



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
24-03-2005
(24208-24202)

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S. Mussa

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

JUDICIAL OFFICE ARCHIVES
ICTR
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[Signature]

DECISION ON REQUEST FOR SEVERANCE BY ACCUSED KABILIGI

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 a request by the Accused Kabiligi for the severance of the hearing of his defence case, filed on 4 February 2005;

CONSIDERING the Prosecution Response of 9 February 2005; the Reply of the Accused Kabiligi, filed on 15 February 2005; and the submissions of the three other co-Accused, all filed on 8 March 2005;

HEREBY DECIDES the request.

INTRODUCTION

1. On 26 October 2004, the Registrar withdrew the assignment of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi and disqualified him from further participation in the Tribunal's legal aid program. 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, Mr. 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, Co-Counsel for Theoneste Bagosora, as his Lead Counsel. Mr. Kabiligi cited Mr. Skolnik's familiarity with the case to be a qualification of prime importance.¹ Mr. Kabiligi conditioned his request on the agreement of both Mr. Bagosora and Mr. Skolnik and, in addition, sought a six-month adjournment to permit preparation of his case. Mr. Bagosora, through his Lead Counsel, consented to the representation of Mr. Kabiligi by Mr. Skolnik.² The Registry indicated its willingness to ensure the expeditious appointment of Mr. Skolnik.³ The Chamber requested the Registrar to look into the matter promptly, with a view to a rapid solution in accordance with the views expressed by the parties.⁴ The Chamber also postponed the commencement of the Defence case until 30 March 2005, to accommodate concerns of the Defence that the coordinated presentation of their case had been disrupted by the disqualification of Mr. Degli.⁵ A status conference was scheduled for 28 February 2005 to consult further with the parties regarding preparations for the progress of the Defence case.

2. On 22 December 2004, Mr. Skolnik sent an email to the Registry expressing concern that pending appeals might subsequently result in his removal as Lead Counsel for Mr. Kabiligi. Mr. Skolnik requested: (i) authorization to meet with Mr. Kabiligi as soon as possible, after which time he would indicate to the Registry whether he would accept the appointment; (ii) to be nominated as *ad interim* Lead Counsel pending resolution of the appeals, which would mean that he could return as Co-Counsel for Bagosora if removed by virtue of the appeals.⁶

3. On 27 December 2004, Mr. Kabiligi retracted his request for the appointment of Mr. Skolnik as his Lead Counsel and, further, requested that any procedures for the appointment

¹ T. 21 December 2004 p. 2.

² *Id.* p. 4.

³ *Id.* p. 12.

⁴ *Id.* p. 26.

⁵ *Id.* p. 28.

⁶ Letter of 22 December 2004, addressed to Mr. Dunstan Mwaungulu, of the Registry, and copied to the President of the Chamber.

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of a new Lead Counsel be suspended pending resolution of the appeals concerning Mr. Degli. Mr. Kabiligi considered Mr. Skolnik's proposed "ad interim" appointment to be unacceptable, as he required a Lead Counsel fully and unconditionally dedicated to his defence. Mr. Kabiligi interpreted the "ad interim" proposal to mean that Mr. Skolnik would have continuing responsibilities *vis à vis* the Bagosora defence, which would create a conflict of interest to the extent that Mr. Skolnik would have to divide his time between the two defences.

4. On 19 January 2005, the Chamber issued written reasons for its oral decision of 20 December 2004. The decision also ordered the Registrar, pursuant to Rule 45 *quater*, to appoint Mr. Skolnik as Lead Counsel for Mr. Kabiligi.⁷ The appointment of a new Lead Counsel had, until that time, been frustrated by Mr. Kabiligi's change of mind concerning Mr. Skolnik and his refusal to propose three names for a new Lead Counsel, as required by Registry procedures. The Chamber observed that the trial was at a "critical juncture", and that the prospect of pending appeals were not a valid justification for further delay by Mr. Kabiligi.⁸

5. On 2 February 2005, Defence requests for certification of appeal of the decision not to reinstate Mr. Degli were denied. 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 still 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 22 December 2004.

