

084

SCSL-2003-06-PT
C1724-1768

1724

**SPECIAL COURT FOR SIERRA LEONE
FREETOWN - SIERRA LEONE**

Before: Trial Chamber of the Special Court for Sierra Leone
OR the Designated Judge

Registrar: Robin Vincent

Date Filed: 16 January 2004

BETWEEN:

TAMBA ALEX BRIMA - APPLICANT
DETAINEE AT THE SPECIAL COURT

AND

SYLVAIN ROY - 1ST RESPONDENT
ACTING PRINCIPAL DEFENDER
SPECIAL COURT FOR SIERRA LEONE

AND

THE REGISTRAR OF THE SPECIAL COURT FOR
SIERRA LEONE - MR. ROBIN VINCENT - 2ND RESPONDENT

AND

MR. ROBERT KIRKWOOD
THE DEPUTY REGISTRAR OF THE
SPECIAL COURT FOR SIERRA LEONE - 3RD RESPONDENT

1ST RESPONDENT'S RESPONSE TO APPLICANT'S MOTION AGAINST DENIAL BY THE ACTING PRINCIPAL DEFENDER TO ENTER A LEGAL SERVICE CONTRACT FOR THE ASSIGNMENT OF COUNSEL FOR AND ON BEHALF OF THE ACCUSED TAMBA ALEX BRIMA THE APPLICANT HEREIN PURSUANT TO RULE 72(B) (IV) OF THE RULES OF THE SPECIAL COURT FOR SIERRA LEONE AND PURSUANT TO ARTICLE 12 (A) - OF THE DIRECTIVE ON THE ASSIGNMENT OF COUNSEL OF THE SPECIAL COURT FOR SIERRA LEONE, AND UNDER THE INHERENT JURISDICTION OF THE TRIAL CHAMBER OF THE SPECIAL COURT FOR SIERRA LEONE.

Counsel for the Applicant

Terrence Michael Terry

Defence Office

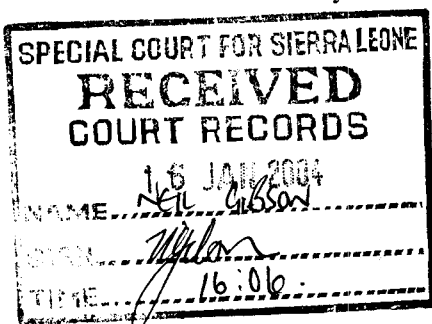
Sylvain Roy, A/Principal Defender

Ibrahim Yillah, Duty Counsel

Haddijatou Kah-Jallow, Duty Counsel

Claire Carlton-Hanciles

Phoebe Knowles, Defence Intern



1. Introduction

The Applicant in his motion dated the 5th day of January, 2004 moves the Trial Chamber or Designated Judge for an Order directing the Registrar and or the Deputy Registrar respectively to enter into legal service contract with the Applicant's duly appointed provisional Counsel, Mr. Terrence Michael Terry.

2. BACKGROUND

2.1. The 1st Respondent was appointed Acting Principal Defender ("A/Principal Defender") 7 July 2003. As A/Principal Defender he is mandated to fully exercise the authority of the Principal Defender as referred to in Rule 45 of the Rules of Procedure and Evidence of the Special Court of Sierra Leone ("the Rules"). The 1st Respondent was appointed pending recruitment of a Principal Defender. On assumption of office, the A/Principal Defender frequently liaised with Defence Counsel for the Applicant. Counsel has never questioned the A/ Principal Defender's authority or mandate prior to the letter of 12 December 2003.

2.2. On 9th June 2003 and 16th September 2003 Counsel for the Applicant filed two motions citing ill-health as his reasons for not filing legal papers on time. This state of affairs warranted a request by the Acting Principal Defender for Counsel for the Applicant to undergo medical examination with a view to satisfying the A/Principal Defender that Counsel is fit and available to defend the Applicant until the completion of his trial.

2.3. The 1st Respondent further informed Counsel for the Applicant that his representation of both the Applicant and another accused before the Special Court, Charles Ghankay Taylor has a potential of placing Counsel in a situation of conflict of interest. In a letter dated 10 November 2003, a copy of which is annexed, the A/Principal Defender requested Counsel to comply with the requirements of Article 14 (C) of the Directive should Counsel intend on continuing his representation of two accused before the Special Court. The various correspondences exchanged between the A/ Principal Defender and Counsel for the Applicant culminated in the correspondence of 12 December 2003 withdrawing the provisional assignment of Counsel. A copy of this letter is annexed.

2.4. Role Of The Defence Office And Principal Defender

The mandate of the Defence Office is set out in Rule 45 of the Rules. Firstly, in accordance with Rule 45(B)(i), Duty Counsel in the Defence Office provide initial advice and assistance to suspects and accused. Secondly, in accordance with Rule 45(C), the

Defence Office assigns defence counsel to those suspect or accused who request that counsel be assigned to them and who do not have the means to pay for their own counsel. Thirdly, the Defence Office renders a variety of assistance to appointed and assigned counsel, including administrative assistance, vetting of investigators, substantive legal research and aid in drafting motions and applications. The Defence Office identifies legal issues that need to be raised before the Judges of the Special Court, researches those issues and prepares briefs to provide to Defence Counsel. Fourthly, the Defence Office has an outreach role in educating Sierra Leoneans about the Defence, the presumption of innocence, the burden and standards of proof and the rights of the accused. The work of the Defence Office is managed by a Principal Defender who engages in the legal, administrative, educational, standard-setting and brainstorming activities of Duty Counsel and Defence Counsel.

2.5. Article 17 Of The Statute Of The Special Court Of Sierra Leone

Article 17 requires that all accused be entitled to adequate and effective representation. This requires that assigned Counsel be fit and available at all times to provide adequate representation for the Applicant until the completion of the latter's trial. The onus is on Counsel to satisfy the A/ Principal Defender that he or she is fit and able to fully represent the accused for the duration of the trial.

2.6. The Directive On Assignment Of Counsel

A certified copy of the Directive was signed by the Registrar on 1 October 2003, was served on Counsel for the Applicant on 2 October 2003 and entered into effect on 3 October 2003. Article 14 (C) details the procedure to be followed where Counsel seeks to represent more than one accused in the Special Court. Firstly, both accused persons must receive independent legal advice. Secondly, both accused persons must elect to waive their right to be represented by separate Counsel. Counsel should then apply through the Principal Defender to the appropriate Judge of the Trial Chamber, for a decision to be reached.

2.7. The Legal Service Contract

The legal service contract ("the agreement") provides for assignment of Counsel to provide legal representation during the trial of the accused. The agreement takes effect on the signing of the contract and expires on completion of the trial of the accused. The agreement may be terminated by either party before the expiry of the agreement in

accordance with the provision of the Rules and the Directive. From the date of the agreement contracting Counsel shall submit stage plans to be approved by the Defence Office of the Special Court of Sierra Leone. Expenses incurred by the contracting Counsel in the performance of their contract shall be reimbursed if approved in the case plan or stage plans and upon submission of all the relevant documentation to the Defence Office. Except for an appeal decision in accordance with Article 19 of the Directive any dispute between the Defence Office and the contracting Counsel arising out of the interpretation or application of this agreement which is not settled negotiation shall be subject to the procedure contained in Article 22 of the Directive.

3. APPLICANT'S ARGUMENT

The Applicant submits the following arguments in support of his application.

3.1. Factual Basis For The Applicant's Motion

The Applicant submitted that the factual basis for the motion arose from the A/Principal Defender's refusal to enter into a legal service contract with Counsel for the Applicant.

The Applicant further submits that the reasons for this refusal are as follows:-

- 3.1.1. That Counsel for the Applicant must first undergo a medical examination; and
- 3.1.2. That Counsel for the Applicant is presently representing Mr. Charles Ghankay Taylor and that Article 14 (C) of the Directive precludes Counsel from representing more than one accused.

3.2. Legal Basis For The Applicant's Motion

In support of his application, the Applicant invokes Article 17 of the Statute, Rule 72 (B) (iv) of the Rules, Article 12 (a) of the Directive and the Trial Chamber's inherent jurisdiction to hear the application. Counsel for the Applicant further relies on Articles, 2 (A) and (B), 3, 4, 5, 11 (A) and (B) , 12 (A) and (B), 14, 17 (A) and 21 of the Directive in further support of his application.

Counsel for the Applicant submitted that Article 1(A) of the Directive refers to the head of the Defence Office as the "Principal Defender" and that the present the "Acting Principal Defender", the 1st Respondent, cannot perform the functions of the Principal Defender contemplated by Article 1 (A) of the Directive. Counsel for the Applicant further argued that the two reasons canvassed by the A/ Principal Defender for his withdrawal are without merit for the following reasons:

- 3.2.1. That the A/ Principal Defender is not capable of making a decision as to Counsel for the Applicant's state of health as he is not a medical doctor.
- 3.2.2. That Counsel for the Applicant represents another accused, Mr. Charles Ghankay Taylor *suo moto* does not amount to a conflict of interest as Counsel's instructions in the latter are limited only to raising procedural questions and do not pertain to the merits of the latter's case.
- 3.2.3. That the purported exercise of powers by the A/ Principal Defender under the provisions of Articles 13 (A) and 14 (C) of the Directive is discriminatory on the ground that no other lead or co-Counsel have been subjected to any medical examination before entering into any legal service contract.

Counsel for the Applicant subsequently invited the Trial Chamber to invoke its inherent jurisdiction with a view to granting the various orders sought by the Applicant in his motion.

4. RESPONDENTS ARGUMENTS

4.1. The Trial Chamber's lack jurisdiction to hear the applicant's motion

The Applicant's complaint is not supported by any of the rules under which the application is purportedly made. The 1st Respondent submits that the motion cannot be heard by the Trial Chamber under Rule 72 (B) (iv) of the Rules nor by Article 17 of the Statute or Article 12 (A) of the Directive for the following reasons:-

Rule 72 provides that any preliminary motions must be filed within 21 days following disclosure by the Prosecutor to the Defence of all relevant material. On 17 April 2003 the Prosecutor disclosed all material to the Registrar in the cases of Kallon, Sesay and Brima pursuant to Rule 66(A)(i). Accordingly all preliminary motions should have been filed by 8 May 2003.

The 1st Respondent submits that the issue raised by the Applicant before the Trial Chamber does not turn on "denial of request for assignment of Counsel" but rather on Counsel complying with the requirements of availability of Counsel and his fitness to conduct the proper defence of the Accused pursuant to Rule 45 (C) of the Rules. The 1st Respondent further submits that the Order for legal assistance granted by this Court to the Applicant supports the view that the applicant has not been refused legal assistance. The order for legal assistance granted by the Court is clearly in force and has not been set aside for any reason.

