

ICTR-98-41-T
02-02-2005
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
(23606-23602)

23606
Ivan

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 2 February 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

JUDICIAL RECORDS/ARCHIVES
ICTR
RECEIVED
2005 FEB -27 P 5: 32
[Signature]

**DECISION ON THE DEFENCE REQUESTS FOR CERTIFICATION OF THE
"DECISION ON THE DEFENCE MOTIONS FOR THE REINSTATEMENT OF
JEAN YAOVI DEGLI AS LEAD COUNSEL FOR GRATIEN KABILIGI"**

The Office of the Prosecutor

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

Counsel for the Defence

Raphaël Constant
Paul Skolnik
René Saint-Léger
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

[Handwritten initials]

23605

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the “Joint Defence Request for Certification to Appeal the Chamber’s Decision on the Reinstatement of Jean Degli as Counsel for General Gratien Kabiligi”, filed on 26 January 2005; and Mr. Kabiligi’s “Requête aux fins d’autorisation d’interjeter Appel contre votre décision écrite du 19 janvier 2005: ‘Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi’”, filed on 28 January 2005;

NOTING that the Prosecution has not filed a response.

HEREBY DECIDES the requests.

INTRODUCTION

1. In a decision of 26 October 2004, the Registrar withdrew the assignment of Mr. Jean Yaovi Degli as Lead Counsel for the Defence of Gratien Kabiligi under the framework of the legal aid system.¹ At the time, the Defence case was scheduled to start on 12 January 2005. All Defence teams, as well as Mr. Kabiligi individually, challenged this decision before the Trial Chamber and requested Mr. Degli’s reinstatement. On 20 December 2004, the Chamber heard oral arguments on the Defence motions. After deliberating, the Chamber rendered an oral decision denying the request to reinstate Mr. Degli and stated that its written reasons would follow. A status conference was scheduled for the following day.
2. During the status conference on 21 December 2004, Mr. Kabiligi expressed his intention to request certification when he received the written decision. In addition, he proposed that Mr. Skolnik, the Co-Counsel for Bagosora at the time, be appointed his Lead Counsel given his knowledge of the case. The Registry indicated that it was favourable to the solution proposed by Mr. Kabiligi. The Bagosora Defence also concurred with this solution. Both Mr. Kabiligi and the Bagosora Defence requested that the Chamber instruct the Registry to make this appointment pursuant to Rule 45 *quater*. The Chamber left it to the Registry to pursue the appointment. In light of the changed circumstances, the Chamber postponed the commencement of the Defence case until 30 March 2005. The Chamber also postponed the date for the filing of Kabiligi’s pre-Defence brief and witness list until 28 February 2004, subject to further representations from Mr. Skolnik if named Lead Counsel. The deadlines for the other three Accused to file the pre-Defence brief and the witness statements were also extended, until 3 January and 7 February 2005, respectively.
3. In furtherance of Mr. Kabiligi’s request, the Registry corresponded with Mr. Kabiligi and Mr. Skolnik to gain further assurances and information related to the proposed solution prior to making an appointment. In a letter dated 22 December 2004, Mr. Skolnik expressed his willingness to accept the appointment as Lead Counsel for Mr. Kabiligi. However, he also indicated a measure of uncertainty due to possible certification to appeal the Trial Chamber’s decision as well as Mr. Degli’s pursuit of a separate administrative review with the Secretary-General of the United Nations. Mr. Skolnik proposed that he be named interim Lead Counsel until the situation was clarified. Subsequently, on 27 December 2004, Mr. Kabiligi withdrew his proposal, stating that it had caused confusion and indicating his desire for Lead Counsel

¹ Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004.

eh

23604

to act in his interests exclusively. He asked that the process of assigning a new Lead Counsel be suspended until the various avenues for reinstating Mr. Degli had been exhausted.

4. On 19 January 2005, the Chamber delivered its written decision setting forth in detail its reasons for denying the Defence motions. The Chamber also instructed the Registrar to appoint Mr. Paul Skolnik as Lead Counsel for the Kabiligi Defence.² On 24 January 2005, the Registrar appointed Mr. Skolnik as Lead Counsel for the Kabiligi Defence and subsequently withdrew his assignment as Co-Counsel for the Bagosora Defence.

