

Case No. ICTR-97-27-I

ICTR-99-52-I  
29-03-2001  
(20149-20142)

20149



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

**TRIAL CHAMBER I**

Before: Judge Navanethem Pillay, Presiding  
Judge Erik Møse  
Judge Asoka de Zoysa Gunawardana

Registry: Ms Aminatta N'gum

Decision date: 29 March 2001

Original : English  
2001 MAR 29 P 1:24  
Aminatta N'gum 29/03/2001  
JUDICIAL RECORDS ARCHIVES  
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**THE PROSECUTOR v. HASSAN NGEZE**  
Case No. ICTR-97-27-I

**DECISION ON THE ACCUSED'S REQUEST FOR WITHDRAWAL OF HIS COUNSEL**

Office of the Prosecutor:

M. Bernard Muna  
M. William T. Egbe  
Ms Simone Monasebian  
Ms Charity Kagwy  
M. Alphonse Van

Counsel for the Accused:

M. John Floyd III  
M. René Martel

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”)**

**SITTING AS** Trial Chamber I composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

**CONSIDERING** the Accused’s motion for withdrawal of his counsels filled on 17 February 2001, through a letter addressed to the President;

**NOTING** that the Accused and his Counsel were heard at a hearing on 19 February 2001.

**Arguments by the Accused**

The accused applied for the withdrawal of his assigned lead counsel, Mr. John Floyd III and co-counsel Mr. René Martel, on the basis that he no longer has confidence in their competence to represent him. He set out his reasons in a letter dated 17 February 2001 addressed to the President of the Tribunal, which he read out at the hearing before the Chamber on 19 February 2001. The reasons are:

(i) Failure to hold consultations with him

The accused avers that since the resumption of trial sessions on the 5 February 2001, his counsel met him on one occasion whereas the trial had been under way for two weeks.<sup>1</sup>

(ii) Motion for Dismissal of the Indictment

The accused complains that he wanted the motion heard in *limine litis*; instead it was adjourned at the request of his counsel. He also objects to the withdrawal by his counsel of affidavits prepared by his investigators and filed in support of the motion.

(iii) Translation of Kangura

The accused requires that all 71 issues of Kangura journal be translated from Kinyarwanda into French and English, as they comprise the “spine bone” of the charges against him. He accused his counsel of incompetence in not succeeding in convincing the Registry and the Tribunal to get



the translations done. He claims that nothing has been done and for that and other reasons he decided not to attend the current trial sessions.

(iv) The dismissal of the three investigators and legal assistant

The accused avers that his counsel fired his two investigators and assistant who were experienced with his case and his witnesses and in whom he had great trust, without reason and without prior consultation with him. He further states that no arrangements were made for the handing over to him of sensitive documents in the possession of the dismissed team members.

**Deliberations**

After hearing the accused and lead counsel on 19/2/01, 20/2/01 and 20/3/01, the Chamber makes the following determinations: -

(i) Attorney Client Consultations:

The accused complains that there has only been a single consultation since 5 February 2001, and yet at the same time he acknowledges ongoing consultations: He alluded to these in his address.<sup>2</sup>

The Chamber has observed counsel and client communicate with one another in the courtroom and on several occasions requests for time for consultations prior to cross-examination of witnesses were made and granted by the Chamber. The accused, when present in the court, actively participated in his defence and his counsel appear to be mounting a vigorous defence on his behalf. In light of this, the Chamber concludes that there is no basis for this complaint.

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<sup>1</sup> See Transcript of 19 February 2001, p. 69, l. 21-25

<sup>2</sup> See Transcript of 20 February 2001, P. 20, l. 5-9:

“Last week Mr. Floyd telephoned me from the Tribunal and on Saturday, Mr. Floyd came to see me at the United Nations Detention Facility. Mr. Floyd; in the presence of Mr. Martel told me...;”

See Transcript of 20 February 2001, p. 102, l. 25; p.103, l. 1-4: “... If you were to look at my letter to you dated 2 September 2000, I said that I spent only 72 hours with Mr. Floyd and that was all I had in my case;”



(ii) Motion to Dismiss Indictment

This motion has been partly heard and will be scheduled for a further hearing. Counsel's request for an *ad limine litis* disposal of the motion was denied by the Chamber and instead, counsel were directed to respond to a series of legal and factual issues raised by the Chamber. Counsel were permitted time to research the questions and a final determination of the motion is pending. The matter of the withdrawn supporting material is also *sub judice*. The alleged incompetence is therefore unfounded.

