



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICIR-98-41-T
24-03-2005
(24201-24192)

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 24 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 MAITRE PAUL SKOLNIK'S APPLICATION FOR
RECONSIDERATION OF THE CHAMBER'S DECISION TO INSTRUCT THE
REGISTRAR TO ASSIGN HIM AS LEAD COUNSEL FOR GRATIEN KABILIGI**

The Office of the Prosecutor

Barbara Mulvaney
Drew White
Christine Graham
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Counsel for the Defence

Raphaël Constant
Paul Skolnik
René Saint-Léger
Peter Erlinder
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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 “Application by Maitre Paul Skolnik for Reconsideration and Modification of the Decision of the Trial Chamber of January 19, 2005”, filed on 2 March 2005;

CONSIDERING the Bagosora Defence submissions, filed on 3 March 2005; the Prosecution’s response, filed on 3 March 2005; Mr. Skolnik’s further application, filed on 8 March 2005; the Prosecution’s further reply, filed on 9 March 2005; Mr. Skolnik’s reply, filed on 14 March 2005; and the Prosecution second further response, filed on 14 March 2005.

HEREBY DECIDES the application.

INTRODUCTION

1. The Prosecution case against the four Accused concluded on 14 October 2004 after eighty-two witnesses had testified. In a decision of 26 October 2004, the Registrar withdrew the assignment of Mr. Jean Yaovi Degli as Lead Counsel for Mr. Gratien Kabiligi under the framework of the legal aid system. The decision was based on evidence of fraudulent conduct.¹ The Registrar also invited Mr. Kabiligi to submit without delay a list of three individuals who could be assigned as new Lead Counsel. At the time, the Defence case was scheduled to start on 12 January 2005.

2. All Defence teams, as well as Mr. Kabiligi individually, challenged the Registrar’s decision before the Trial Chamber and requested Mr. Degli’s reinstatement. On 20 December 2004, the Chamber denied the requests to reinstate Mr. Degli, with written reasons to follow.² During a status conference on 21 December 2004, Mr. Kabiligi expressed his intention to seek certification to appeal the decision.³

3. During the same status conference, Mr. Kabiligi requested the Chamber to order the Registrar to appoint Mr. Skolnik, then Co-Counsel in the Bagosora Defence, to serve as his new Lead Counsel given his familiarity with the case.⁴ The Bagosora Defence concurred with this proposed solution. Both suggested that the Chamber act pursuant to Rule 45 *quater* to facilitate the appointment immediately.⁵ The Registry indicated that it was favourable to

¹ Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004. The Registrar’s decision fully recounts the procedural history of the investigation of Mr. Degli as well as the nature of the allegations against him.

² T. 20 December 2004 p. 38.

³ T. 21 December 2004 p. 2 (“I am going to appeal before the Appeals Chamber as soon as I receive the written decision and after seeking a certification to appeal.”).

⁴ *Id.* (“The President of this Chamber also used wisdom when he said whether there is an alternative solution which could actually clear the impasse in which we are right now. I would like to venture to propose to you a solution which could seem to be the least inconvenient in order to maintain whatever interest there remains in respect of my defence. I would like to respectfully propose to you, Mr. President, that you order the Registrar to appoint a counsel ... [T]he name that I would like to propose, Mr. President, is that of Counsel Paul Skolnik, of course, subject to his assent and the assent of Mr. Constant, as well as the agreement of Mr. Constant’s client ... Mr. Skolnik knows the general context of this trial. He could, therefore, familiarise himself rapidly with the specific points of my case”).

⁵ *Id.* See also T. 21 December 2004 p. 6 (Mr. Constant: “... and I think it is in the interest of all Defence teams that the Chamber orders the Registrar to appoint Paul Skolnik pursuant to Rule 45 *quater*”).

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appointing Mr. Skolnik and that it could do so promptly.⁶ The Chamber left it to the Registry to pursue this option.⁷ In light of the changed circumstances, the Chamber postponed the commencement of the Defence case until 30 March 2005.⁸ The Chamber also postponed the date for the filing of Kabiligi's pre-Defence brief and witness list until 28 February 2005, subject to further representations from Mr. Skolnik if named Lead Counsel.

