446

SCSL-04-16-T
(17115-17123)

17115

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE APPEALS CHAMBER

Before: Justice Raja Fernando, Presiding
Justice Emmanuel Ayoola,
Justice George Gelaga King
Justice Geoffrey Robertson, QC
Justice Renate Winter

Interim Registrar: Mr. Lovemore Munlo, SC

Date: 14th December 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-2004-16-AR73)

APPENDIX TO THE SEPARATE AND CONCURRING OPINION OF JUSTICE ROBERTSON ON THE DECISION ON BRIMA-KAMARA DEFENCE APPEAL MOTION AGAINST TRIAL CHAMBER II MAJORITY DECISION ON EXTREMELY URGENT CONFIDENTIAL JOINT MOTION FOR THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL FOR ALEX TAMBA BRIMA AND BRIMA BAZZY KAMARA

First Respondent:
The Registrar

Second Respondent:
The Principal Defender

Court Appointed Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Court Appointed Counsel for Brima Bazzy Kamara
Andrew K. Daniels
Mohammed Pa-Momo Fofanah

SUSAN GUNSTONG
09:00

1. In my Separate and Concurring Opinion on the Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara of 8th December 2005, I refer, in paragraph 84, to a document entitled "Public Defender Proposal" and I announce that I will append it to my opinion.

2. The above mentioned document is attached to the present Appendix and shall be read together with my Separate and Concurring Opinion.

Done at Freetown this day 14th day of December 2005

Justice Geoffrey Robertson

[Seal of the Special Court for Sierra Leone]

NOTE FOR MANAGEMENT COMMITTEE

Public Defender Proposal

International Criminal Courts have yet to devise a satisfactory means of attracting only experienced, competent and honest defence counsel, so as to comply with the human rights principle that adversary trials should manifest an "equality of arms" (i.e. reasonable equivalence in ability and resources of prosecution and defence).

At Nuremberg, the inequality was especially pronounced. Allied judges and prosecutors and senior Registry staff lived in the same hotel and socialized to the exclusion of the German defence lawyers. The British Bar had refused to permit members to take defence briefs and provincial German bar associations took reprisals against members who defended Nazis "too vigourously". The defence lawyers, floundering in the alien environment of an anglo-american adversary trial, were given limited facilities to prepare their cases and little notice of prosecution evidence.

At the ICTY and ICTR, defence lawyers complain that the court is a 'prosecution entity' because of the closeness of the Registry and the Prosecutor's office. The prosecutor, of course, is the first to be appointed, and works closely with the Registrar in the start-up phase. The 'Registrar's list' system adopted by these tribunals for indigent defendants means that the Registrar keeps a list of counsel from all over the world who are prepared to defend at The Hague or Arusha. After a particular defendant is indicted, he can chose a counsel from the list or a counsel who qualifies to be added to the list. This counsel is then instructed by the Registrar, at a fee of US$100-200 per hour, far beyond any fee obtainable in Africa for criminal work, and will normally bring in other lawyers (up to 5 per defendant) and obtain permission from the Registrar or the court to spend more money on experts, investigators etc.

The "Registrars List" system derives from the old English 'dock brief' where a poor man in the dock could select from amongst the idle barristers sitting in court an advocate to defend him, who would be paid a guinea from public funds. This developed into "the soup list" ('soup kitchens' fed the poor) at Crown Courts, where young or unsuccessful barristers would put their names on a list which the court clerk would give to indigent defendants to select a trial counsel. The 'dock brief' and 'the soup list' were unattractive expedients before a proper legal aid system developed: The "Registrars List" has caused many problems at the ICTR and ICTY, inter alia

1. Many mediocre, and a few dishonest, lawyers volunteer and qualify for the list because they have practiced for more than 10 (or 7) years;
2. The defendant will have no knowledge of them in any event, and no criteria for informed choice;
3. Often the chosen lawyer turns out not to be available, or when chosen turns out to have many home commitments, thus causing delays in ICT trials;
4. The chosen lawyer comes to the case with no local background, and with no solicitor or defence counsel to assist. He is up against a prosecution which

has been working on the case for years. He asks (justifiably) for more legal assistance, and applies to the court for a delay of a year or so in order to investigate and prepare the defence.