It is therefore submitted that since there is no refusal of assignment of Counsel to the indigent Applicant, Rule 72(B)(iv) cannot and should not be invoked and is not applicable in the instant case. Counsel for the Applicant has failed to support his application with any evidence to show that the Applicant has not been assigned Counsel. The inherent jurisdiction of the Trial Chamber cannot be invoked in the instant case as Counsel has not formulated a complaint supported by the Statute, the Rules and the Directive on the Assignment of Counsel. Assuming without conceding that the Trial Chamber holds that it has jurisdiction to entertain the said application, the 1st Respondent submits that the motion be dismissed in its entirety for the following reasons:

4.2. The authority of the A/Principal Defender

The Applicant also submitted that the A/ Principal Defender is not a creature envisaged under Article 1(A) of the Directive as the said article refers to the Principal Defender and not the A/ Principal Defender.

This argument is not supported by any legal authority to show that the 1st Respondent's status as A/ Principal Defender deprives him of authority under the Directive. Assuming without conceding that the argument of the Applicant stands in this regard, there is abundant evidence on the face of the papers exhibited by the Applicant in his affidavit that he has had several course of dealings with the A/ Principal Defender. On those occasions the Applicant chose to recognise the office and authority of the A/ Principal Defender. The Applicant has however chosen not to recognise the authority of the A/ Principal Defender on this occasion because he has been asked to comply with procedural requirements as envisaged by Rule 45 (C) of the Rules.

4.3. Counsel for the Applicant is representing more than one accused

The 1st Respondent submits that Counsel for the applicant is on record representing both the Applicant and another accused, Mr. Charles Ghankay Taylor in the Special Court for Sierra Leone. Counsel for the Applicant argued in the motion that no conflict of interest arises by his representation of two accused in the same tribunal referred to above on the ground that his representation of the latter is limited only to procedural issues.

The 1st Respondent submits that the provisions of Article 14 (C) on the Directive are instructive on this point. They explicate the procedure to be followed where Counsel seeks

to represent more than one accused in the Special Court. Firstly, Article 14 (C) provides that both accused persons should receive independent legal advice and should waive their right to be represented by separate Counsel. Secondly, it requires an application from such Counsel to be made through the Principal Defender to the Presiding Judge of the appropriate Chamber. No evidence of has been adduced by Counsel for the Applicant to suggest that either of these requirements have been met. The jurisprudence of the Special Court is instructive where representation is only limited to procedural matters. However, Art. 14 (C) does not with respect limit such representation to procedural matters.

In the Prosecutor vs. Morris Kallon, in a decision delivered 17 July 2003 the Defence Office's request to be made amicus curia on jurisdictional arguments, which are procedural matters, was rejected by the Trial Chamber on the ground that a possible conflict of interest among other things would arise. Counsel for the Applicant's argument that his involvement in the Taylor case is merely procedural has no legal footing or grounds and is unsupported by the jurisprudence of the Trial Chamber of the Special Court for Sierra Leone.

The 1st Respondent submits that had Counsel for the Applicant followed the procedure spelt out in Art. 14 (C) of the Directive, the possibility of conflict of interest could have been minimised. The procedures spelt out in Art. 14 (C) are designed ultimately to minimise the possibility of conflict of interest.

The 1st Respondent further submits that the indictments of both the applicant and Charles Ghankay Taylor state an allegation of a joint criminal enterprise. The Trial Chamber's attention is drawn particularly to paragraphs 21.27 of the indictment filed by the Prosecutor against Charles Ghankay Taylor. Furthermore, it is submitted that the possibility of a joint trial is imminent as the Prosecution had filed a motion to jointly try the RUF/AFRC. Accordingly, the 1st Respondent submits that the possibility of conflict of interest becomes all the more conspicuous. The Trial Chamber is invited to closely consider these issues and determine whether or not the possibility of conflict interest has arisen or that there is a reasonable possibility that such a conflict will arise.

4.4. Applicant's Right to Counsel of his or her choosing

The Rules do not require that an accused shall have an unfettered right to a Counsel of his choosing.¹ Whilst jurisprudence does allow that usual procedure gives the accused the right to Counsel of his or her choice, such a right may be denied if there are relevant and sufficient grounds for maintaining that it was necessary in the interests of justice.

(*Ntakirutimana ICTR-96-10-T and ICTR-96-17-T* 11 June 1997). This case was confirmed at the ICTY *Dusko Knezevic* IT-95-8/1-PT² by the Trial Chamber on 6 September 2002 it has been confirmed that “the right to a Counsel of the accused’s own choosing is not without limits”

The 1st Respondent submits that the Applicant’s request for assignment of Counsel has been respected and honoured. The applicant has not shown any infringement of the principle of assignment of Counsel. Furthermore, the Rules do not require that an accused person shall have an unfettered right to a Counsel of his choosing. The Defence Office exceeded these requirements in accommodating that the Applicant’s choice in the instant case is respected.

In the *Prosecutor v Nyiramasuhuko and Ntahobali* ICTR-97-21-T³ though the Trial Chamber directed the Registry to withdraw the assignment of Counsel on the request of the accused the point was made that the Registry was responsible for the assignment of Counsel. The Trial Chamber further instructed the Registry to provide a list from which the accused should choose new counsel. The significance of this decision is that the process of legal aid enjoins the Registry, or the Principal Defender as the case may be, to assign counsel, not necessarily a counsel of the accused’s choice. In the *Prosecutor v Delalic et al.*⁴ the Trial Chamber of the ICTY refused the written request of the Accused to

¹ This is supported by jurisprudence from the ICTR where in *Ntakirutimana* ICTR 96-10-T and ICTR -96-17-T, in a decision of 11 June 1997 the Trial Chamber I of the ICTR declared that Article 20(4) of the Statute of the ICTR cannot be construed as giving the indigent accused the absolute right to be assigned the legal representation of his or her choice, this right is not “can be considered *per se* to be absolute”. The Human Rights Committee of the ICCPR, held that Article 14 of the ICCPR did not to grant an accused the right to choose Defence Counsel assigned to him without payment by him. (This was also confirmed in *Little v Jamaica* [Communication No. 330/1988 UN Doc CCPR/C/50/D330/1988 (1994)] and *Osbourne Wright and Eric Harvey v Jamaica* [Communication No. 459/1991, UN Doc. CCPR/C/55/D/459/1991 (1995)]

² *Dusko Knezevic* IT-95-8/1-PT Decision on the Accused’s Request for Review of Registrar’s Decision as to Assignment of Counsel, 6 September 2002.

³ *Prosecutor v Nyiramasuhuko and Ntahobali* ICTR-97-21-T, Decision on Ntahobali’s Motion for Withdrawal of Counsel, 22 June 2001.

⁴ *Prosecutor v Delalic et al* IT-96-21T Order on the Request by the Accused, Esad Landzo, for withdrawal of Lead Counsel, 21 April 1997.

change Counsel. However, the Trial Chamber held that the right to Counsel of Accused's choice is not without qualification in situations where the Accused is indigent and is unable to fund his legal representation; and that a genuine conflict of interest will constitute a good cause for withdrawal of counsel.

4.5. The requirement of a medical examination being discriminatory

The 1st Respondent submits that Counsel for the Applicant had filed two motions dated the 9th June and 16th September 2003 seeking extensions of time to comply with his legal obligations to wit: filing papers on behalf of his client. The reasons canvassed in the referred motions are ill-health.

Subsequently, the A/ Principal Defender requested Counsel undergo medical examination such that the requirements of Rule 45(C) of the Rules could be ensured. By this request, the A/ Principal Defender is upholding the rights of the accused to adequate representation. Furthermore, Article 13(D) of the Directive allows that "The Principal Defender may verify Counsel's qualification for the List of Qualified Counsel by any means", such means may be the undergoing of a medical examination.

The subsequent issue for determination is whether it was discriminatory for Counsel for the Applicant to be requested to undergo such examination. The A/ Principal Defender relied on by Rule 45 (C) of the Rules, the Order for legal assistance and the onus placed on the A/Principal Defender under Article 13 of the Directive regarding the list of Counsel to justify his request. Rule 45 of the Rules provides that the exercise of discretion is within the administrative powers conferred on an A/ Principal Defender. This is supported by Articles 13-16 of the Directive which do not set out procedures in their entirety but rather allow for the A/Principal Defender to use her or her discretion.

The 1st Respondent submits that where a reasonable doubt exists as to the fitness and availability of Counsel to conduct an accused's defence in trials of this magnitude, the A/ Principal Defender is obliged to make further enquiries regarding the fitness of Counsel. Accordingly, the 1st Respondent submits that the request for Counsel to comply with procedural requirements to wit: medical examination, does not tantamount to discrimination. The 1st Respondent submits that the suggestion by Counsel for the Applicant that no other Counsel had been subjected to medical examination is without

merit as no other Counsel have, to date, raised the issue of their health as justification for extensions of time.

4.6. Rule 16(C) of the Directive

Counsel for the Applicant erred in submitting that article 16 (C) of the Directive is non-existent and that the A/ Principal Defender purportedly exercised authority under a non-existent rule. The 1st Respondent submits that Art. 16 (C) may be found on page 8 under Part III of the said Directive, under the heading Payment of Counsel. It behoves Counsel for the Applicant as a prudent lawyer to have consulted with the Directive on the Assignment of Counsel served on his chambers on the 2 October 2003 before making unwarranted pronouncements regarding the non-existence of Art. 16 (C).

4.7. Applicant's Affidavit annexed to the Applicant's Motion

It is interesting to observe that the Applicant's affidavit is confusing in some respect and clear in others. The Trial Chamber's attention is drawn to paragraph 11 of the Applicant's Affidavit. It remains confusing whether the Application is brought by Counsel or the Applicant.

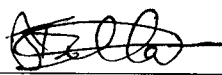
5. ORAL HEARING

Consistent with the jurisprudence of the Trial Chamber, the 1st Respondent submits that the issues raised by the Applicant's motion and the response herein can be resolved by written decision.

CONCLUSION:-

The 1st Respondent submits that for the reasons canvassed in the foregoing paragraphs, the applicant's motion should be dismissed in its entirety.

FOR THE 1ST RESPONDENT



Dated the day of 2004

1st Respondent's List of Authorities.

1. Letter dated 10 November 2003 from A/Principal Defender, Mr. Sylvain Roy to Counsel for the Applicant, Mr. Terrence Terry.
2. Letter dated 12 December 2003 from Counsel for the Applicant, Mr. Terrence Terry to A/Principal Defender, Mr. Sylvain Roy.
3. Directive on Assignment of Counsel signed 1 October 2003 by the Registrar and coming into effect on 3 October 2003.
4. *Ntakirutimana* ICTR 96-10-T and ICTR -96-17-T, in a Decision on the Motion of the Accused for Replacement of Assigned Counsel, of 11 June 1997.
5. *Dusko Knezevic* IT-95-8/1-PT Decision on the Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002.
6. *Prosecutor v Nyiramasuhuko and Ntahobali* ICTR-97-21-T, Decision on Ntahobali's Motion for Withdrawal of Counsel, 22 June 2001.
7. *Prosecutor v Delalic et al* IT-96-21T Order on the Request by the Accused, Esad Landzo, for withdrawal of Lead Counsel, 21 April 1997.