4. The Registry subsequently corresponded with Mr. Kabiligi and Mr. Skolnik to obtain further assurances and information related to the proposed solution prior to making an appointment. On 21 December 2005, the Registry renewed its request for Mr. Kabiligi to formally submit three names for a replacement counsel, including that of Mr. Skolnik if he so desired. In a letter dated 22 December 2004, Mr. Skolnik expressed his willingness to accept the appointment, if certain conditions were met. However, he also indicated concerns that subsequent appeals might lead to his displacement. Mr. Skolnik proposed that he be named interim Lead Counsel until the situation was clarified, if he accepted.⁹

5. On 23 December 2004, the Registry sent a further request to Mr. Kabiligi to submit a list of three names, including Mr. Skolnik, and indicated its willingness to facilitate the solution proposed by the Accused at the status conference.¹⁰ In a letter dated 27 December 2004, Mr. Kabiligi withdrew his proposal, stating that it had caused confusion and indicating his need for Lead Counsel 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.

6. The Chamber delivered written reasons for denial of reinstatement of Mr. Degli on 19 January 2005. It also instructed the Registrar to appoint Mr. Skolnik as Lead Counsel for the Kabiligi Defence.¹¹ On 24 January 2005, the Registrar made that appointment and subsequently withdrew the assignment of Mr. Skolnik as Co-Counsel for the Bagosora Defence in a decision of 27 January 2004.

7. All Defence teams, as well as Mr. Kabiligi, individually, filed requests for certification to appeal the Chamber's decision not to reinstate Mr. Degli. The Chamber denied these requests and stated that "[t]he 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".¹² In a decision delivered the same day, the Chamber further noted that the Registrar's

⁶ T. 21 December 2004 p. 12 ("... in the circumstances of this case, we would support and act expeditiously to get Mr. Skolnik ... as counsel in this case, because it eases a lot of problems which we usually encounter when we have to make that decision.").

⁷ *Id.* at pp. 12-13.

⁸ *Id.* at p. 27.

⁹ Skolnik Application, Annex 2, Letter from Paul Skolnik to Dunstain Mwaungulu (DCDMS), 22 December 2004 ("Under the said circumstances it would be an honour to represent General Kabiligi. However I am prepared to accept to undertake being Gen. Kabiligi's Lead Counsel only under the following conditions. a) that DCDMS approve a work program to meet with Gen. Kabiligi in January as soon as possible, to see what the status of the case is. b) After I meet with Gen. Kabiligi, I shall indicate to DCDMS whether I accept the appointment as Lead Counsel. c) If appointed as Lead Counsel I would accept being named on an "ad interim" basis pending the outcome of Kabiligi's and Degli's appeals. Also as Me Constant suggested in his email to you of December 22d 2004 that he would not withdraw me as his co counsel until the questions raised herein are resolved. d) Should either Kabiligi or Degli succeed in their appeals I want to be re-integrated into the Bagosora Defence team as Co-Counsel, as per the suggestion to you by Me Constant.").

¹⁰ Skolnik Application, Annex 4, Letter from Dunstain Mwaungulu (DCDMS) to Mr. Kabiligi, 23 December 2005.

¹¹ *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, paras. 50-54.

¹² *Bagosora et al.*, 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" (TC), 2 February 2005, para. 13.

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appointment of Mr. Skolnik as Lead Counsel for Mr. Kabiligi on 24 January 2005 had concluded Mr. Degli's obligations toward Mr. Kabiligi. The Chamber authorized Mr. Degli "to have telephone communication with Mr. Kabiligi in order to facilitate the orderly transfer of the case file to the new Lead Counsel, Mr. Skolnik".¹³

8. By letter dated 4 February 2005, Mr. Kabiligi insisted that Mr. Skolnik was not authorized to act as his counsel, and stated that he considered Mr. Degli to be his Lead Counsel. Mr. Kabiligi indicated that he would be unable to comply with the deadline of 28 February 2005 for filing his pre-Defence brief and would not be in a position to proceed with the trial on 30 March 2005, as had been decided at the status conference on 21 December 2004. On 4 February 2005, Mr. Kabiligi filed a document on his own behalf entitled "Motion for severance of trials".