(iii) Kangura

The accused's assertion that "nothing was done" about the translation is not correct. Counsel raised the matter before the Chamber on a number of occasions and have also included the issue as a ground for dismissal of the indictment in their motion referred to in (ii) above. The Chamber denied the request for translation of 71 Kanguras and directed that only excerpts be translated. More recently, upon renewed requests from counsel, the Language and Translation Coordination Committee chaired by the Vice President of the Tribunal, arranged for the translation of several Kangura as requested by Counsel. Counsel have acted on the accused's instructions regarding the translation, hence lack of competence is not a factor.

(iv) The Dismissal of the Investigators and Assistant

Mr. Floyd informed the Chamber that he had not in fact fired the four persons but only two of the investigators; the third investigator left of his own accord. The contract of the Assistant, Mr. Bemba was ended by the Registry's Lawyers and Detention Facilities Management Services (LDFMS). Mr. Floyd was prepared to accept the one investigator who had left on his own. Mr. Floyd stated that he had had long hours of consultation with the accused over the action he had taken and that the accused was aware of the reasons. Counsel was reluctant to make the reasons known to the Chamber in the interests of protecting his client from the exposure of confidential material to the prosecutor and the triers of fact that might be detrimental to the accused. He



furthermore did not wish to act in breach of the attorney client privilege provisions of Article 8 of the Tribunal's Code of Professional Conduct for Defence Counsel.

When pressed by the Chamber to disclose the reasons, Mr. Floyd indicated that his decision to dismiss the investigators and to withdraw the affidavits from the Motion was taken in consultation with the LDFMS and was made on ethical considerations relating to honesty and professionalism. He reminded the Chamber that as lead counsel he was responsible for signing vouchers for money and that the head of the LDFMS was going to deduct money or would not approve certain vouchers under certain things.<sup>3</sup>

The Chamber notes that the responsibility referred to by Mr. Floyd flows from Article 15 of the Directive on Assignment of Counsel, which entitles an accused person to have one counsel assigned to him and that counsel "shall deal with all stages of procedure and all matters arising out of the representation of the suspect or accused or the conduct of the defence". He has the "primary responsibility" within the defence team. Moreover, according to Article 17 of the Directive, Lead Counsel is responsible for the submission of claims and vouchers for costs and expenses relating to investigative steps and ascertainment of facts.

The appointment of co-counsel, assistants and investigators are administrative matters falling within the powers and discretion of the Registrar. Lead counsel must initiate requests for such appointments, and he is held responsible for complying with the practice directions of the LDFMS. It is clear that the accused is not entitled as of right to have co-counsel, investigators and assistants appointed; nor can he assert the right of decision over the appointment or termination of their contracts. As stated above, these are matters for Lead Counsel. There is a presumption that counsel will act in the best interest of providing an effective defence for his client. In the event that an accused person is aggrieved by an administrative decision, he has recourse to certain remedies namely, to make representations to the LDFMS and if he is unsuccessful, to appeal to the Registrar whose decision in turn is subject to review by the President of the Tribunal. The accused is clearly aware of the remedies available to him because he has set in motion an administrative inquiry.

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<sup>3</sup> See Transcript of 20 March 2001 Pages 25-29



By letter dated 18 February 2001, addressed to Mr. Alessandro Caldarone, Chief of LDFMS, which he read out at the hearing before the Chamber, he has applied for the reinstatement of the three investigators and one assistant. The accused identifies Mr. Bemba, the assistant, as the “Brain” of his entire defence team. Removing him, he states, is like taking the yolk out of an egg.<sup>4</sup> It was not Counsel, but the LDFMS, which took the decision to terminate Mr. Bemba’s contract. While awaiting the outcome of his request and before exhausting his remedies, the accused seeks adjudication by the Chamber of the very same issues under the rubric of lack of confidence.

