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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

Original: ENGLISH

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Adama Dieng

Date: 16 April 2002

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THE PROSECUTOR
v.
ANDRÉ NTAGERURA
EMMANUEL BAGAMBIKI
SAMUEL IMANISHIMWE

Case No. ICTR-99-46-T

**DECISION ON NTAGERURA'S EXTREMELY URGENT MOTION FOR ORDER
TO TRANSFER AN ACCUSED FROM THE DETENTION FACILITY IN ORDER
TO TESTIFY FOR THE DEFENCE, PURSUANT TO RULES 73 AND 54 OF THE
RULES OF PROCEDURE AND EVIDENCE**

Office of the Prosecutor:

Richard Karegyesa
Andra Mobberley
Holo Makwaia

Defence Counsel for Ntagerura

Benoît Henry
Hamuli Rety

Defence Counsel for Bagambiki:

Vincent Lurquin
Seydou Doumbia

Defence Counsel for Imanishimwe

Marie Louise Mbida
Jean Pierre Fofé

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Tribunal),

SITTING as Trial Chamber III (Chamber) composed of Judges Lloyd George Williams, presiding, Yakov Ostrovsky, and Pavel Dolenc;

BEING SEISED of André Ntagerura's "Extrêmement Urgente requête pour obtention d'une ordonnance d'extraction d'un prévenu du Quartier pénitentiaire du Tribunal pénal international pour le Rwanda en vue de déposer comme témoin à décharge conformément aux articles 73 et 54 du Règlement de procédure et de preuve" (the "Motion") filed 1 March 2002;

CONSIDERING the Prosecutor's Response to the Motion filed 22 March 2002;

HAVING HEARD the parties on 22 March 2002;

HAVING GRANTED the Motion in its oral ruling of 22 March 2002;

NOW PUTS ITS REASONS IN WRITING:

SUBMISSIONS OF THE DEFENCE

1. Counsel for Ntagerura states that Prosecution Witnesses LAP and LAI alleged during their testimonies that the accused André Ntagerura distributed arms and uniforms on 28 January 1994 at the military camp of Bigogwe in the Prefecture of Gisenyi and in Bugarama in the Prefecture of Cyangugu. These witnesses also stated that Ntagerura came in a helicopter accompanied by General Gratien Kabiligi with whom he coordinated his actions. These facts are relevant evidence upon which the Prosecution bases the various charges, particularly the second count of conspiracy to commit genocide.
2. Ntagerura wishes to call Gratien Kabiligi as a Defence Witness to defend against these allegations. Kabiligi is expected to deny having been present in the locations mentioned by the Prosecution witnesses. Kabiligi will tender his report for the mission he undertook to Egypt on behalf of the Rwandan Government from 27 January to 11 February 1994. This report was disclosed to Kabiligi by the Office of the Prosecutor pursuant to Rule 66 of the Rules.
3. The former General Kabiligi, currently detained in the United Nations Detention Facility in Arusha, has confirmed in writing his willingness to testify as a Defence witness without any protection of his identity. He has however expressed his wish to be assisted by his counsel Mr. Jean Yaovi Degli while he is on the witness stand. Kabiligi appears in the Defence witness list filed with the Registry where he is referred to under the pseudonym of HB1. His identity was disclosed to the Prosecutor on 1 March 2002 and his testimony is scheduled for 25 March 2002. His counsel Degli will be in Arusha from 20 March 2002.
4. Counsel for Ntagerura adds that the Motion filed under Rules 54 and 73 is well founded because the testimony of Kabiligi is very relevant to the issue at stake, as it will enable the judges to assess the credibility of Prosecution witnesses. Counsel concludes that it is a quite common practice in both civil law and common law systems that a witness, in certain circumstances, be represented by a counsel to take care of his own interest. Moreover, this practice does not violate the Statute or the Rules, and serves the interests of justice.

SUBMISSIONS OF THE PROSECUTOR

5. In response to the Motion, the Prosecutor first cautions the Trial Chamber as to the conflict of interest which might arise when the Chamber will sit in judgement of the accused Kabiligi in his case after he has appeared to give testimony in this case, particularly where issues of credibility and self-incrimination arise.

6. The Prosecutor concedes that this possible conflict of interest is not a reason for the Chamber not to hear Kabiligi's evidence in the Cyangugu Trial. The Prosecutor submits however that, as a witness, Kabiligi has no right to counsel nor has the Defence pleaded any exceptional circumstances that would justify such a measure. Rule 90(E) provides a sufficient safeguard for a witness against self-incrimination.

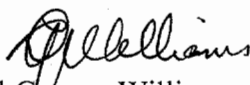
DELIBERATIONS

7. Article 20 (e) of the Statute guarantees the right of the accused person to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. In implementing this right, the test rests on the relevance of the testimony to the matter under consideration. The Prosecutor does not contest the relevance of the anticipated testimony of Gratién Kabiligi in the instant case. Therefore the Chamber should not deprive the Defence of its right to call a particular witness on the hypothetical basis that the manner in which his testimony would be considered might give rise in the future to a dispute where the same person will appear again before the Judges as an accused. Noting further that Gratién Kabiligi has expressed in writing his willingness to testify, the Chamber for these reasons granted the Motion.

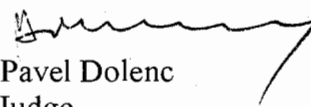
8. Turning now to the issue of assistance of the witness by counsel, the Chamber considers that, although the assistance of a witness by counsel is not the usual practice in common law and civil law systems, the exceptional circumstances of this testimony warrant that counsel be allowed to assist Gratién Kabiligi when he will be on the witness stand. These circumstances include the fact that the potential witness is an accused facing serious charges before this Tribunal, that his testimony might be related to the charges he has to answer, and that the presence of his counsel holding a watching brief may be of great importance in advising him as to his rights set out in Article 20 of the Statute and Rule 90(E).

9. It is for these reasons that the Chamber **GRANTED** the Motion

Arusha, 16 April 2002.


Lloyd George Williams
Judge, Presiding


Yakov Ostrovsky
Judge


Pavel Dolenc
Judge

Seal of the Tribunal