DO/BUGET/BRIMA

1735



SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)
UN Intermission 178 7000 or 178 (+Ext) FAX: +232 22 297001 or UN Intermission: 178 7001

10 November 2003

Mr. Terrence Terry
Barrister
Marong House, 4 th floor
11 Charlotte Street
Freetown, Sierra Leone

RE: Prosecutor vs Alex Tamba Brima aka Tamba Alex Brima

Subject: Legal Service Contract

Dear Mr. Terry,

I hereby acknowledge having received, on 4 November 2003, the document you submitted, as a Case Plan, in the context of our discussions towards the signing of a Legal Service Contract to provide for the legal representation of Mr. Brima before the Special Court for Sierra Leone.

This follows on from the Defence Office sending you, on 3 October 2003, the documents contained in the Contracting Package and a message inviting you to prepare a Case Plan and, at least, the initial Stage Plan for the case. On 2 October 2003, you were also served with the Directive on the Assignment of Counsel (the Directive), as adopted by the Registrar on 1 October 2003.

As a preliminary remark, I would like to point out that, while I have received a Case Plan, I have yet to receive your Stage Plan for the period up to 30 September 2003.

Turning to the Case Plan you have submitted, I note that you have omitted to include certain information requested in the template that was provided to you and, more importantly, have yet to include the anticipated cost for travel and DLA/DSA. Both the Directive and the Contract Specification specify that these expenses are to be included in both the Case Plan and Stage Plans, in addition to legal fees. I will therefore need those details before I can accept your Case Plan as currently presented.

On a more fundamental note, I would like to draw your attention to the provisions of the Directive and of the Contract Specification that require the Principal Defender to ascertain a number of issues before a Legal Service Contract is signed and Counsel is assigned, as opposed to provisionally assigned, to represent an indigent accused.

In relation to article 13 (A) of the Directive, the Principal Defender has to determine that Counsel is and remains available to represent an accused. Whilst at the time of your provisional assignment this matter was dealt with through your written engagement of availability, it has now been put into question by the fact that you have raised, as an issue for a motion you earlier submitted (Application for Extension of time – Habeas Corpus) and subsequent Decision of the Trial Chamber, that health

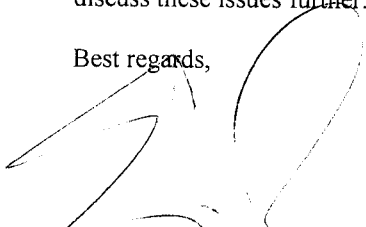
concerns had prevented and, according to the affidavit contained in your motion, could still prevent you from being available to deal with the case. Given this particular sets of circumstances, I feel that it would be in the best interest of all concerned, before a Legal Service Contract can be signed, if you underwent a medical examination. My intention would be that such an examination would be carried out by a doctor approved by the Special Court, covering the same elements as the Special Court staff pre-hiring medical exams. The cost of the examination would be borne by the Defence Office, but from a budget other than that for the defence of Mr. Brima.

Turning to another issue, article 14 (C) of the Directive states that the representation of more than one accused requires the approval by the Presiding Judge of the appropriate Chamber of the Special Court, after an application has been made through the Principal Defender. Whilst the Defence Office recognises its limited role with regards to those Counsel being retained privately, as in the case of your representation of Mr. Taylor, your possible appointment, under a Legal Service Contract to represent Mr. Brima, is clearly an area of concern to the Principal Defender. As I have mentioned to you in the past, I believe that there is a possibility of a conflict of interest arising out of the fact that you are representing both Mr. Taylor and Mr. Brima. In addition, the fact that you are representing both an indigent accused, Mr. Brima, and a privately represented accused, Mr. Taylor, creates, in my opinion, severe practical difficulties in trying to determine those expenses which will be incurred on behalf of one or the other and, as a result, if such expenses should be paid under the legal assistance scheme. It follows that, unless you are able to adhere to the provision of article 14 of the Directive, my request is that you renounce your Power of Attorney pertaining to Mr. Taylor and the Republic of Liberia or decide not to enter into a Legal Service Contract in regards to Mr. Brima.

Finally, in relation to the Contract Specification, there is a specific requirement that each indigent accused be represented by a team of Counsel possessing expertise in Criminal Law (serious offences), International Criminal Law and Sierra Leonean Law. Again, we have discussed this issue in the past and it is my understanding that you have contacted at least two persons who could meet the requirement of expertise in International Criminal Law. It is also my understanding that your previous trip to Europe (June-July 2003) was partly authorised for that purpose. It has been a practice of the Defence Office to authorise such Counsel to travel to Freetown in order to meet with their potential client and discuss their participation in the Defence Team with the Principal Defender. In your particular circumstances, this has not been the case and I have yet to receive any confirmation from either Mr. Khan or Mrs. Fauveau-Ivanovic that either is willing and, particularly, available to join your Defence Team. Furthermore, neither of them have met Mr. Brima. It is therefore my position that, prior to signing a Legal Service Contract, I would expect Mr. Khan or Mrs Fauveau-Ivanovic to travel to Freetown, for that purpose, under the provision of a Travel Authorisation to be issued by myself.

I understand that my response may well raise several questions on your part and I stand ready to discuss these issues further.

Best regards,



Sylvain Roy
A/Principal/Defender
Special Court for Sierra Leone

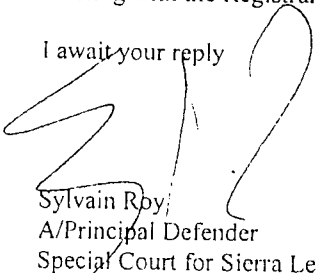
cc: Mr. Robin Vincent
Registrar, SCSL

1737

I would therefore request that you present, to the Defence Office, your invoice for legal work done, to this day, under your Provisional Assignment. Payment of said invoice will be made in due course, once your invoice has been reviewed and approved.

As to your request for a meeting between the Registrar, Mr. Brima, you and myself, please note that the Registrar will only be back in Freetown on 4 January, while I will be on leave with my family from 18 December until 19 January. My absence from Freetown should not deter you from seeking a meeting with the Registrar, once he has returned.

I await your reply



Sylvain Rby
A/Principal Defender
Special Court for Sierra Leone

cc: Mr. Robin Vincent
Registrar, SCSL

1738



SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)

UN Intermission 178 7000 or 178 (+Ext) FAX: +232 22 297001 or UN Intermission: 178 7001

12 December 2003

Mr. Terrence Terry
Barrister
Marong House, 4 th floor
11 Charlotte Street
Freetown, Sierra Leone

RE: Prosecutor vs Alex Tamba Brima aka Tamba Alex Brima

Subject: Legal Service Contract

Sir,

I hereby acknowledge having received your letter of 11 December 2003, in reply to my letter of the same day and earlier exchange of correspondences, in November 2003, this in the context of our discussions towards the signing of a Legal Service Contract, to provide for the legal representation of Mr. Brima before the Special Court for Sierra Leone.

I do not intend to respond to the insults, some of racial nature, nor to the unfounded accusations made against me or the threats you have proffered towards me but, as you requested, want to inform you of my decision concerning your appointment under a Legal Service Contract.

In no uncertain terms, and given your position, your responses to my requests and statement by yourself that this is your final position, I am not prepared to enter into a Legal Service Contract with you, this based on the following reasons:

- You are not willing to have the issue of your health status clarified and, therefore, I can not ensure that you will remain available to continue to represent Mr. Brima to the finality of the proceedings before the Special Court, this in accordance with Article 13 (A) of the Directive on the Assignment of Counsel.
- You continue to refuse to follow the procedure indicated in Article 14 (C) of the Directive on the Assignment of Counsel, regarding representing more than one defendant before the Special Court.

Given these facts, I hereby inform you that, in accordance with Article 16 (C) of the Directive on the Assignment of Counsel, I am withdrawing your Provisional Assignment to represent Mr. Brima under the Legal Assistance program of the Special Court.

Since Mr. Brima has the right to choose his own Counsel, he can decide to continue having you as his Counsel but, this will not be under the auspices of the Legal Assistance program provided by the Special Court. You will have to be retained privately.



1739

SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +39 0831 257000 or +232 22 297000 or +1 212 963 9915 Ext:178 7000

FAX: +39 0831 257001 or +232 22 297001 or +1 212 963 9915 Ext: 178 7001

DIRECTIVE ON THE ASSIGNMENT OF COUNSEL

PREAMBLE

The Registrar, in consultation with the President of the Special Court for Sierra Leone,

Considering the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone signed in Freetown on 16 January 2002 and the Statute of the Special Court for Sierra Leone annexed to that Agreement and, in particular, the rights guaranteed all individuals appearing before the Special Court for Sierra Leone under Article 17 of the Statute of the Special Court for Sierra Leone, including the right to Counsel, and the rights of a suspected or accused person or detainee under international law; and

Considering the Rules of Procedure and Evidence of the Special Court for Sierra Leone adopted pursuant to Article 14 of the Statute of the Special Court for Sierra Leone on 7 March 2003, and as subsequently amended, and in particular Rules 44, 45, 45 *bis* and 46;

Issues this Directive laying down the conditions and arrangements for the Assignment of Counsel to an Accused or Suspect.

PART I: BASIC PRINCIPLES

Article 1: Use of Terms

(A) For the purposes of this Directive the following terms are defined as:

- Accused:** Any individual against whom an indictment of the Special Court for Sierra Leone has been confirmed in accordance with Rule 47 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
- Agreement:** The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone signed in Freetown on 16 January 2002.
- Assigned Counsel:** Counsel appointed under Rule 45 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and engaged, in accordance with this Directive, to provide legal services to a Suspect or Accused before the Special Court for Sierra Leone, either by virtue of having been provisionally assigned to a Suspect or Accused or by virtue of having entered into a Legal Services Contract with the Principal Defender.