6. On 4 February 2005, Mr. Kabiligi filed a document on his own behalf entitled "Motion for severance of trials", which is the object of the present decision. Other defence teams filed submissions on the motion on 8 March 2005, having been requested to do so by the Chamber during a status conference on 1 March 2005.⁹

SUBMISSIONS

7. Mr. Kabiligi argues that as a result of the removal of Mr. Degli as his Lead Counsel, he is unable to adequately prepare his defence on the timetable of the joint trial, which is now scheduled to start on 11 April 2005.¹⁰ Whether his new Lead Counsel be Mr. Skolnik or another person, a minimum of six months is required for his defence to be adequately prepared. This situation causes a conflict of interest between Mr. Kabiligi and his co-Accused. On the one hand, Mr. Kabiligi's right to adequate time and facilities for the preparation of his defence requires a delay; on the other hand, his co-Accused, who have not been affected by the removal of Mr. Degli in the same way, have the right to be tried without undue delay. Mr. Kabiligi does not request the re-hearing of the Prosecution evidence against him, but simply that the hearing of his defence be severed from the joint trial, and that such a hearing be delayed for a minimum of six months.

8. The Prosecution objects that the motion was filed *pro se*, and not through duly assigned counsel. The Prosecution also opposes the motion in substance, arguing that a severed presentation of the defence would occasion delay not only of the Kabiligi defence,

⁷ The order was contained in the written reasons for the 20 December 2004: Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005, p. 17.

⁸ *Id.*, paras. 52-54.

⁹ T. 1 March 2005 pp. 15-16.

¹⁰ At the time the motion was filed, the Defence case was scheduled to commence on 30 March 2005, but was further postponed to 11 April 2005 during a status conference on 1 March 2005. T. 1 March 2005, p. 19.

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but of all the other defence teams as well, who have argued that their defences are highly integrated and rely on one another's witnesses. The loss of the Kabiligi witnesses to the joint defence would, accordingly, lead to delay. Furthermore, the conspiracy charge implicating all four accused is best heard in the course of a single trial.

9. The Ntabakuze Defence agrees that Mr. Kabiligi is not adequately represented and requires additional preparation time, but severance is opposed. Ntabakuze is willing to postpone the presentation of the defence case to accommodate the difficulties faced by Mr. Kabiligi, and to waive any breach of the right to be tried without undue delay arising therefrom. Alternatively, Ntabakuze argues that he should also be severed from the *Bagosora et al.* trial and that the remainder of his trial should be heard jointly with Kabiligi, with whom he is jointly indicted.

10. The Bagosora Defence also agrees that Mr. Kabiligi is not in a position to proceed on the schedule prescribed for the joint trial, in light of the need for the preparations of its new defence team. However, severance is rejected as an inappropriate solution, on several grounds. First, Mr. Kabiligi cannot invoke the rights of other co-defendants as a basis for severance. Second, Mr. Kabiligi ignores the extent to which the other co-defendants have also been disrupted by his lack of preparation. No conflict of interest arises because all the co-Accused have been prejudicially affected in a similar way. Third, Mr. Bagosora objects to being obliged to present his defence against the Prosecution case without knowing the position of the Kabiligi defence and the identity of its witnesses, whether the case is severed or not. Accordingly, the Bagosora Defence agrees with the Kabiligi request for a delay of six months, but insists that the delay apply to all co-Accused in the context of the joint trial.

11. The Nsengiyumva Defence opposes severance. In light of the conspiracy charges in common against the co-Accused, there is a need for each Accused to know, and if necessary respond to, the defences raised by other co-Accused. Thus, if prejudicial or conflicting defences are raised, the co-Accused will know and be able to respond. The timeliness of the motion is also questioned. First, the Defence has not yet started, so the need for severance is questionable given the possibility of alternative measures to mitigate the lack of preparedness of Kabiligi. Second, Kabiligi has known of the relevant facts since 26 October 2004 when his Lead Counsel's commission was withdrawn. Third, the common interests of the Accused have already been established over the course of a long trial, and now outweigh the benefits of severance. Should either of the requests for severance by Kabiligi or Ntabakuze be granted, Nsengiyumva requests that the conspiracy charge against him be dropped or dismissed.

DELIBERATIONS

12. As a preliminary matter, the Chamber finds that Mr. Kabiligi's submissions are inadmissible. Following the Chamber's direction, the Registry assigned Mr. Skolnik as Lead Counsel of Mr. Kabiligi on 24 January 2005. As of that date, Mr. Skolnik assumed "primary responsibility for the Defence" under Article 15 (E) of the Directive on the Assignment of Defence Counsel, and was obliged to "sign all documents submitted to the Tribunal unless he authorizes Co-Counsel, in writing to sign on his behalf". This authority is incompatible with *pro se* submissions pertaining to the conduct of the defence of the Accused.¹¹ In the interest of judicial economy, however, and in light of submissions in proper form from other parties concerning severance or an adjournment of proceedings, the Chamber shall address the merits of the motion.

