



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-98-41-T  
04-03-2005  
(23901-23897)

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TRIAL CHAMBER I

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

**Registrar:** Adama Dieng

**Date:** 4 March 2005

**THE PROSECUTOR**

v.

**Théoneste BAGOSORA**

**Gratien KABILIGI**

**Aloys NTABAKUZE**

**Anatole NSENGIYUMVA**

*Case No. : ICTR-98-41-T*

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**DECISION ON REQUEST FOR PRIVATE REPRESENTATION OF  
GRATIEN KABILIGI**

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**The Prosecution**

Barbara Mulvaney  
Drew White  
Christine Graham  
Rashid Rashid

**The Defence**

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

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

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

**BEING SEIZED OF** an offer by Jean Yaovi Degli, at the request of the Accused Gratién Kabiligi, to direct a privately funded defence of the Accused and a request to allow contact between them;

**TAKING INTO ACCOUNT** the views of the parties expressed on 28 February 2005;

**HEREBY DECIDES** the request.

**INTRODUCTION**

1. On 26 October 2004, the Registrar withdrew the assignment of Jean Yaovi Degli as Lead Counsel for Gratién Kabiligi and found that he was no longer eligible as counsel within the framework of the Tribunal's legal aid program. This action was taken on the basis of, *inter alia*, a report by the Office of Internal Oversight Services of the United Nations, which implicated Mr. Degli in a scheme of fraudulent billing in excess of USD 300,000. Mr. Degli refused an invitation by the Registrar to respond to the results of the investigation before the decision was taken.

2. On 20 December 2004, having heard oral argument, the Chamber denied orally a joint Defence motion for the reinstatement of Mr. Degli as Lead Counsel for Mr. Kabiligi, with reasons to follow. During a status conference the following day, the Accused Kabiligi indicated his intention to file a motion for certification of appeal of the Chamber's decision once written reasons had been given. He also, however, requested that the Chamber order the Registrar to appoint Paul Skolnik, at the time Co-Counsel for Theoneste Bagosora, as his Lead Counsel. Mr. Kabiligi considered Mr. Skolnik's familiarity with the case to be a matter of prime importance, in light of the imminent start of the Defence case, set to commence on 12 January 2005.<sup>1</sup> Mr. Kabiligi conditioned his request on the agreement of both Mr. Bagosora and Mr. Skolnik. Mr. Bagosora, through his Lead Counsel, consented to the representation of Mr. Kabiligi by Mr. Skolnik.<sup>2</sup> The Registry indicated its willingness to ensure the expeditious appointment of Mr. Skolnik.<sup>3</sup> The Chamber did not consider it necessary at that time to order the appointment of Mr. Skolnik as Lead Counsel, but requested the Registrar to look into the matter quickly, with a view to a solution in accordance with the views expressed by the parties.<sup>4</sup> The Chamber also postponed the commencement of the Defence case until 30 March 2005, to accommodate concerns of the Defence that the co-ordinated presentation of their case had been disrupted by the withdrawal of Mr. Degli.<sup>5</sup> A status conference was scheduled for 28 February 2005 to discuss ongoing preparations for the start of the Defence case, in particular, the status of Mr. Kabiligi's defence.<sup>6</sup>

3. Written reasons for denial of reinstatement of Mr. Degli were issued on 19 January 2005. The Chamber observed that the Registrar's decision of 26 October 2004 dealt with Mr. Degli's eligibility under the legal aid program and was, therefore, distinguishable from

<sup>1</sup> T. 21 December 2004 p. 2.

<sup>2</sup> *Id.* p. 4.

<sup>3</sup> *Id.* p. 12.

<sup>4</sup> *Id.* p. 26.

<sup>5</sup> *Id.* p. 28.

<sup>6</sup> *Id.* p. 50.

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proceedings for disbarment, which in some national jurisdictions might require more elaborate procedural safeguards. In that regard, the Chamber recalled that: "Mr. Degli is not being criminally sanctioned, prevented from practicing law in general, nor from appearing before the ICTR as a counsel privately engaged by an Accused."<sup>7</sup> By that same decision, the Chamber appointed Mr. Skolnik as Lead Counsel for Mr. Kabiligi pursuant to Rule 45 *quater*. The Chamber cited the need for immediate resolution of the representation of the Accused, who had not been adequately represented since 26 October 2004. It was important to ensure that Mr. Kabiligi be adequately represented at this critical juncture of the trial. The judicially ordered assignment was also intended to allay the concerns of Mr. Kabiligi that Mr. Skolnik's involvement was conditional upon Mr. Degli not being reinstated as Lead Counsel by subsequent proceedings.<sup>8</sup>

