ICTR-98-44-T
3-10-2001
(2650-2642)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 3 October 2001

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The PROSECUTOR
v.
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON NZIRORERA'S MOTION FOR WITHDRAWAL OF COUNSEL

The Office of the Prosecutor:
Melinda Pollard
Kerstin Keith

Counsel for Nzirorera:
Andrew McCartan
Martin Bauwens

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

SITTING as Trial Chamber II ("the Chamber"), composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu, and Arlette Ramaroson;

BEING SEIZED of the "Extremely Urgent Motion for the Withdrawal of Messrs McCartan and Bauwens from Joseph Nzirorera's Defence (Article 20 (4)(d) of the Statute, Rules 45 and 73 of the Rules of Procedure and Evidence)" ("the Motion"), with Annexes, filed by Accused Joseph Nzirorera on 3 and 4 July 2001 respectively;

CONSIDERING the letter of Co-Counsel Martin Bauwens in response to the Motion, filed on 4 July 2001;

CONSIDERING the letter of Counsel Andrew McCartan in response to the Motion, filed on 17 August 2001;

CONSIDERING the "Duplique à la réponse de Me Andrew Mc Cartan à la requête du 20 juin 2001" filed by the Accused on 28 August 2001;

CONSIDERING the letter of Co-Counsel Martin Bauwens responding to the Accused, filed on 4 September 2001;

CONSIDERING the confidential Memorandum addressed by the Registrar to the Judges of Trial Chamber II pursuant to Rule 33(B) of the Rules of Procedure and Evidence ("the Rules") regarding the "Motion by the Accused Joseph Nzirorera for the withdrawal of his Counsel Mr Andrew Mc Cartan and Mr Martin Bauwens" with Annexes (including the letter dated 11 April from Counsel Mc Cartan to Mr Caldarone and Mr Preira), filed on 20 September 2001 and served to the Parties pursuant to an Order by the Chamber to that effect;

NOTING the letter addressed by Counsel Mc Cartan to the Registry and filed on 19 September 2001;

NOTING the letter from Mr Nzirorera addressed to Trial Chamber II Judges regarding the "Forwarding of documents" and the "Independent investigation into my case" filed on 24 September 2001;

NOTING the Registrar's "Decision Rejecting the Request of Mr Joseph Nzizorea (sic) for Withdrawal of His Lead Counsel Mr Andrew Mc Cartan," filed on 15 May 2001;

NOTING the President's "Decision on Review, in Accordance with Article 19(E) of the Directive on Assignment of Defence Counsel", filed on 18 June 2001;

HAVING HEARD the Accused, the Lead Counsel, the Prosecution and the Registry on 21 September 2001 in closed session pursuant to Rule 79 (A) (iii) of the Rules;

CONSIDERING the Statute of the Tribunal ("the Statute") and the Rules of Procedure and Evidence ("the Rules"), specifically Articles 16, 19 and 20 of the Statute and Rules 45 and 73 of the Rules;

SUBMISSIONS OF THE PARTIES

Mr Nzirorera' Submissions

1. On the basis of Rules 45(H) and 73(A), the Accused requests that the Trial Chamber withdraw the appointment of Lead Counsel McCartan, and Co-counsel Bauwens. The Accused alleges, *inter alia*, with respect to both Counsel that:

   1.1. There exists a "profound and irreconcilable disagreement between [himself] and his Counsel concerning defence strategy";

   1.2. Both Counsel lack "competence, loyalty, honesty, diligence and a spirit of collaboration," all of which are requirements for the defence of an Accused in a case involving such serious accusations;

   1.3. Both Counsel "are more concerned with the interests of unknown third persons and with selfish financial interests than with the defence of their client"; and

   1.4. Both Counsel, in a meeting on 3 May 2001, allegedly denied the Accused a presumption of innocence to which he is entitled and compared him to Nazi criminals.

