147) SCSL-03-01-PT (3700 – 3759) 3700

THE SPECIAL COURT FOR SIERRA LEONE

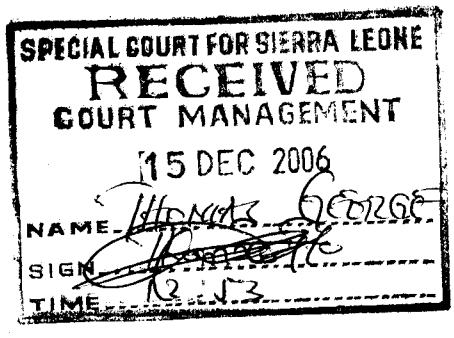
In Trial Chamber II

Before: Justice Richard Lussick, Presiding
Justice Teresa Doherty
Justice Julia Sebutinde

Registrar: Mr. Lovemore Munlo SC

Date: 15 December 2006

Case No.: SCSL-2003-01-PT



THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE MOTION ON ADEQUATE FACILITIES FOR THE PREPARATION OF MR TAYLOR'S DEFENCE

Office of the Prosecution
Mr. Christopher Staker
Mr. James C. Johnson
Ms. Wendy van Tongeren
Ms. Shyamala Alagendra
Mr. Alain Werner

Counsel for Charles Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

3701

I. Introduction

1. Counsel for Mr. Charles Taylor (the "Defence") seeks the intervention of this Trial Chamber (the "Chamber") to ensure the provision of adequate facilities for the preparation of Mr. Taylor's defence. The Defence urges the Chamber to exercise its inherent powers to guarantee Mr. Taylor's right to a fair trial under Article 17 of the Statute of the Special Court for Sierra Leone (the "Statute").

2. In order to ensure that the resources and facilities allocated to the parties are not stacked wholly in favour of the Prosecution, the Defence respectfully requests the Chamber to direct the Registrar to provide offices or financial support for Defence offices in both The Hague and Monrovia.

II. The Chamber's Jurisdiction

3. The jurisprudence of the Special Court for Sierra Leone (the "SCSL") allows for a Trial Chamber to exercise its inherent jurisdiction where the matter goes to "the fundamental right of an accused to a fair trial".[1] For example, in ruling against the Registrar's decision to withdraw a legal services contract from a counsel in ill-health, this Chamber held that "in view of the mandatory provisions of Article 17(4)(d) of the Statute [it] can, as it does now, invoke its judicial prerogative based on the concept of our inherent jurisdiction, to entertain and adjudicate on a motion of the nature of the one under consideration".[2] Indeed, the Chamber stated that to decline jurisdiction in that case "would further amount to a total abdication on our part, of our sovereign obligation and judicial responsibility as a Court and as Judges, to subject questionable administrative acts to Judicial scrutiny and review in order to check and curb arbitrary acts, conduct, or decisions taken by our

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[1] *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-PT-110, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, 23 June 2006.

[2] *Prosecutor v. Brima et al,* SCSL-04-16-PT-68, Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, para. 65. *See also Prosecutor v. Milutinovic et al,* IT-99-37-PT, Decision on Motion for Additional Funds, 8 July 2003, p. 4 ("in the exercise of its powers under Rule 54 of the Rules and the Trial Chamber's statutory obligation to ensure a fair and expeditious conduct of the proceedings with full respect for the rights of the accused, the Trial Chamber is undoubtedly empowered to review the Registrar's decision, albeit only upon exceptional circumstances being shown"); *Prosecutor v. Strugar,* IT-01-42-PT, Decision on Defence Request for Review of Registrar's Decision and Motion for Suspension of all Time Limits, 19 August 2003; *Prosecutor v. Enver Hadzihasanovic & Amir Kubura,* IT-01-47-PT Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences thereof for the Rights of the Accused to a Fair Trial, 17 June 2003, p.2; *Prosecutor v. Dusko Knezevic,* 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.

Administrative Officials in particular, and by the Executive Organs in general".[3] Additionally, the SCSL President has held that Trial Chambers are best situated to rule on matters which "impact significantly upon the right under Article 17(4)(b) of the Statute to adequate preparation of the defence".[4]

4. Although cognizant of the Registrar's primary authority over the administration of the legal-aid scheme, the Defence submits that, upon the exhaustion of administrative remedies, the Chamber may review decisions of the Registrar "to ensure the integrity of the proceedings and a fair trial".[5]

III. The Right to a Fair Trial and Equality of Arms

5. Article 17(4) of the Statute sets out the *mandatory* minimum guarantees to which an accused person is *entitled* "in full equality". Specifically, Article 17(4)(b) mandates the provision of "adequate time and facilities for the preparation" of an accused person's defence.

6. Potential violations of an accused person's right to a fair trial must be assessed in context, and International Criminal Tribunals tend to examine the adequacy or inadequacy of time and facilities in combination.[6] For the European Court of Human Rights, rights violations are viewed on the whole, and even if, *ex arguendo*, none of the individual deficiencies themselves amount to violations of the right to a fair trial, their combination may well rise to that level.[7] The Defence therefore submit that this motion should be considered in conjunction with our Defence Motion for Adequate Time for the Preparation of Mr. Taylor's Defence filed simultaneously today.

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[3] *Prosecutor v. Brima et al*, SCSL-04-16-PT-68, Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, para. 69.
[4] *Prosecutor v. Norman*, SCSL-2003-08-PT-119, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, para. 5. *See also Prosecutor v. Sam Hinga Norman et al*, SCSL-04-14-PT-141, Decision on Request by Samuel Hinga Norman for Additional Resources to Prepare his Defence, 23 June 2004, where similar complaints, including complaints strictly relating to the detention regime, were considered and partly granted by the Trial Chamber.
[5] *Prosecutor v. Milan Martic*, IT-95-11-PT, Decision on Appeal against Decision of Registry, 2 August 2002, p. 4. See also *Prosecutor v. Hadzihasanovic et al.* ("Central Bosnia"), IT-01-47, Decision on Prosecution's Motion for review of the Registrar to assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002.
[6] *Prosecutor v. Milosevic*, IT-02-54-AR73.6, Decision on the interlocutory appeal by the amici curiae against the Trial Chamber order concerning the presentation and preparation of the defence case, 20 January 2004, para. 13.
[7] *Stanford v. United Kingdom*, ECrtHR Judgement of 30 August 1990, Series A, No. 182, para. 24; Case of *Kamasinski v. Austria, (Application no. 9783/82)*, 19 December 1989, para. 98.

7. In *Prlic*, it was held that "the right of an accused to have adequate facilities for the preparation of his defence is related to the issue of whether, under the circumstances of the case, the defence in criminal proceedings has not suffered substantial impairment to the preparation of its defence".[8] The Chamber must further continuously be alert and monitor the progress of the case to ensure that no unfair prejudice is caused to the accused "due to the lack of adequate time and resources for the preparation of their defences".[9] According to the U.N. Human Rights Committee's interpretation of ICCPR Article 14(3)(b), adequate "facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel".[10]

8. Equality of arms obligates a judicial body to ensure that neither party is at a disadvantage when presenting its case.[11] Lack of adequate time and facilities usually impinges the right to equality of arms.[12] In order that the guarantee of equality of arms is more than a "hollow claim" it may be necessary to grant more facilities.[13]

A. Lack of Office Space – The Hague

9. The current issue arises from the unique situation in which Mr. Taylor and the Defence have found themselves—geographically divorced not only from the seat of the SCSL itself but also from the alleged crime base. As a result of his transfer to The Hague, Mr. Taylor is isolated from the infrastructure and resources available to other detainees and their defence teams in Freetown. The Defence has been told by the Registrar that the

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[8] *Prosecutor v. Prlic et al*, IT-04-74-T, Decision on the Oral Request of the Accused Jadranko Prlic for Authorisation to Use a Laptop Computer at Hearings or to be Seated Next to his Counsel, 29 June 2006.
[9] *Prosecutor v. Milutinovic et al*, Second Decision on Motions to Delay Proposed Date for Start of Trial, 28 April 2006, para. 4. See further *Prosecutor v. Milosevic*, IT-02-54-AR73.6, Decision on the interlocutory appeal by the amici curiae against the Trial Chamber order concerning the presentation and preparation of the defence case, 20 January 2004, para. 20.
[10] ICCPR General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14): 13/04/84 (twenty-first session). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 9.
[11] *Prosecutor v. Tadic*, IT-94-1, ICTY, Appeals Judgement, July 15, 1999, para. 48.
[12] *Prosecutor v. Momcilo Krajisnik & Biljana Plavsic*, IT-00-39 & IT-00-40/1, Decision on prosecution motion for clarification in respect of application of Rules 65 ter, 66 (b) and 67 (c), 1 August 2001, para. 7 (the principle of equality of arms is likely violated if the Prosecution does not disclose documents prior to trial thus hampering the Defence's position to prepare the case properly).
[13] This is in accordance with Judge Hunt's opinion. See his Dissenting Opinion in: *Prosecutor v. Milan Milutinovic et al.*, IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, para. 36.

process of establishing an office in The Hague, which has already taken several months, will not be complete until sometime in February 2007.

B. Lack of Office Space – Liberia

10. The Defence is also attempting to undertake extensive investigations in Liberia, one of the two principal alleged crime bases. A large proportion of the evidence that has been disclosed to the Defence relates to Liberia. In summary, the case against Mr. Taylor is that he exercised *de facto* control over the Revolutionary United Front ("RUF") in his capacity as the President of Liberia, and earlier while leader of the National Patriotic Front of Liberia. The Prosecution is likely to adduce evidence that Mr. Taylor directed the RUF's activities from Monrovia. Mr. Taylor, alone of all accused persons facing trial before the SCSL, is not a citizen of Sierra Leone. Many of the critical Prosecution witnesses are former Liberian government employees, army or security personnel, or supporters or sympathisers of the present government or other groupings, currently resident in Liberia. Critical documentation relating to Mr. Taylor's administration will, it is anticipated, only be found in Monrovia. Defence investigations in Liberia are, therefore, equally if not more important than those to be conducted in Sierra Leone.

11. As of 6 November 2006, Defence requests for an office in Monrovia have been summarily rejected by the OPD.[14] As stated below, in an interoffice memorandum dated 19 October 2006, the Principal Defender explained that the Defence's request for an office in Liberia was "difficult" because the SCSL had no experience in this matter.[15] The Principal Defender went on to suggest that the Defence utilize the private office of a Liberian team member who is acting *pro bono* on this matter.[16] In response to further representations from the Defence that such suggestion was entirely inappropriate and that an independent facility should be made available, in a letter dated 6 November 2006, the Principal Defender stated that Liberia was not more important than "Ivory Coast, Libya or any other

[14] Annex 3: Letter from the Principal Defender, addressed to the Defence Counsel for Mr. Taylor, dated 6 November 2006.
[15] Annex 2: Interoffice Memorandum from the Principal Defender, addressed to the Defence Counsel for Mr. Taylor, dated 19 October 2006.
[16] Annex 2: Interoffice Memorandum from the Principal Defender, addressed to the Defence Counsel for Mr. Taylor, dated 19 October 2006.

country that may be connected to the trial" and that, therefore, the establishment of a Monrovia office for the Defence was not merited.[17]

12. On 14 November 2006 the Defence wrote to the OPD once again stating that:

> We ask you to consider your position on this point again on the basis that we are willing to set up an office in Monrovia ourselves if granted a monthly clerical services allowance in the region of 3,000 Euros to run to the conclusion of trial.[18]

To date the Defence has received no reply to this letter.

C. Lack of Office Space Has Impaired the Preparation of Mr Taylor's Defence

13. The prejudice caused to the Defence by the lack of office facilities is tangible. At this moment, the team in The Hague has neither an office nor any other logistical facilities—no computer, no printer, no telephone, no internet access, no storage space, and no meeting place provided by the SCSL. Disclosure and other case material are dispersed at the private residences of team members. There is no dedicated location from which to access the some 34,000 pages of electronic disclosure, and the physical documents are mothballed in Freetown, inaccessible to team members in The Hague. Further, no materials can be stored in Monrovia for access by the Liberian team for want of secure office space, and Defence investigators are forbidden by the OTP to receive electronic disclosure.