9. On 6 February 2005, Mr. Skolnik travelled to Arusha and met with Mr. Kabiligi on several occasions, including 7 and 8 February 2005.¹⁴ Mr. Kabiligi refused to meet with Mr. Skolnik at a previously scheduled meeting on 11 February 2005.¹⁵ Mr. Kabiligi subsequently sent a letter of apology to Mr. Skolnik for refusing to meet with him.¹⁶

10. 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 undertake his defence until the end of the trial.¹⁷ On 24 February 2005, four days before the scheduled status conference, Mr. Degli indicated by letter to the Chamber that he was prepared to do so, and Mr. Degli requested permission to enter into attorney-client communications with Mr. Kabiligi.

11. Mr. Skolnik appeared as Mr. Kabiligi's Lead Counsel during the status conference on 28 February 2005. The Chamber heard oral submissions from the parties and Mr. Kabiligi concerning a possible role for Mr. Degli in the Kabiligi Defence. Mr. Kabiligi confirmed his request to be represented by Mr. Degli on a *pro bono* basis.¹⁸ At a status conference on 1 March 2005, the Chamber denied the request and stated that a written decision would follow. It noted that Mr. Degli could not legally be appointed Lead Counsel, which would imply control over the legal aid defence provided to Mr. Kabiligi.¹⁹ The Chamber also stated that Mr. Degli was not excluded from providing assistance to the existing Defence team, if so requested by the duly designated Lead Counsel, who has "primary responsibility for the Defence".²⁰

12. After the Chamber's oral ruling, Mr. Skolnik, citing constraints placed on him by the Accused, asked that Mr. Kabiligi be allowed to address the Chamber.²¹ Mr. Kabiligi

¹³ *Bagosora et al.*, Decision on Mr. Degli's Request for Authorization to Communicate with Mr. Kabiligi (TC), 2 February 2005.

¹⁴ Skolnik Application, paras. 32-33.

¹⁵ *Id.* at para. 35.

¹⁶ *Id.* at para. 40.

¹⁷ "[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."

¹⁸ T. 28 February 2005 p. 6.

¹⁹ T. 1 March 2005 pp. 1-2; *Bagosora et al.*, Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005, para. 9.

²⁰ T. 1 March 2005 p. 2; *Bagosora et al.*, Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005, para. 10.

²¹ T. 1 March 2005 p. 4 ("Mr. Skolnik: The matter is very complex. We met and my position is the following: considering that General Kabiligi wrote a letter to me on 9th of February in which he says, 'From my point of view, you are not my counsel, therefore, you cannot do anything on my behalf', having those

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expressed his wish to have Mr. Degli complete his case and indicated his intention to request certification of the Chamber's decision concerning Mr. Degli's possible role as part of the Defence on a *pro bono* basis.²² In addition, Mr. Kabiligi requested severance of his case and six additional months to prepare his Defence.²³ He added that he would not accept having a counsel "imposed" on him, and requested that he be allowed to use the normal process of choosing counsel from the Tribunal's list of potential lawyers.²⁴ In light of Mr. Kabiligi's statement, Mr. Skolnik informed the Chamber of his intention to file the present motion.²⁵ During the same status conference, the Chamber postponed the commencement of trial until 11 April 2005.²⁶

13. On 4 March 2005, the Chamber issued its written decision on the request for Mr. Degli to appear as a *pro bono* counsel.²⁷ Mr. Kabiligi filed a request for certification of appeal on 14 March 2005.