2. Consequently, the confidence that should exist between the Accused and his Counsel no longer exists.

3. More specifically, the Accused reproaches his Lead Counsel with the following:

   3.1. Lead Counsel has never been able to produce a defence strategy document;

   3.2. Lead Counsel decided to dismiss the team's legal assistant without prior consultation with the Accused;

   3.3. Lead Counsel has problems communicating with his client, because Lead Counsel speaks poor French and the Accused speaks poor English. These problems had been overcome in the past with the assistance of said legal assistant;

   3.4. Lead Counsel seeks to conduct the defence without taking into account the instructions of his client, and has failed to file a motion as had been requested by the Accused.

   3.5. Lead Counsel has acted dishonestly to the detriment of the interests of his client and of the Tribunal, by asking the legal assistant *inter alia* to alter his fee claims in order to maximise his payments.

Counsel's Response

Lead Counsel McCartan disputes the allegations of the Accused and contests the existence of exceptional circumstances, asserting *inter alia* that:

3.6. He is not in the service of any third party but independently fulfils his role as Defence Counsel and, in light of more than 20 years of experience, works to ensure that the Accused is given the best possible defence.

3.7. At no point did he challenge the presumption of innocence of the Accused. To share with the Accused the gravity of his situation was an invitation to obtain the fullest collaboration between the Accused and his defenders and cannot be compared to challenging the presumption of his innocence.

3.8. Mr McCartan refutes the accusation of financial dishonesty with regard to the Tribunal, and states that his sole concern was to be remunerated for services rendered for the defence, in accordance with the billing rules put in place by the Registry. He reiterated that because some charges had been disallowed by the Registry, he had merely expressed his concern that all expenses be accounted for rightfully.

3.9. In regard to the dismissal of the Legal Assistant, Mr McCartan alleged that he made such a decision after learning that the Assistant had breached certain rules at the Tribunal's Detention Facilities.

4. During the 21 September 2001 hearing, while recalling the principle of confidentiality binding himself and the Accused, Mr McCartan explained the context of his letter dated 11 April 2001 addressed to Mr Caldarone, Chief of the Lawyers and Detention Facilities Management Section (LDFMS), and annexed to the Registrar's confidential Memorandum addressed to the Judges pursuant to Rule 33(B) of the Rules. Mr McCartan recalled that the said letter predated any withdrawal request by the Accused Nzirorera. According to Counsel, the matter discussed in the said letter would appear to be the actual reason behind the Accused's request to obtain his dismissal, adding that any other reason advanced by the Accused is merely a smokescreen.

5. Counsel McCartan stated that he sought advice from his Bar in Scotland as to whether or not he had an obligation to keep the matter at stake confidential. Having been assured that he was not so bound, on 11 April 2001 Mr McCartan forwarded to the Registry his concern about alleged attempts by the Accused since November 2000 to extract a "kick back" and also requested advice from the Registry.

6. Co-Counsel Bauwens also contests the allegations of the Accused. He emphasises that he fully recognises the principle of the presumption of innocence and that he has fulfilled his duty as Defence Counsel in the context of an independent professional relationship inspired by mutual respect.

Mr Nzirorera's Reply

7. Mr Nzirorera argues *inter alia* that Mr McCartan has not properly replied to his complaints. The Accused affirms that the professional independence of Counsel should conciliate with the Defence strategy desired by his client. The Accused alleges that, before this Motion, he had already indicated by a letter of 1 November 2000 that he had lost confidence in Mr McCartan.

8. The Accused states that Counsel has not denied the content of the letter regarding the fee claims and that the procedure of "altering and maximising his fees" should be considered as violating Articles 11 and 13 of the Code of Professional Conduct for Defence Counsel. He further asserts that Counsel's 20 years experience practicing Common Law is no guarantee of his ability to conduct a defence in line with "his wishes and his instructions".

9. Mr Nzirorera adds that Counsel should not hide behind the obligation of confidentiality not to respond to the Accused's serious accusations.