5. Defendants who wish to delay trials sack their counsel and chose another on the list. Then they sack him and ask for another!
6. The corrupt practice of "fee-splitting" occurs when ambulance-chasing lawyers on the list approach defendants' families and offers to share the defence counsel fee (massive, by African standards) if they are selected. The result: men against whom there is a prima facie case of genocide own Armani suits and their families enjoy satellite television!
7. According to the Ackerman report, some listed counsel have become notorious for "excessive lawyering" – making more motions than necessary in order to rack up fees.

These and other aspects of the 'Registrar's List' are giving international criminal justice a bad name. The cost of these "counsel of choice" from around the world is extortionate – up to US$1m per defendant at the ICTR. The UN audit committee in 1999 (chaired by Jerome Ackerman) identified some of these problems, and suggested that legal fees should be certified to the court by counsel and might be reduced if delays had been caused by defence tactics, but this is hardly a satisfactory solution.

Mariana Goetz, our principal legal officer, previously co-ordinated one of the busiest Chambers at the ICTR, she recalls leaving to deal with international counsel from the Registrar's List who were utterly bewildered (some had never been to Africa before). She has explained to me in some detail the damaging consequence of giving indigent defendants a "counsel of choice" power over their defence teams, in effect controlling the receipt of public money, by their lawyers and the choice of investigators (who also receive lavish payment from the Tribunal, and may be relatives or political operatives).

I believe that the 'Registrar's List' is an obsolete and inappropriate system, and should be replaced by employment of full-time defence counsel with considerable experience and demonstrable ability.

The 'Registrar's List' arrangements in any event reflects a confusion between the 'counsel of choice' principle and the right of indigent defendants to legal aid. These two rights are quite separate. Article 17 of the Special Court statute promises that each defendant shall be entitled "to communicate with counsel of his or her own choosing" (17(4)(b)) – but subject to that counsel's availability and willingness to accept such communications, a contingency almost invariably depending on payment of his fees! Then Article 17 (4)(d) promises the right

"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."

Thus it is clear that a defendant has the right under our statute, when put on trial,

a) to defend himself, or
b) to be assisted in his defence by counsel of his choice (in practice, if he can pay for this legal assistance) or
c) if indigent, and the interests of justice require, to have legal assistance provided free of charge.

The statute places an obligation on the court to assign legal assistance to the poor defendant if this is in the interests of justice. It says nothing about giving him the right to choose a lawyer for whom the court will pay. The court's only duty is to assign him a competent lawyer, which he can accept or not.

The interests of justice usually will require such assignment for trial and appeal and for a bail application, if the defendant is too poor to hire private counsel or where he decides to defend himself and the court (as in Milosevic) thinks that in the interests of justice it should appoint an amicus to take any legal points on his behalf. There is nothing in Article 17 or in the court's statute that requires a "Registrar's List".

So how best do we discharge our duty of assigning legal assistance to the poor? The most cost-effective and competence-effective way must be to establish and build up a defence unit that can take on the prosecutors and so ensure "equality of arms". The prosecutor has a number of trial counsel, and some lawyers and investigators preparing cases, as well as support staff. For indigent defendants (who may comprise over half the indictees) we should supply a smaller but nonetheless competitive unit. We need a principal defender (D2 level) installed as soon as possible, with four trial counsel (P4) and two local lawyers (already hired) and several investigators and some support staff. Once the PD is appointed, he or she can build up the staff necessary to deal with the prosecutor's indictments, at levels which can be subject to management committee approval.

The system would work like this:

Soon, the prosecutor will bring down his indictments. Imagine 25 of them, with 15 indictees arrested and in custody, 10 of whom claim to be indigent. Two of the latter group insist on defending themselves, one manages to obtain a lawyer "pro bono" and another refuses to have any part in the trial. The five wealthy defendants all hire counsel. The prosecutor seeks three consecutive trials, with 5 defendants in each.

The PD's role will be to take general charge of defence arrangements. He or his counsel will, if instructed, make bail applications for any defendant. His office will research legal issues and background material, and give such assistance in these respects to the privately hired counsel and the pro bono counsel, if they welcome it (they almost certainly will).

But his main function will be to implement Article 17 (4)(d) by assigning counsel to indigent defendants. He will have, say, 4 experienced and independent defence counsel employed in his office, who can each be assigned two defendants. The PD himself may argue interlocutory legal issues, together with some of the private counsel. The PD may also be requested by the Court to arrange an amicus for the defendants who are representing themselves or who refuse to acknowledge the court, so that at least legal points may be taken expertly on their behalf, whether they like it or not.