SUBMISSIONS

14. Mr. Skolnik seeks reconsideration and modification of the Chamber's decision of 19 January 2005, instructing the Registrar to assign him as Lead Counsel for Mr. Kabiligi. He requests the Chamber to instruct the Registrar to withdraw his assignment as Lead Counsel for Mr. Kabiligi and to reinstate him as Co-Counsel for Mr. Bagosora. Mr. Skolnik advances three principal reasons in support of his request: (i) his lack of consent to the assignment; (ii) Mr. Kabiligi's refusal to accept Mr. Skolnik as his Lead Counsel which has resulted in a breakdown in trust; and (iii) the potential conflict in which this situation places him with respect to his ethical obligations as a member of the Quebec Bar and under the Tribunal's Code of Professional Conduct for Defence Counsel.²⁸

15. The Bagosora Defence seeks the return of Mr. Skolnik as Co-Counsel or, in the alternative, a delay of three months in the presentation of its evidence after the nomination of a new Co-Counsel. The Bagosora Defence notes that its reasons for proposing Mr. Skolnik as Lead Counsel for the Kabiligi Defence have disappeared given Mr. Kabiligi's recent positions. Mr. Constant, Lead Counsel, has refrained from selecting a new Co-Counsel given the present uncertainty with respect to Mr. Kabiligi's representation. Any new Co-Counsel would lack Mr. Skolnik's extensive knowledge of the case.

16. The Prosecution opposes Mr. Skolnik's application, but does not oppose the transmission of the present file to the Quebec Bar for their consideration. In addition, the Prosecution

constraints or parameters of his letter which constrain me and put me in a position where I really cannot speak on his behalf, I will ask the Trial Chamber to recognise General Kabiligi's request to address the Trial Chamber on the issues that he wishes to raise to the Trial Chamber.").

²² T. 1 March 2005 p. 4.

²³ *Id.* at p. 5.

²⁴ *Id.*

²⁵ *Id.* at pp. 12-13.

²⁶ *Id.* at pp. 15-16.

²⁷ *Bagosora et al.*, Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005.

²⁸ In addition, Mr. Skolnik seeks leave to transmit the present pleadings to the Quebec Bar and to allow the Quebec Bar to intervene if it sees fit to do so. The present application and supporting material were filed confidentially given their relation to attorney-client communications and closed session proceedings. On 16 March 2005, the Chamber informed Mr. Skolnik that it did not consider that any of the information in the pleadings would be subject to non-disclosure to his professional regulatory body by virtue of any rule of the Tribunal. On 23 March 2005, Mr. Skolnik filed a letter dated 22 March 2005 from the Bâtonnier of the Quebec Bar concerning the present situation. Consequently, these requests are moot.

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requests the Chamber to order Mr. Degli to transmit the case file to either the Accused or Mr. Skolnik.²⁹

DELIBERATIONS

17. The Chamber has the authority to reconsider its decisions if satisfied that the underlying factual premise has changed substantially in a way that alters the original outcome.³⁰ In addition, the Chamber has the authority, pursuant to Rule 45 (H), to instruct the Registrar to withdraw the assignment of counsel upon good cause being shown.³¹

18. Mr. Skolnik's application must be considered against the backdrop of the entire proceedings, in particular since 26 October 2004. The Chamber is in the midst of a lengthy and complicated trial, which commenced in April 2002. The Accused, including Mr. Kabiligi, have been in pre-trial detention for nearly eight years. The disqualification of Mr. Degli for serious misconduct as Mr. Kabiligi's Lead Counsel was unforeseen. The Chamber has made every effort to ensure that the Accused's defence and that the difficulties faced by his defence are reasonably accommodated. The Chamber's decision of 19 January 2005 created a workable solution to the present impasse, addressing both Mr. Kabiligi and Mr. Skolnik's concerns with respect to Mr. Kabiligi's own proposal.

Mr. Kabiligi's Refusal

19. Mr. Skolnik argues that it would be in the interests of justice to permit him to withdraw as Lead Counsel because Mr. Kabiligi refuses to work with him and insists on the return of either Mr. Degli or the selection of another counsel. In particular, he points to Mr. Kabiligi's statement that Mr. Skolnik was not his counsel and therefore could not take any act in his name.

20. In reaching its decision of 19 January 2005, the Chamber was mindful that Mr. Kabiligi might resist Mr. Skolnik's representation given his insistence on Mr. Degli's return and the withdrawal on 27 December 2004 of his original proposal for Mr. Skolnik to be his counsel. Thus, this cannot constitute a ground for reconsideration.