10. The Accused denies having any knowledge of the letter dated 11 April 2001 from Mr McCartan to Mr Caldarone Chief of LDFMS regarding allegations of fee-splitting or of the content of the Registrar's confidential Memorandum until the two documents were filed on 20 September 2001 by order of the Chamber. Nonetheless, Mr Nzirorera denies Counsel's allegation of attempts of fee-splitting on his part.

HAVING DELIBERATED

11. The Chamber has considered the President's Decision on Review of 13 June 2001 in which she ruled that:

> "A factual determination on the allegations made by the Accused against his assigned Lead Counsel, which related to the integrity, competence and diligence of the said Counsel and his dismissal of the investigator cannot be made under the purview of this review [....] [T]he Trial Chamber before which the Accused appears will be in a better position to determine these allegations, in particular the standard of representation made by Lead Counsel on behalf of the Accused."

12. The Chamber recalls that Rule 45(H) of the Rules states that:

> "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."

13. The Chamber further notes the relevant case-law of this Tribunal and of the International Criminal Tribunal for ex-Yugoslavia (ICTY), and concurs with the findings of the "Decision on Request by Accused Mucic for Assignment of New

Counsel" of 24 June 1996 (*Prosecutor v. Zejnil Delalic et al*, Case No. IT-96-21) ("the Mucic Decision"), that

> "[t]he Trial Chamber [...] has a responsibility to examine the reasons for the Accused's dissatisfaction with the Counsel assigned and determine whether those reasons constitute good cause. The Trial Chamber must be satisfied that the reasons are genuine and that the request is not made by frivolous reasons or in order to pervert the course of justice e.g. by causing additional delay."

14. Accordingly, the Chamber should first be satisfied that exceptional circumstances exist and good cause has been shown to warrant withdrawal of counsel, and second, that the request is not designed to delay the proceedings. The Chamber notes that, in support of his request for withdrawal of Counsel, the Accused develops several points allegedly amounting to the showing of exceptional circumstances. The Chamber will review and decide upon these allegations respectively before turning to Counsel's appraisal of his client's conduct.

I. Exceptional Circumstances and Showing of Good Cause

Allegations of Counsel's Lack of Professionalism

15. Having reviewed the Accused's specific allegations, the Chamber recalls its "Decision on Ntahobali's Motion on Withdrawal of Counsel" of 22 June 2001 (*Prosecutor v. Nyiramasuhuko and Ntahobali*, Case No. ICTR-97-21-T), in which it clarified the status and duties of Defence Counsel, noting particularly that :

> "in the exercise of his professional judgement, Counsel is independent of the Accused, even if Counsel is expected to maintain a proper Counsel-Client relationship. The Trial Chamber has to be assured that a Counsel properly conducts an accused's defence and protects the latter's lawful interest during trial, but also has to verify that the accused does not abuse this right.[...] [a]s a matter of principle, the Chamber finds that an accused is mistaken when saying that counsel must consult with him, whereas there are matters of professional judgement for which Counsel alone is liable. While Counsel should take full instructions about facts surrounding the case, this does not imply that Counsel have to consult with the accused whenever any step in his defence is taken by the Counsel. Nevertheless, Counsel have to keep the Accused informed of the steps taken to protect his interests and provide the Accused with a reasoned explanation as to why they took such steps."

16. The Chamber finds that the events and documents cited by Nzirorera in his request do not support the conclusion that Lead Counsel and Co-Counsel acted in a unprofessional manner in conducting the Accused's Defence.

17. Concerning the organisation of the Defence Team, the Chamber concurs with the findings in the "Decision on the Accused's Request for Withdrawal of His Counsel" rendered on 29 March 2001 (*Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I) ("the Ngeze Decision"), in which Trial Chamber I noted that

> "[t]he 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." (Emphasis added.)

18. As to the communication difficulties between the Accused and his Lead Counsel, the Chamber notes that Counsel are appointed by the Registry, who can verify *inter alia* their language abilities. The Chamber also notes that it was with particular reference to language issues that Lead Counsel requested, and was assigned, a bilingual co-Counsel. (*See* letter from Lead Counsel McCartan to Mr. Caldarone (LDFMS) dated 30 September 2000, and the subsequent assignment of Mr. Martin Bauwens).