## SUBMISSIONS

4. On 10 February 2005, citing the language in the 19 January 2005 decision, Mr. Kabiligi filed a letter requesting Mr. Degli, in his private capacity, to voluntarily assure his defence until the end of the trial.<sup>9</sup> On 24 February 2005, three days before the scheduled Status Conference, Mr. Degli indicated by letter to the Chamber that he was prepared to undertake the defence of Mr. Kabiligi on this basis. Mr. Degli requested permission to enter into attorney-client communications with Mr. Kabiligi. During a status conference on 28 February 2005, Mr. Kabiligi confirmed his request to be represented by Mr. Degli on a *pro bono* basis.<sup>10</sup>

## DELIBERATIONS

5. The question before the Chamber is whether to grant Mr. Degli's request to enter into attorney-client communications with Mr. Kabiligi.<sup>11</sup> The broader issue upon which that question depends is whether, and on what basis, Mr. Degli may act as privately engaged counsel for Mr. Kabiligi, unsupported by the Tribunal's legal aid program. Assuming that Mr. Degli may act as a privately engaged counsel, the question also arises as to the limitations on his competencies arising from the Chamber's decision of 19 January 2005 and, in particular, his relationship to the legal team duly constituted under the legal aid program defined in the Rules of Procedure and Evidence ("the Rules") and the Directive on the Assignment of Defence Counsel ("the Directive").

6. Article 20 (4)(d) of the Statute confers upon an accused the right to "defend himself or herself in person or through legal assistance of his or her own choosing". This right is substantially qualified where an accused asks that the costs of legal assistance be paid from the public purse.<sup>12</sup> In such cases, the Tribunal has a legitimate interest to ensure that money is

<sup>7</sup> *Bagosora et al.*, Decision on the Defence Motions for Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratién Kabiligi (TC), 19 January 2005, para. 42.

<sup>8</sup> *Id.* paras. 53-54.

<sup>9</sup> "[J]e vous demande votre intervention urgente, et saisir la Chambre de votre volonté de m'aider et m'accorder votre assistance judiciaire dans un but purement déontologique de mettre les intérêts de votre Client avant les vôtres, en m'assurant, vous personnellement, la défense à titre privé bénévolement, jusqu'à la fin de mon procès en première instance."

<sup>10</sup> T. 28 February 2005 p. 6.

<sup>11</sup> At no time was Mr. Degli prohibited from communicating with Mr. Kabiligi. Indeed, the Chamber has been sent copies of a number of letters between Mr. Degli and Mr. Kabiligi in the period between 26 October 2004 and Mr. Degli's request of 24 February 2005.

<sup>12</sup> The Appeals Chamber has consistently stated that "the right to choose counsel applies only to those accused who can financially bear the costs of counsel" and that "the right to free legal assistance by counsel does not confer the right to choose one's counsel". *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.

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well-spent and to regulate the assignment of counsel. Since his arrest by the Tribunal, Mr. Kabiligi has declared that he is indigent and has relied on legal aid for assignment of counsel and to otherwise pay the costs of his defence. By his letter of 9 February 2005, Mr. Kabiligi requested the legal assistance of Mr. Degli, who has agreed to act on the Accused's behalf free of charge. In the present circumstances, the Chamber must assess the relationship between the invocation of the right to choice of counsel and the Tribunal's legitimate interest in administering the legal aid program of which Mr. Kabiligi is, and had long been, a beneficiary.

7. Mr. Kabiligi does not appear to have requested, and Mr. Degli has not agreed, that the entire cost of the defence until the end of trial would be paid by Mr. Degli, so as to take Mr. Kabiligi out of the legal aid program entirely. Such an undertaking would be surprising indeed, particularly in light of the scope of the present trial and the breadth of coverage of legal aid.<sup>13</sup> Substantial costs arise from the transportation and accommodation of witnesses; meeting witnesses in disparate geographic locations; conducting ongoing investigations; and paying the salaries of the legal team on which counsel must necessarily rely in order to provide a competent defence. Even assuming that Mr. Degli were to make such a promise, the Chamber could not rely on such an undertaking. The Registrar found in its decision of 26 October 2004 that Mr. Degli had engaged in serious financial malfeasance. The Chamber could not, under such circumstances, give credence to any assurance that Mr. Degli would adequately fund the Defence through to completion of the trial. In these circumstances, Mr. Degli's letter can only be considered an offer to serve as a *pro bono* attorney, without otherwise disturbing Mr. Kabiligi's entitlement to the assistance of legal aid.<sup>14</sup>

