial Cooperation to Certain States pursuant to Article 28 of the Statute of the Tribunal, 8 May 2002. See also, ICTY: *Prosecutor v. Kovacević and Drljaca*, Case No. IT-97-24, Decision on Defence Motion to Issue *Subpoena* to the United Nations Secretariat (Trial Chamber), 1 July 1998.

¹⁴ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, "Decision on the Motion to *Subpoena* a Witness" (Trial Chamber), 19 November 1997.

17. It is also significant that the Statute of the International Criminal Court provides that the Court shall have the authority to *make requests* for cooperation, not only to States Parties to the Statute of the Court but also to intergovernmental organizations. With regard to States not parties to the Statute, these can only be *invited* by the Court to provide assistance, and this is solely on the basis of an *ad hoc* arrangement, an agreement or "any other appropriate basis."¹⁵

18. It should be noted, however, that the United Nations in general and its Department of Peace-keeping Operations in particular could invoke confidentiality or the sensitive nature of certain information or certain documents (in view, *inter alia*, of security imperatives). The United Nations, and its specialized agencies, like other intergovernmental organizations, could thus justify refusing to disclose or produce certain documents or information in their possession requested of them by the Tribunal pursuant to Article 28 of the Statute and Rule 54 of the Rules. Alternatively, all intergovernmental organizations so approached may request measures setting conditions for the production of the documents and information required, such as *in camera* examination of the material concerned. There is no doubt that these principles, which are well settled in the jurisprudence of the *ad hoc* Tribunals vis-à-vis States, also apply to intergovernmental organizations, as part of the mission assigned to them by the States comprising the organizations. Similar principles have been codified in the Statute and the Rules of the International Criminal Court, which take into account the imperatives of national security of the States Parties in the context of their general cooperation obligations vis-à-vis the Court.¹⁶

19. 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.¹⁷

20. As the principle of the Tribunal's powers to issue binding orders requiring the cooperation of intergovernmental organizations has been raised, it remains to be established whether, in the present instance, the Defence has demonstrated that there is a legitimate

¹⁵ Articles 86 and 87, paras. 1, 5 and 6 of the Statute of the International Criminal Court (ICC) (in Part 9: International Cooperation and Judicial Assistance). See also Rule 176 of the Rules of Procedure and Evidence of ICC at sub-rules 2 and 4. Rule 176(4), which concerns requests by the Court for cooperation from intergovernmental organizations refers back *mutatis mutandis* to sub-rule 2 of the same Rule concerning cooperation of States Parties with the Court. See also Rule 177(2) para. 2.

¹⁶ Statute of ICC, Article 57(3)(c) (Functions and powers of the Pre-Trial Chamber): "(...) [the Pre-Trial Chamber shall, w]here necessary, provide for ... the protection of national security information." *Id.*, Article 72 (Protection of national security information). ICC Rules of Procedure and Evidence, Rules 121(10) and 131(2).

¹⁷ Cp. *Blaskic* Judgement, para. 65. The ICTY Appeals Chamber in this instance was ruling on assertions of national security that a State might invoke in order to refuse to surrender documents.

forensic purpose for issuing such an order to the United Nations Department of Peace-keeping Operations.¹⁸

21. With regard to a motion for an order to be issued for the production of documents, the following should be considered:

(i) Whether the Defence has given adequate reason to believe that the United Nations Department of Peace-keeping Operations is in custody of the documents requested;

(ii) Whether the documents or categories of documents requested are adequately specified in the application, so that the execution of the order appears relatively easy;¹⁹

(iii) Whether there are reasonable grounds for believing that the documents requested by the Defence will materially assist its case in relation to clearly identified issues to be dealt with in the trial;²⁰ and, above all,

(iv) Whether it has been established that the Defence made adequate efforts to seek voluntary production of the required documents by the Department of Peace-keeping Operations, and that such efforts were fruitless.²¹

22. The Defence cites, as the only steps taken to obtain from the United Nations Department of Peace-keeping Operations the documents required, two letters dated 1 and 14 November 2003 that it sent to the Custodian of Records of that Department. The Defence states further that no response to the two letters was received. Meanwhile, the Defence does not establish that those letters were indeed sent, on what date they were sent, or by what means they were transmitted. In the absence of a receipt or any other evidence proving these issues, the Chamber considers that the Defence has failed to establish any justification for its motion in terms of the fourth criteria indicated in the preceding paragraph.

23. In the circumstances, it is not necessary to consider whether the motion meets the three other criteria.

24. There is no indication, however, that the Defence is not acting in good faith. Moreover, the trial is under the way. Accordingly, it is appropriate to request the Registry to assist the Defence in bringing the requests for the production of documents, which must meet the criteria set forth in paragraph 21 above, to the attention of the United Nations Department of Peace-keeping Operations.

¹⁸ With regard to a legitimate forensic purpose, see *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, "Decision on Application for *Subpoenas*" (Appeals Chamber), 1 July 2003, para. 10. The ICTY Appeals Chamber was ruling on a Defence motion for *subpoenas* to be issued to witnesses requiring them to attend at a given location.

¹⁹ On the specificity criterion, see the *Blaskic* Judgement. See also *The Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Request to the Government of the United States for Cooperation (Trial Chamber), 10 July 2002.

²⁰ On this issue see in particular the aforementioned *Krstic* Decision, para. 10.

²¹ On this issue see in particular the *Blaskic* Judgement, para. 31. See also *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, "Decision on the Defence Motion to Have the Court Request a *Subpoena Duces*

FOR THE FOREGOING REASONS,

THE CHAMBER

I. DENIES the Motion;

II. INSTRUCTS the Registrar to assist the Defence in bringing the requests for the production of documents, which must meet with the criteria set forth in paragraph 21 above, to the attention of the United Nations Department of Peace-keeping Operations at Headquarters, New York.

Arusha, 9 March 2004

[Signed]

Andrésia Vaz

Presiding Judge

[Signed]

Flavia Lattanzi

Judge

[Signed]

Florence Rita Arrey

Judge

[Seal of the Tribunal]



tecum for the Production of the Defendant's Arrest and Certified Court Records" (Trial Chamber),
10 May 2000.

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