19. Having considered the circumstances of this case, the Chamber is of the view that Mr Nzirorera has misunderstood both the relationship between an Accused and his Counsel, and the professional role and responsibilities of the latter in preparing the Accused's defence and in organising the Defence Team. The Chamber thereby concurs with the Decision of the Registrar of 14 May 2001 that the general manner in which Counsel conducts the defence is within the purview of his role "as director of the defence team, [...] in conformity with the Code of Professional Conduct for Defence Counsel". In the instant case, the Chamber cannot find that the Accused has substantiated his claim of any improper behaviour by Counsel in exercising his professional functions.

Allegations of financial dishonesty of Counsel

20. The Chamber has considered Article 16(1) of the Statute, and the Directive on the Assignment of Defence Counsel ("the Directive"), which together establish the authority of the Registrar over all administrative matters relating to assigned Defence Counsel.

21. The Chamber considers that the allegation of financial dishonesty by Counsel is an administrative matter that falls under the power of the Registry, not a Trial Chamber. The Chamber also notes that the initial request of the Accused before the Registrar did not include any allegations of financial dishonesty. The Chamber acknowledges that that this is a serious allegation which needs to be investigated by the proper authority.

Request for New Counsel

22. The Chamber has considered the Annexes to the Motion and notes the letter dated 18 May 2001 from the Accused to the Registrar requesting (1) the reconsideration of the decision rejecting the Accused's request for withdrawal of counsel, and (2) the replacement of his current Counsel with other Counsel that have been involved in other cases. Although the Accused does not entertain this specific request in his Motion, the issue was mentioned during the hearing and the Chamber is not far from

concluding that the purpose of the instant proceedings may not be, as is alleged, for the Accused to rid himself of incompetent counsel, but rather for him to be able to have counsel of his own choice. (*See* Similar reasoning and conclusion of Trial Chamber I in the "Decision on the Motions of the Accused for Replacement of Assigned Counsel /Corr." of 11 June 1997 (*Prosecutor v. Gérard Ntakirutimana*, Case No. ICTR-96-17-T) (Ntakirutimana Decision)).

23. In the instant case, and for the reasons explained above, the Chamber is not satisfied that the Accused has shown either the existence of exceptional circumstances or good cause that would justify the withdrawal of both Counsel. Consequently, the Chamber will not consider whether or not the condition pertaining to the absence of delay of the proceedings envisaged under Rule 45 (H) of the Rules has been met.

II. Allegations of attempts of fee-splitting

24. Mindful of the seriousness of the issues that were to be ventilated during the hearing of 21 September 2001 on the basis of the written material submitted to the Judges pursuant to Rule 33 (B) of the Rules, the Chamber decided to order that these written materials, originally classified as confidential, be filed and made available to all the Parties concerned by the proceedings. Nonetheless, in view of the nature of the issues to be discussed and, more particularly, the allegation of attempted fee-splitting, the Chamber suggested that the hearing be held in closed session to protect the interests of justice pursuant to Rule 79(A) (iii) of the Rules.

25. The Chamber has considered the Parties' submissions as well as the correspondence filed or produced and it is of the view that the request for fee-splitting could have been made by the Accused and that, Counsel's refusal to accede to that request may have been the reason behind the motion for withdrawal. In any event, even if this were indeed the factual scenario, the refusal on the part of Counsel to commit an improper act, would not in any way constitute exceptional circumstances or good cause, pursuant to Rule 45 (H) of the Rules, to warrant the withdrawal of assigned Counsel.

26. The Chamber strongly notes that fee-splitting matter, including allegations in this case, should be exhaustively examined by the Tribunal's Registry which should also take all necessary measures to inform all accused and Counsel before this Tribunal that fee-splitting is unacceptable and merits sanctions under the Rules.