Contract Specification:	The DOSCSL Contract Specification as issued by the Defence Office.
Contracting Counsel:	Counsel qualified under Rule 45 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, engaged under a Legal Services Contract with the Principal Defender and responsible for supervising the provision of all services, to a Suspect or Accused, by the Defence Team.
Counsel:	An individual licensed or otherwise permitted to practice law in any State, as defined in Rule 44 or 45 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
Defence Office:	The office set up by the Registrar of the Special Court for Sierra Leone pursuant to Rule 45 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone responsible for ensuring the rights of Suspects and Accused.
Defence Team:	The individuals providing services to a Suspect or Accused in accordance with a Provisional Assignment Agreement or Legal Services Contract described in Article 16 of this Directive.
Legal Services Contract:	The agreement between Contracting Counsel and the Principal Defender for the representation of a Suspect or Accused before the Special Court for Sierra Leone outlined in Article 16 of this Directive.
List of Qualified Counsel:	The list contemplated by Rule 45(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and kept by the Principal Defender for the purposes of assigning counsel to Suspects or Accused.
President:	The President of the Special Court for Sierra Leone elected pursuant to Article 12(3) of the Statute of the Special Court for Sierra Leone and exercising the functions set out in Part III, Section 2 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
Principal Defender:	The head of the Defence Office of the Registry described in Rule 45 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
Provisional Assignment period:	The period after the assignment of Counsel to a Suspect or Accused in accordance with this Directive and before agreement to the Legal Services Contract between the Contracting Counsel for the Suspect or Accused and the Principal Defender.
Provisional Assignment Agreement:	The agreement between Assigned Counsel and the Principal Defender for the representation of a Suspect or Accused during provisional assignment.
Registrar:	The head of the Registry of the Special Court for Sierra Leone as set out in Article 16 of the Statute of the Special Court for Sierra Leone and exercising the functions set out in Part III, Section 5 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

- Rules:** The Rules of Procedure and Evidence of the Special Court for Sierra Leone as approved by the Special Court for Sierra Leone at its first Plenary Session on 7 March 2003 and as subsequently amended.
- Special Court:** The Special Court for Sierra Leone established by the Agreement between the United Nations and the Government of Sierra Leone on 16 January 2002 and the Special Court Agreement Ratification Act, 2002.
- Statute:** The Statute of the Special Court for Sierra Leone as amended.
- Suspect:** Any individual held under the authority of Rules 40 or 40 *bis* of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

- (B) The masculine shall include the feminine and the singular the plural and vice-versa.

Article 2: Right to Counsel

- (A) Any person detained on the authority of the Special Court has the right to Counsel, in terms conclusively defined in Article 17 (4) (d) of the Statute.
- (B) All references in this Directive to Suspects or Accused shall also be understood to apply to any persons detained on the authority of the Special Court.

Article 3: Right to Counsel if indigent

If a Suspect or Accused cannot engage Counsel by his own means and he wishes to be represented by Counsel, he shall be assigned a Counsel in accordance with this Directive, if the interest of justice so require.

Article 4: Indigence and partial indigence

- (A) A person shall be considered to be indigent if he does not have the means to engage Counsel of his choice to represent him at proceedings before the Special Court.
- (B) A person shall be considered to be partially indigent if he does not have sufficient means to engage Counsel of his choice to represent him at proceedings before the Special Court but has means to contribute to the payment of Counsel for such representation.

PART II: PROCEDURE FOR THE ASSIGNMENT OF COUNSEL

Article 5: Request for assignment of Counsel

Subject to the provisions of Article 14 of this Directive, a Suspect or Accused who wishes to be assigned a Counsel shall make a request to the Defence Office by means of the appropriate form established by the Principal Defender in consultation with the Registrar. A request shall be lodged with the Defence Office, or transmitted to it, by the Suspect or Accused himself or by a person authorised by him to do so on his behalf.

Article 6: Applicant's financial situation

(A) A Suspect or Accused who requests the assignment of Counsel, must fulfil the requirement of indigence or partial indigence, defined in Article 4 of this Directive, in order to have Counsel assigned to him.

(B) In order to determine whether the Suspect or Accused is indigent or partially indigent, there shall be taken into account means of all kinds of which he has direct or indirect enjoyment or freely disposes, including any family or social benefits to which he may be entitled, and irrespective of where in the world such assets may be situated. In assessing such means, account shall also be taken of the means of the spouse of a Suspect or Accused, as well as those of persons with whom he habitually resides.

(C) Account shall also be taken of the apparent lifestyle of a Suspect or Accused, and of his enjoyment of any property, movable or immovable, and whether or not he derives income from it.

Article 7: Declaration of means

(A) For the purposes of Article 6 of this Directive, the Principal Defender shall invite a Suspect or Accused requesting the assignment of Counsel to make a declaration of his means on the appropriate form established by the Principal Defender in consultation with the Registrar.

(B) Any information about a Suspect or Accused's financial situation shall be kept confidential by the Principal Defender and members of the Defence Office but the foregoing shall not prevent the Principal Defender or individuals acting under his authority from investigating the declaration of means or gathering information about the Suspect or Accused for the purposes of Article 9 of this Directive.

Article 8: Investigation

For the purpose of establishing whether the Suspect or Accused satisfies the requisite conditions for assignment of Counsel, the Principal Defender may request the gathering of any information, hear the Suspect or Accused, consider any representation, or request the production of any documents, in whatever form, likely to support the request.

Article 9: Decision by the Principal Defender

(A) After examining the declaration of means laid down in Article 7 and relevant information obtained pursuant to Article 8 of this Directive, the Principal Defender shall determine if the Suspect or Accused is indigent, partially indigent or not, and shall decide:

- (i) in the case of an indigent Suspect or Accused but without prejudice to Article 23 of this Directive, either provisionally to assign Counsel and, after consultation with the Suspect or Accused, choose for this purpose a name from the List of Qualified Counsel; or

- (ii) in the case of a partially indigent Accused or Suspect but without prejudice to Article 23 of this Directive, provisionally to assign Counsel upon the Accused or Suspect paying such amount at such times as the Principal Defender may demand from the Accused or Suspect in trust for the payment of Counsel and, after consultation with the Suspect or Accused, to choose for this purpose a name from the List of Qualified Counsel in which case the decision shall be accompanied by a written explanation giving reasons for the demand; or
 - (iii) not to grant the request for assignment of Counsel, in which case the decision shall be accompanied by a written explanation giving reasons therefore.
- (B) To ensure that the right to Counsel is not affected while the Principal Defender examines the declaration of means laid down in Article 7 and the information obtained pursuant to Article 8 of this Directive, the Principal Defender may assign Counsel provisionally in accordance with Article 16 for a period not exceeding 90 days.

Article 10: Assignment of Counsel in the interests of justice

Without prejudice to Article 23 of this Directive, the Principal Defender may assign Counsel to a Suspect or Accused in the interests of justice in accordance with Rule 45(C) of the Rules regardless of whether a Suspect or Accused has complied with Articles 5 to 9 of this Directive.

Article 11: Notification of the decision

- (A) The Principal Defender shall notify the Suspect or Accused of his decision whether or not provisionally to assign Counsel or to demand payment in accordance with Article 9(A)(ii) of this Directive.
- (B) The Principal Defender shall also notify Counsel of his decision.

Article 12: Remedy against a decision not to assign Counsel

- (A) The Suspect or Accused whose request for assignment of counsel has been denied or who is subject to a demand under Article 9(A)(ii) of this Directive may bring a Preliminary Motion before the appropriate Chamber objecting to the Principal Defender's decision in accordance with Rule 72(B)(iv) of the Rules.
- (B) The Suspect or Accused whose request for assignment of Counsel has been denied or who is subject to a demand under Article 9(A)(ii) of this Directive shall be informed of his right to seek review of the decision of the Principal Defender and, should he seek such review, shall be assisted by Duty Counsel in pursuing such review.

Article 13: Placement of Counsel on the List of Qualified Counsel

- (A) Any person may be assigned as Counsel if his name appears on the list maintained by the Principal Defender in accordance with Rule 45(C) and the Principal Defender has determined he is and remains available to deal with the case of a particular Accused or Suspect.

1744

(B) To be eligible to be included by the Principal Defender in the List of Qualified Counsel an individual must have the following qualifications:

- (i) speak fluent English;
- (ii) be admitted to the practice of law in any State;
- (iii) have at least 7 years of experience as Counsel;
- (iv) possess reasonable experience in criminal law, international law, international humanitarian law or international human rights law;
- (v) have indicated their willingness and availability to be assigned by the Special Court to an Accused or Suspect; and
- (vi) have no record of professional or other misconduct, which may include criminal convictions.

(C) Before being considered by the Principal Defender for inclusion on the List of Qualified Counsel applicant Counsel shall file:

- (i) A duly completed Application Form for Counsel wishing to be considered by the Registrar for assignment to indigent Suspects or Accused;
- (ii) Proof of current qualification to practice law in any State which shall include copies of a certificate of registration with a bar association, a certificate of admission to the practice of law, a certificate of current practice and good standing and the highest law degree obtained;
- (iii) A detailed *curriculum vitae* showing qualification for the List of Qualified Counsel in accordance with (B) above and setting out, among other things, all degrees awarded and all criminal, human rights and international law experience;
- (iv) The names and addresses of two referees, including contact information for the referees;
- (v) A photocopy of passport or other valid identification;
- (vi) A letter setting out applicant Counsel's schedule for eighteen months from the date of application and an undertaking by the applicant that he will make himself available for trial whenever called upon by the court subject to,
 - a) a severe illness of a temporary nature;
 - b) attendance of obligations related to the death of close family member;
- (vii) Upon request, a copy of the code(s) of professional conduct from the jurisdiction(s) in which the applicant Counsel is admitted to practice;

(D) The Principal Defender may verify Counsel's qualification for the List of Qualified Counsel by any means including, but not limited to,

- (i) seeking original or certified copies of documents submitted;
- (ii) consulting referees provided by the applicant Counsel;
- (iii) interviewing the applicant Counsel; or
- (iv) demanding such other information from the applicant Counsel or other parties as the Principal Defender deems necessary to assess Counsel's qualification for the List of Qualified Counsel.

(E) Where the Principal Defender refuses to place the name of an applicant Counsel on the List of Qualified Counsel, or removes the name of Counsel from the List of Qualified Counsel, the Principal Defender shall notify the applicant Counsel of his decision in writing and briefly set out his reasons for refusing to include the name of the applicant Counsel on the list, or for removing the name of Counsel from the list.

(F) Where the Principal Defender refuses to place the name of the applicant Counsel on the List of Qualified Counsel, or removes the name of Counsel from the List of Qualified Counsel, the concerned Counsel may seek review, by the President, of the Principal Defender's refusal. An application for review shall be in writing and the Principal Defender shall be given the opportunity to respond to it in writing.

Article 14: Scope of the assignment

(A) The scope of the assignment of Counsel shall be set out in the Provisional Assignment Agreement or in the Legal Services Contract.

(B) Subject to the provisions of Article 3 of this Directive, each indigent or partially indigent Suspect or Accused shall be entitled to have Counsel assigned to him.

(C) No Counsel shall be assigned to more than one Suspect or Accused unless the concerned Suspects or Accused have received independent legal advice and have waived their right to be represented by separate Counsel. Any application by Counsel to be assigned to more than one Suspect or Accused must be made, through the Principal Defender, to the Presiding Judge of the appropriate Chamber.

