



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. ICTR-99-52-I
Date: 27 November 2001
Original: English

IN THE TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Asoka de Zoysa Gunawardana

Registrar: Mr. Adama Dieng

Decision: 27 November 2001

PROSECUTOR

v.

**Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE**

**ORAL DECISION ON THE NGEZE REQUEST TO CROSS-
EXAMINE WITNESS SERUSHAGO**

The Office of the Prosecutor:

Counsel for the Accused:

For the Defendant Ngeze:
Mr. John Clifford Floyd III

Extract from the Transcripts of 27 November 2001, pp. 1-8 :

13 MR. PRESIDENT [Judge Erik Mose]:

14 Okay. Thank you very much. Well, I will
15 now express the ruling of this Chamber.
16
17 We take as other parties, of course, the
18 point of departure being Article 20 of the
19 Statute which contains two relevant Rules in
20 this context. On the one hand litra (d)
21 which gives the right of an accused to
22 defend himself in person or through legal
23 assistance and litra (e) to examine and have
24 examined witnesses against him.
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1 Now, these provisions that are taken from
2 the Covenant of Civil and Political Rights,
3 Article 14(3) and the European Convention
4 Article 6(3) do not give the Accused an
5 explicit right to pose additional questions
6 to a witness after his counsel. They,
7 rather, indicate that there is a choice
8 either in person or by legal assistance
9 either to examine or have examined on his
10 behalf, to use the wording of the provision,
11 and "have examined on his behalf" is when he
12 has a lawyer. That was the wording of the

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provisions.

Then, the next point is the case law of the Human Rights Committee and the European Court. That case law does not provide support for giving an accused the right to pose questions in addition to his counsel's question. We haven't found clear case law giving him such a right explicitly. And case law stresses the point that matters of evidence are, as a general rule, left to the national courts. And Strasbourg will only intervene if the proceedings, seen as a

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whole, are not fair. I recall that Article 6(3) is an application of the general principle of Article 6(1) of the European Convention on Human Rights.

Third point: The case law of the present Tribunal has been very restrictive. We have had some decisions where there is a situation of a particular nature, but the Tribunal has certainly been granting such a right to pose questions for the accused only on an exceptional basis. And this Chamber has previously also allowed for that

14 possibility in the present case,
15 exceptionally.
16
17 So, it's clear that there is no such right.
18 On the other hand, there is no provision
19 that prohibits it. And the situation may be
20 different in various countries. The
21 intervention of Mr. Pognon yesterday is one
22 illustration of this.
23
24 So the question, then, is whether the
25 Chamber should, in it's discretion, allow

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1 it. And in exercising this discretion, the
2 Chamber will take into account inter alia
3 the following general considerations: The
4 fairness of the proceedings, and in this
5 particular context, then, the need to ensure
6 the necessary progress of the case and
7 control of the proceedings; and, of course,
8 the respective roles of counsel and the
9 accused in the courtroom. So, these are the
10 general issues.
11
12 Then we come to the concrete application of
13 these principles now. And here the opinions
14 on the Bench are different. My view is the
15 following: Mr. Floyd has had 11 hours'

16 cross-examination. There has been extensive
17 cross-examination also by other counsel.
18 Ngeze has been asked three times to give his
19 questions to counsel who has assessed them
20 and has not seen any need to pursue these
21 matters. And I do not have any basis to
22 believe that counsel's assessment is not
23 made in conformity with his client's
24 interests.
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1 Judge Gunawardana has a different approach.
2 I will now ask him to explain it, and then I
3 will come back again and explain how we are
4 to solve this issue when this is the
5 position. Judge Gunawardana, please.

6 JUDGE GUNAWARDANA:

7 I regret I cannot agree with my brother
8 fully, but in my view there is a fundamental
9 right of an accused to defend himself, even
10 when he has been assigned counsel, and if he
11 feels he has not been adequately defended,
12 he can exercise the right to question the
13 witness whom he thinks would affect his case
14 prejudicially. So in the exercise of that
15 right, the accused may, in limited
16 circumstances, be permitted to pose

17 questions to a witness in a given situation.
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19 Then there is the second aspect of this case
20 that there appears to be a special
21 relationship between the Accused and the
22 witness in that they were known to each
23 other for a long time and the Accused has
24 special knowledge of the witness, rather
25 than a witness who has been brought by the

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1 Prosecution to give evidence against him.
2 So, therefore, he may be having particular
3 matters in mind to cross-examine him on,
4 which would, more importantly, go to the
5 question of credibility of the witness.
6 After all, we are here looking at the
7 evidence of the witness to ascertain the
8 credibility that one can attach to the
9 witness. So in that regard he may have a
10 valuable contribution to make.

11
12 The credibility issue: If these questions
13 go to the question of credibility of the
14 witness, then I believe the Accused must be
15 given an opportunity to put the questions
16 that he wishes to put to the witness. Of
17 course, this will be subject to the order,
18 in principle, that the questions must be

19 relevant and they must be admissible. That
20 control the Court will not abandon. The
21 Court will closely examine the questions to
22 ascertain whether these questions are
23 relevant and admissible and, if they are
24 found to be so, may be permitted in the
25 given limited circumstances in this case.

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1 MR. PRESIDENT:

2 Now, what follows from these two opinions is
3 the common ground that we are talking about,
4 exceptional circumstances here. And it is
5 certainly also the common ground that it is
6 up to the Court to control. This is in a
7 limited fashion. Now, how will we then
8 solve the practical situation in front of us
9 now? Our solution will then be that
10 Mr. Ngeze will write these questions down
11 -- the five questions -- on a piece of paper
12 and hand it over to the Bench. These
13 questions will then be at the Bench's
14 disposal and we may decide to use it, but
15 certainly not as a mouthpiece to take up
16 that formulation. We may decide to use them
17 if we consider them relevant, together with
18 our other questions.
19

20 So, that's the procedure to be followed now
21 to solve this issue. And let me stress that
22 this solution is chosen now because we are
23 only talking about five questions; in other
24 words, it is actually not a new
25 cross-examination, but simply a few

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1 additional questions.

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3 Secondly, there are two Judges on the Bench
4 with two differing opinions and, thirdly,
5 but not least, Defence counsel himself has
6 not objected to this solution. In fact, he
7 proposed it as a compromise yesterday.

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9 So, then, Mr. Ngeze, we have, as the
10 President promised, addressed your concerns.
11 We are addressing your concern now with this
12 procedure and if you haven't written down
13 your questions, please do and hand it over
14 to us and then we will get back to that
15 after Prosecution's redirect.

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17 Ms. Kagwi, you have the floor.