By these means the duty to assign counsel to the indigent will be amply satisfied. Each poor defendant will have one competent and independent trial counsel, who is not overworked (having to represent only one or at most two defendants in other trials) and who is present in Sierra Leone full-time to work on his case. That counsel will have a defence unit support structure - researchers, investigators, casework lawyers – to draw upon as necessary. There will be an "equality of arms" with the prosecution by time of trial and no question of fee-splitting cannot arise because there will be no incentive.

This does not mean an exclusion of 'outside' lawyers. The PD, if he considers there is a serious conflict, may arrange for a particular defendant to be represented by an 'outside' lawyer. He may bring in an outside lawyer with special experience to argue a different question of law, or to act as an amicus in a particular trial. An indigent defendant can, of course, sack the lawyer assigned by the PD, who may offer to assign another to him, but if this is refused then (subject to any application to the court) he will have to defend himself or obtain pro bono assistance.

Proper provision for defence costs may not have been made in the original budgetary estimates. Certainly if the "Registrar's List" approach is adopted, then the costs will greatly exceed those of the PD model and the delays caused by waiting upon counsel from abroad will be severe. "Fee-splitting" will become an issue, as it has in other international courts.

The need to make proper provision for the defence is being urged rather late in the day. The PD should be in place by the time the indictments come down, to make bail applications and begin work on collecting defence evidence and on interlocutory challenges. Regrettably, this may not be possible, and I fear that NGOs will criticise the management committee over this failure.

The Special Court has already been subjected to published criticism over its failure to make proper provision for the defence. In the December 2002 Criminal Bar Association newsletter (UK) a barrister from "No peace without Justice" wrote of the court:

"There appears to be no proper provision for defence. This is a feature which emerges again and again in fledgling court systems. There is a popular belief that the prosecution of international crimes requires paying large sums of money to international prosecutors, and leaving defendants with the cold comfort of the right to be represented by counsel without any consideration as to how this will be funded, ... each new court system

appears to be taken entirely by surprise by the need to pay for defence counsel of equal skill and experience to prosecutors in order to ensure equality of arms and fair trials."

I think this criticism is merited and the position needs to be addressed so that it cannot be repeated, at least in relation to our court.

It will be bad publicity for the court if we are perceived to be locking up penniless people before putting in place a system that provides some form of legal aid for bail applications. We must advertise immediately (February 2003) for a PD and some supporting trial counsel at P4 level, but quite frankly most advocates who are any good will be booked up months ahead. Of the few who are more-or-less immediately available, some will be reluctant to sign up for three years. So the Registrar should be given some discretion - perhaps to appoint the PD on a part-time basis at first, or to offer one or two year contracts, subject to an agreement to be available for any appeal proceedings. I trust the management committee will approve an immediate search for a principal defender and for lawyers etc., to staff the defence unit. I append a draft advertisement.

Geoffrey Robertson QC
7th February 2003

17122

TRIAL COUNSEL
SIERRA LEONE SPECIAL COURT

The Registrar, pursuant to the "equality of arms" principle, seeks four experienced trial counsel to work under the supervision of the Principal Defender. Successful applicants will have been in unblemished practice, specializing in criminal or international human rights law, for at least seven years: they must have a reputation for fearless and independent representation of defendants charged with serious crimes.

Counsel will be assigned by the Principal Defender to represent indigent defendants before the Special Court in respect of bail applications, interlocutory motions, and at trials and on appeal.

17123

PRINCIPAL DEFENDER
SIERRA LEONE SPECIAL COURT

The Special Court for war crimes in Sierra Leone has been established by agreement between the United Nations and the Sierra Leone Government to try persons accused of bearing the greatest responsibility for war crimes and crimes against humanity committed in that country since November 1996. The prosecutors will shortly file indictments against those they accuse of bearing such responsibility.

The Registrar, pursuant to the "equality of arms" principle, now seeks an experienced criminal trial lawyer with a reputation for able and fearless defence, and some proven administrative ability, for appointment to the office of Principal Defender. The duties will include setting up and staffing a defence support unit; assigning and retaining counsel for indigent defendants; making arrangements for bail applications; conducting (either personally or by assigning other counsel) legal arguments for indigent defendants or as an amicus) at interlocutory, trial and appeal stages; directing such investigation, research, witness searches and the like as appears necessary for adequate preparation of assigned cases on behalf of indigent clients; liaison with and assistance to the court, the Registrar and (if requested) to counsel retained privately by other defendants.