5. On 24 January 2005, Mr. Kabiligi requested that the decision be translated into French and that he be accorded a corresponding extension of the time to file his request for certification. The Presiding Judge responded to Mr. Kabiligi's letter on 26 January 2005, informing him that the French translation had been filed on 25 January 2005 and that his request for certification was due seven days from this date. All defence teams, through counsel, filed a joint request for certification on 26 January 2005. Mr. Kabiligi filed a separate request, individually, on 28 January 2005.

SUBMISSIONS

Joint Defence Request

6. The Defence asserts that it may be injustice to force Mr. Kabiligi to complete the trial represented by a counsel, Mr. Skolnik, without his consent. In effect, the situation regarding Mr. Kabiligi's legal representation remains "up in the air" which may lead to future postponements either before or during the next trial segment. According to the Defence, the Chamber's decision not to reinstate Mr. Degli has already led to a "significant postponement" of the trial from 12 January 2005 until 30 March 2005. These factors significantly affect the expeditious conduct of the proceedings. In addition, it is asserted that an immediate resolution by the Appeals Chamber would either reinstate Mr. Degli as Lead Counsel, thus allowing the trial to proceed as originally envisaged, or would definitively resolve the question so that another lawyer could be appointed secure in the knowledge that the appointment is not on an interim basis.

Kabiligi's Request

7. Mr. Kabiligi asserts that the Chamber's refusal to suspend the Registrar's decision withdrawing his Lead Counsel until the end of the trial is a significant issue affecting the fair and expeditious progress of the proceedings. The removal of Mr. Degli at the close of the Prosecution case, when the Registrar suspected misconduct in April 2003, punishes only Mr. Kabiligi. Mr. Degli's departure after following the dossier from its inception compromises the presentation of the evidence and prolongs Mr. Kabiligi's preventative detention while a new Lead Counsel is integrated. The Chamber's decision only considered the situation globally with respect to the trial as a whole and failed to take sufficient consideration of his individual circumstances. The Chamber's concern was for the rapid progress of the trial of Mr. Kabiligi's three co-Accused, who benefit from the additional time to prepare. Mr. Kabiligi is now at a disadvantage in contrast to the other three Accused who each have counsel who have followed the case from the early stages. Immediate resolution by the Appeals Chamber would definitively resolve the issue of Mr. Degli's status. If Mr. Degli is reinstated, then the proceedings can be resumed in three months. In any event, prompt resolution will allow Mr. Skolnik to proceed without the uncertainty of the present circumstances.

² *Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005.

6m

23603

DELIBERATIONS

8. Rule 73 (B) provides:

Decisions rendered on such motions are without interlocutory appeals save with certification by the Trial Chamber, which may grant such certification if the decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

9. The Chamber is mindful that the departure of Mr. Degli at the close of the Prosecution case created a complicated situation for Mr. Kabiligi, as well as the other three Accused. The Chamber's decision noted the changed circumstances and addressed them, paying particular attention to the direct impact that the Registrar's decision had on Mr. Kabiligi's Defence. The joint Defence request has suggested that the situation of Mr. Kabiligi's Defence team is not clear, given his lack of consent to Mr. Skolnik's assignment, and that this may lead to further postponements. Mr. Kabiligi also alludes to the present uncertainty with the composition of his defence.

10. In the Chamber's view, none of these grounds constitutes an issue that would significantly effect the fair and expeditious conduct of the trial. Mr. Saint-Léger, the present Co-Counsel, is relatively new and in need of medical treatment, necessitating a prolonged absence from the case. The Chamber was therefore required to act immediately in order to safeguard Mr. Kabiligi's right to counsel and the fairness of the proceedings at this critical juncture in the case.³ The Chamber resolved this situation by instructing the Registrar to assign Mr. Skolnik to serve exclusively as Mr. Kabiligi's Lead Counsel and to withdraw him as Co-Counsel for Bagosora. This was in conformity with Mr. Kabiligi's own proposal. His subsequent withdrawal of consent to have Mr. Skolnik assigned as Lead Counsel does not in anyway implicate the fairness of the proceedings or the validity of the appointment. Mr. Skolnik's competence and ability to represent Mr. Kabiligi, if permanently assigned, have not been questioned. He knows the case well through his previous role as Co-Counsel for the Bagosora Defence. The Appeals Chamber has repeatedly stressed that an Accused does not have the right to a particular counsel under the legal aid system.⁴