For the foregoing reasons,

THE TRIBUNAL HEREBY

DENIES the Accused's Motion for Withdrawal of Counsel.

DIRECTS the Registry to examine fee-splitting matters, including allegations in this case, and to take all necessary measures to inform all accused and Counsel before this Tribunal that fee-splitting is unacceptable and merits sanctions under the Rules.

Judge Winston C. Matanzima Maqutu appends a separate and dissenting opinion to this Decision.

Arusha, 3 October 2001

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

(Seal of the Tribunal)

ICTR-98-44-T
3-10-2001
(2642-2634)

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

2642

TRIAL CHAMBER II

Original : ENGLISH

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson.

Registrar: Adama Dieng

Date: 3 October 2001

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THE PROSECUTOR
v
Joseph NZIRORERA

(Case N°. ICTR-44-T)

SEPARATE AND DISSENTING OPINION OF JUDGE W.C. MATANZIMA MAQUTU ON THE REQUEST OF ACCUSED FOR CHANGE OF ASSIGNED COUNSEL

The Office of the Prosecutor:

Ken Fleming
Ifeoma Ojemini

Counsel for Nzirorera

Andrew McCartan
Martin Bauwens.

1. I regret I cannot agree with the decision of the majority that Mr. Andrew McCartan should continue as Counsel for the accused Joseph Nzirorera in this case.

2. **Legal Basis of Motion**

Applicant – the accused has applied to the Chamber in terms of Rules 45(H) and 73(A) for the withdrawal of Lead Counsel Andrew McCartan and his Co-Counsel Martin Bowens from his case as Defence Counsel.

3. The crisp issue for determination is whether in terms of Rule 45(H) "exceptional circumstances, at the request of the suspect or accused or his Counsel" have arisen which at the Chamber's discretion "the Chamber may instruct the Registrar to replace an assigned Counsel".

4. **Accused Nzirorera's Submission:**

I will only concentrate on my points of disagreement with the majority. Accused accuses both Counsel of:-

4.1 Lack of competence, loyalty, honesty, deligence and spirit of collaboration.
4.2 Pursuing selfish financial interests and not devoting themselves to his defence.

5. The accused says the confidence that should exist between an accused and his Counsel no longer exists.

6. **Counsel's Answer**.

In the papers that formed pleadings and on the basis of which the Registrar ought to have reached his decision, Counsel does not address the real issue of fee-splitting that he told this Court was at the root of his problem with the accused.

6.1. This issue of fee-splitting appears for the first time as part of the record of proceedings before this Court in the Registrar's memorandum of 5th September 2001.

6.2. It was highly irregular and a breach of the audi alteram partem principle for the Registrar to dismiss accused application inter alia because he was aware of Counsel's secret letter that accused was demanding fee-splitting in terms of his agreement with Counsel of November 2000.

7. **Fee-splitting**

Counsel wrote to the Chef de Section on the 11th April 2001 reporting to him that the accused was blackmailing him to pay up, because Counsel had entered into a fee-splitting agreement with the accused in November 2000. In Court I specifically asked Counsel whether in Scotland where he practices as a solicitor in

the firm Andrew McMartan and Co. Solicitors and Notaries fee-splitting was not regarded as unethical and unprofessional conduct. The Lead Counsel, Mr. McCartan agreed that it was forbidden and unethical. Indeed the Code of Conduct of the Law Society of Scotland provides:-

Article 9
"No payment in money or kind should be made to an accused person, a member of the accused person's family or a potential witness". (http//www.lawscot.org.uk...introduction.htm)

8. When Mr. McCartan the Lead Counsel was asked about fee-splitting in relation to the International Criminal Tribunal for Rwanda, he said he expected an even higher standard of ethical conduct in this Tribunal than in Scotland, because this Tribunal sets international standards. Mr. McCartan's moral position would have been relatively enhanced had he reported the accused fee-sharing overtures within a few days of their being made. He waited six months before doing so. Even when he did so, he did so without letting the accused know. What he did instead was to write to the accused a letter dated the 12th April 2001 claiming his professional relations with the accused are still good. Mr. McCartan therefore, had lost the moral high ground by this time by:-

   a) Entering into a fee-splitting agreement with the accused in November 2000.
   b) Failing to report this fee-plitting agreement timeously
   c) Pretending to the accused that everything was in order between them on the 12th April 2001, after Mr. McCartan had reported to the Chef de Section on the 11th April 2001 – the accused's fee-splitting blackmail, without informing the accused.
   d) Reporting the fee-splitting when he knew the accused was about to apply for his removal as Counsel the second time.