¹¹ *Nahimana et al.*, Order Concerning Filing by Jean-Bosco Barayagwiza (AC), 4 February 2005, p. 2. Submissions concerning the representation of an accused are not, however, precluded by Article 15 (E).

13. Rule 82 of the Rules of Procedure and Evidence governs the severance of the trial of a co-accused from a joint trial: 24204

- (A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.
- (B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Whether to order a separate trial of an accused is within the discretion of the Trial Chamber.¹² The nature of the possible prejudice to an accused, the advantages of a joint trial, and the mechanisms for mitigating the claimed prejudice by means other than severance, must all be weighed in the exercise of this discretion.¹³ The advantages of a joint trial, which are not lightly outweighed, include the uniform presentation of evidence and procedure; the guarantee of consistent treatment of evidence, verdicts, sentencing, and other matters; and ensuring that witnesses need not be called repeatedly in separate trials.¹⁴

14. Mr. Kabiligi argues that, at present, he is the only party not adequately represented and that, accordingly, he is disadvantaged relative to his co-Accused. Furthermore, proceeding with his trial at this stage would violate his right to an adequate defence, whereas any postponement would violate the rights of his co-Accused to be tried without undue delay. This is said to create a conflict of interest which can be resolved only through severance and a six-month postponement of his separate trial.

15. The Chamber disagrees that proceeding with trial as presently scheduled would violate the right of the Accused Kabiligi to "have adequate time and facilities for the preparation of his ... defence", as prescribed by Article 20 (4)(b) of the Statute. The loss of Lead Counsel on 26 October 2004 undoubtedly constituted a significant setback for the preparation of the defence of Mr. Kabiligi, through no fault of his own. Since that time, the

¹² *Bagosora et al.*, Decision (AC), 28 October 2003 p. 5; *Ntahobali*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 32; *Brdanin and Talic*, Decision on Request to Appeal (AC), 16 May 2000.

¹³ *Ntahobali*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 39 (recognizing that any prejudice from mutually antagonistic defences could be avoided in a joint trial through cross-examination and, where necessary, by permitting rebuttal evidence); *Simic et al.*, Decision on Defence Motion to Sever Defendants and Counts (TC), 15 March 1999 (finding that alleged prejudice arising from testimony, or refusal to testify, of co-accused which would not arise in single trials could be mitigated by the regular rules of admissibility). See also *Zafiro v. United States*, 506 U.S. 534, pp. 538-39 (federal rule of procedure authorizing severance "does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion").

¹⁴ *Bagosora et al.*, Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses (TC), 9 September 2003, para. 22 ("The preference for joint trials of individuals accused of acting in concert in the commission of a crime is not based merely on administrative efficiency. A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; and minimizes the possibility of inconsistencies in treatment of evidence, sentencing or other matters, that could arise from separate trials"; *Delalic et al.*, Decision on Motions for Separate Trial Filed by the Accused Zejnir Delalic and the Accused Zdravko Mucic, 25 September 1996, para. 7; *Brdanin and Talic*, Decision on Motions By Momir Talic for a Separate Trial and for Leave to File a Reply (TC), 9 March 2000, para. 31; *Simic et al.*, Decision on Defence Motion to Sever Defendants and Counts (TC), 15 March 1999; *R. v. Lake*, 68 Cr App R 172 (CCA), p. 175: "It has been accepted for a very long time in English practice that there are powerful public reasons for why joint offences should be tried jointly. The importance is not merely one of saving time and money. It also affects the desirability that the same verdict and the same treatments shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise."

Chamber has taken steps to ameliorate the situation by, *inter alia*, postponing the start of the Defence case from 12 January 2005 until 30 March 2005;¹⁵ directing the Registrar on 21 December 2004 to promptly appoint a new Lead Counsel in accordance with Mr. Kabiligi's wish as expressed during a status conference on that day;¹⁶ directing the Registrar on 19 January 2005 to appoint Mr. Skolnik as Lead Counsel for Mr. Kabiligi;¹⁷ and further postponing the start of the trial from 30 March 2005 until 11 April 2005.¹⁸ During this same period, Mr. Kabiligi has not acted promptly to ensure that his defence is reconstituted as rapidly as possible. Mr. Kabiligi failed to nominate the names of three candidates to assume the role of Lead Counsel of his defence, as requested in the Registrar's decision of 26 October 2004 and in further correspondence from the Registrar dated 21 and 23 December 2004. Neither the request for review of the Registrar's decision, nor the notice of intention to appeal the Chamber's decision of 20 December 2004, justified this failure. An appeal does not suspend the application of the decision appealed unless an injunction or a stay is ordered.¹⁹ Mr. Kabiligi was, of course, entitled to pursue any reviews or appeals provided for under the rules; but this did not excuse or exclude timely co-operation with the Registry for the appointment of a new Lead Counsel.