21. Appeals Chamber case law has emphasised that an accused does not have the right to unilaterally destroy the trust between himself and his counsel in the hope that such actions will result in the withdrawal of his counsel by the Registrar.³² Similarly, Mr. Kabiligi's present unwillingness to cooperate with Mr. Skolnik does not constitute good cause for permitting withdrawal. In the Chamber's view, the obstacle between Mr. Skolnik and Mr.

²⁹ This request is moot. See *Bagosora et al.*, Decision on Request for Private Representation of Gratién Kabiligi (TC), 4 March 2005, para. 11.

³⁰ *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, paras. 18, 20. See also *Nahimana et al.*, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005 (AC), 4 February 2005, p. 2 ("... [T]he Appeals Chamber has an inherent discretionary power to reconsider a previous interlocutory decision, for example, if a clear error of reasoning has been demonstrated or if it is necessary to do so in order to prevent an injustice."); *Barayagwiza*, Decision (Prosecution's Motion for Review or Reconsideration)(AC), 7 April 2000, paras. 37, 41.

³¹ Rule 45 (H) states: "Under exceptional circumstance, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings." In addition, the Registrar has this authority independent of the Chamber pursuant to Article 19 (A) of the Directive on the Assignment of Defence Counsel ("the Directive"): "The Registrar may ... [i]n exceptional circumstances, at the request of the accused, or his Counsel, withdraw the assignment of Counsel".

³² *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 51.

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Kabiligi is the Accused's reluctance to cooperate with a counsel that he views as being imposed on him. Mr. Kabiligi is a long-time and willing beneficiary of the Tribunal's legal aid system. The Appeals Chamber has repeatedly emphasized that the right to free legal assistance by counsel does not confer the right to choose one's counsel.³³ The present practice of assigning counsel is simply to accord weight to the Accused's preference, but that preference may always be overridden if it is in the interests of justice to do so.³⁴ In addition, the Appeals Chamber has confirmed that counsel may be assigned to an accused even against his will.³⁵ Therefore, Mr. Kabiligi's purported termination of Mr. Skolnik's mandate is not dispositive.

22. Since the removal of Mr. Degli on 26 October 2004, Mr. Kabiligi's own conduct has obstructed the proper and expeditious conduct of trial, despite the Chamber's efforts to accommodate his new circumstances. Mr. Kabiligi was given an opportunity to propose counsel of his choice on three separate occasions from 26 October until 23 December 2004. Furthermore, after the withdrawal of his proposal on 27 December 2004, Mr. Kabiligi made no move to nominate any other Lead Counsel. On the contrary, he asked that the process of naming a new counsel be stayed and continued to insist on the return of Mr. Degli despite the Chamber's decision of 20 December 2004. Consequently, the Chamber was forced to act and to instruct the Registrar to appoint Mr. Skolnik as his Lead Counsel both to advance the trial and to safeguard his rights. At this stage, the introduction of a new Lead Counsel, unfamiliar with the case, would inevitably result in undue delay.³⁶

23. In the Chamber's view, the reasons for instructing the Registrar to assign Mr. Skolnik remain. Mr. Degli, the former Lead Counsel, has been disqualified from participating in the Tribunal's legal aid system for serious misconduct. Mr. Kabiligi's case is at a critical juncture, and he is in need of immediate additional legal assistance. Mr. Skolnik is already familiar with the case in general and, consequently, is uniquely situated to rapidly assimilate into the Kabiligi Defence.³⁷ Mr. Kabiligi's objections to Mr. Skolnik, after initially proposing him, are unrelated to his competence as a lawyer and his professionalism.

Counsel's Lack of Consent to Accept Appointment

24. Mr. Skolnik contends that he never consented to his assignment as Lead Counsel for Mr. Kabiligi. Reference is made to Article 13 (iii) of the Directive which provides that the

³³ *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.

³⁴ *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 22. See also *Nahimana et al.*, Decision on Jean Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel (AC), 19 January 2005, p. 3 ("... [A]lthough the choice of an accused regarding his defence counsel should be respected, the Registrar maintains a degree of discretion in assigning counsel to an indigent accused, and may decide not to appoint the accused's first choice of counsel if there are sufficient grounds overriding the accused's preference").