14. Consequently it is submitted that the conditions that individual Defence Team members are working under in The Hague are intolerable. Simply put, the Defence has been forced, by circumstances beyond its control, to prepare for a highly complicated international criminal trial without office facilities accessible to the bulk of its team members. Meetings between Defence team members are irregular and held at informal locations. Hotel lobbies, restaurants, and cafes are hardly the proper environment to hold team meetings and prepare for trial. Documents can only be printed at external printing agencies at considerable expense. Internet connections are private and unsecured. Mobile

[17] Annex 3: Letter from the Principal Defender, addressed to the Defence Counsel for Mr. Taylor, dated 6 November 2006.
[18] Annex 4: Letter from the Defence Counsel for Mr. Taylor to the Principal Defender, dated 11 November 2006, transmitted 14 November 2006.

phones, paid for by individual team members, are the primary means of communication with other team members based in various locations.

15. Perhaps most troubling is that work may not be completed nor confidential instructions discussed in a convenient, secure environment. The Defence has nowhere to interview witnesses and no secure communication facilities. The Defence aspires to maintain high standards of security in the preparation of Mr. Taylor's case, but cannot guarantee this without further resources.

16. The Defence is cognizant of the Registrar's institutional decision-making process, its budgetary limitations, and its best intentions. Nevertheless, delays by the Registrar and OPD in responding to urgent Defence letters in a period when time was of the essence, their lack of response to the Defence's invitation to hold a telephone conference, their lack of any explanation for their excessive delays in providing the Defence with an office in The Hague, and mostly, their lack of any offer of alternative solutions to facilitate Defence preparations while waiting for a proper office are unacceptable. Renting and furnishing temporary accommodation could be completed within a week. The Defence finds it remarkable that the SCSL liaison officer in The Hague, whose appointment is appreciated even though his powers are limited, has a liaison office on the ICC premises, while the Defence itself has none.

IV. Efforts to Secure an Administrative Solution – Chronology of Defence Enquiries

17. The Defence has exhausted all administrative remedies with regard to the provision of office facilities and respectfully urges the Chamber's intervention in order to guarantee Mr. Taylor's rights to a fair trial.

18. Informal discussions about office space and other concerns relating to the detention regime began immediately after Mr. Taylor's transfer to The Hague on 21 June 2006 and continued up until 27 September 2006 when it became clear to the Defence that office facilities would not be immediately available. On 21 September 2006, having considered the proposed budget, the Defence signed the Legal Services Contract offered by the OPD.

19. On 27 September 2006, in response to an email from the Defence, the Principal Defender indicated:

> The Defence Office will have a unit in The Hague with a Legal Officer/Duty Counsel. Also, the Defence Team will be assigned two offices in close proximity to the Defence Office's unit ... As I hinted to you when we met, the Special Court has just identified an office space. A lease contract would need to be entered into and the office space would need to be partitioned and all necessary equipment put in place. The expectation is that the offices should be occupied by December 06/January next year.[19]

20. On 2 October 2006, a letter under the heading "DSA and Logistical Provisions for the Defence of Charles Taylor" was sent to the Principal Defender highlighting the need for immediate access to an office in The Hague and stating that the Defence had no "access to any of the basic facilities necessary to organise Mr Taylor's case—no correspondence address in The Hague, no telephone and no space to house the 12 boxes (100 plus lever arch files) of OTP evidence we have been served with which are gathering dust in Freetown".[20]

21. On 6 October 2006, the Registrar wrote to the Defence as follows;

> Just one clarification as to the moment the office space will be available and ready for use in The Hague. We are about to finalise lease discussions in The Hague and we will be able to have access to the building as of November/December. Partitioning and cabling etc will however take some time. So it would be safer to assume that as of 1 February the building is ready for use.[21]

22. On 10 October 2006, the Defence emailed the Registrar asking for an office to be provided in Liberia to conduct investigations and the necessary interviews, which would be difficult to conduct from a hotel or guest-house.[22] The Registrar responded on the same day expressing sympathy and suggesting the Defence discuss the matter first with the Principal Defender.[23]

23. On 19 October 2006, the Defence received a memorandum from the Principal Defender wherein he stated that he could do no more than to present the challenges faced by the Defence to the Registrar and that the request of an office in Liberia was difficult because the SCSL had no experience in this matter. While promising to engage further with the

[19] Annex 5: Email Correspondence from the Principal Defender, to Defence Counsel for Mr. Taylor, dated 27 September 2006.
[20] Annex 6: Letter entitled 'DSA and Logistical Provisions for the Defence of Charles Taylor', from Defence Counsel for Mr. Taylor, addressed to The Principal Defender, dated 2 October 2006.
[21] Annex 1: Email Correspondence, from the Registry to the Defence Counsel for Mr. Taylor, dated 6 October 2006.
[22] Annex 8: Email Correspondence, from the Defence Counsel for Mr. Taylor to the Registry, dated 10 October 2006.
[23] Annex 7: Email Correspondence, from the Registry to the Defence Counsel for Mr. Taylor, dated 10 October 2006.

Registrar on this issue, the Principal Defender suggested the Defence utilize the private office of its Liberian legal assistant acting *pro bono* in Monrovia.[24]

24. On 22 October 2006, the Defence again wrote to the Principal Defender re-emphasizing its position that it was unacceptable to have access to an office space in The Hague only in February 2007 when a tentative trial date had been set for 2 April 2007.[25]

25. On 27 October 2006, the Defence wrote another letter to clarify points raised in the 22 October 2006 letter. In this letter, the Defence suggested an alternative solution, namely financial assistance "as regards IT, Office and other clerical facilities in The Hague for the interim period prior to the opening of the Defence Office at The Hague".[26]

26. On 6 November 2006, the Principal Defender responded stating that the promised office in The Hague would be available only from February 2007. No other form of assistance was offered and the other points raised previously were not addressed.[27] On 14 November 2006, the Defence again raised the issue of both offices with the Principal Defender. To date, no reply has been received.[28]

V. Breach of Legal Services Contract and Directive on Assignment of Counsel

27. The Defence submits that, in addition to a violation of the right to a fair trial, the lack of proper office space also amounts to a breach of the Legal Services Contract (the "LSC") between the OPD and the Defence, which guarantees the provision of logistical support to the Defence, and of Part V, Article 26 of the Directive on the Assignment of Counsel. Annex 2 of the LSC, in addressing the issue of logistical support, categorically states that "logistical support to defence teams will be provided to members of Defence Teams" and explicitly mentions the provision of office space, office equipment, and support. The office space is to be furnished with "tables and a sufficient number of chairs" as well as a

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[24] Annex 2: Interoffice Memorandum from the Principal Defender, addressed to the Defence Counsel for Mr. Taylor, dated 19 October 2006.
[25] Annex 9: Letter from the Defence Counsel for Mr. Taylor, addressed to the Principal Defender, dated 22 October 2006.
[26] Annex 10: Letter from the Defence Counsel for Mr. Taylor, addressed to the Principal Defender, dated 27 October 2006.
[27] Annex 3: Letter from the Principal Defender, addressed to the Defence Counsel for Mr. Taylor, dated 6 November 2006.
[28] Annex 4: Letter from the Defence Counsel for Mr. Taylor to the Principal Defender, dated 11 November 2006, transmitted 14 November 2006.

computer with internet connection; and members of the Defence Team should have access to "fax machines, photocopy machine, ink for printer, for the exclusive benefit of the Defence Team, at no cost for the Defence Teams."[29]

28. Similarly the Directive on the Assignment of Counsel, Part V, Article 26 states:

> (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.[30]

29. The Defence therefore submits that the OPD, and by extension the Registrar, are in breach of their contractual and professional obligations to the Defence. Accordingly, the Defence seeks the Chamber's appropriate intervention.

VI. Conclusion

30. Accordingly, for the reasons adumbrated above and in order to ensure that Mr. Taylor's right to a fair trial is not compromised, the Defence respectfully urges the Chamber to direct the Registrar to provide offices or financial support for offices in both The Hague, The Netherlands and Monrovia, Liberia. Even with the immediate grant of adequate facilities, the Defence would not be in a position to adequately prepare Mr. Taylor's case in time for the Tentative Trial Date.

Respectfully submitted this 15th day of December 2006.

Karim A. A. Khan
Counsel for Mr. Charles Taylor

[29] Legal Services Contract between OPD and Defence for Mr. Taylor, 2006/001.
[30] SCSL Directive on the Assignment of Counsel, Adopted on 1 October 2003.

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Annex 1 – Email Correspondence, from the Registry to the Defence Counsel for Mr. Taylor, dated 6 October 2006.

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Annex 4 – Letter from the Defence Counsel for Mr. Taylor to the Principal Defender, dated 11 November 2006, transmitted 14 November 2006.

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Annex 10 – Letter from the Defence Counsel for Mr. Taylor, addressed to the Principal Defender, dated 27 October 2006.

Annex 1

[redacted]ahota@hotmail.com

Subject:
RE: From Roger Sahota - please see enclosed

Attachments:

Security scan upon download
Stage Plan 1.doc (141.6 KB), Dear Vincent.doc (46.2 KB)

Hi Roger,

I read the correspondence with the Principal Defender.
Just one clarification as to the moment the office space will be available and ready for use in The Hague. We are about to finalise lease discussions in The Hague and we will be able to have access to the building as of November/December.
Partitioning and cabling etc will however take some time. So it would be saver to assume that as of 1 February the building is ready for use.

If you have any further questions on such matters, don't hesitate to contact me
Regards
Herman

Herman von Hebel
Deputy Registrar
Special Court for Sierra Leone, Freetown

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Annex 2

SPECIAL COURT FOR SIERRA LEONE
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INTEROFFICE MEMORANDUM

To: Mr. Karim Khan, Lead Counsel, Taylor Defence Team.

From: Vincent O. Nmehielle, Principal Defender.

C.c.: Mr. Lovemore G. Muno SC, Registrar; Mr. Herman von Hebel, Deputy Registrar; Ms. Elizabeth Nahamya, Deputy Principal Defender; Charles Jalloh, Legal Advisor, Defence Office

Date: 19th October 2006.

Subject: Your letter dated 2nd October 2006 re: Defence DSA and Logistical Provisions for the Defence of Charles Taylor.

Dear Karim:

Thank you for your letter dated 2nd October 2006 in which you raised a number of concerns regarding the availability of support to you and your team to facilitate the defence of your client Mr. Charles Taylor.

In your letter, you categorized your concerns under the following headings: 1) Defence Office in the Hague; 2) DSA Policy; 3) Work Reports; and 4) Terms of Engagement. It is therefore fitting for me to address each of these issues in turn.

1) Defence Office in the Hague

You do appreciate that, as Principal Defender, I am indeed acutely aware of the right of all accused persons before the Special Court (including Mr. Taylor) to have adequate time and facilities to prepare their defence consistent with their right to do so under Article 17(4) (b) of the Statute of the Special Court and more generally as provided for under international human rights law.

In the case of your client's defence, I fully agree that your legal team which is still being composed face immense complexity in respect of both the legal and factual issues, including the heap of documentary evidence that will need to be reviewed. I note that these already serious challenges are further compounded by the reality that the pre-trial preparation will now have to take place far away from the geographical location of Mr. Taylor's alleged crimes and in circumstances whereby the Special Court is still working out the practical modalities of identifying suitable office space to house staff and assigned counsel.