9. The accused was not given a copy of this letter of 11th April 2001 - to which he was entitled. It is very unconvincing for a member of the legal profession to claim he thought the Rules of this Tribunal permitted the patently immoral practice of fee-splitting. This conflicts with what Mr. McCartan said during the hearing of this matter when he said he expected this International Tribunal to have standards of ethics and professional conduct that are higher than even Scotland – his country of origin.

10. Accused, during argument drew my attention to the United Nations Report of the Office of Internal Oversight Services on the investigation into possible fee-splitting between Defence Counsel and indigent detainees in the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia. This document is dated 1st February 2001. It concluded:-

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"Based on documents examined and interviews conducted, OIOS investigators found that:-

several former defence counsels assigned at both the International Criminal Tribunal for Rwanda and the International Tribunal for the former Yugoslavia, have either solicited and/or have accepted requests for fee-splitting made to them by their respective clients".

It would have therefore done the Tribunal a lot of good to have ventilated this fee-sharing issue fully – with both sides notified timeously and viva voce evidence heard to determine who is telling the truth in an open and transparent manner.

11. I have a feeling that the nature of the accused's accusation that his Counsel lacked loyalty and honesty, and is pursuing selfish financial interests, might give a man a feeling that accused might have entered into this fee-splitting agreement as Counsel alleges. If that might be so this Tribunal must protect all Counsel who serve in this Tribunal from this evil and blackmail of law abiding Counsel. Unfortunately Courts and Tribunals should act on evidence not on feelings.

12. Dealing with the fee-splitting allegation for the first time - because he had not been given this information before – accused in argument said it is not the first time he asked for the dismissal of Mr. McCartan for incompetence. After argument accused sent this Chamber a letter dated 24th September 2001. Annexed to this letter is Mr. McCartan's letter dated 21st November 2000. In that letter Mr. McCartan refers to accused's letter dated 3rd November in which accused had written to the Registrar asking him for the withdrawal of Mr. McCartan as his Counsel. It seemed (at that time) the root of the problem was the need for a Co-Counsel who is French-speaking. Mr. McCartan concludes his plea to the accused to retain him with the following words, "we need to re-establish our relationship and work together in preparing your defence". What this Tribunal will never know are the following:-

a) Did the accused blackmail Mr. McCartan into a fee-sharing agreement as a prize of retaining Mr. McCartan as Counsel?
b) Are the financial demands of "maximizing fees" which the accused relies on in presenting Mr. McCartan as unworthy to continue as Counsel not a by-product of the fee-splitting agreement's pressure on Mr. McCartan's financial resources?
c) Why did Mr. McCartan in his letter of 12th April 2001 continue to allege to the accused that everything was normal after he had secretly written to the Chef de Section about the accused's fee-splitting demands?

13. **Failure to Observe the audi alteram partem Rule**

When this matter was before the Registrar, there is no evidence that accused was aware that Counsel had written to the Chef de Section of this Tribunal alleging that the accused had entered into a fee-splitting agreement, which Counsel refused to honour. Before this Chamber the accused said he saw this letter of the 11th April 2001 for the first time on the 20th September 2001, which was the day before the hearing. This fact was not disputed by his Counsel, nor did he bother to address this point. The Registrar referred to this fee-splitting problem as being at the root of the quarrel between accused and his Lead Counsel. This was done without the accused being given an opportunity to make representations or comments on this fee-sharing allegation against him.