³⁵ *Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (AC), 1 November 2004. 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 ("[T]he Appellant appears to believe that, if he continues to hold the erroneous view that he has a right to choose his lead Counsel and, as a corollary to that right, a right to choose Co-counsel, that assertion will be eventually recognized as warranting the removal of his assigned Counsel. That belief is mistaken.").

³⁶ The Chamber is mindful that on Mr. Degli's removal as Lead Counsel, Mr. Saint-Leger who had been following the case for five months, requested a minimum of six additional months to prepare.

³⁷ The Chamber notes that Mr. Skolnik submits that he focused primarily on the evidence concerning his former client Mr. Bagosora during the presentation of the Prosecution case. The Chamber observes that he has nonetheless actively followed the proceedings for nearly three years. In view of the evidence against Mr. Kabiligi, Mr. Skolnik's familiarity with the case in general, as well as his skills as an advocate, the Chamber is satisfied that Mr. Skolnik is best situated to adequately defend Mr. Kabiligi in the context of the ongoing case.

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agreement of counsel is one of the pre-requisites to assignment. In this regard, he points to a number of exchanges in which he expressly conditions his acceptance of any potential assignment on a prior meeting with the Accused.

25. As the decision of 19 January 2005 reflects, the Chamber was already well aware of Mr. Skolnik's preoccupations with respect to representing Mr. Kabiligi.³⁸ Thus, this cannot constitute a ground for reconsideration. In reaching its decision, the Chamber considered in particular Mr. Skolnik's openness to the possibility of representing Mr. Kabiligi. An order pursuant to Rule 45 *quater* provides a legal basis for appointing a counsel; it does not, in itself, make the particular appointment.³⁹ On 24 January 2005, the Tribunal's Defence Counsel and Detention Management Section (DCDMS) sent Mr. Skolnik a letter indicating that the Registrar had assigned him as Lead Counsel for Mr. Kabiligi. On 27 January 2005, the Deputy Registrar withdrew Mr. Skolnik's assignment as Co-Counsel for Mr. Bagosora. Mr. Skolnik could have appealed both decisions administratively, but he did not do so. He travelled to Arusha to meet with Mr. Kabiligi mindful that the Accused might resist his representation.

26. In any event, in the Chamber's view, Mr. Skolnik's request for reconsideration is not based on his asserted lack of consent, but rather his concern with respect to Mr. Kabiligi's unilateral conduct after the appointment.⁴⁰ As the Appeals Chamber has stated, "where an accused unjustifiably resists legal representation from an assigned counsel, the counsel's

³⁸ These were expressed in his letter of 27 December 2004 copied to the Chamber and referred to in the Decision. Mr. Skolnik's application simply points to additional correspondence reflecting the same concerns during this time period.

³⁹ The Appeals Chamber has stated that the Registrar has the "primary responsibility of determining matters relating to the assignment of counsel under the legal aid system". *Mejakic et al.*, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic (AC), 6 October 2004, para. 7. Appeals Chamber case law reflects that a Chamber has the authority to order the Registrar to appoint a counsel and even to recommend a particular counsel. However, the Registrar retains the ultimate authority to make the appointment. *Nahimana et al.*, Decision on Jean-Bosco Baryagwiza's Motion for Appointment of Counsel or a Stay of Proceedings (AC), 22 October 2004 ("Orders the Registrar to appoint counsel for Appellant Barayagwiza pursuant to Rule 10 *bis* of the Directive ..."); *Nahimana et al.*, Order to Appoint Counsel to Jean Bosco Barayagwiza (AC), 3 November 2004 ("Hereby orders the Registrar: (i) to consider reinstating Mr. Richard Harvey on the list of eligible counsel, and, if he is eligible and available, to appoint Mr. Richard Harvey as lead counsel for Appellant Barayagwiza; (ii) If Mr. Richard Harvey is not eligible or available to appoint Mr. Donald Herbert as lead counsel ..."); *Nahimana et al.*, Decision on Jean Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel (AC), 19 January 2005, p. 3 ("Finding that, in the circumstances of this case, the Registrar has given reasonable explanations why Appellant Barayagwiza's first choice of lead counsel is unsuitable for appointment and has therefore named another lead counsel from the names proposed by the Appellant, as ordered by the Appeals Chamber"); *Nahimana et al.*, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005 (AC), 4 February 2005 (refusing to reconsider decision affirming Registrar's choice of counsel which the Accused characterizes as causing him great prejudice). See also *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, para. 53 ("The Chamber is aware that the assignment of a particular counsel is typically within the province of the Registry, but recalls the Registry's previously expressed amenability to this solution."); *Nahimana et al.*, Oral Decision (TC), T. 6 February 2001 pp. 6-7 (ordering the Registrar to appoint a counsel without naming a counsel).