In this vein, I wish to note that unlike any of the arrangements for any other defence team, I have motivated and the Registry has agreed to provide two well equipped offices to be provided for your team's work when the Special Court secures the office facilities that are being sought for the trial in addition to the separate office for the Defence Office Legal Officer/Duty Counsel stationed in the Hague to provide defence support to your trial. I regret that I can only state at this stage that I am doing the utmost possible to present the challenges you are currently facing to the Registry and the need to provide adequate facilities for your team as soon as possible to facilitate preparations for the trial tentatively scheduled for April 2007

2) DSA Policy

I agree with you that it is a cardinal principle in a fair criminal justice process such as the one before the Special Court for all accused persons to be informed of the case against them by the Prosecution. I also understand the imperative for your team to review the over 32,000 pages of initial Prosecution disclosure and to engage upon close consultation with your client on cross-examinations, issues regarding agreed admissions, identification and interview of potential defence witnesses and the formulation of a general defence strategy. However, as I noted in my e-mail of 2 October 2006, due to budgetary constraints, my office is not in a position to pay team members full DSA during the pre-trial period as it was expected that the team members will be working from their respective offices where their full-time legal practices are based and travel to The Hague only from time to time.

Granted that you reiterated what appears to be your key concern to the effect that "the refusal to guarantee DSA payments that will enable all members of the Defence team to reside in the Hague during the short pre-trial period to be so unreasonable and unfair so as to make the original agreement in practice unworkable" and that failure to address these concerns may put you in a position where you "may not be able to fulfil our professional obligations and, accordingly may have to review our current terms of engagement".

I am afraid that Continuous residence of your team members in The Hague during the pre-trial presents real DSA challenges that has never been envisaged in this or any other trial in any other tribunal during the pre-trial period. Again, I will present this issue to the Registrar for us to have a reasoned consultation on it.

3) Work Reports

With respect to work reports, the Legal Services Contract (LSC) requires all expenditures incurred by counsel be approved in advance by my office. In our experience, this does not impose an undue administrative burden on your team in the sense that it does not mean that each item of expenditure must first be approved in advance; rather, it means that whatever category of expense is provided for as a reimbursable expense in the LSC can be utilized by counsel and will be reimbursed by the Special Court, provided that counsel complies with the necessary procedures including the provision of documentary evidence.

In this regard, I would draw your attention to the letter and spirit of section 4 of the LSC which states that expenses incurred by defence teams shall only be reimbursed if approved 1) in the Case or Stage Plan and 2) upon submission of documentary proof of such expenses. Indeed, Article 16(A) of the Directive on the Assignment of Counsel confirms that no Assigned Counsel or other Defence Team member shall be paid for any service to an Accused or expense incurred in the course of representing that Accused except in accordance

with the LSC and the Contract Specification or by the written authorisation of the Principal Defender in consultation with the Registrar.

Article 16(D) then anticipates that the LSC will include agreement as to the amounts to be paid to the defence team (fixed in section 4 of the LSC) and any other categories of expenses, which may include travel costs or DLA/DSA, which the Principal Defender agrees to pay the Assigned Counsel or other members of the Defence team. For ease of reference, Annex 2 of the Contract Specification generally highlights the main expenses that are reimbursable to defence counsel, including their limits, as well as what is not reimbursable (except if special permission were obtained from the Principal Defender by counsel in advance).
To assist Defence Teams, I can and do exercise discretion to approve advances up to a certain percentage of the amount contained in the stage plan to enable members of a team to function before their invoices are submitted. But it will not be up to 80% as you suggest – likely 50%. The amount advanced would be recovered from the team member against his or her invoice.

4) Terms of Engagement.

Under this heading, you concluded in your letter that the current lack of "immediate logistical support" to your team is "in clear breach of Annex 2 of the Taylor Contract Specification." You further concluded that "this breach alone is sufficient to render the whole agreement invalid".

While, as I have noted above, my office in conjunction with the Registry is working hard to make available to you the requisite facilities as soon as possible to assist you to prepare your case, I do not believe or agree that this in itself is sufficient to render invalid our agreement for your provision of legal services to Mr. Taylor under the LSC we signed in the Hague recently. This is particularly so considering the factual circumstances relating to the conclusion of the LSC and your awareness at the time that my office is not currently in a position to provide the immediate facilities envisaged due to circumstances beyond our control .

As our office does not believe that it would be in the best interests of Mr. Taylor for you to withdraw from the case at this stage of the judicial process when plans are being made for trial, a suggestion that is alluded to in your letter, I agree that it is best that we discuss these points with you in person along with a representative of the Registry to see if any immediate solution can be found in relation to all the above issues that may be outstanding.

5) Monrovia Office Proposal

Though not contained in your letter but in your recent email to me, I am thinking seriously on how to go about the Monrovia Office proposal. I will need to engage the Registry more on this and see how we could address it, since we do not have any prior experience in this area. One way that just got into my head as I am writing this memo is whether the private office of the Liberian member of the Team cannot be utilized as the team's Monrovia liaison office.

Be rest assured that the Defence Office will do its utmost to assist your team and facilitate the preparation for your client's case. Let us continue in the good relationship that I believe we have had so far in this regard.

Kind regards.

Annex 3

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INTEROFFICE MEMORANDUM

To: Mr. Karim Khan, Assigned Counsel to Mr. Taylor

From: Vincent O. Nmehielle, Principal Defender

cc: Mr. Lovemore G. Munlo SC, Registrar; Mr. Herman von Hebel, Deputy Registrar; Ms. Elizabeth Nahamya, DPA; Mr. Charles Jalloh, Legal Advisor, OPD; Ms. Shakiratu Sanusi, Legal Officer OPD Taxing and Contracts

Date: 06 November 2006

Subject: Re: Request for Clarification and Review of DSA and Logistical Provisions for the Defence of Charles Taylor

Your letter of 27 November on the above subject refers. Your letter arrived while both the Registrar and the Deputy Registrar were away on leave. On the return of Mr. Herman von Hebel, the Deputy Registrar, I held a meeting with him on the issues you raised in your said letter and we agreed to respond to you separately relative to the issues that pertain directly to our respective offices even though they may be cross-cutting. In this regard, I have seen Mr. von Hebel's response to you regarding office facilities and the use of laptop computers in the detention facility. I will not add to the response on those issues. I will thus focus on pre-trial travel and DSA policy in The Hague and Defence Office in Monrovia. I will also clarify on the interwoven issue of the provision of "clerical facilities" in The Hague pending the provision of office facilities to your team.

1 Pre-Trial and DSA Policy in The Hague

I believe that my Inter-Office memo of 19 October that you refer to you in your letter clearly sets out the policy to be followed regarding DSA in The Hague, which accords with the practice here in Freetown and the practice in all other international tribunals. The important issue here is that it is not the practice that members of a Defence Team would reside at the trial venue continuously either during the pre-trial or the trial period. The presence of defence team members at the trial venue within these periods would be triggered by authorized travel to the venue based on a travel request made to the Defence Office indicating activities that the team member would undertake within the particular period. It follows that DSA would be payable for the authorized periods. Defence team members cannot just pack their bags and travel to The Hague and then begin to accrue DSA. The Legal Services Contract (LSC) clearly indicates the requirement of travel authorization, which must be approved before team members undertake any travel.

While as Principal Defender, I appreciate that neither the accused person nor Counsel chose The Hague as venue for the Taylor trial, which complicates issues a bit, it is important that reasonable procedures are followed in the proper management of the trial. Thus, I cannot

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approve or authorize DSA for your team members from the date you began taking instructions from Mr. Taylor "throughout the pre-trial period" as you request. While your team members may choose "to remain in The Hague on a full time basis until this trial commences," it does not necessarily follow that we would have to pay DSA to your team members for that period irrespective of whether it is authorized or not.

So to clarify as requested, travel to The Hague by Counsel and Team members during the pre-trial and trial periods must be based on travel authorization that is made to and approved by the Defence Office and the Registry for a particular duration with clear description of activities that would take place during the travel period. DSA will then be paid for the period of authorized travel to the particular team members so authorized. Also, in accordance with the configuration of teams that is outlined in the LSC the Defence Office's commitment in terms of fees and expenses is limited to a total of four team members: Lead Counsel, two Co-Counsel and one Legal Assistant and DSA would not be applicable to any team member of Dutch citizenship or a person ordinarily resident in The Hague as is the practice here in Freetown. It is not conceivable therefore that your team members would be authorized to remain in The Hague on a full time basis during the pre-trial period. The only thing I can say at this point is that I will continue to engage the Registry on the possibility of authorizing a full time stay of some members of the team in The Hague for some reasonable period (say between four to six weeks) prior to the commencement of trial. This has to be approved by the Registrar.

II. Defence Office in Monrovia

Your proposal for an office for the Defence Team in Monrovia has been considered and we have come to the conclusion that it is also not the practice of the Court or that of any other tribunal to do so. The fact that you have some members of the team based in Monrovia does not merit the establishment of a Monrovia Office for the team. There is no doubt that Liberia is an important in the Taylor trial, but its importance is similar to that of say Ivory Coast, Libya or any other country that may be connected to the trial. The only thing that can be done in this regard is that the Defence Team can be facilitated to undertake investigations in Liberia as necessary. The practice of the Court is to provide an office for a defence team at the venue of the trial, which Monrovia is not. As you are aware efforts are underway to provide your team an office in The Hague. You already have an office here in Freetown, which may prove useful for your Sierra Leonean and Liberian investigators as well as for the Liberian Legal Assistant. My clarification therefore is that the Defence Office or the Registry is not in a position to provide your team an Office in Monrovia.

III. Provision of Clerical Services

Let me clarify that Counsel may be reimbursed for reasonable expenses for clerical services provided it is contained in your stage plan and approved by the Defence Office.

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IV Conclusion

The bottom line of providing logistics, authorizing travel and payment of DSA in trials of this nature under the legal aid system is that assigned Counsel and members of the Defence Teams are ordinarily private legal practitioners with domestic offices from where they are expected to practice. Because of their involvement in the trial at the international level, the team members are facilitated by the Court to be at the venue of the trial and to take instructions from their client from time to time and are thus not expected to continuously reside at the venue unless they choose to do so on their own.

We all agree that the Taylor trial is a high profile case and that the transfer of the trial out of Freetown to The Hague makes logistics a bit difficult, but we are doing our best under the circumstances to provide the necessary office space and equipment and we will continue to push until that is realized. I agree that the schedule set for the tentative commencement of trial in April 2007 puts the Defence a bit under pressure. Let us, however, try to work within the schedule as much as possible to determine whether or not the set date is feasible.

I hope that I have bee able to clarify the issues as requested.

Kind regards

Annex 4

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Our Ref RJS 14112006 (1)

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Principal Defender
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The Special Court for Sierra Leone
By Email: nmehielle@un.org

Cc: Herman von Hebel: vonhebel@un.org
L Munro: munlo@un.org

First Letter of the 11th November 2006

Dear Vincent

Application to Registry re Inadequate Facilities and DSA provisions

Thank for your letter of the 6th November 2006. We would be grateful if Roger Sahota could be included in the circulation list for all future correspondence.

We welcome your indication that full DSA may be available to eligible members of the Defence team for the 4 to 6 week period preceding trial.

We remain committed to seeking a compromise on all the points we have raised to date and it is in this spirit of co-operation that we would kindly ask for your urgent consideration of the points we have raised below. As stated Lead Counsel Mr Khan is available at any time to discuss these matters in person by telephone.

Application for DSA

We note that you require a formal travel request to be made to trigger consideration of DSA entitlement together with an indication of the activities that any team member is to undertake and we have endeavored to comply with this below.

We made a blanket request for DSA throughout this period in our letter of the 2.10.06 and refer you to the points raised in our subsequent correspondence, which to our disappointment have not all been fully addressed. As we had previously notified you of our work plan on the 2nd October 2006 and that all work would have to be conducted in the Hague we request that all DSA allowances should be assessed from the date that work commenced.