16. Mr. Kabiligi has been given ample "time and facilities" to prepare for trial commencing on 11 April 2005. He has had since 26 October 2004 to appoint and to instruct a new Lead Counsel. On 21 December 2004, after almost two months' delay, Mr. Kabiligi proposed the appointment of Mr. Skolnik. Shortly thereafter, he retracted this proposal, but took no steps to propose any other name. On the contrary, he continued to insist that Mr. Degli was still his counsel, and declined to participate in procedures for his replacement. After another month's delay, and in the absence of any other candidates for Lead Counsel having been proposed by Mr. Kabiligi, the Chamber ordered the appointment of Mr. Skolnik on 19 January 2005. Mr. Kabiligi's ongoing refusal to nominate a replacement counsel, or to collaborate with Mr. Skolnik once he had been assigned, does not infringe his right to adequate time and facilities for the preparation of his defence. The time and facilities have been available, but refused.

17. Furthermore, the Chamber has indicated its willingness to mitigate by alternative remedies the difficulties faced by the Kabiligi Defence. The Chamber is prepared, for example, to postpone the presentation of any Kabiligi witnesses for several months. The deadline for the filing of a pre-Defence brief has twice been postponed, and is now suspended pending further submissions.²⁰ Witnesses may be recalled if the Kabiligi defence can establish specific prejudice arising from a genuine inability to prepare. Other accommodations may be considered where necessary. The Chamber is well aware of the complexity of the case to be met by Mr. Kabiligi, which includes evidence not only of his specific conduct, but of the responsibility of military leadership for the criminal acts of subordinates and militia. Nevertheless, in light of the alternative remedies at the Chamber's disposal, and the preparation time which has been available, commencing the joint trial on 11 April 2005 will occasion no breach of Mr. Kabiligi's right to have adequate time and facilities for his defence.²¹

¹⁵ T. 21 December 2004 pp. 31-33.

¹⁶ *Id.* p. 31.

¹⁷ *Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratién Kabiligi (TC), 19 January 2005.

¹⁸ T. 1 March 2005 p. 19.

¹⁹ See e.g. *Strugar*, Decision Rejecting the Motion for Certification to Appeal the 'Decision and Order Relating to Accused's Pavle Strugar Request for Postponement', etc. (TC), 5 December 2003; *Simba*, T. 13 May 2004, p. 2.

²⁰ T. 1 March p. 11.

²¹ *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 ("The

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18. Mr. Kabiligi has, accordingly, not established that he is in a conflict of interest with his co-Accused. On the contrary, the three other co-Accused are unanimous with Mr. Kabiligi in stating their preference for an adjournment, claiming that the lack of preparedness of the Accused Kabiligi has impaired the joint efforts of the Defence to present witnesses of common benefit to all four defendants. Though the Accused Kabiligi may at present be less prepared than the other co-Accused, there is no divergence of interest between them.

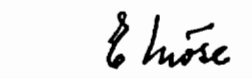
19. In their Responses, the Bagosora and Nsengiyumva Defences object to the commencement of the defence case without knowing the position of the Kabiligi defence through its pre-Defence brief, including the identity of all of its witnesses. Mr. Bagosora requests a six-month postponement of the joint trial so that the defence can be started with all parties knowing one another's witnesses. However, any prejudice that might be caused by positions taken by the Kabiligi defence after the commencement of the joint defence can be obviated by permitting any defence team, upon good cause shown, to amend its pre-Defence briefs and witness list. Furthermore, the Chamber would be amenable to recalling witnesses or granting adjournments should any prejudice arise to another co-Accused from positions taken by the Kabiligi Defence after the start of trial.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 24 March 2005


Erik Møse
Presiding Judge


pp. Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



authority best placed to determine what time is sufficient for the Accused to finish preparing his defence in this admittedly complex case is the Trial Chamber which has been conducting his trial for over two years”).