(D) The Provisional Assignment Agreement or the Legal Services Contract may provide for the appointment, as part of the Defence Team, of other Counsel to assist the Assigned Counsel in appearances before the Special Court.

(E) Under the authority of Assigned Counsel, who has primary responsibility for the Defence, other Counsel may deal with any appearance before the Special Court. The Assigned Counsel shall sign all the documents submitted to the Special Court unless he authorises other Counsel, in writing, to sign on his behalf.

Article 15: Applicable Law

In the performance of their duties Counsel and other members of the Defence Team shall be subject to the relevant provisions of the Statute, of the Agreement, of the Rules, of any other rules, regulations or Codes of Conduct adopted by the Special Court, of the Host Country Agreement, of this Directive and of the codes of practice and ethics governing their profession.

PART III: PAYMENT OF COUNSEL

Article 16: Provisional Assignment Agreement and Legal Services Contract

(A) No Assigned Counsel or any other member of the Defence Team shall be paid for any service to a Suspect or Accused or expense incurred in the course of representing a Suspect or Accused except in accordance with a Provisional Assignment Agreement, referred to in (B) below, a Legal Services Contract and the Contract Specification, referred to in (C) below, or by the written authorisation of the Principal Defender in consultation with the Registrar.

(B) Upon assignment, the Assigned Counsel and the Principal Defender shall agree upon the terms of payment for the period of the Counsel's provisional assignment and the length of that provisional assignment. Provisional assignment shall cease upon agreement of a Legal Services Contract.

(C) The Assigned Counsel and the Principal Defender shall agree upon the terms of the Legal Services Contract as soon as practicable after assignment. If the Assigned Counsel and the Principal Defender cannot agree upon the terms of a Legal Services Contract within 90 days of provisional assignment of Counsel, the provisional assignment may be withdrawn by the Principal Defender and other Counsel shall be assigned to the Suspect or Accused.

(D) The Legal Services Contract shall be in accordance with the Contract Specification and shall include agreement as to

- (i) the members of the Defence Team;
- (ii) the amounts to be paid to specified members of the Defence Team for their work for the Accused or Suspect;
- (iii) any consultation with experts necessary for the defence of the Suspect or Accused and the amount authorized for the retainer of such expert or experts by the Defence Team;
- (iv) any other categories of expenses, including travel costs or Daily Living/Subsistence Allowances (DLA/DSA), which the Principal Defender will pay the Assigned Counsel or other members of the Defence Team;
- (v) tasks which the Defence Team must complete in order to represent the Suspect or Accused and the dates by which such tasks must be completed;
- (vi) the period during which the Legal Services Contract shall have effect; and
- (vii) when payments under the Legal Services Contract or for travel expenses and DLA/DSA shall be made.

(E) The Legal Services Contract may include agreement as to any other aspect of the representation of an Accused or Suspect by the Assigned Counsel or other members of the Defence Team.

(F) The Principal Defender may require that the membership of the Defence Team include individuals with qualifications the Principal Defender deems necessary for the competent defence of a particular Suspect or Accused.

Article 17: Statement of remuneration

(A) Subject to the provisions of Article 23 of this Directive and the Contract Specification, payment according to a Provisional Assignment Agreement shall be made in accordance with the Agreement or the Decision on the Provisional Assignment of Counsel and as soon as practicable. Payment under the Legal Services Contract, including travel expenses and DLA/DSA, shall be made in accordance with the terms set out in this Directive, the Legal Services Contract and the Contract Specification.

(B) When required by the Principal Defender, the Contract Specification or the Legal Services Contract, the Assigned Counsel and other members of the Defence Team shall provide as much information as possible, including the nature of the services rendered; and, as appropriate, the relation between these services and the case pending before the Special Court.

Article 18: Provisional payment

When the engagement of Assigned Counsel outside his place of residence lasts more than one week, the Principal Defender may authorize an advanced payment of the Daily Living/Subsistence Allowance (DLA/DSA), set out in Article 20 of this Directive .

Article 19: Sharing of payment

When, during a Provisional Assignment period, an Assigned Counsel is replaced in the same capacity by another Counsel, the remuneration shall be paid to each of them according to work completed by each to the satisfaction of the Principal Defender.

Article 20: Travel Expenses

(A) Travel expenses shall be included within the expenses set out in the Legal Services Contract, but shall be separately itemised.

(B) Air travel expenses shall be reimbursed for a member of the Defence Team who does not usually reside in city where the particular stage of the procedure is being conducted, on the basis of one economy or equivalent class round trip air ticket by the shortest route or within limits laid down by the Principal Defender in consultation with the Registrar. Such reimbursement will be made on presentation of a statement of travel expenses using the appropriate form established by the Principal Defender, accompanied by the original counterfoil of the ticket, as well as the original of the invoice and any receipt including receipt showing payment by credit card.

(C) Travel expenses shall be reimbursed to a member of the Defence Team residing in the territory of the country but not in the town where he is serving, on the basis of either first class public transportation tickets or fixed rates as established by the United Nations Schedule of Rates of Reimbursement for Travel by Private Motor Vehicle applicable to different groups of Countries and Territories, per kilometre travelled on the outward and return journeys by the shortest route. Such reimbursement will be made on presentation of a statement of travel expenses using the appropriate form established by the Principal Defender in consultation with the Registrar and supporting receipts.

(D) Notwithstanding paragraphs (A), (B) and (C), the Principal Defender shall assess, after consulting the Registrar and depending on the circumstances of the case, whether the Special Court, in the interests of justice and in order to ensure the full exercise of a Suspect or Accused's rights, is required to meet other travel expenses of a member of the Defence Team.

(E) Members of the Defence Team who do not usually reside in city where the particular stage of the procedure is being conducted shall be paid a Daily Living/Subsistence Allowance (DLA/DSA) based on the United Nations Schedule of Daily Subsistence Allowance Rates or the Daily Living Allowance Rate for Sierra Leone in force at the time when work was done. The Daily Living/Subsistence Allowance (DLA/DSA) shall be paid for each day that a member of the Defence Team spends in the city where the particular stage of the procedure is being conducted in accordance with the Legal Services Contract, the Contract Specification or with the prior written approval of the Principal Defender.

(F) Travel expenses, and Daily Living/Subsistence Allowance payable under this Article, shall only be reimbursed when authorisation for travel by member of the Defence Team has been sought by the Assigned Counsel and authorised by the Principal Defender.

Article 21: Approval of remunerations and expenses

All sums payable to members of the Defence Team under the provisions of the Legal Services Contract, this Directive or the Contract Specification shall be assessed by the Defence Office but paid by the Finance Section of the Registry.

Article 22: Settlement of disputes

Any dispute between the Principal Defender and Assigned Counsel or Contracting Counsel, arising out of the interpretation or application of the Provisional Assignment Agreement or Legal Service Contract, which is not settled by negotiation shall be submitted to arbitration by a single arbitrator agreed to by both parties. Should the parties be unable to agree on a single arbitrator within thirty days of the request for arbitration, then each party shall proceed to appoint one arbitrator and the two arbitrators thus appointed shall agree on a third. Failing such agreement, either party may request the appointment of the third arbitrator by the President of the Special Court. The decision rendered in the arbitration, including payment for the costs of the arbitration, shall constitute final adjudication of the dispute.

PART IV: WITHDRAWAL AND REPLACEMENT OF COUNSEL

Article 23: Withdrawal of assignment when the Suspect or Accused is no longer indigent

- (A) Assignment of Counsel may be withdrawn by the Principal Defender if, after his decision, the Suspect or Accused comes into means which, if available at the time the request in Article 5 of this Directive was made, would have caused the Principal Defender not to grant the request.
- (B) Assignment of Counsel may be withdrawn if information obtained according to Article 8 of this Directive establishes that the Suspect or Accused has sufficient means to allow him to pay for the cost of his defence.
- (C) Where the Principal Defender receives information that establishes that an Accused or Suspect has become partially indigent he may demand that individual pay such amount as he deems necessary to the Registrar in trust for the payment of Counsel.
- (D) The decision to withdraw the assignment, or demand payment in the case of a partially indigent Suspect or Accused, shall be accompanied by a written explanation giving reasons for such decision and the Suspect or Accused and the Assigned Counsel shall be so notified. Such withdrawal or demand shall take effect from the date of receipt of the notification.
- (E) After the notification of the withdrawal of the assignment of Counsel, all the costs and expenses incurred by the representation of the Suspect or Accused shall cease to be met by the Special Court.
- (F) Where a Suspect or Accused who has become partially indigent fails to comply with the demand made pursuant to (C) above the assignment of Counsel may be withdrawn until such time as the Suspect or Accused complies with the demand.
- (G) The provisions of Article 12 of this Directive shall apply to decisions made under this Article, as to withdrawing the assignment of Counsel or, in the case of a partially indigent Suspect or Accused, demanding payment to the Registrar.

Article 24: Withdrawal of assignment in other situations

- (A) The Principal Defender may:
- (i) in exceptional circumstances, at the request of the Suspect or Accused, or his Assigned Counsel, withdraw the assignment of Counsel;
 - (ii) in exceptional circumstances, at the request of the Assigned Counsel withdraw the nomination of other Counsel in the Defence Team;
- (B) The Principal Defender shall withdraw the assignment of Counsel or nomination of other Counsel in the Defence Team:
- (i) in the case of a serious violation of the Code of Conduct;

- (ii) upon the decision by a Chamber to refuse audience to Counsel for misconduct under Rule 46 of the Rules;
 - (iii) where the name of the Assigned Counsel has been removed from the list kept by the Principal Defender under Rule 45(C) and Article 13 of this Directive.
- (C) The Accused, the Counsel concerned and his respective professional or governing body shall be notified of the withdrawal.
- (D) The Principal Defender shall immediately assign a new Counsel to the Suspect or Accused, and where appropriate, authorise the nomination of other Counsel in the Defence Team. The Legal Service Contract resulting from the assignment of a new Counsel shall be limited to funds remaining in the allocation made by the Principal Defender for the defence of the Suspect or Accused.
- (E) Where a request for withdrawal, made pursuant to paragraph (A), has been denied, the person making the request may seek review of the decision of the Principal Defender by the presiding Judge of the appropriate Chamber.
- (F) Where the assignment of Counsel or nomination of other Counsel in the Defence Team is withdrawn by the Principal Defender, pursuant to paragraph (B) (i) and (iii), Counsel affected by withdrawal may seek review of the decision of the Principal Defender by the presiding Judge of the appropriate Chamber.