14. Because of this procedural oversight, the proceedings before the Registrar were flawed. The President confirmed the Registrar's finding presumably unaware that the accused had never been heard of his Counsel's allegation of fee-splitting. Nevertheless, in recusing herself and Chamber I, the President requested this Chamber to go into this issue of free-splitting. It was only in this Chamber that it emerged, accused had never been heard on this issue, and that he learned of it less than 24 hours before it was heard. In the past, by not informing the accused of his Counsel's secret defense of fee-splitting, justice was not seen to have been done to the accused in this matter.

15. By mischance therefore, the disclosure of confidential information to the Chef de Section Secretary without letting the accused know has led to the breach of Article 19A(iii) of the Directive on the Assignment of Counsel (Directive N°. 1 of 1996) which provides that the Registrar may:

> "In the case of a serious violation of the Code of Conduct, withdraw the assigned Counsel or Co-Counsel".

This has happened in this case, and the Registrar was obliged to withdraw Counsel.

16. **Whether Counsel can continue to represent Accused**

The real issue on which I cannot agree with my brother and sister Judges in this Chamber is on whether this Counsel can continue to represent the accused.

17. On the 19th September 2001 when the matter was due for a hearing, he wrote the following letter to the Chef de Section:-

"Dear Sir,

> I refer to my letter of 11th April 2001. For the avoidance of any doubt, I would like to clarify paragraph 2, line 5, of that letter, as to why I agreed at first to make payment. I agreed to the accused's demand for payment because I wanted to give myself time to investigate his statement that this was "the normal procedure" for Lead Counsel. I also wanted to confirm the Rules prohibited such fee splitting conduct".

These letters of 19th September 2001 and that of 11th April 2001 were written to the Chef de Section without giving the accused a copy.

17. Counsel knew the accused was now his adversary in the proceedings that were to be heard in two days' time. Accused should have had a copy of this letter. In other words I deplore the fact that Counsel kept writing about the accused's fee-splitting blackmail between April and September 2001 without affording the accused copies of such letters.

19. **Rule 97** of this Tribunal provides:-

"All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered unless:

i) The client consents to disclosure:....."

Counsel was duty bound in terms of Article 8(2)(d) of the Code of Professional Conduct for Defence Counsel, to disclose this illegal agreement of fee-splitting with client, but he could not do so without letting his client know.

20. Once Counsel denounces the accused for asking him to do something improper, then the Counsel-client relationship cannot continue. This is especially so when the accused denies this (as in this case) and the Tribunal has not gone into the merits of this issue.

21. I have already said Counsel told the Chef de Section of the Tribunal about accused's corruption, without conforming with the professional duty and the courtesy of letting accused know that he had done so. This, as I had already said, is most unprofessional and unfair.

22. **Expectations of the Tribunal**

Once Counsel's professional ethics are found to be wanting, then the trust that the Tribunal had in the Counsel must diminish.

23. The guiding principle which in my view sums up the expectations of this Tribunal is found in Chapter 23 of the Legal and Professional Conduct Handbook of Nova Scotia which provides:-

> "The lawyer should try at all times to observe a standard of conduct that reflects credit on the profession and the system of administration of justice generally, and inspires the confidence, respect and trust of clients, those with whom the lawyers work and the Community".
> (http//www.nsbs.ns.ca/handbook/Chapter 23-print.htm).

It seems to me this International Tribunal (as Lead Counsel himself has conceded) ought to have even higher ethical standards. Mr. McCartan has failed to "observe a standard of conduct that reflects credit on the profession and the system and administration of justice" of the Tribunal. This is because this Tribunal acts transparently under the glare of publicity.

24. Article 5 of the Code of Professional Conduct for Defence Counsel of the ICTR expects all Counsels to:-

> "(c) Counsel must never be influenced by improper or patently dishonest behaviour on the part of a client;
> (d) Preserve their own integrity and that of the legal profession as a whole;
> (e) Never permit their independence, integrity and standards to be compromised by external pressure".