Our position remains as previously stated, namely that in order to have any prospect of reaching a position where we are trial ready by September 2007 (we consider the tentative trial date to be untenable) we will need to attend on Mr Taylor 4 – 5 times a week throughout the pre-trial period. We have chosen to base

ourselves in the Hague as we cannot envisage how this case can be prepared remotely without day to day reference to the client. We note that you are prepared to provide DSA with regards to attendances on Mr Tayor from "time to time" – given our position all we seek is a determination of the DSA entitlement the Defence Office is prepared to allocate in light of what follows i.e. how many days DSA a month you are prepared to grant.

Avi Singh - Travel Request

Travel Request - 16.10 – 3.11.06

Arrived in Holland from Arusha (fare paid by the ICTR) on the 16.10 and returned due to visa problems on the 3.11.06. Attended the client on 11 separate days during this period and completer other tasks as set out in Stage Plan 1 (preparing clients instructions re John Tarnue and other OTP witnesses.).

Travel Requests (San Fransisco – Hague)
15.11 - 20.12.06

During this period Avi will be attending on the client 4 days a week and performing tasks 1, 2,3,4,5,7,8,11,15,16,17,18,20,21 and 23 as set out in Stage Plan 1.

Clerical Services

Further to our earlier correspondence re office facilities may we also suggest an alternative resolution – namely that the Defence Team are provided with a monthly allowance in the region of 3,000 euros for clerical services prior to the establishment of a Defence Office in the Hague (backdated to October). This will cease once the Defence office opens and allow us to respond flexibly to our current logistical problems. This may also prove cost-effective to the court - for instance the OTP have not provided Mr Taylor with any hard copies of the additional evidence served subsequent to the first tranche of disclosure on the 17th May 2006. This amounts to in excess of approximately 5,000 pages. The cost of copying and filing this material will be prohibitive and far in excess of the purchase price of essential hardware and stationery.

Office in Monrovia

We are disappointed to learn that the court will not provide a Defence Office in Monrovia, particularly as it is our understanding that OTP investigators (presumably unencumbered by any of the budgetary constraints we face) are currently and have been operating in the capital from some time. We ask you to consider your position on this point again on the basis that we are willing to set up an office in Monrovia ourselves if granted a monthly clerical services allowance n the region of 3,000 euros to run to the conclusion of trial .

We would be grateful for a reply to this letter within the next three working days.

Yours faithfully

Karim A Khan
Roger J sahota

Annex 5

To: rogersahota@hotmail.com
CC: nahamya@un.org; jallohc@un.org
Subject: Re: From Roger Sahota
From: nmehielle@un.org
Date: Wed, 27 Sep 2006 15:54:25 +0000

Dear Roger:

Thank you for your mail. It was indeed also my pleasure to have met you at The Hague and to formally welcome you as part of the Taylor Defence Team. Regarding your questions, I would answer as follows:

1. The Defence Office will have a unit in The Hague with a Legal Officer/Duty Counsel. Also, the Defence Team will be assigned two offices in close proximity to the Defence Office's unit. The Duty Counsel position has been advertised and would soon be recruited. As to when the successful candidate would assume duty, I cannot be exact. As I hinted you when we met, the Special Court has just identified an office space. A lease contract would need to be entered into and the office space would need to be partitioned and all necessary equipment put in place. The expectation is that the offices should be occupied by December 06/ January next year.

2. Regarding interns, yes your team could benefit from interns in accordance with the Special Court's internship policy. All interns come to the Special Court through the application channel that is established by the Registry. Each section of the Court is involved in the selection process based on the interests of the interns as indicated in their application forms. In this regard, the Defence Office selects interns that have identified Defence as their area of interest and assigns selected interns to Defence Teams based on need and prior requests. The internship policy of the Court does not allow a Defence Team to hire interns to work in the Court. The issue of funding interns is entirely out of the hands of the Defence Office, as the Registry is the only organ responsible for articulating an internship fund budget. At this moment the Registry has advised all sections of the Court that it has run out of internship funds until further notice. As a result, all interns who come to the Court, and more so to the Defence Office, must be prepared to come unpaid, but have to pass through the Registry application procedure. All I can promise you at this point is that there are a number of qualified interns who have applied to the internship program and are willing to come to the Court unpaid. As soon as we have accepted those that we find qualified and who are willing to work for the Defence, we will assign one or more to your team.

I hope this clarifies the position.

Regards.

Vince

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"roger sahota" <rogersahota@hotmail.com>
09/26/2006 11:46 AM

To nmehielle@un.org
cc
Subject From Roger Sahota

Annex 6

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Our Ref RJS 02102006

Vincent O. Nmehielle
Principal Defender
Office of the Principal Defender
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By Email: nmehielle@un.org

Cc: Herman von Hebel: vonhebel@un.org
L Munro: munlo@un.org

2nd October 2006

Dear Vincent

DSA and Logistical Provisions for the Defence of Charles Taylor

Thank you for your prompt reply to our recent email.

May we also thank you for your efforts on our behalf. We hope that you will continue to represent the Defence interests robustly, as you have been doing.

It is self-evident that this case is on a totally different level as far as legal preparation and investigative scope is concerned from every other case before the SCSL. Whilst we appreciate that the funding arrangements currently in place are exceptional for the SCSL they are otherwise somewhat limited for a case of this complexity. We trust that if the court does receive additional funding, the amount available to the Defence may be re-visited and that the resources will not simply go to the OTP. As you are aware the Prosecutor detailed a team of at least 5 lawyers so far that are involved in the Taylor case. It is going to be extremely tight to conduct our defence to this budget, but we will attempt it in good faith as we indicated.

In light of this, and despite your best efforts which are greatly appreciated, we must register our concern at the support facilities (or lack thereof) currently available to us in the Hague and other aspects of our funding and logistical provisions, namely:-

Defence Office in the Hague

As Principal Defender you will be acutely aware of the right of a defendant to have adequate time and facilities to prepare their defence. Having agreed to transfer this matter to the Hague the Special Court is under an obligation to ensure that the necessary steps are taken to ensure that Mr Taylor's basic legal rights are observed, particularly given the political sensitivity and evidential complexity characteristic in this case.

The Taylor defence team have a mountain to climb in the coming months. To date we have been served with over 32,000 pages of evidence without sight of any of the exhibits to date. We have recently recruited another legal assistant (subject to your approval) to assist in absorbing this material while at the same time we endeavour to obtain instructions from our client, not to mention co-ordinate an investigation that is taking place in a different continent. We will further require an additional legal assistant to begin as soon as possible to assist in our pre-trial preparation.

In this context we are forced to state that we consider it wholly unacceptable that office facilities will not be made available to the defence team until some time in December or January, some 8 to 12 weeks before this trial is to commence. In the interim we will have no access to any of the basic facilities necessary to organise Mr Taylor's case - no correspondence address in the Hague, no telephone and no space to house the 12 boxes (100 plus lever arch files) of OTP evidence we have been served with which are gathering dust in Freetown. At this present moment in time we cannot confirm to our prospective legal assistants whether they will be required to work from home or to loiter in the library of the ICC when they begin work as anticipated in mid October.

DSA Policy

We are also disappointed to learn that that

"DSA for team members during this pre-trial period is limited to the limited periods that team members are expected to be at the Hague. We do not expect that team members will reside at The Hague during this period, but would work from their respective domestic offices."

(Email from the Principal Defender dated 2nd October 2006)

The Accused in any criminal prosecution has the right to be made aware of the case against him. That the OTP have chosen to frame the indictment on a broad canvas as here is not of our choosing. We must find some way of distilling the 32,000 pages of evidence before us into a manageable form and obtain our clients instructions thereon. From this we will be able to clarify our defence strategy, decide upon the appropriate questions to be put in cross-examination, agree admissions, identify and interview relevant defence witnesses and formulate our defence strategy. In our submission it

will be impossible to complete these tasks in a case of this complexity where the Accused is a Head of State unless all members of the defence team are allowed to reside permanently in the Hague so they can have daily access to the client during the short pre trial period. We are already facing the challenge of condensing, what is in our opinion, 12 months of preparation into a six month window (see post).

We emphasise again that these problems are not of our making. The UN and Special Court have chosen to stage this trial in the Hague. None of the problems addressed herein would have arisen if the Accused were remanded in Freetown, and we do not think, as a matter of principle, it is unreasonable to ask, at the very least, for equivalent rights of access as would be available there.

We have given this matter considerable thought as can be seen from the attached document – Stage 1 of our Case Plan (version 1, supplementary case plan dealing with investigative issues to be forwarded in due course) setting out the steps we propose to take in the next three months. You will note that our Case Plan anticipates that in total the three legal assistants assigned to the defence team will attend upon Mr Taylor five to six days a week. Roger Sahota will focus on taking instructions re the critical nexus witnesses alleged to work for the Accused (2 days a week), another legal assistant on the RUF and other insiders (2 days) and the third legal assistant to focus on the political background and 14 prospective expert witnesses (2 days). All the legal assistants will spend the rest of their time reviewing the material served and conducting further preparation enquiries based on the instructions elicited. To review the 32,000 pages of evidence alone would take over a year at 5 minutes per page. Until we have completed this task and then obtained the clients instructions we will not be able to agree admissions as we are currently required to do by November 2006.

The work objective of Stage 1 requires us to perform six months of preparation in three months, a challenge which in our submission can only be met by a dedicated, tightly knit team working together around the clock. This is simply not feasible on any reading if we are not permitted a permanent base in the Hague. We therefore request an assurance that each individual member of the team will be entitled to a full DSA allowance during the pre-trial period.

Work Reports

The current funding arrangements require us to obtain approval in advance for any defence expenditure from the Office of the Principal Defender. We believe this creates an unnecessary administrative and bureaucratic burden on both parties and would therefore ask the Principal Defender to consider adopting a model similar to that in practice to the ICTY for this case. We propose a model where, for each month of each stage, 80% of our monthly budget is provided monthly in arrears on a good faith basis. The balance is then paid within 28 days of submission of a work report at the end of the stage. The work report will detail all the tasks performed by the defence during that stage.

Terms of Engagement

As stated above we will continue in good faith to prepare Mr Taylor's defence within the budgetary constraints imposed by the SCSL. However we consider the failure to

provide immediate logistical support to the Defence to be in clear breach of Annex 2 of the Taylor Contract specification. It may be that be that this breach alone is sufficient to render the whole agreement invalid. This is not an avenue that any of us wish us to explore.

Furthermore we consider that the refusal to guarantee DSA payments that will enable all members of the Defence team to reside in the Hague during the short pre-trial period to be so unreasonable and unfair so as to make the original agreement in practice unworkable.

These are not matters we take lightly and this is why we have taken the decision to write to you in these terms. We are subject to court orders (e.g commencement of trial, agreeing admissions see ante) that we will simply not be able to meet unless adequately resourced. We have not touched upon the issue of equality of arms in the body of this letter but it is also plain to us that there is a clear disparity in the time and facilities afforded to the OTP and that offered to the Defence.

In conclusion we would also advise you that we have a duty to represent our clients interests vigorously and to act in his best interests at all times pursuant to the Rules of the Law Society of England and Wales and the Code of Conduct of the English Bar. If this situation persists we are both of the opinion that we may not be able to fulfil our professional obligations and, accordingly may have to review our current terms of engagement. We would therefore welcome the opportunity to discuss these points with you in person or with representatives of the Registry to see if any immediate solution can be found so that acceptable DSA arrangements and an office are in place by mid-October at the very latest (more than six months after our client's transfer to the Hague). In the spirit of co-operation we are also willing to assist in any way we can, to the extent of identifying and equipping suitable premises for the Taylor defence team subject to the provision of adequate funding.

Yours faithfully

Karim Ahmad Khan and Roger J Sahota

Annex 7

From: *Herman von Hebel <vonhebel@un.org>*
To: *karimahmadkhan@hotmail.com*
CC: *packham@un.org, rogersahota@hotmail.com, vonhebel@un.org*
Subject: *RE: CT trial witnesses*
Date: *Tue, 10 Oct 2006 11:57:51 +0000*

Dear Karim,

Thanks for your quick response. I understand very well that you can not tell at the moment as to whether you will have any high risk witnesses in your defence case; actually I had not expected a different answer.