Article 25: Replacement

- (A) Where the assignment of Counsel is withdrawn by the Principal Defender or where the services of Assigned Counsel are discontinued, Duty Counsel of the Defence Office, including the Principal Defender, shall give the Suspect or Accused legal assistance until a new Counsel is assigned unless the Suspect or Accused waives the right to such assistance in which case he shall represent himself until a new Counsel is assigned.
- (B) Where the assignment of Counsel is withdrawn by the Principal Defender, or where the services of Assigned Counsel are discontinued, said Counsel must deliver within 15 days of withdrawal all the original documents in the file to the Counsel who succeeds him or to the Defence Office who will then forward the materials to new Assigned Counsel or, where the Suspect or Accused has chosen to represent himself, to the Suspect or Accused.
- (C) In the case of the withdrawal of the nomination of other Counsel in the Defence Team, such delivery of documents shall be made to the Assigned Counsel within 7 days.
- (D) Failure by Counsel to comply with the requirement of this article may result in withholding of payment, notification to the professional body regulating the conduct of Counsel in the State in which he is qualified to practice law or such other action as the Principal Defender may deem appropriate.
- (E) If Assigned Counsel is temporarily not available for any appearance on behalf of his client before the Special Court, other Counsel in the Defence Team shall assume responsibility for the appearance and carriage of the client's case for such time as Assigned Counsel is unavailable. In exceptional circumstances, if other Counsel in the Defence Team is also

unavailable for the appearance, Duty Counsel may appear to advise the Suspect or Accused upon receiving instructions from the Assigned Counsel.

PART V: FACILITIES

Article 26: Provision of Facilities

(A) Assigned Counsel and members of the Defence Team who do not have professional facilities close to the seat of the Special Court shall be provided with reasonable facilities and equipment such as access to photocopiers, computer equipment, various types of office equipment, and telephone lines.

(B) At the seat of the Special Court, Assigned Counsel and members of the Defence Team may use the libraries and the documentation centre available at the Special Court.

(C) Assigned Counsel shall be entitled to request the assistance of the Defence Office for the any motion or other matter, and the Defence Office, if it can provide such assistance, must ensure that it does so without creating any conflict of interest. between the Suspect or Accused and Defence Office personnel.

(D) Assigned Counsel shall make all reasonable efforts to use the personnel and facilities of the Defence Office in the preparation of a Suspect or Accused's case.

(E) The Principal Defender may refuse to approve a claim for remuneration or portion thereof where Assigned Counsel fails to make such reasonable efforts to use the personnel and facilities of the Defence Office in the preparation referred to in (C).

Article 27: Amendment of the Directive

(A) This Directive may be amended by the Registrar in consultation with the President of the Special Court. The Registrar may consult any other body or individual in the course of considering amendments to this Directive.

(B) An amendment shall enter into force upon adoption, but without prejudice to the rights of the Accused in any pending case.

Article 28: Entry into Force

This Directive shall enter into force on 3 October 2003.

ICTR-96-10-T
18.6.97
(363-358)

363

1752

UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBRE I - CHAMBER I

OR:FR

Before: Judge Laity Kama, Presiding Judge
Judge Yakov A. Ostrovsky
Judge Lennart Aspegren

Registry: Mr. Frederik Harhoff

Decision of: 11 June 1997

THE PROSECUTOR
VERSUS
GÉRARD NTAKIRUTIMANA

Case No. ICTR-96-10-T
Case No. ICTR-96-17-T

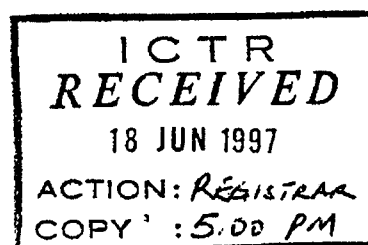
**DECISION ON THE MOTIONS OF THE ACCUSED
FOR REPLACEMENT OF ASSIGNED COUNSEL /Corr.**

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Elizabeth Ann Farr
Ms. Brenda Sue Thornton

Counsel for the Accused:

Mr. N. K. Loomu-Ojare



THE TRIBUNAL,

SITTING as Trial Chamber I of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Laïty Kama as Presiding Judge, Judge Yakov Ostrovsky and Judge Lennart Aspegren;

WHEREAS, through numerous letters addressed to the President of the Tribunal, the accused Gérard Ntakirutimana is requesting that the counsel assigned to him by the Registrar on 10 March 1997, in the person of Mr. N. K. Loomu-Ojare of the Tanganyika Bar Association, be replaced on the grounds of having lost confidence in said counsel, and subsequently that the Registrar assign to him a particular counsel of his choice;

WHEREAS, on this last point, he cites the provisions of Article 20 (4) of the Statute of the Tribunal (the "Statute"), which supposedly entitles him, though indigent, to freely choose his counsel, and submits that the Registrar should never have imposed Mr. Loomu-Ojare on him;

WHEREAS it should be recalled that this is the second request made by the accused for replacement of counsel;

WHEREAS in fact, during a hearing on this matter on 4 March 1997, taking into account the crisis situation that had developed between the accused Gérard Ntakirutimana and his counsel at the time, Ms. Ghislaine Moïse-Bazie of the Côte d'Ivoire Bar Association, who had asked to be withdrawn from the case, the Tribunal considered that there existed, on that occasion, an exceptional case as a condition for the change of assigned counsel, as required by Article 19 (D) of the Directive on Assignment of Defence Counsel (the "Directive"), and, for that reason, decided to withdraw Ms. Moïse-Bazie and instructed the Registrar to immediately assign a new counsel to the accused;

WHEREAS it was therefore at the instruction of the Tribunal that the Registrar assigned Mr. N. K. Loomu-Ojare to replace Ms. Moïse-Bazie;

WHEREAS it is, however, worth pointing out that it was at a time when the accused was fearing his imminent arrest by the Côte d'Ivoire authorities, at the request of the Prosecutor of the Tribunal, that he instructed Ms. Moïse-Bazie, to represent him at his own expense, particularly during his detention in Côte d'Ivoire, Ms. Moïse-Bazie having even declared that she had received the sum of CFA 500,000 in legal fees from the accused and his family;

WHEREAS it was later that Ms. Moïse-Bazie requested that her name be placed on the Registrar's list of counsel eligible for assignment and that request was granted;

WHEREAS it would therefore be inaccurate to state that the accused Mr. Gérard Ntakirutimana had chosen his counsel from the list previously established by the Registrar, since, for practical reasons, the Registrar had limited himself to confirming that Ms. Moïse-Bazie had been instructed by the accused, who in the meantime had declared himself to be indigent;

1754

TAKING INTO ACCOUNT the rights of the accused, as set forth in Article 14(3)(d) of the International Covenant on Civil and Political Rights (the "Covenant"), in Article 20(4)(d) of the Statute, in Article 7(1)(c) of the African Charter on Human and People's Rights (the "African Charter") and in Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention");

AFTER HAVING DELIBERATED,

WHEREAS the Tribunal considers that the correspondence and oral arguments of the accused Gérard Ntakirutimana raise two important issues:

- firstly, the existence of an exceptional case as a condition for the replacement of counsel, upon the decision of a Chamber, at the request of an accused; and
- secondly, consequences of indigence in relation to the choice of counsel.

A. On the replacement of Mr. Loomu-Ojare upon the decision of the Chamber

WHEREAS, in accordance with Article 19 (D) of the Directive, only in exceptional cases may the assigned counsel be replaced, upon a decision by a Chamber, at the request of the accused;

WHEREAS, in support of his request for the replacement of his current counsel, the accused essentially claimed, at the hearing convened on 8 May 1997 to that end, that he no longer had confidence in said counsel, solely on the ground that Mr. Loomu-Ojare was a Tanzanian national and that the United Republic of Tanzania maintained special ties with the present Government of the Republic of Rwanda;

WHEREAS, while objecting to the allegations made by the accused, Mr. Loomu-Ojare asserted, at the same hearing, that, as a lawyer and in accordance with the professional code of ethics of his Bar, he was totally independent of the Tanzanian Government, and was committed to the defence of Gérard Ntakirutimana;

WHEREAS with regard to Mr. Loomu-Ojare, the Tribunal has had occasion to confirm for itself that he has always conscientiously striven to provide effective legal representation for the accused;

WHEREAS, consequently, the Tribunal is not far from believing that the accused's request for change of counsel is motivated solely by his desire to be assigned a particular counsel, and not because of any loss of confidence vis-à-vis Mr. Loomu-Ojare;

WHEREAS an exceptional case, as required by Article 19 of the Directive, to permit a change of counsel therefore does not exist, and thence the accused's request should not be granted;

B. Consequences of indigence in relation to the choice of counsel

WHEREAS, at the above-mentioned hearing of 8 May 1997, the accused Gérard Ntakirutimana, on the basis of the provisions of Article 20(4) of the Statute, submitted that any accused, even if indigent, has the right to choose his own counsel and cannot have one imposed upon him, as the Registrar did when he assigned Mr. Loomu-Ojare to him without his prior accord;

WHEREAS Article 20(4) of the Statute, which does, actually, simply reiterate Article 14 of the Covenant, stipulates:

“In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(...)

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(...)

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(...)”

WHEREAS it seems that the formula used for the indigent accused, which is the right “to have legal assistance assigned to [him], ... , and without payment by [him] in any such case if [he] does not have sufficient means to pay for it”, involves a party other than the accused in the choice of assigned Defence counsel;

WHEREAS, according to Rule 45 of the Rules of Procedure and Evidence (the “Rules”) and Article 13 of the Directive, it is the Registrar who is vested with such power;

WHEREAS, this being the case, the question is whether, in so doing, the Registrar is necessarily bound to consider the choice made by the indigent accused;

WHEREAS, on this question, the Tribunal points out that Article 20(4) of the Statute outlines two situations:

- the first situation requires that, where the accused has the means to pay for counsel, the accused may choose whomever he or she wishes;
- the second situation is precisely that of the accused Gerard Ntakirutimana who declared himself to be indigent and was so recognized by the Registrar; in this case, it is for the Registrar to assign him counsel who will be remunerated from the funds allocated by the Tribunal for this purpose;

WHEREAS the Registrar shall assign him a counsel whose name is on the list of counsel eligible for assignment, as drawn up by his office, pursuant to Rule 45 of the Rules and Article 13 of the Directive;

WHEREAS this means that the Registrar cannot be expected to fulfill another obligation, that would be to always follow the wishes of the indigent accused with regard to the choice of counsel, furthermore, while in the present case, the accused Gerard Ntakirutimana had requested, when the Tribunal heard his request on 8 May 1997, that the Registrar assign him a particular counsel whose name was not even on the Registrar’s list;

WHEREAS the Tribunal reads Article 20(4) in the same manner as the Human Rights Committee, the supervisory and interpretation body of the Covenant, established in accordance with Article 28, when it reads Article 14(3)(d) of the said Covenant;

WHEREAS, indeed, in several of its findings, the Human Rights Committee has had to reiterate that the said Article 14 does not entitle the accused to choose Defence counsel assigned to him without payment by him;