11. In reaching its decision to instruct the Registrar to appoint Mr. Skolnik, the Chamber fully considered and addressed Mr. Kabiligi's subsequent concerns related to Mr. Skolnik's assignment. Mr. Kabiligi's principal ground for withdrawing his proposal was the interim solution and the possible eventual return of Mr. Degli. The Chamber's assignment of Mr. Skolnik, expressly rejecting any sort of interim solution, provided clarity and certainty to the Kabiligi Defence and thereby ensured the fair and expeditious conduct of the proceedings. The Appeals Chamber case law reflects that a Trial Chamber's assignment of counsel falls squarely within its discretion.⁵

³ Mr. Kabiligi in his submissions noted that "[p]ourtant, votre Chambre elle-même reconnaît que depuis le 26 octobre 2004, je ne suis pas défendu adéquatement, parce que ni Maître Degli, ni Maître Rene, ne fait plus rien; le premier suite a son renvoi, et le second suite a son ignorance du dossier".

⁴ *Akayesu*, Judgement (AC), 1 June 2001, para. 61; *Kambanda*, Judgement (AC), 19 October 2000, para. 33. See also *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 22.

⁵ *Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (AC), 1 November 2004, para. 9 ("[A Trial Chamber's assignment of counsel] draws on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and,

Sh

23602

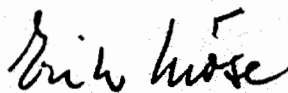
12. Mr. Kabiligi principally argues that the Chamber's refusal to suspend the Registrar's decision to withdraw Mr. Degli has compromised the presentation of his evidence, putting him on unequal footing with his three co-Accused, and prolonged his preventative detention due to the need to integrate a new Lead Counsel. In this regard, the Chamber indicated that any specific problem could be brought to its attention for appropriate resolution. Mr. Skolnik is presently Mr. Kabiligi's Lead Counsel. He is a competent and qualified lawyer with a great deal of familiarity with the case in general. Mr. Kabiligi has been provided with additional extensions of time, the possibility of recalling witnesses, and the ability to present his evidence at the end of the case. Additional appropriate relief may be granted based on further representations from Mr. Skolnik. Given the Chamber's response to the changed circumstances and its continued attention to this matter, there is no indication at this stage that the presentation of Mr. Kabiligi's evidence has been compromised or that there has been undue delay. The Appeals Chamber has stated that the authority best placed to determine what time is sufficient for the Accused to finish the preparation of his defence is the Trial Chamber.⁶

13. In the Chamber's view, certification would only result in the delay that the Defence seeks to avoid. As explained in detail in the Chamber's written decision, the Registrar acted neither illegally nor arbitrarily in withdrawing Mr. Degli's assignment under the legal aid system for serious misconduct. The Defence has not pointed to any jurisprudence suggesting that this conclusion is incorrect or which supports its reading of the Tribunal's governing instruments. The Chamber is not convinced that Mr. Degli's return at this point would materially advance the case. Therefore, an immediate resolution by the Appeals Chamber is not required. The denial of these requests for certification definitively closes the issue of Mr. Degli's return as Lead Counsel of the Kabiligi Defence under the legal aid program.⁷

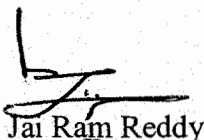
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence requests for certification.

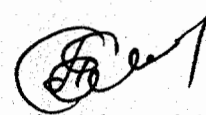
Arusha, 2 February 2005



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge



requires a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.”).

⁶ *Milosevic*, Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and preparation of the Defence Case (AC), 20 January 2004, para. 18.

⁷ In a letter of 31 January 2005 to the Chamber, Mr. Degli submits that he has remained actively involved in the Kabiligi Defence. Mr. Degli's submissions do not alter the Chamber's disposition.