



ICTR-98-41-I
20-06-2004
(20776-20773)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

20776
S. Mutsaers

TRIAL CHAMBER I

Before: Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 23 June 2004

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2004 JUN 23 P 5:25
ICTR
OFFICIAL RECORDS

DECISION ON REQUEST FOR SUBPOENA OF MAJOR GENERAL YAACHE AND
COOPERATION OF THE REPUBLIC OF GHANA

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”),

SITTING as Judge Sergei Alekseevich Egorov, as designated by Trial Chamber I pursuant 73(A) of the Rules of Procedure and Evidence (“the Rules”);

BEING SEIZED of the “Memoire Ex Parte de la Défense de Théoneste Bagosora sur la Demande en Coopération de la République du Ghana afin qu’Elle Facilite l’Interview d’un Témoin”, filed on 9 June 2004;

CONSIDERING the “Submission of the Registrar under Rule 33B of the Rules of Procedure and Evidence regarding the Order of the Chamber on the Defence request to obtain cooperation of the Republic of Ghana dated 25th May 2004”, filed on 27 May 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 6 May 2004, the Defence sought an order requesting the cooperation of the Republic of Ghana in arranging a meeting between the Defence for Bagosora and Major General Yaache, a former sector commander and military observer of the United Nations Assistance Mission in Rwanda (UNAMIR) and current Chief of Staff of the Ghanaian army.¹ In that motion, the Defence for Bagosora outlined and documented efforts to obtain the voluntary cooperation of Major General Yaache. The Defence for Bagosora also consulted with the United Nations and obtained its consent for such a meeting.² In its decision of 25 May 2004, the Chamber requested the assistance of the Republic of Ghana in facilitating the voluntary cooperation of Major General Yaache.³ The Chamber noted that neither Major General Yaache, after being provided with material to refresh his memory, nor the Republic of Ghana had expressly refused to cooperate.⁴

2. On 27 May 2004, the Registrar informed the Chamber of the existence of a diplomatic note sent by the Government of Ghana on 24 April 2004, which indicated that Major General Yaache was not in a position to offer any assistance to the Defence even after having received the additional materials. This information had not been conveyed to the Chamber prior to its decision of 25 May 2004.

SUBMISSIONS

3. In its motion, the Defence for Bagosora recalls its submissions that Major General Yaache is in a position to provide relevant evidence because he observed the events at issue and that it has made repeated efforts to directly approach Major General Yaache to obtain his cooperation. The Defence for Bagosora notes that the Chamber’s earlier ruling was based in part on lack of information about Major General Yaache’s position after the receipt of additional materials, and that it is now clear that he will not voluntarily cooperate. The Defence for Bagosora therefore requests that the Chamber issue a subpoena, under Rule 54, compelling Major General Yaache to attend a meeting with the Defence. It further seeks an order, pursuant to Article 28 of the Statute of the Tribunal (“the Statute”), requesting the

¹ *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Requête Ex Parte de la Défense de Théoneste Bagosora Visant à Obtenir la Coopération de la République du Ghana pour Faciliter la Recontre avec un Témoin (TC), 6 May 2004 (“*Bagosora Ghana Request*”).

² *Bagosora Ghana Request*, *supra* note 1, Annexe 3.

³ *Bagosora et al*, Decision on the Defence for Bagosora’s Request to Obtain the Cooperation of the Republic of Ghana (TC), 25 May 2004.

⁴ *Id.* at para 7.

cooperation of the Republic of Ghana in facilitating the meeting through service of the subpoena.

DELIBERATIONS

4. Under the Statute, the Chamber has incidental and ancillary jurisdiction over persons, other than an accused, that may assist the Tribunal in its pursuit of criminal justice.⁵ Rule 54 lays down the different mechanisms through which such testimony may be compelled including orders, summonses, subpoenas, warrants and transfer orders issued by the Chamber when deemed necessary for the preparation and conduct of the trial. When the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness it is in the interests of justice to allow the Defence to meet the witness and assess his testimony.⁶ However, the Defence must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful.⁷ Additionally, the Defence must have a reasonable belief that the prospective witness can materially assist in the preparation of its case.⁸ Indeed, subpoenas should not be issued lightly.⁹ Major General Yaache's position as an official of UNAMIR and his meetings with the Accused Bagosora indicate that he had the opportunity to observe the events at issue and obtain information that may be relevant to these proceedings. Given that the Defence for Bagosora is interested in Major General Yaache's personal observations, the Chamber is satisfied that the information he may provide could not be obtained by other means. In light of the Chamber's determination that the Defence for Bagosora has met the requisite requirements, issuance of a subpoena to Major General Yaache is appropriate to the fair conduct of this trial.