WHEREAS, thus, in the cases Little v. Jamaica, [Communication No. 330/1988 UN Doc. CCPR/C/50/D330/1988 (1994)] and Osbourne Wright and Eric Harvey v. Jamaica [Communication No. 459/1991, UN Doc. CCPR/C/55/D/459/1991 (1995)] the Human Rights Committee declared, on the one hand, that Article 14(3)(d) of the Covenant did not entitle the accused to choose counsel provided to him or her without payment by him or her and, on the other, that the counsel must ensure the effective representation of the accused in the interests of justice;

WHEREAS, furthermore, the European Commission on Human Rights also arrived at such an interpretation and adopted a similar position with regard to Article 6(3)(c) of the European Convention, by declaring, in the case F. v. Swiss Confederation (Decision of 9 May 1989, Application No. 12152/86) that Article 6(3)(c) of the European Convention did not guarantee the accused the right to choose the assigned counsel, nor even the right to be consulted on this matter by the court, which must nevertheless ensure that the Defence of the accused is effective;

WHEREAS the European Court of Human Rights, on its part, in the case Croissant v. Germany [62/1991/314/385 (1992)] confirmed the right of an accused to be defended by a counsel of his or her own choosing, while emphasizing that certain limitations apply where free legal representation is concerned; the right of an accused to be defended by counsel of his or her own choosing can therefore not be considered *per se* to be absolute; and while affirming that national courts must certainly take into account the preferences of the accused, such preferences may not be followed when there are relevant and sufficient grounds for maintaining that it was necessary in the interests of justice;

WHEREAS, the principle having thus been set out that the final decision for the assignment of counsel, and of the choice of such counsel rests with the Registrar, the Tribunal submits nonetheless that, mindful to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial, and convinced of the importance to adopt a progressive practice in this area, an indigent accused should be offered the possibility of designating the counsel of his or her choice from the list drawn up by the Registrar for this purpose, pursuant to Rule 47 of the Rules and Article 13 of the Directive, the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused.

FOR THESE REASONS

THE TRIBUNAL, by two votes to one,


DECLARES that, in this case, no exceptional case exists to justify the replacement of Mr. N. K. Loomu-Ojare, as requested by the accused Gérard Ntakirutimana;

DECIDES, consequently, not to grant the request made by the accused Gérard Ntakirutimana for Mr. Loomu-Ojare to be replaced;

DECLARES that Article 20(4) of the Statute cannot be interpreted as giving the indigent accused the absolute right to be assigned the legal representation of his or her choice;

DECLARES, nonetheless that, mindful to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial, and convinced of the importance to adopt a progressive practice in this area, an indigent accused should be offered the possibility of designating the counsel of his or her choice from the list drawn up by the Registrar for this purpose, the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused.

Arusha, 11 June 1997


Laity Kama
Presiding Judge


Lennart Aspegren
Judge

Judge Yakov Ostrovsky's separate opinion is attached to the Decision of Trial Chamber I.

(Seal of the Tribunal)



1758

TRIAL CHAMBERS

The Prosecutor v. Dusko Knezevic- Case No. IT-95-4-PT, IT-95-8/1-PT

"Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel"

• 6 September 2002

• Trial Chamber III (Judges May [Presiding], Robinson and Kwon)

The right to a counsel of the accused's own choosing - The power of a Trial Chamber to review a Registrar's decision on assignment of counsel - Article 13(B) of the Directive on Assignment of Counsel - Rule 54 of the Rules of Procedure and Evidence.

The power of a Trial Chamber to review a Registrar's decision on assignment of counsel: the power of a Trial Chamber to review a decision on assignment of counsel should only be used in exceptional cases. In the exercise of its power under Rule 54 to issue such orders as may be necessary for the conduct of the trial, the Trial Chamber is empowered to review the decision of the Registrar.

Procedural Background

· On 10 June 2002, the Registrar rejected the request of Dusko Knezevic ("the Accused") for the assignment of Mr. Miodrag Deretic. The Registrar's decision was based on the fact that as of 21 August 2001, Mr. Deretic was assigned as co-counsel to Mr. Zoran Zigic who was formerly charged in the same indictment as the Accused with crimes in the same location. The Registrar assigned Mr. Thomas Moran as Defence counsel to the Accused.

· On 24 June 2002, the Accused challenged the Decision of the Registrar of 10 June 2002 and requested that Mr. Drasko Zec be assigned as his counsel. The Registrar rejected this request on the ground that Mr. Zec and Mr. Deretic shared the same law office in Prijedor and that the professional relationship between both attorneys was not sufficiently clear, so as to ensure that a potential conflict of interest would not occur.

The Decision

The Trial Chamber denied the Application of the accused Knezevic challenging the decision by the Registrar of 10 June 2002.

The Reasoning

The right to a counsel of the accused's own choosing

The Trial Chamber affirmed that contrary to the submission of the Accused and Mr. Zec, "the right of indigent accused to counsel of his own choosing is not without limits" and that the decision for the assignment of counsel rests with the Registrar. This reaffirms the findings of the *Ntakirutimana* Decision,¹ whereby, unless it has reasonable and valid grounds not to grant the request, the Registrar must take the wishes of the accused into account.

1759

The Trial Chamber recalled that the Registrar has the primary responsibility for matters relating to qualification, appointment or assignment of counsel.²

The power of a Trial Chamber to review a Registrar's decision on assignment of counsel

Considering that matters relating to the assignment of counsel for an accused affect the conduct of a trial and that the Chamber has a statutory obligation to ensure the fair and expeditious conduct of proceedings with full respect for the rights of the accused, the Trial Chamber held that the body responsible for the assignment of counsel is the Registrar and therefore that the "power" of a Trial Chamber to review a decision to assign a counsel "should only be used in exceptional cases".³

The Trial Chamber found that the Registrar's decision not to appoint Mr. Zec as counsel to the Accused was justified. It considered that Mr. Zec's proposal (overheard in a non-privileged telephone conversation) that the Accused should appoint him as counsel in order to enable Mr. Deretic to act alongside him constituted improper conduct and would in effect "nullify the Registrar's decision not to appoint Mr. Deretic".

1. *Ntakirutimana*, ICTR-96-10-T, ICTR-96-17-T, Decision on the Motions of the Accused for Replacement of Assigned Counsel/Corr., 11 June 1997.

2. *Hadzihasanovic*, IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002, *Judicial Supplement No. 31 bis*.

3. In fact, "on further reflection", the Trial Chamber affirmed that "in the exercise of its power under Rule 54 to issue such orders as may be necessary for the conduct of the trial, the Trial Chamber is empowered to review the decision of the Registrar".



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1760

OR: ENG

TRIAL CHAMBER II

Before:

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

Registrar: Adama Dieng

Date: 22 June 2001

THE PROSECUTOR
v.
Pauline NYIRAMASUHUKO
And
Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

DECISION ON NTAHOBALI'S MOTION FOR WITHDRAWAL OF COUNSEL

The Office of the Prosecutor:

Sylvana Arbia
Japhet Mono
Jonathan Moses
Adesola Adeboyejo
Gregory Townsend
Manuel Bouwknecht

Counsel for Ntahobali:

René Saint-Léger
James Michael Bailey

Counsel for Nyiramasuhuko:

Nicole Bergevin
Guy Poupart

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

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

1761

BEING SEIZED of the "Requête en extrême urgence aux fins de retrait de la commission d'office des conseils Me St-Léger et de Me Michael Bailey", filed by Accused Ntahobali on 11 June 2001 (the "Motion");

CONSIDERING the "Prosecutor's Reply to Ntahobali's Motion to Remove Counsel" filed on 14 June 2001;

CONSIDERING the "Response to Arsène Shalom Ntahobali's Urgent Motion for Withdrawal of Counsel Me St- Leger and Me James Michael Bailey" filed by Counsel for Ntahobali on 14 June 2001;

NOTING the Registrar's "Decision to Reject Shalom Ntahobali's Request for Withdrawal of his Lead Counsel, Me René Saint-Léger", filed on 4 April 2001;

NOTING the President's "Decision on Review, in Accordance with Article 19(E) of the Directive on Assignment of Defence Counsel", filed on 4 June 2001;

HAVING HEARD the Parties on 15 June 2001;

NOTING that co-Accused Nyiramasuhuko and her Counsel were present during the said hearing;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), specifically Articles 19 and 20 of the Statute and Rules 73, 54 and 45(F) of the Rules;

SUBMISSIONS OF THE PARTIES

Accused Ntahobali

1. Ntahobali alleges that since his assignment as Lead Counsel on 7 February 2000, Saint Léger has shown lack of interest and lack of professionalism, and that, despite several warnings, his conduct has not improved and consequently, Ntahobali has definitely lost confidence in his Counsel and co-Counsel in January 2001.

2. The reasons for Ntahobali's withdrawal request with respect to both Counsel are, *inter alia*, the following:

2.1. Counsel have failed to hold consultations with him. For instance, they should not have filed the Motions for the suppression of custodial statements and for a separate trial. Ntahobali objected to the procedure followed in respect of the drafting and the filing of these Motions. Further, Ntahobali alleges that his Counsel have bluntly copied portions of Motions submitted by his co-Accused Nyiramasuhuko to support the claim of their lack of professionalism;

2.2. Counsel did not discuss with him the content of these Motions whereas the Accused does not have an enabling command of English, language in which these Motions were drafted. With regards co-Counsel Bailey, Ntahobali alleges that despite the latter's claim to have a good working knowledge of French, Ntahobali has not been able to communicate with him in the said language and adds that Counsel Bailey refused to visit him at the detention centre;

2.3. Counsel fired the Defence assistant Isabelle Bouchard, who was experienced in his case, without reason and without prior consultation with him;

2.4. Counsel Saint Léger and Bailey have endangered the existing co-operation between

1762

his Defence and that of his mother and co-Accused Pauline Nyiramasuhuko, and they have allegedly threatened him after a hearing;

2.5. Ntahobali stated that he had personally withdrawn the Counsel's assignment and had not authorised them to act on his behalf anymore. Rather, since a letter dated 24 April 2001, Ntahobali has expressed his willingness to conduct his own defence, pursuant to his statutory right to do so, pending assignment of new counsel of his choice from the Registry's list of Counsel, with the formal undertaking that he shall not request an adjournment of the proceedings pending assignment of new counsel;

2.6. Finally, during the hearing of 15 June 2001, Ntahobali dismissed the Counsel's submissions that there had been some communication between them since the opening of his trial and further alleged that co-Counsel Bailey had refused to hand over to him two Prosecution videotapes for inspection.

Response by Counsel

3. Counsel for Ntahobali replied that they "have at all times acted professionally, have at no time created conflict with their client, nor have they jeopardized their client's rights".

4. They added that "recently there has been some communication established with the Accused in reviewing exhibit videotapes."