In our view, the accused has not represented accurately the facts of the departure of the four persons, wrongly attributing all as “dismissals” and as acts of the lead counsel. The Chamber is, of course, mindful of the need to ensure efficient representation of the accused. However, the accused has not placed any reliable information before us which suggests that his right is encroached. Counsel has indicated why he fired two of the investigators and also why he is under an ethical obligation not to give further information. At the most, it can be said that there is disagreement between counsel and client on the dismissal of the two investigators. Consequently, the Chamber sees no need to pursue this matter. Counsel had the professional and legal competence to decide the matter.

With regard to the accused’s complaint that counsel had not arranged for sensitive documents to be taken from the investigators before their departure, the Chamber noted from the court transcripts that the situation appears to have been orchestrated by the accused himself. The accused was requested orally and subsequently by letter from the Chief of the UNDF, to remove defence documents left in the consultation booth. Upon his persistent refusal to do so, UNDF summoned counsel, who then uplifted the documents.

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<sup>4</sup> See Transcript of 19 February 2001, p. 7, l. 17-19.



Rule 45 (H)

Applications by accused persons for change of counsel are governed by Rule 45(H), which reads as follows:

*“Under exceptional circumstances, 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.”*

For the reasons set out above, the Chamber is satisfied that no good cause has been shown, nor do exceptional circumstances exist for the order sought by the accused.

The Chamber is furthermore not satisfied that the request is not designed to delay the proceedings in light of the following considerations:

The accused stated at the hearings that Mr. Floyd was appointed as counsel by his choosing<sup>5</sup>, *“They are my friends”*....., *“I like my counsel”*<sup>6</sup>. He is willing to retain his counsel provided they cooperate with him and accept his assistant and investigators<sup>7</sup>. If this is his difficulty with his present counsel then it stands to reason that he would have similar difficulty with future counsel assigned to him, who, for professional and ethical considerations do not accept his condition. The accused has threatened to boycott court sessions as long as he does not get his way with regard to his assistant and investigators and the Kangura translations.

The accused has changed his counsel many times. The legal representatives appointed at his request and subsequently withdrawn by him were: Paul Wamuti-Ndegwa, Kenya; David Kamau-Ngata, Kenya; André Gagnier, Canada; Patricia Mongo, Democratic Republic of Congo. He is now requesting a fifth change.

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<sup>5</sup> See Transcript of 20 February 2001. p. 100, l. 23.

<sup>6</sup> See Transcript of 20 March 2001. p. 16 of draft lines.

<sup>7</sup> See Transcript of 20 March 2001 p.15 of draft lines 16-20 “so the problem with my investigators I would wish that counsel leave the room and that I be assigned other counsel or that counsel here accept that they are going to work for me...”



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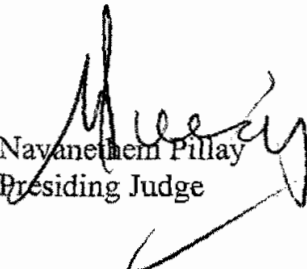
The Chamber is mindful that the Statute enjoins the Tribunal to hold fair and expeditious trials. Hence it intends to ensure that this trial is conducted without undue delay.


**FOR ALL THE ABOVE REASONS**

**THE CHAMBER**

**DENIES** the motion by the Accused for the withdrawal of his assigned Counsels.

The oral decision was rendered on 22 March 2001, in the presence of all the Parties. The written decision is signed this 29 March 2001.

  
Navanethem Pillay  
Presiding Judge

  
Erik Møse  
Judge

Judge Asoka de Zoysa Gunawardana appends a Dissenting Opinion to this Decision.