⁴⁰ T. 1 March 2005 p. 4 ("... Mr. President: But you are his lead counsel. Mr. Skolnik: I understand. But I am a lead counsel with two hands and two legs tied behind me ..."); p. 12 ("Mr. President, in light of what General Kabiligi said today, 'I do not accept having imposed counsel in my trial. I request that I be allowed to choose counsel from the list of counsel kept by the registry.' I find myself in an untenable situation as an attorney, and I must tell the Trial Chamber that I'm going to file a motion to ask the Trial Chamber to reconsider and modify the decision of January 19th 2005, in which the Trial Chamber directed registry to name me as the lead counsel of Kabiligi ... I had a positive attitude to come here to work with the General, to represent him. I think his situation is very sympathetic in the sense that he has had nothing but problems in his Defence team from the beginning ... But on the other hand, I feel that taking into account my obligation as an officer of the Court and taking also into account my dignity as a lawyer does not permit me to stay in this case representing General Kabiligi ...").

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professional obligations to represent the Accused remain”.⁴¹ Mr. Skolnik has repeatedly emphasized in exchanges with the Accused and before the Tribunal that he has a “positive attitude” about providing Mr. Kabiligi with effective representation.⁴² The Chamber is satisfied that Mr. Skolnik is committed to representing Mr. Kabiligi and that the Accused will receive a fair trial with his assistance. The Chamber is sympathetic to Mr. Skolnik’s position and recognizes the inherent difficulties in representing an Accused who refuses to fully cooperate. Mr. Skolnik however must continue to extend his best professional efforts on Mr. Kabiligi’s behalf.

Conflict with Codes of Conduct

27. Mr. Skolnik argues that the present situation places him in conflict with several provisions of the code of ethics of his national bar association as well as the Tribunal’s Code of Professional Conduct for Defence Counsel (“the Code of Conduct”), prohibiting him from acting on a client’s behalf where the client so demands.⁴³

28. Article 4 (1) of the Code of Conduct provides that “Counsel must advise and represent their client until the client duly terminates the Counsel’s position, or the Counsel is otherwise withdrawn with the consent of the Tribunal”. This provision must be interpreted in light of Appeals Chamber case law prohibiting an Accused from unilaterally destroying the trust between himself and counsel as well as authorizing the Chamber to assign counsel in certain circumstances against an Accused’s will.⁴⁴ Mindful of this jurisprudence and in the present circumstances of this case, the Chamber is satisfied that Mr. Skolnik’s continued representation of Mr. Kabiligi is fully consistent with his obligations under the Code of Conduct.

29. The Tribunal has its own Code of Conduct, a Directive on the Assignment of Defence Counsel, as well as a number of Rules governing Defence counsel. The code of conduct of a counsel’s national bar association has no direct application before the Tribunal. To a certain extent, however, the Tribunal’s Rules have incorporated by reference the standards and qualifications of national jurisdictions.⁴⁵ Nevertheless, Article 19 of the Code provides that “[i]f there is any inconsistency between this Code and any other code which Counsel is bound to honour, the terms of this Code prevail in respect of Counsel’s conduct before the Tribunal”. In determining whether there is such an inconsistency, submissions concerning the

⁴¹ *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 54. See also *Milosevic*, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw (President), 7 February 2005, para. 9; *Milosevic*, Decision on Assigned Counsel’s Motion for Withdrawal (TC), 7 December 2004, para. 17.

⁴² T. 1 March 2005 p. 12 (“... all I want to say to the Trial Chamber is, I had a positive attitude to come here to work with the General, to represent him.”); Skolnik Application, para. 49 (“The position of Me. Skolnik has always been to have a positive attitude and to provide effective counsel to the Defendant Kabiligi, subject to the right to refuse the mandate if circumstances so required.”).