As to office space for Defence in The Hague. Our projections at the moment are that the office space is fully operational and open for use by everyone as of roughly 1 February of next year. You are more than welcome as of then to start making use of the office space by then. The real final date is yet unknown, but don't hesitate to contact me or Paul Packham (who is on top of this issue) whenever you feel a need. Office space in Liberia is the most problematic. I see your point and fully sympathise. I would actually suggest that you discuss this matter first with the Principal Defender and see what he can do for you or what you can arrange with him. Keep me posted on any developments in that regard.

Hopefully this will assist
Warm regards
Herman

Herman von Hebel
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Annex 8

"karim khan" <karimahmadkhan@hotmail.com>

10/10/2006 11:23 AM

To vonhebel@un.org
cc packham@un.org, rogersahota@hotmail.com
Subject RE: CT trial witnesses

Dear Herman,

Am fine. Thank-you. I am sorry I cannot even fathom a guess at the moment. I would hope there will not be too many high risk defence witnesses. A few perhaps, if I had to hazard a guess. Usually most of these are in the OTP camp as you know. But I simply dont know until I have a presence on the ground. As you are aware, we do not have any investigators appointed at the moment and the one we have identified and requested for the Liberia end of things, we asked the OTP to "clear" in advance" as a courtesy and a precaution. We are awaiting their response which they have promised by the end of the week.

On another note, is there any chance of being provided a defence office in Liberia from which to conduct investigations and necessary interviews etc? All this is going to be very very hard to say the least from hotel rooms (if I am there) or, given the budget for local investigators, local guest houses. Can you do anything please? The problem remains, of course, about the lack of office facilities in the Hague. This has been raised in previous correspondence to you. Please let us know what the Registry can do to help.

with kind regards

Karim

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Annex 9

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L Munro: munlo@un.org

22nd October 2006

Dear Vincent

DSA and Logistical Provisions for the Defence of Charles Taylor

Thank you for your Inter office Memorandum dated 19th October 2006 responding to the various concerns raised in our letter to you dated 02 October 2006.

At the outset, let me state that we remain committed to trying to work out a solution to the various difficulties facing us in a collegiate and constructive way. Difficulties *are* faced by us however, and it would not be responsible for us to delay indefinitely in a bid to resolve these bilaterally. I remain available, any time this week, for a telephone conference with you and / or other Registry Representatives in a bid to satisfactorily address the various concerns raised in our 02 October letter. The point has come, however, when trying to "negotiate" or "motivate" for essential and basic rights becomes irresponsible as the tentative start date for trial becomes every closer.

We have tried to be understanding of the various "start up" problems, which have been well ventilated previously. However, as I said at the first aborted status conference on Wednesday 21st June 2006, "*...individuals on a personal level may have difficulties. Of course, one may sympathise with them. But the bottom line is that those difficulties are of no legal consequence to the rights of the accused.*" This remains my position. I hope we

can come to a mutually acceptable solution to the various issues raised by the end of this week (in particular the urgent need now for an Office and Facilities in the Hague and in Monrovia, and DSA for team members working, on my instructions, in the Hague). Should this not be possible, I consider it would be imprudent of me not to seek relief from the Trial Chamber as all the issues raised are based upon the Article 17 Rights guaranteed my client, as well as from the express wording of the Legal Services Contract itself.

The help of the Principal Defender is greatly appreciated and is invaluable, and we do understand that the purse strings of the Court are controlled by the Registry, not by the Principal Defender. It is, however, simply unacceptable in my view for the Registry to state that there is no office in Monrovia available to us and no resources being offered to fund such facilities. It is similarly unacceptable, in my respectful view, for the Registry to state that my team can have access to office space only in February 2007 when the tentative trial date has been set for April 2007. We need support now. There is surely some obligation on the Registry to come up with a proposal to ameliorate or otherwise address the very understandable difficulties we are facing? At the very least the Registry should be willing to independently inform the Trial Chamber that the April start date is looking ever more unattainable because of these issues.

We have been as patient as possible and have also, I am sure you will agree, been as candid as we can. We are dependent, at the moment, on the resources provided by the Registry. I know no one would think that a case as important and complex as this can be done "on the cheap" if this means depriving the Defence of the basic facilities required to ensure a fair trial to an accused who is, of course, presumed innocent.

Please do telephone me **at any time** and let me know if you consider a telephone conference would be useful. Alternatively, or in addition, please feel free to e-mail any constructive comments which address the concerns raised in our letter dated 02 October 2006.

Kind regards

Karim A. A. Khan
Lead Counsel to Charles Ghankay Taylor

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Annex 10

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Cc: Herman von Hebel: vonhebel@un.org
L Munro: munlo@un.org

27th October 2006

Dear Vincent

Request for Clarification and Review of DSA and Logistical Provisions for the Defence of Charles Taylor

Further to our letter of the 22nd October 2006 and recent correspondence, we reiterate that we are committed to solving the current obstacles to the proper functioning of the defence team through constructive discussion, as we know you are. Karim Khan is available at any time for a telephone conference with you and / or other Registry representatives to discuss the issues raised here, and in previous correspondence.

As stated previously, if we cannot reach a mutually acceptable solution that allows us to function properly and adequately prepare the defence, we shall have to seek relief from the Trial Chamber. As such, we would be grateful for clarification of the position of the Office of the Principal Defender and Registry as regards the points set out below, which in our respectful submission have not been fully addressed to date. We would also ask you to review your position given a recent change in circumstances following the recruitment of two Legal Assistants (as anticipated in our letter of the 2nd October) and the appointment of Co-counsel.

Office in The Hague

As you are aware, there has been previous correspondence on this issue. We remain unclear as to when office facilities for the Defence will be made available in The Hague.

On the 27th September you notified us that *"The Defence Office will have a unit in The Hague with a Legal Officer/Duty Counsel. Also, the Defence Team will be assigned two offices in close proximity to the*

Defence Office's unit. The Duty Counsel position has been advertised and would soon be recruited. As to when the successful candidate would assume duty, I cannot be exact. As I hinted you when we met, the Special Court has just identified an office space. A lease contract would need to be entered into and the office space would need to be partitioned and all necessary equipment put in place. The expectation is that the offices should be occupied by December 06/ January next year."

Subsequently we received the following email from the Deputy Registrar on the 6th October 2006 – *"Just one clarification as to the moment the office space will be available and ready for use in The Hague. We are about to finalise lease discussions in The Hague and we will be able to have access to the building as of November/December. Partitioning and cabling etc will however take some time. So it would be safer to assume that as of 1 February the building is ready for use."*

Although there seems to be a plan for a future office, the Defence team needs an office now to be able to adequate prepare Mr. Taylor's defence. The three members of the defence team in The Hague have no office space to work in, no access to meeting place, or dedicated facilities. We have stated previously at length our view that failure to provide immediate office facilities to the Defence in The Hague is completely unacceptable and in breach of Annex 2 of our Legal Services Contract.

We therefore seek clarification of the position of the Registry and the Office of the Principal Defender as to the following:-

1. **The provision of any assistance, financial or otherwise as regards IT, Office and other clerical facilities in The Hague for the interim period prior to the opening of the Defence Office at The Hague. We request that any such assistance should be forthcoming within the next 14 days, failing which an indication should be given as to when and if any assistance will be provided during this interim period.**

Pre-trial Travel and DSA Policy in The Hague

In your email of the 2nd October you stated *that "DSA for team members during this pre-trial period is limited to the limited periods that team members are expected to be at The Hague. We do not expect that team members will reside at The Hague during this period, but would work from their respective domestic offices."* In your Interoffice memorandum of the 19th October you state that due to budgetary constraints the Defence Office is not in a position to pay full DSA during the pre trial period as it *"was expected that the team members will be working from their respective offices where their full time legal practices are based and will be travelling to The Hague from only time to time."*

We request full DSA for all Defence team members from the date that we began taking instructions from the client throughout the pre-trial period. Co-counsel and our Legal Assistants are now residing full time in The Hague in order to facilitate daily attendances on Mr Taylor in accordance with our Stage Plan 1. We intend to remain in The Hague on a full time basis until this trial commences. Mr Sahota attends on Mr Taylor on average twice a week, and our Legal Assistants three to four times a week. The remainder of the week is spent completing other tasks set out in Stage Plan 1 and in our submission residence in the Hague is essential for this purpose (see our previous correspondence).

We therefore seek clarification from the Registry and the Office of the Principal Defender as to the following:-

2. **A formal statement setting out the pre-trial DSA and travel policy for the Defence Team of Mr Taylor in the Hague specifying the provisions governing the authorization of travel and daily subsistence allowance (DSA). We submit that the policy should specify:-**
    a. **the practice to be followed when both assessing and submitting travel and DSA requests and claims.**

b. **maximum allowances of DSA available to each team member if appropriate within any given month**
c. **the date from which Defence team members will be entitled to DSA.**

As we had previously notified of our work plan on the 2nd October 2006 we request that all DSA and travel allowances should be assessed from the date that work commenced.

Defence Office in Monrovia

In your letter of the 19th October 2006 you state that *"Though not contained in your letter but in your recent email to me, I am thinking seriously on how to go about the Monrovia office proposal. I will need to engage the Registry more on this and see how we could address it., since we do not have any prior experience in this area. One way that just got into my head is whether the private office of the Liberian member of the team cannot be utilized as the team's Monrovia Liaison office."*

We have now recruited two investigators, Mr Aaron Kollie and Mr Supuwood (acting pro-bono). We do not think it is appropriate for the Defence to operate from Mr Supuwood's offices and request our own independent facility.

We therefore seek clarification of the position of the Registry and the Office of the Principal Defender as to the following:-

3. **The provision of assistance, financial or otherwise with regards to the provision of IT, Office and other clerical facilities for the Defence in Monrovia and, if applicable, the date from any such assistance will became available.**

Laptop Access during UNDU visits

We have made numerous requests of the ICC UNDU staff for the necessary clearance to allow us to take our notebooks with us to the UNDU to use when we meet our client. These have been met with a blanket refusal. On the 17th October the following communication was sent to Harry Tonk and Terence Jackson of the ICC Detention Unit - *"[p]lease reconsider your decision not to allow the Taylor team to bring laptops with them during legal visits. We have been served with 32,000 pages of evidence in this case in electronic form which needs to be presented to and discussed with our client. We do not have hard copies of most of this material.*

It will therefore be impossible to prepare our client's defence without the use of our notebook computers when taking instructions. We have already requested the assistance of the Principal Defender of the SCSL who is aware of this matter and further we understand that Legal Advisers to the ICTY detainees are allowed to bring laptop computers."

The same matter was raised in an email to the Principal defender from Lead Counsel on the 18th October to which we still await a reply.

We therefore seek clarification of the position of the Registry and the Office of the Principal Defender as to the following:-

4. **Whether the Defence Team will be allowed access to and use of their laptop computers during legal visits and if applicable, the date this facility will become available.**

We hope we continue to work together constructively and expeditiously to resolve the issues. As stated above, we consider it extremely important to receive the current status of the solutions being sought on these issues, and your opinion on the same. Given that many of these matters have been raised in

correspondence dating back as early as the 25th September 2006 and as we are working in intolerable conditions under immense pressure to be trial ready by April 2006, we feel that we have no choice but no request a formal reply **within the next seven days i.e. by 4pm GMT on the 3rd November 2006**. Subject to your reply we will consider the appropriate course of action open to us.

Thank you for your consideration.