Seal of the Tribunal





ICTR-99-52-1

29-03-2001

(20141-20136)

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International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

UNITED NATIONS  
NATIONS UNIES

**TRIAL CHAMBER I**

**Original: English**

Before: Judge Navanethem Pillay, Presiding  
Judge Erik Møse  
Judge Asoka de Zoysa Gunawardana

Registry: Ms Aminatta N'gum

Decision date: 28 March 2001

**THE PROSECUTOR v. HASSAN NGEZE**  
Case No. ICTR-97-27-I

JUDICIAL RECORDS ARCHIVES  
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2001 MAR 29 P 1:25

**SEPARATE AND DISSENTING OPINION OF JUDGE GUNAWARDANA ON  
THE ACCUSED'S REQUEST FOR WITHDRAWAL OF HIS COUNSEL**

Office of the Prosecutor:

M. Bernard Muna  
M. William T. Egbe  
Ms Simone Monasebian  
Ms Charity Kagwy  
M. Alphonse Van

Counsel for the Accused:

M. John Floyd III  
M. René Martel

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I regret that I can not agree with the decision of the majority, to dismiss the Motion of the accused Hassan Ngeze, for the withdrawal of his assigned Lead Counsel, Mr John Floyd III, and his Co-Counsel Mr Rene Martel, on the basis that they are not acting in his best interest and thereby he has lost confidence in them.

***The Main Grounds Urged in Support of the Motion***

The principle grounds *inter alia* urged in support of the said motion are twofold,

- (i) that the Counsel failed to hold adequate consultations with the accused,
- (ii) that the Lead Counsel dismissed the Investigators and the Legal Assistant, against the accused wishes and without consultation with the accused.

***Alleged Failure of the Counsel to hold Adequate Consultations***

The accused alleged that both his Counsel have failed to adequately consult him at this crucial stage of the trial, when the witnesses are giving evidence directly implicating him. He asserted that the Counsel do not visit him at the UN Detention Facility, so as to enable him to discuss the evidence of the ongoing witnesses and to give specific instructions. He pointed out that he had only one consultation since 5th February 2001. This allegation was repeated several times in Court when this Motion was taken up for hearing. In this regard it may be noted in passing that, on 20th March 2001, when the accused made an application in open Court to speak with his Lead Counsel for five minutes, the Lead Counsel did not accede to his request, stating that he had had consultations earlier and it would serve no purpose. It was also observed on some occasions that the accused was instructing the Counsel in open Court, which may suggest that he had insufficient time to instruct the Counsel outside Court.

In response to the allegations by the accused that he did not adequately consult his client, the Lead Counsel stated that he had in fact regularly consulted the client, at the UNDF and in Court. However, the Counsel did not substantiate his assertion that he

had adequately consulted the client with any documentary evidence or other information, with the result that the Court is starved of relevant evidence to adjudicate on this issue. It may be observed that the information relating to the consultations with the accused could have been disclosed to the Court without any breach of confidentiality, because what Counsel was required to furnish was not the contents of the consultations but rather the extent and the duration.

It must be emphatically stated here, that a Defence Counsel has a duty to provide an adequate opportunity for the client to hold consultations with him. Therefore, the failure to do so would be a serious violation of the duty of the Defence Counsel. Although the accused himself has admitted that he had a total of 72 hours of consultations with Mr Floyd, this does not necessarily mean that the consultations were ongoing or adequate.

In the circumstances, I am of the view that the information available as at present, is insufficient to make a determination on the truth or falsity of the allegation made by the accused, that he had no opportunity to have adequate consultations with his Counsel. Therefore, I would hold that Defence Counsel be required to substantiate his assertion by some sustainable evidence.

***Alleged Unreasonable Dismissal of the Investigators and the Legal Assistant***

The accused has stated that the Lead Counsel has dismissed his Investigators and the Legal Assistant against his wishes and without prior consultation with him. He alleged that this action was not in his best interest, and hampered the progress of the trial. He pointed out that the Investigators had a thorough knowledge about his case, as they were working on the case since its inception. He added that, some of them were lawyers and were well acquainted with the background and conditions prevalent in Rwanda. The accused specifically denied that the Investigators were related to him in any way. He stated that he had full confidence in their competence, and went on to quote a remark made by the Lead Counsel in Court, admitting their competence.

