



International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

ICTR-98-41-T  
29-12-2008  
(39944-39938)

39938  
S. MUSE

TRIAL CHAMBER 1

Before: Erik Møse, President;  
Jai Ram Reddy;  
Sergei Aleckseievitch Egorov.

Registrar: M. Adama Dieng,

Date Filed: 27 December 2008

JUDICIAL RECORDS/ARCHIVE  
1 2008 DEC 29 11 A 10: 05

THE PROSECUTOR

v.

THÉONESTE BAGOSORA  
GRATIEN KABILIGI  
ALOYS NTABAKUZE  
ANATOLE NSENGIYUMVA

Case No: ICTR-98-41-T

**KABILIGI RESPONSE TO "PROSECUTOR'S EXTREMELY URGENT MOTION  
REQUESTING THE TRIAL CHAMBER TO IMPOSE CONDITIONS ON KABILIGI'S  
LIBERTY PENDING THE PROSECUTOR'S DECISION TO APPEAL"**

Counsel for the Prosecutor

Hassan Bubacar Jallow  
Bongani Majola  
Alex Obote-Odora  
George Mugwana

Counsel for the Defence

Paul Skolnik-for Gratien Kabiligi

Other Defence Counsel  
Raphael Constant for Théoneste Bagosora  
Peter Erlinder for Aloys Ntabakuze  
Andre Tremblay for Aloys Ntabakuze  
Kennedy Ogetto for Anatole Nsengiyumva

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**I. BACKGROUND**

1. On 18 December 2008, after a period of over 11.5 years of imprisonment, the Trial Chamber in these proceedings acquitted General Gratien Kabiligi on all counts and ordered his immediate release pursuant to Rule 99A. Written reasons are to be provided.
2. Four days later, on 22 December 2008, the Prosecutor filed his "extremely urgent" motion asking the Trial Chamber to impose conditions of General Kabiligi to restrict his liberty.

**II. DEFENCE RESPONSE**

3. In sum, to grant the Prosecutor's request would require the Trial Chamber to act without jurisdiction. The Statute and Rules do not provide for the measures requested by the Prosecutor, nor has a case been made for the Trial Chamber to exercise its "inherent powers". Moreover, given the current circumstances of General Kabiligi, the Prosecutor's request is moot.

***The request falls outside the Trial Chamber's jurisdiction***

4. The relevant Rule 99 provides as follows:

***Rule 99: Status of the Acquitted Person***

*(A) In case of acquittal, the accused shall be released immediately.*

*(B) If, at the time the judgment is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, at the request of the*

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Prosecutor, issue a warrant for the arrest and further detention of the accused to take effect immediately. (emphasis added)

5. The scope of this rule 99B is clear. The Prosecutor is required to advise the Trial Chamber, in open court, at the time the judgement is pronounced, of any intention to file a notice of appeal. The Prosecutor in these proceedings not advise the Trial Chamber at the rendering of the judgment of Kabiligi's acquittal, and the order for his immediate release pursuant to Rule 99A that it intended to file a notice of appeal. The Trial Chamber's ability to act pursuant to this rule has therefore expired.
6. The Prosecutor appears to be arguing that because he has not had the opportunity to read and analyse the Chamber's written reasons, he was unable to follow the procedure set out in Rule 99 of the Rules. This argument is without merit. The procedure set out in Rule 99 cannot be contingent upon the Prosecutor having time to read and review a written judgement, as the Rule itself requires the Prosecutor to inform the Trial Chamber of his intention to file an appeal '*at the time the Judgement is pronounced*' and '*in open court*'. Accordingly, the lack of a written decision is no bar to the requirement that the Prosecutor must make the request immediately. Even in cases where the judgement was handed to the parties immediately following the oral summary of the judgement,<sup>1</sup> the Prosecutor did not have the opportunity to read and analyse the written judgement, but rather was required to advise the Chamber of an intention to file an appeal on the basis of what was heard during the oral summary of judgement.

#### **Inherent Jurisdiction**

7. Having rendered its judgement, the Trial Chamber is now "*functus officio*" and does not have the jurisdiction to impose the conditions which were not applied for under Rule 99B in open court.