Kind Regards

Karim A. A. Khan
Roger J Sahota

List of Authorities

SCSL Jurisprudence

1. *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-PT-110, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, 23 June 2006. Online:
http://www.sc-sl.org/Documents/SCSL-03-01-PT-110.pdf

2. *Prosecutor v. Brima et al,* Case No. SCSL-04-16-PT-68, Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, paras. 47, 65, 112. Online:
http://scsl-server/sc-sl/new/Documents/SCSL-04-16-PT-068-5276-5290.pdf
http://scsl-server/sc-sl/new/Documents/SCSL-04-16-PT-068-5291-5305.pdf
http://scsl-server/sc-sl/new/Documents/SCSL-04-16-PT-068-5306-5316.pdf
http://scsl-server/sc-sl/new/Documents/SCSL-04-16-PT-068-5317-5326.pdf

3. *Prosecutor v. Sam Hinga Norman et al*, Case No. SCSL-04-14-PT-141, Decision on Request by Samuel Hinga Norman for Additional Resources to Prepare his Defence, 23 June 2004. Online:
http://www.sc-sl.org/Documents/SCSL-04-14-T-141.pdf

4. *Prosecutor v. Sam Hinga Norman,* Case No. SCSL-2003-08-PT-119, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, para. 5. Online:
http://www.sc-sl.org/Documents/SCSL-03-08-PT-119.pdf

ICTY Jurisprudence

5. *Prosecutor v. Delalić et al*, Case No. IT-96-21-T, ICTY, Decision on the Motion by the Prosecutor for Protective Measures for the Prosecution Witnesses pseudonym "B" through "M", Preliminary Judgement, 28 April 1997, para. 27. Online:
http://www.un.org/icty/cases-e/index-e.htm

6. *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. (copy attached)

7. *Prosecutor v. Hadzihasanovic et al,* Case No. IT-01-47-PT, Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences thereof for the Rights of the Accused to a Fair Trial, 17 June 2003, para. 2. Online:
http://www.un.org/icty/hadzihas/trialc/decision-e/030617.htm

8. *Prosecutor v. Hadzihasanovic et al.* ("Central Bosnia"), Case No. IT-01-47, Decision on Prosecution's Motion for Review of the Registrar to assign Mr.

Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002. (copy attached)

9. *Prosecutor v. Halilovic,* Case No. IT-01-48-T, Decision on Defence Motion for Postponement of Start of Defence and Other Deadlines, 13 June 2005. Online: http://www.un.org/icty/halilovic/trialc/decision-e/050613.htm

10. *Prosecutor v. Halilovic*, Case No. IT-01-48-PT, Decision on Prosecution's Application for Leave to Disclose further Rule 66(A)(II) Materials to the Defence, 14 January 2005. Online: http://www.un.org/icty/halilovic/trialc/decision-e/050114.htm

11. *Prosecutor v. Milan Martic*, IT-95-11-PT, Decision on Appeal against Decision of Registry, 2 August 2002, para. 4. Online: http://www.un.org/icty/martic/trialc/decision-e/09122227.htm

12. *Prosecutor v. Milutinovic et al*, Second Decision on Motions to Delay Proposed Date for Start of Trial, 28 April 2006, para. 4. Online: http://www.un.org/icty/milutino87/trialc/decision-e/060428.htm

13. *Prosecutor v. Milan Milutinovic et al*, Case No.: IT-99-37-PT, Decision on Defence Request for Certification of Appeal Against the Decision of the Trial Chamber on Motion for Additional Funds, 16 July 2003. Online: http://www.un.org/icty/milutinovic/trialc/decision-e/030716.htm

14. *Prosecutor v. Milan Milutinovic et al,* Decision on Motion for Additional Funds, 8 July 2003. Online: http://www.un.org/icty/milutinovic/trialc/decision-e/030708.htm

15. *Prosecutor v. Milan Milutinovic et al,* IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003. Online: http://www.un.org/icty/milutinovic/appeal/decision-e/031113.htm

16. *Prosecutor v. Momcilo Krajisnik & Biljana Plavsic*, IT-00-39 & IT-00-40/1, Decision on prosecution motion for clarification in respect of application of Rules 65 ter, 66 (b) and 67 (c), 1 August 2001, para. 7, para 9. Online: http://www.un.org/icty/krajisnik/trialc/decision-e/10801DE516117.htm

17. *Prosecutor v. Strugar*, Case No. IT-01-42-PT, Decision on Defence Request for Review of Registrar's Decision and Motion for Suspension of all Time Limits, 19 August 2003. Online: http://www.un.org/icty/strugar/trialc1/decision-e/030820.htm

18. *Prosecutor v. Tadic,* Case No. IT-94-1, ICTY, Appeals Judgement, July 15, 1999, paras. 44, 48. Online: http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf

19. *Prosecutor v. Milosevic*, IT-02-54-AR73.6, Decision on the interlocutory appeal by the amici curiae against the Trial Chamber order concerning the presentation and preparation of the defence case, 20 January 2004, para. 13. Online: http://www.un.org/icty/milosevic/appeal/decision-e/040120.htm

20. *Prosecutor v. Prlic et al*, IT-04-74-T, Decision on the Oral Request of the Accused Jadranko Prlic for Authorisation to Use a Laptop Computer at Hearings or to be Seated Next to his Counsel, 29 June 2006. Online: http://www.un.org/icty/prlic/trialc/decision-e/prl-dec060729e.pdf

ECHR Jurisprudence

21. *Kamasinski v. Austria,* Judgement of 19 December 1989, Application No. 9783/82, para. 65, 98. Online: http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Kamasinski%20%7C%20v.%20%7C%20Austria&sessionid=9561600&skin=hudoc-en

22. *Stanford v. United Kingdom*, Judgement of 23 February 1994, Application No. 16757/90, para. 24. Online: http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=1132746FF1FE2A468ACCBCD1763D4D8149&key=455&sessionId=9773275&skin=hudoc-en&attachment=true

International Materials

23. Universal Declaration of Human Rights, adopted 10 Dec. 1948, UNGA Res 217 A(III) (UDHR), Art. 11. Online: http://www.unhchr.ch/udhr/lang/eng.htm

24. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, entered into force 23 March 1976, 999 UNTS 71; Art. 14(3)(b), art 21.4(b).

25. Statute of the International Criminal Tribunal for the Former Yugoslavia, SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993), Art. 21.

26. Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994), Art. 20.

27. Rome Statute of the ICC, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, Art. 67(1)(d).

28. European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221, Art. 6(3)(b).

General Comments and Reports

29. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993). Online: http://www.un.org/icty/legaldoc-e/index.htm

30. ICCPR General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14): 13/04/84 (twenty-first session). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994). Online: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument

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UNITED
NATIONS

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

Case No.: IT-95-4-PT
IT 95-8/1-PT

Date: 6 September 2002

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: **Mr. Hans Holthuis**

Decision of: **6 September 2002**

PROSECUTOR

v.

DUŠKO KNEŽEVIĆ

DECISION ON ACCUSED'S REQUEST FOR REVIEW OF REGISTRAR'S DECISION AS TO ASSIGNMENT OF COUNSEL

Office of the Prosecutor:
Ms. Joanna Korner
Mr. Kapila Waidyaratne

The Accused:

Duško Kneževic

Counsel for the Accused:

Mr. Thomas Moran

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"),

BEING SEISED of an application from the accused Duško Kneževic ("Accused") dated 24 June 2002 and filed in one of the working languages of the Tribunal on 5 July 2002 ("Application"), challenging the decision by the Registrar of the International Tribunal of 10 June 2002 assigning Mr. Thomas Moran as defence counsel to the Accused ("Impugned Decision") and, instead, seeking the assignment of Mr. Draško Zeć as counsel,

NOTING that the Accused argues in the Application that the Impugned Decision "would considerably infringe on [his] right to choose an attorney",

NOTING that, in the Impugned Decision, the Registrar rejected the request of the Accused dated 23 May 2002 for the assignment of Mr. Miodrag Deretić, attorney-at-law from Prijedor, on the basis that Mr. Deretić was assigned since 21 August 2001 as co-counsel to Mr. Zoran Žigić who was formerly charged in the same indictment as the Accused with crimes in the same location; that the Accused's subsequent request for the assignment of Mr. Draško Zeć, also attorney-at-law from Prijedor, was rejected on the ground that Mr. Zeć and Mr. Deretić shared the same law office in Prijedor, and the professional relationship between both attorneys was not sufficiently clear to ensure that a potential conflict of interest would not also affect Mr. Zeć,

NOTING the "Registry Comments on Trial Chamber's Invitation to Comment on the Accused's Request for Review of Registrar's Decision as to Assignment of Counsel", filed partly confidentially and *ex parte* on 19 July 2002 ("Registry Comments"), wherein the Registrar reiterates the reasons for rejecting the Accused's requests, adding that, in response to his request for further information on the circumstances of their professional co-operation, all the attorneys did was to deny any conflict of interest; that the Registrar submitted that in a number of non-privileged telephone conversations, Mr. Zeć suggested to the Accused that he should request his

appointment as counsel, and stated that this would enable Mr. Deretić to act alongside him; that the Registrar submits that such an arrangement would contradict his decision not to assign Mr. Deretić, and if Mr. Zeć were assigned, that could result in a fee-splitting arrangement between both attorneys,

NOTING that the Registrar also submits that the assessment whether a conflict exists is to be made by the Registry under the supervision of the Trial Chamber and not by the affected counsel or the Accused; that it is for the Registry to determine how a conflict of interest can be remedied in accordance with the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal ("Code of Conduct"),

NOTING the "Motion for the Confirmation of Duško Kneževic's Counsel Status" filed by Mr. Draško Zeć on 30 August 2002, requesting his recognition by the Trial Chamber as the counsel chosen by the accused pursuant to Article 21 paragraph 4 (d) of the Statute of the International Tribunal ("Statute"),

CONSIDERING that, contrary to the submission of the Accused and Mr. Draško Zeć, the right of indigent accused to counsel of his own choosing is not without limits; that the decision for the assignment of counsel rests with 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",[1]

CONSIDERING that the Registrar has the primary responsibility in the determination of matters relating to qualification, appointment or assignment of

[1] *Prosecutor v. Gérard Ntakirutimana*, Decision on the Motions of the Accused for Replacement of Assigned Counsel/Corr., Case No. ICTR-96-10-T, ICTR-96-17-T, 11 June 1997. The European Court of Human Right's case of *Croissant v. Germany*, Judgement of 25 September 1992, Series A no. 237-B, para. 29 provides, in relation to Art. 6(3) of the ECHR, that the right to be defended by counsel of one's own choice "cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned". It further held that when appointing defence counsel "regard to the defendant's wishes" should had but the court "can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice". While these principles are applicable to the domestic criminal systems of States which have ratified the ECHR, the Trial Chamber considers them to be of persuasive value.

counsel[2] in accordance with the relevant provisions of the Statute, the Rules of Procedure and Evidence of the International Tribunal ("Rules"),[3] the Directive on Assignment of Defence Counsel issued by the International Tribunal ("Directive") and the Code of Conduct,

CONSIDERING however, that matters relating to the assignment of counsel for an accused affect the conduct of a trial; that the Chamber has a statutory obligation to ensure the fair and expeditious conduct of the proceedings, with full respect for the rights of the accused,

RECOGNISING however that, as the Registrar has responsibility for the assignment of Counsel, this power should only be used in exceptional cases,

BEARING in mind that the recent decision of this Trial Chamber in the Halilović case[4] was confined to the particular circumstances of that case, in which the Accused sought a review by the Trial Chamber of the Registrar decision on the basis of Article 13(B) of the Directive, and the Trial Chamber held that it had no power on the basis of that provision to review the Registrar's decision to assign a particular counsel,

CONSIDERING however, on further reflection, 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 the Registrar; that Trial Chambers of the International Tribunal[5] and the International Criminal Tribunal for Rwanda[6] have reviewed Registrars' decisions to assign counsel,

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[2] *Prosecutor v. Enver Hadžihasanović et al.*, 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, Case No. IT-01-47-PT, 26 Mar. 2002.

[3] An important provision in this respect is Rule 45, on "Assignment of Counsel". Rule 45(A) provides: "Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignment shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges".