8. Rule 44 of the Rules requires that counsel be "admitted to the practice of law in a State, or is a University professor of law". The Chamber has not received any information that Mr. Degli no longer fulfils these conditions and assumes, for present purposes, that this is still the case. The question remains whether Mr. Kabiligi's request for the assistance of Mr. Degli is compatible with the structure of assigned counsel already in place. In accordance with the Chamber's decision of 19 January 2005, Mr. Degli is disqualified from the legal aid program of which Mr. Kabiligi is a beneficiary. Under Article 15 of the Directive, he is also disqualified from being designated as Lead Counsel or as Co-Counsel, both of which are roles created and defined by the legal aid program itself. Lead Counsel has "primary responsibility for the Defence"; "shall sign all the documents submitted to the Tribunal unless he authorizes Co-Counsel, in writing to sign on his behalf"; and "may request the Chamber to authorize the withdrawal of the assignment of Co-Counsel". The authority of Lead Counsel to direct the defence of an accused is a natural corollary of his or her primary responsibility as steward of the financial resources of the Defence team. The consequence of Mr. Degli's disqualification from involvement in the legal aid program is that he may not assume a directing role in the Defence of an accused who continues to be assisted by legal aid. It would be an unacceptable contradiction to permit a lawyer who has been disqualified from legal aid for serious misconduct to nevertheless direct a defence funded by that program.

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<sup>13</sup> Article 17 of the Directive provides that "the costs and expenses of legal representation of the suspect or accused necessarily and reasonably incurred shall be met by the Tribunal"; such costs and expenses are said to include "costs relating to investigative and procedural steps, measures taken for the production of evidence to assist or support the Defence, expenses for ascertainment of facts, consultancy and expert opinion, transportation and accommodation of witnesses, postal charges, registration fees, taxes or similar duties, and all remuneration due to Counsel in Accordance with Articles 22 and 27".

<sup>14</sup> This understanding is confirmed by Mr. Kabiligi's representation during the status conference that "I asked for Counsel Degli to represent me on a *pro bono* basis". T. 28 February 2005 p. 6.

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9. The letters of Mr. Kabiligi and Mr. Degli suggest that their intention is that Mr. Degli shall be Lead Counsel.<sup>15</sup> No reference is made to the existing legal team. As Mr. Degli cannot legally be appointed Lead Counsel, which would imply control over the legal aid defence provided to Mr. Kabiligi, Mr. Degli's request to enter into contact with Mr. Kabiligi in order to continue his defence is denied.

10. This does not necessarily mean that Mr. Degli is excluded from providing assistance to the existing Defence team operating under the legal aid program. Such participation would have to be at the request of the duly designated Lead Counsel, who has "primary responsibility for the Defence". In such a situation, Lead Counsel would assume responsibility for the conduct of the *pro bono* lawyer. Such an arrangement would have to ensure that the cohesiveness of the Defence team not be undermined.

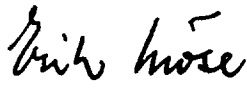
11. In his decision of 26 October 2004, the Registrar ordered Mr. Degli to transmit all original documents in the file to Mr. Kabiligi or to Co-Counsel within fifteen days. In its 19 January 2005 decision, the Chamber noted that it seemed that Mr. Degli had not fulfilled this obligation.<sup>16</sup> On 2 February 2005, the Chamber authorized Mr. Degli to communicate with Mr. Kabiligi for the purpose of facilitating the transfer of the documents.<sup>17</sup> As of today, the Chamber has no indication that the documents have been transmitted. The continued failure to transfer the documents is a cause of delay at a critical stage in the preparations of the defence. Accordingly, the Chamber considers it necessary to specifically order Mr. Degli to transmit all original documents to Mr. Kabiligi or to his legal team within five days of this decision.


**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the request;

**ORDERS** Mr. Degli to transmit all original documents in the file to Mr. Kabiligi or to his legal team within five days of this decision.

Arusha, 4 March 2005

  
Erik Møse  
Presiding Judge

  
Jai Ram Reddy  
Judge

  
Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]



<sup>15</sup> For instance, Mr. Degli's letter of 24 February 2005 contains formulations as "mon Client"; "... je puisse continuer d'assurer et de terminer sa défense à titre privé"; "... je m'organise avec lui sur la suite de la procédure en tant que son Conseil...".

<sup>16</sup> *Bagosora et al.*, Decision on the Defence Motions for Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratién Kabiligi (TC), 19 January 200, para. 52.

<sup>17</sup> *Bagosora et al.*, Decision on Mr. Degli's Request for Authorization to Communicate with Mr. Kabiligi (TC), 2 February 2005.