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<sup>1</sup> See for example *Prosecutor v. Baglishema*-Decision on Prosecutor's request Pursuant to Rule 99B-Trial Chamber 1 -8 June 2001 ICTR case #95-1A-T. In this case the Prosecutor advised the Trial Chamber in open court that he intended to appeal based upon a dissenting opinion.-See also *Limaj* Judgment 30 November 2005 par.740 ICTY case #IT-03-66T 30 November 2005, where the accused was released immediately without any reservation (pursuant to Rule 99B) by the ICTY Trial Chamber.

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8. The fact that the Trial Chamber does not have jurisdiction to impose the measures requested by the Prosecutor finds further support in the fact that the Prosecutor also appears to be arguing for the Chamber to exercise its "inherent powers" to do so. It is true that Trial Chambers of both the ICTY and ICTR have found that they are able to act in certain circumstances pursuant to their 'inherent powers'. As has been explained *"there may be need to take account of the inherent competence of a judicial body, whether civil or criminal, to regulate its own procedure in the event of silence in the written rules, so as to ensure the exercise of such jurisdiction as it has, and to fulfil itself, properly and effectively, as a court of law."*<sup>2</sup> The ICTY Appeals Chamber has held that *"[t]his Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of jurisdiction which is expressly given to it by the Statute is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which interferes with its administration of justice."*<sup>3</sup>
9. Trial Chambers and the President have previously exercised their inherent powers to punish contempt of court and false testimony,<sup>4</sup> to refuse audience to counsel who was not a fit and proper person to appear,<sup>5</sup> to recommend minimum sentences<sup>6</sup> and to grant early release.<sup>7</sup>
10. Orders to restrict the liberty of an acquitted person do not fall easily within the cases in which an exercise of inherent powers has been held to be appropriate. Perhaps this is why the Prosecutor has offered no argument to support its request that the Chamber exercise its inherent powers in this case. Imposing conditions or restricting an individual's liberty is a significant step. Accordingly, the Statute and Rules set out

<sup>2</sup> *Prosecutor v. Kanyabashi*, ICTR-96-15-A, Dissenting Opinion of Judge Shahabuddeen, 3 December 1999.

<sup>3</sup> *Prosecutor v. Tadic*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel Milan Vujin, 31 January 2000, para. 13.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Prosecutor v. Kunarac et al*, IT-96-23-PT and IT-96-23/1-PT, Decision on Request of Accused Radomir Kovac to allow Mr. Mirko Vrdojlak to Examine the Defence Witnesses, 25 June 1999.

<sup>6</sup> *Prosecutor v. Tadic*, IT-94-1-Abis, Judgment and Sentencing Appeals, 26 January 2000

<sup>7</sup> Early release of Blaskic, see UN Doc A/59/215-S/2004/627.

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precisely when it may be done. This is not an example of when the 'rules are silent' on the matter. Rule 99 sets out when the restriction of liberty can occur following a judgement of acquittal. Simply because the Prosecutor has failed to exercise his rights under a rule in a timely manner does not mean that the Chamber should act pursuant to its "inherent powers" to grant the Prosecutor relief which its own actions have rendered impossible under the Rules.

11. Moreover The Tribunal acts pursuant to its inherent jurisdiction where there is neither statutory provision nor any Rule under which it can give relief. In the present situation there is a statutory regime in place pursuant to Rule 99A and 99B. The Prosecutor not having availed himself of this provision cannot now ask for the relief by virtue of the inherent powers of the Trial Chamber.
12. Rule 99B requires that the request to issue a warrant of arrest for the further detention of the accused be done in open court. This is because the judgment is rendered to advise not only the parties but the world at large. How can the the world at large know that the Prosecutor is asking to impose restrictions on liberty of Kabiligi, when those spectators in the public gallery have left and the journalists have disappeared? To ask for this relief "in private "would be a violation of Rule 99B.
13. The Prosecutor is asking indirectly what he failed to do directly by not following the procedure outlined in Rule 99B.
14. If the Trial Chamber comes to the conclusion that it is not "functus officio" the Kabiligi Defence position is that the relief requested by the Prosecutor [that the Trial Chamber exercise its inherent jurisdiction], is discretionary remedy which ought not to be exercised in the present situation for the reasons stated above.<sup>8</sup>

***No jurisprudence or precedent to support the Prosecutor's motion***

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<sup>8</sup> Prosecutor v. Bagosora et al-Decision on Defence Motion for Reconsideration of the Decisions Rendered on the 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction 28 March 2002 pars #21 and #22 c/f Prosecutor v. Bagosora et al case #98-41-A appeal dismissed 2 May 2002 (Ganey, Meron and Hunt JJ)