[4] *Prosecutor v. Sefer Halilović*, Decision on Sefer Halilović's Application to Review the Registrar's Decision of 19 June 2002, Case No. IT-01-48-PT, 1 Aug. 2002.

[5] *Prosecutor v. Enver Hadžihasanović et al.*, 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, Case No. IT-01-47-PT, 26 Mar. 2002, in particular paras 21, 23 & 55; *Prosecutor v. Milan Martić*, Decision on Appeal against Decision of Registry, Case No. IT-95-11-PT, 2 Aug. 2002.

CONSIDERING that the proposal by Mr. Zeć (overheard in a non-privileged telephone conversation) that the Accused should appoint him as counsel, and that that would enable Mr. Deretić to act alongside him constitutes improper conduct, since it would, in effect, nullify the Registrar's decision not to appoint Mr. Deretić; and that, therefore, the Registrar was justified in his decision not to appoint Mr. Zeć as counsel to the Accused,

HEREBY DENIES the Application.

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

Richard May
Presiding

Dated this sixth day of September 2002
At The Hague
The Netherlands

[Seal of the Tribunal]

[6] *Prosecutor v. Gérard Ntakirutimana*, Decision on the Motions of the Accused for Replacement of Assigned Counsel/Corr., Case No. ICTR-96-10-T, ICTR-96-17-T, 11 June 1997; *Jean-Paul Akayesu v. Prosecutor*, Appeals Chamber Decision relating to the Assignment of Counsel, Case No. ICTR-96-4-A, 27 July 1999.

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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-01-47-PT
		Date:	26 March 2002
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Florence Mumba
Judge Carmel Agius

Registrar: **Mr. Hans Holthuis**

Decision of: **26 March 2002**

PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
MEHMED ALAGIĆ
AMIR KUBURA

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

The Office of the Prosecutor:

Ms. Jocelyne Bodson
Mr. Ekkehard Withopf
Ms.Cynthia Fairweather

Counsel for the Accused:

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Ms. Vasvija Vidović and Mr. John Jones for Mehmed Alagić
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

I. INTRODUCTION

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1. 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"), is seized of the confidential "Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura", filed by the Office of the Prosecutor (hereinafter "Prosecution") on 20 December 2001 ("Motion of 20 December 2001"), in which the Prosecution requests the Trial Chamber to review a decision rendered on 26 November 2001 by the Deputy Registrar of the International Tribunal assigning a co-counsel for the Accused Kubura. Before joining private legal practice, counsel in question was previously associated with the Prosecution as a legal advisor for the period of January 1996-January 2000.

2. The Lead Counsel for the Accused Kubura filed the confidential "Defence Response to Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Amir Kubura", on 18 January 2002 (hereinafter "Defence Response").

3. The confidential "Prosecution's Reply to the Defence's Response to Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Amir Kubura" was filed on 4 February 2002 (hereinafter "Prosecution Reply").

4. The Trial Chamber issued a confidential scheduling order on 31 January 2002, which invited the Registrar of the International Tribunal to file submissions on the issues raised by the Motion of 20 December 2001, the Defence Response, and the Prosecution Reply including, in particular, the following issues:

> 1) whether, in the light of the law and practice of the International Tribunal, a Chamber may review a decision of the Registrar of the International Tribunal assigning counsel to a concrete case;
>
> 2) whether, if the answer to question 1) were to be in the negative, there would be a genuine obstacle in terms of general principles of law for a Chamber to review such a decision in the interests of justice and integrity of the proceedings before the International Tribunal; and
>
> 3) whether, if the answer to question 2) were to be in the negative, this Chamber could also take into consideration a possible scenario in which more than one counsel with previous association with the International Tribunal appear in one and the same case.

5. On 8 February 2002, the Registrar of the International Tribunal filed the confidential "Registry Submission regarding the Assignment of Rodney Dixon as Co-Counsel to the Accused Kubura"(hereinafter "Registry Submission").

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II. ADMISSIBILITY

6. The first question before the Chamber is one on the admissibility of the Motion of 20 December 2001: can a Trial Chamber review the Registrar's decisions assigning counsel?

7. While conceding that there is no explicit provision in the Rules of Procedure and Evidence of the International Tribunal (hereinafter "Rules") or in the *Directive of Assignment of Defence Counsel*, as amended on 15 December 2000 (hereinafter "Directive"), the Motion of 20 December 2001 argues that an analogy should be drawn between this case and the one envisaged in Article 13 of the *Directive*.

8. The Defence Response submits that Article 11 of the *Directive* establishes the power of the Registrar to assign counsel, whereas Article 13(B) of the Directive is concerned with remedy accorded an accused before the International Tribunal in the cases in which his request for assigning a counsel is refused by the Registrar.[1] It draws a distinction between the matter of assignment of counsel and the conduct of counsel during trial. Only the conduct is governed by the Rules. It suggests that the Chamber decline jurisdiction over the Motion of 20 December 2001 but that it will have the power to deal with the conduct of the counsel in question during the trial. Subsidiarily, it argues that if the Prosecution was relying on Article 13 (B) of the *Directive*, the Motion of 20 December 2001 was filed out of time.[2]

9. The Prosecution Reply submits that the Motion of 20 December 2001 was filed pursuant to Rules 54 and 73 of the Rules as well as the inherent powers of the International Tribunal "to entertain motions relevant to the control of its proceedings". Were the Chamber not to accept the Motion of 20 December 2001 as based on the two rules, the Prosecution Reply would rely on the

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[1] Paras. 4-5. Article 11, "Decision by the Registrar", provides that "(A) After examining the declaration of means laid down in Article 7 and relevant information obtained pursuant to Article 10, the Registrar shall determine how far the suspect or accused lacks means to remunerate counsel, and shall decide, providing reasons for his decision: (i) without prejudice to Article 18, to assign counsel and choose for this purpose a name from the list drawn up in accordance with Article 14; or, (ii) without prejudice to Article 18, that the suspect or accused disposes of means to partially remunerate counsel in which case the decision shall indicate which costs shall be borne by the Tribunal; or (iii) not to grant the request for assignment of counsel. (B) To ensure that the right to counsel is not affected while the Registrar examines the declaration of means laid down in Article 7 and the information obtained pursuant to Article 10 the Registrar may temporarily assign counsel to a suspect or an accused for a period not exceeding 120 days. (C) If a suspect or an accused, either (i) requests an assignment of counsel but does not comply with the requirements set out above within a reasonable time; or (ii) fails to obtain or to request assignment of counsel; or (iii) fails to elect in writing that he intends to conduct his own defence; the Registrar may nevertheless assign him counsel in the interests of justice in accordance with Rule 45 of the Rules and without prejudice to Article 18." Article 13, "Remedy against the Registrar's decision", provides in paragraph (B) that "the suspect whose request for assignment of counsel has been denied may, within two weeks of the date of notification to him, make a motion to the Chamber before which he is due to appear for immediate review of the Registrar's decision. The Chamber may (i) confirm the Registrar's decision; or (ii) rule that the suspect or accused has means to partially remunerate counsel, in which case it shall refer the matter again to the Registrar for determination of which parts shall be borne by the Tribunal; or (iii) rule that a counsel should be assigned."

inherent powers of the International Tribunal to justify the review by the Chamber of the Registrar's decision assigning counsel. Mindful of the division of powers between the Registry and the Chambers, the Prosecution Reply also suggests that for the reason that "a decision such as the assignment of counsel, while superficially appearing a purely administrative decision, may impact upon the course of justice before the Tribunal", the International Tribunal "must have the inherent and implied power to control the right of appearance before it even if it involves exercising a power tantamount to a 'review' of a Registry decision".

10. The Registry Submission argues that "in the absence of any express provision to the contrary, such as Article 13 of the Directive of the Assignment of Defence Counsel, Chambers do not possess a general power of review over Registry decisions". In the context of a concrete case, it suggests that "if during the course of proceedings, it becomes evident that a conflict of interest exists, and that this conflict would be likely to improperly prejudice the outcome of proceedings, then the Chamber may invite the Registrar to reconsider the assignment of Mr. Dixon in lights [*sic*] of its findings, or the material presented before the Chamber". While recognising that the Chamber has the inherent power to regulate the proceedings and the conduct of the parties, the Registry Submission argues that "this power should only be utilised in a manner that is consistent with and complementary to the powers of the Registrar", and that "an order to withdraw the assignment of counsel requested by an accused is contrary to an accused's right to free choice of counsel, which would not be an appropriate area for the Chamber to exercise its inherent powers".

11. The Chamber considers the issue to be of general importance. At the same time, the Chamber observes that the issue is not covered by provisions of the Rules and the Directive. The Chamber will therefore focus primarily on the submission that the jurisdiction of the Chamber in this matter is based on Rules 54 and 73 and the inherent powers of the International Tribunal.

12. The Chamber notes that the Registry Submission refers to Rule 33 (A) of the Rules which is explicit as to the authority of the President of the International Tribunal over the exercise of powers by the Registrar in the administration of the International Tribunal.[3] The Registry Submission thus argues that, as far as Chambers are concerned, there is no "general power of review over Registry decisions". The Chamber considers that Article 13 of the Directive amply demonstrated that the President and Chambers may intervene in certain decisions of the Registrar.

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[2] Article 13 (B) provides for a time-limit of two weeks following the notification of the refusal to assign counsel, for the accused to seek review of the refusal decision before the Chamber his case is pending.

[3] "...Under the authority of the President, the Registrar shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication".

13. The basis for presidential intervention in general lies in the provision of Rule 33 (A) of the Rules. In addition, Rule 44 on the Appointment, Qualifications and Duties of Counsel provides in the last sentence of paragraph (b) that "A suspect or accused may appeal a decision of the Registrar to the President." This provision may be considered as *lex specialis* to the *lex generalis* of Rule 33 (A).

14. The basis for action by a Chamber rests with its power and duty to guarantee a fair trial and the proper administration of justice as set forth in the Statute of the International Tribunal. It is against this background that Rules 46 and 77, for example, have been included in the Rules. Rule 46 (A)(i) determines that a Chamber may refuse audience to counsel if the conduct of that counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings. Rule 46 (A)(ii) goes one step further by providing that the Chamber may even determine that counsel is no longer eligible to represent a suspect or accused. Rule 77 (I) allows a Chamber to take a similar decision in case a counsel is found guilty of contempt of the Tribunal. These Rules, which aim to exclude a counsel in general are, however, not exhaustive.

15. Another important provision in this respect is Rule 45, on "Assignment of Counsel". Rule 45 (A) provides:

> Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in the Directive set out by the Registrar and approved by the permanent Judges.

The procedure mentioned in the Rule is found in Article 11 of the *Directive*, "Decision of the Registrar". This article provides the Registrar with the power either to assign counsel from the list of counsel he is empowered to maintain under Rule 45 (B) or to refuse to assign counsel. There is no question that the primary responsibility for assigning counsel rests with the Registrar. However, Rule 45 does not cover the circumstances in which a factor other than the means of the accused to pay his counsel has become an important issue in its correct implementation. Among the factors at issue in the present dispute is the potential for a conflict of interest or undue advantage to one of the parties. Since a factor relating to the disqualification of counsel in relation to a particular case can arise from the moment counsel is assigned, the Chamber considers that the question of both appointment and qualification of counsel may have a role to play in this context.

16. The appointment and qualification of counsel is regulated by Rule 44 of the Rules which reads, in part:

> (A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. A counsel shall be considered qualified to represent a suspect or accused

> if the counsel satisfies the Registrar that the counsel is admitted to the practice of law in a State, or is a University professor of law, and speaks one of the two working languages of the Tribunal.
>
> ...
>
> (C) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment on the Assignment of Defence Counsel.