In response, the Lead Counsel pointed out that the reasons for the dismissal of the Investigators were ethical and professional. He stated that they were not competent to

do the work assigned to them. He also hinted at his inability to certify vouchers submitted by the Investigators, due to the suspicions he entertained about their irregularities and/or genuineness. The Lead Counsel reminded the Chamber of the responsibilities he is vested with under Article 15(e) on the Directive on the Assignment of Defence Counsel, wherein the Lead Counsel is required to sign all documents submitted to the Tribunal.

The Lead Counsel informed the Court that he had not dismissed four persons, but had dismissed only two Investigators. He added that the Registry officials have terminated the contract of the Legal Assistant and the third investigator had left on his own accord in protest of the dismissal of the other two. According to the Lead Counsel the accused was fully aware of the reasons for the action he had taken with regard to the Investigators. However, the Lead Counsel declined to give the reasons to the Court on the basis of protecting the interests of his client, by non-disclosure of confidential material to the Prosecutor and to the Judges, who are the triers of fact. He added that disclosing such information might put him in breach of the provisions relating to the lawyer client relationship, as envisaged under Article 8 of the Tribunal's Code of Professional Conduct for Defence Counsel.

In deference to matters urged by the Lead Counsel for non-disclosure, the Court suggested to the Lead Counsel that he should submit a confidential note to the Chambers, stating the grounds on which he terminated the services of the Investigators. The Lead Counsel declined to do so, mainly on the basis that it would prejudice the lawyer client relationship and that it would not be in the best interest of his client.

Although there is a presumption that the lawyer acts in the best interest of his client, whether that presumption is applicable in the present context is also an issue that needs consideration. When this matter came up for consideration at different times, on no less than three occasions during the proceedings in Court, the accused informed the Court that he has lost confidence in his Counsel, that he is not afforded adequate opportunity for consultation, and that his Counsel are not acting in his best interest. Thus there is a clear indication by the accused that his Counsel are not acting in his best interest, and that he wants to terminate the lawyer client relationship. Since the

allegations are made personally against the lawyers it is relevant to know what exactly is the situation in regard to the matters urged against the lawyers by the accused. This can not be ascertained without some evidence of the factual matters and circumstances relating to the allegations made.

The question also arises for consideration, whether in fact the right to preserve the confidentiality really exists, in regard to the information relating to the allegations against the Investigators, as alleged by the Lead Counsel. The allegations hinted at by Counsel against the Investigators seem to suggest some fraudulent activity on their part. The Lead Counsel relied on Article 8 (1) of the Code of Professional Conduct for Defence Counsel, for the preservation of the confidentiality of his client's affairs. It is hard to discern from the allegations hinted at against the Investigators, that they would require the disclosure of information that would affect the confidentiality of the client's affairs.

In any event, the said allegations seem to implicate the Investigators for acts akin to criminal offences. As such, the provisions of Article 8(2) specifically provide for revelation of such information. To wit,

Article 8(2) Notwithstanding sub-article (1), and subject to Article 19 ("Conflicts"), Counsel may reveal information which has been entrusted to him in confidence in any one of the following circumstances:

[...]

- (d) To prevent an act which Counsel reasonably believes:
  - (i) Is, or may be, criminal within the territory in which it may occur or under the Statute or the Rules; . . . .

Hence, I am of the view that the Lead Counsel would not be able to rely on the provisions of Article 8 not to reveal the facts and circumstances upon which he terminated the services of the Investigators.

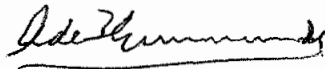
For the reasons stated above, I hereby order the Lead Counsel to provide to the Bench the evidence available to him to counter the allegations made by the accused against the Counsel in regard to the inadequacy of opportunity for consultations. Further, I

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make order that the Lead Counsel should reveal to the Chamber the facts and circumstances upon which he dismissed the two Investigators, in order that this Court may make an informed decision in regard to the said allegations.

Done, in Arusha

This 28<sup>th</sup> day of March 2001



Judge Asoka de Z. Gunawardana