Response by the Prosecutor

5. The Prosecutor submits that both the Registrar and the President made the correct decision in denying the Accused's requests.

6. The Prosecutor replies that the Accused's request should be dismissed on the grounds, *inter alia*, that the Accused does not have the right to counsel of his choice as stated in the Appeals Judgement rendered on 1 June 2001 in the *Prosecutor v. Akayesu*, (Case No. ICTR- 96-4-A) and that the Accused has not demonstrated that the problems of communications existing between him and his Counsel amounted to exceptional circumstances justifying the removal of his Counsel.

7. Further, the Prosecutor submits that the Accused has not made a complete or categorical request to act for himself, and seemed to have conditioned it to the right to have a counsel of his choice and that his insistence on having other counsel appointed each time he faces divergences with the assigned counsel is an indication that the Accused sees the need for counsel to assist him.

8. Finally, the Prosecutor raises an objection, pursuant to Common Law principles, as to the direct cross-examination of victims of rape testifying against the Accused by the latter, and would then prefer that the questions be put in writing and read out either by the Trial Chamber or by the Registry if he was to represent himself.

HAVING DELIBERATED

9. As a preliminary matter, the Chamber notes that, despite the Decisions rendered by the Registrar and the President on the Accused's request for withdrawal of Counsel, since the commencement of his Trial on 11 June 2001, Ntahobali has orally and in writing maintained his application for withdrawal of his Counsel and co-Counsel on the basis that he no longer has confidence in their competence to represent him and that there has been a complete breakdown of communication between them.

10. The Chamber has then considered the President's Decision on Review, dated 4 June 2001 in

1763

which the President declared herself unable "to make a factual determination of the allegations made by the Accused [...]" This is a matter best left for consideration by the Trial Chamber."

11. 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."

12. The Chamber should therefore firstly be satisfied that exceptional circumstances exist and good cause is shown warranting withdrawal of counsel, and secondly, that the request is not designed to delay the proceedings, particularly at this stage of the proceedings.

Exceptional circumstances and showing of good cause

13. The Chamber 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 the Request by the Accused for Change of Assigned Counsel" rendered on 26 June 1997, (Case No. ICTR-96-7-T, *The Prosecutor v. Bagosora*) that if "there was no meaningful communication between the accused and his counsel", whereas "an accused person needs constant contact with his counsel", the Chamber considered that "there no longer existed a relationship of trust between the accused and the assigned counsel", the "lack of confidence by the accused in his Counsel to be an exceptional circumstance warranting the replacement of assigned counsel within the ambit of Article 19 (d) of the directive". Further, the Chamber takes note of the reasoning retained by the ICTY Trial Chamber seized of the 'Celebici' case, in the "Decision on request by Accused Mucic for assignment of new counsel" dated 24 June 1996, whereby "though the overriding interest of the administration of justice means that [an Accused] should not be permitted to seek withdrawal of his assigned counsel without establishing good cause", the occurrence of a complete breakdown of communication between the Accused and his Counsel which could "adversely affect the rights of the Accused" (*See Decision of 24 June 1996*) constitutes exceptional circumstances required for the replacement of assigned counsel provided for in Article 19(d) of the Directive.

14. In the circumstances of this case, the Chamber is of the view that the breakdown in communication and trust between the Accused and his Defence team, a situation which the Chamber has even observed in Court on several occasions since the start of the trial of the Accused constitutes exceptional circumstances within the ambit of Rule 45 (H) of the Rules. In making this finding, the Chamber has considered the necessity for a proper relationship of communication and trust to be established between the Accused and his defence team to ensure an effective defence and for smooth proceedings in relation to the Trial as a whole.

15. The Chamber notes however that, as the Defence Counsel expressed the need to preserve the confidentiality of their client's affairs, the underlying reasons for the breakdown of trust and confidence remain unknown to the Chamber which however cannot but notice the severe absence of a good working relationship.

16. The Chamber strongly emphasises that it has not been proven that the Accused's Counsel have done anything to the prejudice of the Accused, notably by associating themselves with concerns raised by other accused. Rather than proving such allegations, it seems that the Accused either inadvertently or deliberately rendered his Counsel's tasks difficult, while the latter did not appear to be in a position to explain why the Accused was acting in such a manner in view of their duty, as submitted to the Chamber during the hearing to maintain professional confidentiality and not divulge what could be detrimental to the interest of the Accused

Undue delay

1764

17. Before ordering replacement of Counsel, the Chamber must also be satisfied that the withdrawal of Counsel in those exceptional circumstances will not pervert the course of justice by unduly delaying the proceedings in light of the on-going Trial of the Accused and of five Accused jointly tried since 12 June 2001.

18. The Chamber takes note of the fact that Ntahobali has firmly reiterated during the hearing that, if his assigned counsel were to be withdrawn, he is unambiguously willing to exercise his right to represent himself pursuant to Articles 20 and 20 (4)(d) of the Statute and Rule 45 (F) of the Rules pending the assignment of new counsel of his choice from the list of Counsel provided for by the Registry, so as to not delay the proceedings.

19. Thus, being satisfied that withdrawal of the Accused's Counsel is not designed to delay the proceedings since the Accused has elected to exercise his right, pursuant to Rule 45 (F) and Article 20 of the Statute, to conduct his own defence pending assignment of new Counsel, the Chamber grants the Accused's request.

20. Nonetheless, the Chamber has duly considered the seriousness of the charges pending against the Accused who is currently being tried and has taken note of the Prosecution's arguments as to the Accused directly cross-examining witnesses. In light of these factors, and by virtue of its inherent powers to control its own proceedings, the Chamber decides *proprio motu* that it is in the interest of justice that a Duty Counsel be immediately appointed so as to ensure that the Accused is assisted in the conduct of his defence pursuant to Rule 44*bis* (D) of the Rules.

Clarification on the status and duties of Counsel

21. Having considered the issues at stake, the Chamber is bound to find that the Accused was mistaken about the role and status of his Counsel in the administration of justice which has created a difficult situation.

22. Therefore, the Chamber wishes to take this opportunity to clarify for the future the nature of the Counsel-Accused relationship and recalls 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.

23. As 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.

24. Finally, in view of the fact that (1) Accused Ntahobali had already requested the withdrawal of the previous assigned Counsel in February 2000, (2) that the Chamber did not find that Counsel for Ntahobali were at fault but (3) rather, acted in a professional manner and were willing to continue to conduct the Accused's Defence, the Chamber formally invites Accused Ntahobali to endeavour in the future to co-operate with the Registry and with replacement Counsel so as not to affect the due course of the administration of justice and to ensure smooth proceedings.

25. Having made these clarifications, the Trial Chamber decides that it will not tolerate such behaviour in the future.

1765

THE TRIBUNAL HEREBY

- I.** Directs the Registry to withdraw immediately the assignment of Counsel Saint Léger and co-Counsel Bailey.
- II.** Instructs the Registry that Accused Ntahobali be immediately provided with a list of potential counsel from which to choose, and that, as soon as possible from the date of this decision, the Accused lodges a written request for Counsel with the Registry by means of an appropriate form pursuant to Article 5 of the Directive indicating three names of counsel from the list.
- III.** Instructs the Registry, in accordance with Article 19(D) of the Directive, to proceed with the assignment of new Counsel without delay.
- IV.** Once Lead counsel is appointed, instructs the latter to choose immediately a co-Counsel from the list provided by the Registry.
- V.** Decides that Counsel for Ntahobali will immediately assist the Accused and shall conduct its Defence without delay and will conform to the dates set for Trial decided by the Tribunal so as to not delay the proceedings.
- VI.** Pending the replacement of Counsel and in the interest of a proper administration of justice, instructs the Registry to appoint a Duty Counsel with immediate effect pursuant to Rule 44*bis* of the Rules to assist the Accused in the conduct of his defence pending replacement of Counsel.
- VII.** Directs the Registry, pursuant to Article 20(A) and 20(B) of the Directive to ensure that Counsel remits immediately to the Duty Counsel all the original documents in the file pending assignment of new Counsel.

Arusha, 22 June 2001.

William H. Sekule
Presiding Judge

Winston C. Matanzima Maqutu
Judge

Arlette Ramaroson
Judge

[Seal of the Tribunal]

1766

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Order of: 21 April 1997

PROSECUTOR

v.

**ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"**

**ORDER ON THE REQUEST BY THE ACCUSED, ESAD LANDZO, FOR WITHDRAWAL OF
LEAD COUNSEL**

The Office of the Prosecutor

Mr. Eric Ostberg

Mr. Guiliano Turone

Ms. Teresa McHenry

Ms. Elles van Duschotten

Counsel for the Accused

Mr. Mustafa Brackovic

Ms. Cynthia McMurrey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"),

NOTING the written request (the "Request") of Esad Landzo ("the accused") for the withdrawal of the lead counsel for his defence, Mr. Mustafa Brackovic, dated 9 April 1997 on the grounds of conflicts of interest;

1767

CONSIDERING that the accused has a right, guaranteed by Article 21(4)(d) of the Statute of the International Tribunal, to defend himself in person or through legal assistance of his choosing;

CONSIDERING, that it is a generally recognised principle of law that the above right is not without qualification in situations where an accused person is indigent and unable to fund his legal representation;

CONSIDERING that the defence of the accused is funded by the International Tribunal and that the accused, cannot, therefore, withdraw lead counsel without showing good cause:

CONSIDERING that a genuine conflict of interest will constitute such good cause;

CONSIDERING HOWEVER that the events cited by the accused in the Request do not support a conclusion that there is a conflict of interest between the accused and Mr. Brackovic;

CONSIDERING FURTHER that the Trial Chamber has a duty under Article 20(1) of the Statute of the International Tribunal to ensure that trials are fair and expeditious;

CONSIDERING FURTHER that the Trial Chamber has not found any dereliction of duty as counsel on the part of Mr. Brackovic;

CONSIDERING FURTHER that the Trial Chamber has not found any substance in the assertion of the accused that his choice of Mr Brackovic as counsel was not made by his own free will;

CONSIDERING FURTHER that the Trial Chamber will be failing in its said duty if it grants the request for the reasons cited;

FOR THESE REASONS AND TAKING INTO ACCOUNT the provisions of Article 21 of the Statute of the International Tribunal, Rule 45 of the Rules of Procedure and Evidence and Article 20(A) of the Directive on Assignment of Defence Counsel,

THE TRIAL CHAMBER PURSUANT TO RULE 54 HEREBY DENIES the Request

Done in English and in French, the English text being authoritative.

Adolphus
Godwin
Karibi
-
Whyte

Presiding
Judge.

Dated this twenty-first day of April 1997

order on the request by the accused, Esad Landzo, for withdrawal of lead counsel

Page 3 of 3

At The Hague

1768

The Netherlands.

[Seal
of
the
Tribunal]