



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-1
24-03-2005
(24212-24209)

24212
S. Muna

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 RECORDS ARCHIVES
ICTR
2005 MAR 24 P 2:49
S. Muna

**DECISION ON REQUEST FOR CERTIFICATION OF APPEAL CONCERNING
PRIVATE REPRESENTATION**

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

S. Muna

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

24211

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 filed on 14 March 2005 by the Accused Kabiligi for certification of appeal from the Chamber's "Decision on Request for Private Representation of Gratien Kabiligi", filed on 4 March 2005;

HEREBY DECIDES the request.

INTRODUCTION

1. On 10 February 2005, the Accused Gratien Kabiligi filed a letter requesting his former Lead Counsel, Jean Yaovi Degli, to represent him in his private capacity through to the end of the trial.¹ The request followed the disqualification of Mr. Degli from participation in the Tribunal's legal aid program, based on the Registrar's finding that he had engaged in fraudulent billing in excess of USD 300,000.² On 24 February 2005, four days before a scheduled Status Conference, Mr. Degli indicated by letter to the Chamber that he was prepared to continue Mr. Kabiligi's defence in his private capacity, and requested permission to enter into attorney-client communications with Mr. Kabiligi. During the status conference on 28 February 2005, Mr. Kabiligi confirmed his request to be represented by Mr. Degli on a *pro bono* basis.³ The Chamber also heard submissions from the other parties on the request.

2. On 1 March 2005, the Chamber rendered an oral decision denying the request, with written reasons following on 4 March 2005. The Chamber assumed, for the purposes of the decision, that Mr. Degli continued to satisfy the conditions for appearance of counsel in Rule 44 (A) of the Rules, namely, that he is "admitted to the practice of law in a State, or is a University professor of law".⁴ The Chamber found, however, that he could not assume the position of "Lead Counsel", which would necessarily entail some control or direction over the expenditure of legal aid resources.⁵ Nor, in light of the Registrar's findings of fraud, could Mr. Degli provide sufficient guarantees that he would be able to privately assume the entire cost of the Defence of Mr. Kabiligi through to the end of the trial, so as to obviate the need for legal aid assistance.⁶ These findings did not exclude Mr. Degli from participating in the

¹ "[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 interets de votre Client avants les vôtres, en m'assurant, vous personnellement, la défense à titre privé bénévolement, jusqu'à la fin de mon procès en première instance."

² Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004.

³ T. 28 February 2005 p. 6.

⁴ *Bagosora et al.*, Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005, para. 8.

⁵ *Id.* ("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.")

⁶ *Id.* para. 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. 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

6/11

defence of the Accused on a *pro bono* basis, but such participation would, accordingly, have to be with the consent and under the direction of the duly appointed Lead Counsel for Mr. Kabiligi.⁷ Mr. Kabiligi requested certification to appeal the decision in a letter to the Chamber filed on his own behalf on 14 March 2005.

SUBMISSIONS

3. Mr. Kabiligi contends that the Chamber's decision violates his right to counsel of his choosing, prescribed by Article 20 of the Statute. He argues that Mr. Degli is entitled to be accredited to appear before the Tribunal in a private capacity, and that other attorneys have been permitted to appear before Chambers on a *pro bono* basis, without being accredited under the legal aid scheme or otherwise receiving a salary.

DELIBERATIONS

4. Rule 73 (B) of the Rules of Procedure and Evidence provides that decisions are without interlocutory appeal unless certified by the Trial Chamber:

which may grant such certification if the decision involves 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.

Mr. Kabiligi interprets the 4 March 2005 decision as precluding the appearance of Mr. Degli before the Chamber which, he argues, impedes the fair and expeditious conduct of proceedings.

5. Contrary to Mr. Kabiligi's understanding, the Chamber's decision does not state that Mr. Degli is disqualified from appearing before a Chamber of this Tribunal. On the contrary, the decision assumes that he is still so qualified under Rule 44 (A). The questions addressed by the Chamber were: (i) whether Mr. Degli could undertake the defence of the Accused on an entirely private basis, without any support from legal aid; (ii) whether Mr. Degli could assume the position of "Lead Counsel", in title or in fact, following his disqualification from the legal aid program; and (iii) having answered negatively to the first two questions, what role Mr. Degli could play on a *pro bono* basis. The Chamber determined (i) that Mr. Degli could not credibly undertake to defend the Accused using his private resources through to the end of the case, and (ii) that he could not assume control for a defence team funded by the legal aid program, even if he himself acted *pro bono*. Accordingly, the Chamber concluded (iii) that Mr. Degli could only act for the Accused *pro bono* under the direction and at the request of the newly-appointed Lead Counsel, who must necessarily have control over the conduct of the defence.

6. The issue addressed by the Chamber does arguably engage the right of the Accused to legal assistance of his own choosing and, thus, the fair conduct of proceedings. Certification would not, however, "materially advance the proceedings" in the present case. The Chamber

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.")

⁷ *Id.* 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 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.")

24209

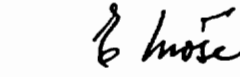
has already denied certification of appeal concerning the appointment of new Lead Counsel.⁸ The provision of new counsel, combined with adequate adjournments, has mitigated any harm to the progress or fairness of proceedings caused by Mr. Degli's departure. The Chamber will adopt other measures as needed in the conduct of proceedings to ensure that the fair trial rights of the Accused are respected. Furthermore, in light of the Accused's reliance on the pendency of appeals as a justification for refusing to promptly comply with decisions of the Registrar and the Chamber, it is likely that certification would seriously impede the material advancement of proceedings.⁹

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]



⁸ *Bagosora et al.*, Decision on the Defence Requests for Certification of the "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.

⁹ See e.g. letter of 4 February 2005, addressed to the Chamber, in which Mr. Kabiligi declares that he considers Mr. Degli to still be his Lead Counsel ("*Conseil principal*").