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15. The Prosecutor's motion refers to no relevant jurisprudence to assist the Trial Chamber. This is because there is no jurisprudence to support its position. In previous cases at the ICTR, the acquitted person was unconditionally released following the Prosecutor's failure to avail himself of the procedure contained in Rule 99. In the most recent cases of *Mpambara*<sup>9</sup> and *Rwamakuba*,<sup>10</sup> for example, the Trial Chamber ordered the immediate release of the acquitted person, the Prosecutor did not advise of any intention to appeal, and no further steps were taken. Accordingly, the Prosecutor is asking the Trial Chamber to act without precedent.

***The current circumstances of General Kabiligi render the request moot***

16. Perhaps most significantly, given the current circumstances of General Kabiligi, the Prosecutor's request is moot. Since his release from the UN Detention Facility on 18 December 2008, General Kabiligi has been housed in a safe house provided for by the Registrar of the Tribunal. He is currently experiencing what the Appeals Chamber has recently acknowledged amounts to 'de facto custody of the Tribunal'.<sup>11</sup> The Registrar and the Security Department of the Tribunal are aware of Kabiligi's location and movements. There would be no purpose in him reporting daily to the Registrar or the Security Desk as the Security Department of the Tribunal is precisely the body which facilitates his movements between the safehouse and the Tribunal. Accordingly, the relief requested in paragraph 7 of the Prosecutor's motion is without object.
17. As regards the potential "flight risk" of General Kabiligi, both the Registrar and the Prosecutor are aware that upon his arrest his passports were sized and remain in the custody of the Prosecution Evidence Unit. Accordingly, any perceived "flight risk" is non-existent, and the relief requested in paragraph 7(2) is moot and of no object. When one takes into account the problems encountered by Andre Ntagerura and other

<sup>9</sup> *Prosecutor v. Jean Mpambara*, ICTR-01-65-T, Judgment and Sentence, 11 September 2006, page 66.

<sup>10</sup> *Prosecutor v. Andre Rwamakuba*, ICTR-98-44C-T, Judgment and Sentence, 20 September 2006, page 87.

<sup>11</sup> *In Re Andre Ntagerura*, ICTR-99-46-A28, Decision on Motion for Leave to Appeal the President's Decision of 41 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008, para. 13.

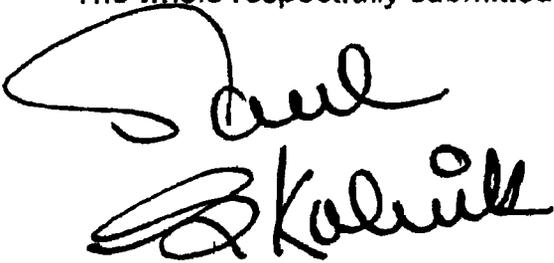
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acquitted persons to find a host country outside of Tanzania, it is submitted that the position of the Prosecutor is speculative, "*in futuro*" and moot.

**III. CONCLUSION**

- 18. Based on the above, the Kabiligi Defence requests that the Trial Chamber dismiss the Prosecutor's Motion in its entirety.

The whole respectfully submitted at Montreal, Canada this 27<sup>th</sup> day of December 2008.

A handwritten signature in black ink, appearing to read "Paul Skolnik". The signature is written in a cursive, flowing style. The first name "Paul" is written above the last name "Skolnik".

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PAUL SKOLNIK  
LEAD COUNSEL FOR GENERAL KABILIGI

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**TRANSMISSION SHEET  
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**COURT MANAGEMENT SECTION**  
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**I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)**

<b>To:</b>	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometownu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
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<b>Case Name:</b>	The Prosecutor vs. KABILIGI et al			<b>Case Number:</b> ICTR-98-41-T
<b>Dates:</b>	Transmitted: 27 December 2008		Document's date: 27 Decemebr 2008	
<b>No. of Pages:</b>	8 Including this page	<b>Original Language:</b>	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
<b>Title of Document:</b>	Kabligi Reply to the "Prosecutor's Extremely Urgent Motion Requesting the Trial Chamber to Impose Conditions on Kabligièa Liberty Pending Appeal"			
<b>Classification Level:</b>	<b>TRIM Document Type:</b>			
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