5. The Chamber notes that Major General Yaache's prospective testimony is based on events he may have witnessed while serving as a member of UNAMIR. As such, he may be treated somewhat differently than as member of his government operating in an official capacity.¹⁰ Consequently, he may be subpoenaed by the Tribunal.¹¹ The Chamber emphasizes that the United Nations has indicated that it has no objections to an interview between Major General Yaache and the Defence.¹²

6. Under Article 28 of the Statute, the Tribunal may request the assistance of member States in the service of documents as well as other forms of cooperation. Article 28(1) imposes an obligation on States to "cooperate with the International Tribunal for Rwanda in

⁵ *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on Issuance of Subpoenas (AC), 21 June 2004, para. 5; *Prosecutor v. Kristic*, IT-98-33-A, Decision of Application for Subpoena (AC), 1 July 2003, para. 10; *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 48. See also *Bagosora et al*, Decision on Requests for Subpoenas (TC), 10 June 2004; *Kamuhanda*, Decision on the Extremely Urgent Motion to Summon a Witness Pursuant to Rule 54 (TC), 20 August 2002.

⁶ *Prosecutor v. Kristic*, IT-98-33-A, Decision of Application for Subpoena (AC), 1 July 2003, paras 6-8.

⁷ See generally *Bagosora et al*, Decision on the Defence For Bagosora's Request to Obtain Cooperation of the Republic of Ghana (TC), 25 May 2004, para. 7; *Bagosora et al*, Request to the Government of Belgium for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 17 September 2003.

⁸ *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004, paras. 6-7; *Kristic*, Decision of Application for Subpoena (AC), 1 July 2003, paras. 10-11.

⁹ *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004, paras. 6,10.

¹⁰ *Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 50. ("The situation differs for a state official (e.g., a general) who acts as a member of an international peace-keeping or peace enforcement force... he should be treated by the International Tribunal qua an individual").

¹¹ *Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 50. See also *Akayesu*, Decision on the Motion to Subpoena a Witness (TC), 19 November 1997 (Subpoena issued to UNAMIR official).

¹² *Bagosora Ghana Request*, *supra* note 1, Annexe 3.

the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". Article 28(2) requires States to comply with requests for assistance issued by a Trial Chamber. Accordingly, the Chamber requests that the Republic of Ghana effect service of the subpoena of Major General Yaache and grant its permission, to the extent required, to allow the meeting to take place. The Chamber further requests that the Republic of Ghana provide any other relevant assistance that may be reasonably required by the Defence for Bagosora to facilitate their meeting.

7. The Chamber notes that the Defence for Bagosora did not specify a particular time and venue for its proposed meeting with Major General Yaache. Therefore, the Chamber requests the Registry to communicate with Defence for Bagosora, Major General Yaache, and any relevant Ghanaian authorities in order to determine an appropriate time and venue for the meeting, taking due consideration of the needs of judicial economy.

FOR THE ABOVE REASONS, THE CHAMBER

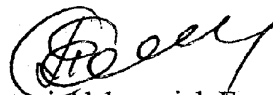
GRANTS the motion;

ORDERS the Registrar to prepare a subpoena in accordance with this decision, addressed to Major General Yaache, and to communicate it, with a copy of the present decision, to the Republic of Ghana;

REQUESTS the Republic of Ghana to serve the subpoena on Major General Yaache as soon as possible, to grant its permission, to the extent necessary, for Major General Yaache to meet with the Defence for Bagosora, and additionally to provide any other relevant assistance that may be reasonably required to facilitate their meeting;

DIRECTS the Registrar to determine an appropriate time and venue for the meeting after communicating with the relevant parties and taking due consideration of the needs of judicial economy.

Arusha, 23 June 2004



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