25. Mr. McCartan, the Lead Counsel should have been aware of Article 5 of the ICTR Code of Professional Conduct for Defence Counsel which is not different from Article 7 of the Code of Conduct of the Law Society of Scotland which provides:-

> "Solicitors must act honestly at all times and in such a way as to put their personal integrity beyond question".

26. A person does not have to be a lawyer to know that fee-splitting is unlawful, unethical and improper. For Counsel to say he believed it was the done thing in the International Criminal Tribunal for Rwanda is no excuse because of Article 5 of the said ICTR Code of Professional Conduct. Nowhere does Lead Counsel say he asked other Counsel about this fee-splitting as he claimed he wanted to do in his letter of 19th September 2001. Mr. McCartan in the light of his 20 years experience in Scotland cannot pretend he was uncertain that he was doing something wrong when he breached Article 9 of his own Scottish Law Society Code of Conduct which forbids "payment in any or kind to an accused person" and entered into a fee-sharing agreement with the accused.

27. **Rights of the Accused**

Counsel wants to continue as accused's Counsel although there can no more be trust between him and the accused. His desire to continue as Counsel cannot be honourable in the best traditions of the legal profession. Counsel concedes in his country he would have withdrawn from the case once he had denounced the accused for his fee-splitting blackmail.

28. Counsel's desire to continue in the circumstances to defend the accused with the help of the Tribunal - therefore, is incompatible with Counsel's professed wish to see the accused have the best defence possible. Counsel in my view violates Article 9 of the ICTR Code of Professional Conduct which provides: "Counsel must put his client's interests above his own".

29. I should add that the balance of convenience favours the change of Counsel within the provisions of Rule 45(H) because such a change will not delay proceedings. This matter will only be heard in eight months' time after May 2001.

30. I consider it wrong to treat this application to be solely the accused's application in which he stands or fall by what he has asserted. Broader issues of justice and the balance of convenience come into play in this matter. Counsel's behaviour and the way he conducted himself supports and proves the accused's assertion that the necessary trust between Counsel and client has been shattered beyond repair or tolerance. Counsel (by not informing client that he reported their fee-splitting agreement to the Chef de Section), has violated one of the main tenets of professional ethics and behaviour as between Counsel and client. Even if he had not, he has been placed in an untenable moral and professional situation. He ought not to continue. He was in honour bound to ask for leave to withdraw as Counsel in this matter.

31. **CONCLUSION**

Counsel should have prima facie lost the respect of his client and that of many people. Therefore, I take the view that exceptional circumstances have arisen which make a change of Counsel imperative, if the accused is to have a dignified and fair trial. A Counsel who has behaved unprofessionally in relations between Counsel and client in the disclosure of confidences should not continue as Counsel. Consequently, in terms of Article 19A(iii) of the Directive on the Assignment of Defence Counsel, the Registrar was obliged to withdraw Counsel.

32. One might argue that at the root of the majority's refusal to grant the accused's application for withdrawal of Counsel is the underlying feeling that accused will have benefitted from his wrong-doing of blackmailing Counsel – who will not abide by the immoral fee-sharing agreement. We cannot punish the accused in

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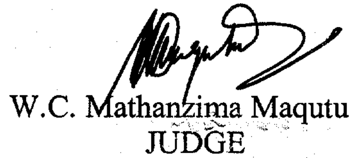
any way because he has never been heard him fully on the merits of fee-sharing. In any event legal representation can never or ought never to appear to be used as a method of punishment, even if we believed the accused to be guilty of entering into this fee-sharing agreement.

33. I WOULD GRANT THE ACCUSED MOTION because of surrounding circumstance and Counsel's conduct and ;

(a) Direct that both his Lead Counsel and Co-Counsel be withdrawn as accused's Counsel;

(b) Direct that a circular be issued to all accused in this Tribunal condemning fee-splitting between Counsel and any accused on pain of legal sanction.

Arusha 3 October 2001



W.C. Mathanzima Maqutu
JUDGE

Seal of the Tribunal