⁴³ Mr. Skolnik makes reference to Articles 3.00.01, 3.01.03, 3.02.09, 3.03.04, 3.05.01, 3.05.02, 3.06.08 of the Code of Ethics of the Quebec Bar.

⁴⁴ *Milosevic*, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw (President), 7 February 2005, para. 9; *Milosevic*, Decision on Assigned Counsel’s Motion for Withdrawal (TC), 7 December 2004, para. 17; *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 51. *Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel (AC), 1 November 2004.

⁴⁵ Rule 44 provides that Counsel must be “admitted to the practice of law in a State” and are subject to, *inter alia*, “the codes of practice and ethics governing their profession”. In addition, Article 1 (4) of the Code of Conduct states: “While Counsel is bound by this Code, it is not, and should not be read as if it were a complete or detailed Code of Conduct for Counsel. Other standards and requirements may be imposed on the conduct of Counsel by virtue of the Tribunal’s inherent jurisdiction and the code of conduct of any national body to which Counsel belongs.”

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content of a national code governing a counsel may be relevant. To this end, the Chamber has considered the letter of 22 March 2003 from the *Bâtonnier* of the Quebec Bar to Mr. Skolnik concerning the present situation.

30. The *Bâtonnier* has not indicated whether, in his opinion, Mr. Skolnik is obliged to withdraw under the code of conduct applicable in Quebec. Nevertheless, he has expressed concern with two aspects of the situation presently faced by Mr. Skolnik. First, Mr. Kabiligi appears to oppose the representation by Mr. Skolnik, and has so far failed to collaborate with him in the preparation of the defence. As discussed above, Appeals Chamber case law reflects that an accused is not permitted to unilaterally sabotage the preparation of a defence by refusing to cooperate. Requests to withdraw on this basis have been refused in the past without occasioning any breach of the ethical obligations of counsel.⁴⁶ The second concern raised by the *Bâtonnier* is that the Chamber's decision concerning Mr. Degli's request to represent Mr. Kabiligi as *pro bono* attorney may intolerably impinge upon Mr. Skolnik's professional independence. However, as the Chamber made clear in its decision, any involvement of Mr. Degli would be at the absolute discretion of Mr. Skolnik.⁴⁷ Having considered these submissions, the Chamber does not find that any inconsistency has been established between the ethical obligations under the Quebec Bar and of this Tribunal.

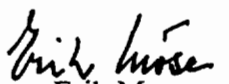
Bagosora Defence Submissions

31. The submissions of the Bagosora Defence do not alter the Chamber's position. Once counsel is assigned to an Accused, he may only be withdrawn in exceptional circumstances in accord with Rule 45 (H) and Article 19 (A) of the Directive. In the view of the Registry's decisions of 24 January and 27 January 2005, the Bagosora Defence's decision not to name a Co-Counsel cannot be a basis for postponing the case.⁴⁸ The Chamber is mindful, nonetheless, that the withdrawal of Mr. Skolnik as Co-Counsel impacted the preparations of the Bagosora Defence, which will be taken into consideration in witness sequencing.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES Mr. Skolnik's application to withdraw as Lead Counsel for Mr. Kabiligi.

Arusha, 24 March 2005


Erik Møse
Presiding Judge


P. P. Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge



⁴⁶ *Milosevic*, Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw (President), 7 February 2005; *Milosevic*, Decision on Assigned Counsel's Motion for Withdrawal (TC), 7 December 2004.

⁴⁷ *Bagosora et al.*, Decision on Request for Private Representation of Gratién Kabiligi (TC), 4 March 2005, para. 10 ("This does not necessarily mean that Mr. Degli is excluded from providing assistance to the existing Defence team operating under the legal aid system. Such participation would have to be at the request of the duly designated Lead Counsel.") (emphasis added).

⁴⁸ The Chamber is mindful that DCDMS has accommodated the Bagosora Defence in the interim by authorizing the team's bi-lingual Legal Assistant to bill additional hours each month.