17. From the above it follows that once a Chamber is seized of a case, any measure or request that may impact on the conduct of the case is within its power of regulation and control, not as a replacement for the similar powers vested in the Presidency, but as an alternative path to fulfil the mandate of the International Tribunal. From the above, it also follows that if the Rules explicitly provide for the power of a Chamber to take such far-reaching steps as to exclude a counsel for all future cases from representing a suspect or accused, the Chamber certainly has the power to take less far-reaching steps aimed at ensuring a fair trial and the proper administration of justice in a concrete case pending before that Chamber. One such measure a Chamber is entitled to take is to determine that a counsel in such a particular case must be disqualified and barred from representing a suspect or accused, due to a conflict of interest resulting from a counsel having worked with the Office of the Prosecutor on a related case.

18. The Chamber wishes to stress here that the issue in such a particular case is not one of assignment of counsel to a suspect or accused in general. The issue here is rather one of qualification or disqualification as it relates to the question of whether, in relation to a concrete case at hand, counsel will be able to meet the qualifications required to guarantee a fair trial and the proper administration of justice. This must function in an equal way regardless of whether counsel is *appointed* pursuant to Rule 44 or *assigned* pursuant to Rule 45.

19. Rule 54, "General Rule", provides:

> At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

As is known, this rule has been applied widely in the judicial practice of the International Tribunal, including in matters as distinct as scheduling court sessions, indicating protective measures, subpoenaing witnesses or documents, and requesting medical reports on detainees. It is conceivable that an issue like the assignment or disqualification of counsel can be a matter falling within the scope of the rule because of its being part of the process of preparation or, later on, conduct of a trial. The issue of whether a person is suitable to act as counsel in a certain case is just one aspect of the fair trial obligation imposed on the Chamber. A competent and qualified counsel serves the

important purpose of assisting the International Tribunal in fulfilling its extraordinary international mandate. Whether the accused receives a fair trial whereby justice is both done and seen to be done, is a matter over which the Chamber has jurisdiction.

20. Rule 73,"Other Motions", provides, *inter alia*:

> (A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber.

This rule has wide applicability not only in the course of a trial but also in certain pre-trial matters including e.the indication of protective measures. Its scope of application is wide enough to cover the issue before the Chamber so far as that issue influences the procedure in a concrete case.

21. The Chamber considers that the issue of qualification, appointment and assignment of counsel, when raised as a matter of procedural fairness and proper administration of justice, is open to judicial scrutiny. The silence of the Rules and the Directive alone does not lead to a finding of a kind of *non liquet* in respect of the issue. Problems relating to the defence of an accused will affect the conduct of a case over which a Chamber has not only the power but also the duty to regulate in accordance with the statutory requirements for a fair and expeditious trial. Such requirements are part of the mandate of the International Tribunal to ensure that justice is seen to be done. These problems, therefore, are justiciable.

22. A subsidiary issue is whether the Motion of 20 December 2001 was filed out of time and whether by a late filing, the Prosecution has acquiesced in the Registrar's decision in question, which was rendered 26 November 2001. While time limits set out in the Rules must be complied with, the Chamber nevertheless considers that qualification, appointment and assignment of counsel continuously affects the concept of a fair trial so long as a counsel acts on behalf of a suspect or accused, and that there can be no time limits for challenges raised under Rules 54 and 73 in the course of the proceedings before the Chamber.

23. The Chamber therefore finds, that the concrete issue of qualification, appointment and assignment of counsel is properly within the jurisdiction of this Chamber where it can be shown that it affects, or is likely to affect, the right of the accused to a fair and expeditious trial or the integrity of the proceedings.

24. The Chamber, however, wishes to emphasise that although it considers that it is vested with the power to review a decision of this type in the interests of justice, it is not obliged to intervene in every complaint regarding the assignment of counsel. It recognises that the Registrar has the primary responsibility in this matter and that, if the Registrar was not properly informed of

necessary facts, he would be entitled to reconsider his previous decision on the basis of new information hitherto unavailable to him. In cases where within this limited scope, the Chamber reviews a final decision of the Registrar on an assignment of counsel because of an alleged disqualification of counsel in the case at hand, and then decides to correct that decision, it may order the Registrar to withdraw that assignment immediately. In the view of the Chamber, this is not a power to overrule the responsibilities of the Registrar, but rather a power which is complementary to that of the Registrar and aimed at ensuring the proper administration of justice, a power that falls clearly within the primary, if not exclusive, responsibility of the Chamber.

III. MERITS

25. Now the Trial Chamber will turn to the question: does previous association create a conflict of interest or undue advantage with regard to the assignment in question?

A. Submissions of the Parties and the Registry

26. The Registry's Decision of 26 November 2001 which assigned Mr. Dixon as co-counsel for the Accused Kubura states that Article 21 of the Statute of the International Tribunal provides the accused with the right of free choice of counsel, that Mr. Dixon has provided the Registry with detailed information on his previous association with the Prosecution, but that the Prosecution has not supplied the Registry with specific information as to the level of involvement of Mr. Dixon which might lead to a conflict of interest. The decision also finds that Mr. Dixon has provided in writing his undertaking to abide by the confidentiality of any information obtained while working for the Prosecution and that the information available does not show a conflict of interest. As a result, the assignment was approved by the Registry.

27. The Motion of 20 December 2001 alleges that the assignment of Mr. Dixon as co-counsel will cause both a conflict of interest and an undue advantage due to his previous association with the Prosecution during which period he was involved in "relevant investigations and relevant prosecutions of the so-called 'flip-side' cases such as Blaskić, Kordić and Čerkez, and Čelebići". Supporting materials to that effect are attached.

28. The Defence Response argues that, notwithstanding the documents attached to the Motion of 20 December 2001, the Prosecution has failed to pinpoint the precise conflict of interest and that "the Prosecution must *at least be required to identify the confidential material, not in the public domain, or disclosed to the Defence in any event, which it alleges Mr. Dixon had access to while*

with the OTP, that gives rise to a conflict of interests in the specific circumstances of the case against Mr. Kubura." This argument is made in reference to the fact that the Deputy Prosecutor stated to the Registrar in his letter of 1 November 2001 that "I cannot predict what potential conflicts may arise for him as the trial unfolds". The Defence Response stresses that "most importantly, none of the documents show that Mr. Dixon was in any way involved *in investigation or preparing the case against Mr. Kubura*".

29. The Registry Submission outlines the procedure for the assignment of counsel by the Registry. First, the parties are to be consulted as to whether there may be a potential conflict of interest before the assignment is approved. Second, where a party alleges a conflict of interest, the Registry will verify, on the basis of the materials presented by the party, "whether the alleged conflict would be likely to prejudice the outcome of the proceedings, or result in an improper advantage or disadvantage for one of the parties". Further, the materials will be reviewed to see whether the alleged conflict could result in a potential disadvantage to the accused. In respect of the case of Mr. Dixon, the Registry Submission considers that any undue advantage his assignment might generate would be balanced by the fact that the cases in which he previously worked "have been exhaustively litigated at first instance, and are in advanced appellate stage". The existence of a particular 'prosecutorial strategy' could therefore be deduced by any person who followed the public hearings and filings of these trials." Despite the supporting documents annexed to the Motion of 20 December 2001, the Registry Submission states that "there was insufficient evidence" to conclude that the assignment "would be likely to prejudice the outcome of the trial improperly, cause an unfair advantage to the defence, or result in a material disadvantage to the Office of the Prosecutor". The Registry is prepared, however, to re-consider its decision of 26 November 2001 should there be new material pointing to a conflict of interest unknown to the Registry at the time of the decision.

B. Discussion

30. The ultimate concern of the Chamber is to ensure the integrity of the proceedings – that justice is to be done and seen to be done – and to ensure the right of the accused to a fair and expeditious trial. Subsumed under that general principle are two questions this Chamber must resolve: 1) is there a conflict of interest that affects, or is likely to affect, the integrity of the proceedings before the Chamber and 2) is there an undue advantage arising from the assignment which undermines the integrity of proceedings before the Chamber? In order to answer these questions, the Chamber will examine the law of the Tribunal as well as national practice where the law of the Tribunal is silent.

31. The Chamber will first consider the relevant provisions, if any, of the basic law and regulations of the Tribunal.

32. Article 21 (4) of the Statute provides, *inter alia*, that:

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

This provision forms the basis for Rule 45 and Article 11 of the Directive of the Assignment of Defence Counsel, as already referred to and commented upon above.

33. However, the Rules and the Directive do not touch upon the specific question of a possible conflict of interest in the case a defence counsel has previously worked with the Office of the Prosecutor.

34. The same applies to the *Prosecutor's Regulation No.2 (1999): Standards of Professional Conduct for Prosecution Counsel*. The Chamber notes in this context also that this Regulation does not contain any prohibition of prosecution staff members from becoming defence counsel.

35. Article 9 of the *Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal* (IT/125) ("Code of Conduct") refers to the issue of conflict of interest. The relevant parts of the article provide:

> (1) Counsel owes a duty of loyalty to his or her Client. Counsel must at all times act in the best interests of the Client and must put those interests before their own interests or those of any other person.
>
> (2) In the course of representing a Client, Counsel must exercise all care to ensure that no conflict of interest arises.
>
> (3) Without limiting the generality of sub-articles (1) and (2), Counsel must not represent a Client with respect to a matter if:
>
> (a) such representation will be or is likely to be adversely affected by representation of another Client;
>
> (b) representation of another Client will be or is likely to be adversely affected by such representation;
>
> (c) the Counsel's professional judgement on behalf of the Client will be, or may reasonably be expected to be, adversely affected by:

(i) the Counsel's responsibilities to, or interests in, a third party;

....

This *Code of Conduct* was drafted in June 1997 on the basis of a survey of Bar codes of seven countries: Australia, Belgium, Bosnia and Herzegovina, England, France, Netherlands, Spain, and the United States; an International Charter of Defence Rights by the *Union Internationale des Avocats*, and the *Code of Conduct for Lawyers in the European Community*.[4] Here again, however, the Chamber observes that the *Code of Conduct* says nothing about a conflict of interest which may arise from the previous association of a defence counsel with the Prosecution.

36. The Chamber must therefore conclude that there is no relevant provision in the basic law and regulations of the Tribunal dealing with the dispute before it.

37. There are also no rules, norms or guidelines available that may apply correspondingly. For example, norms relating to the disqualification of judges can hardly serve as a useful tool here as such rules are designed to ensure the impartiality of the judges whereas in the present case, rules relating to defence counsel are aimed at protecting primarily the rights of the party needing representation.

38. Failing relevant rules within the legal framework of the Tribunal, the Chamber will have to consider whether national practices provide any guidance. The American Bar Association's *Model Rules of Professional Conduct* (2001 edition), Rule 1.11 (a), for example, provides:

> Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency *consents* after consultation... (emphasis added)

These *Model Rules* are followed in two-thirds of the jurisdictions in the United States. The Rules therefore seek guidance from the parties involved and, in particular, require the *consent* of the government in order to have a lawyer with a possible conflict of interest represent a client[5].

39. Opposed to this prerequisite of consent, the Chamber observes that, under some national practices, the approach has been taken that *for a certain period of time* former prosecutors or judges may not, in principle, become defence lawyers in the same district or court.

40. For example, Article 36 of the Chinese *Law on the Profession of Lawyer* forbids a former prosecutor or judge from serving as defence counsel within two years of his/her resignation from

[4] The list of sources is attached to the *Code*.
[5] Preface of the *Model Rules*.

the post of prosecutor or judge.[6] Section 20 (1), No.1 of the German *Federal Law on Lawyers*[7] has, in general, a time-limit of five years for admission to the roll if the applicant has worked as a judge or as a permanent civil servant, *inter alia* as Prosecutor, in the same district of the court where he applies for admission. [8] There seems to be a presumption of conflict of interests in these instances and the protection of the integrity of the judiciary is regarded as crucial.

41. Yet another approach can be found in the *Code of Conduct for the Bar of England and Wales* where there is no restriction on the possibility that a lawyer can work as a prosecuting or defence counsel, and where the practice is well known that a counsel may serve in these two functions in different cases.

42. On the basis of this survey, the Chamber can already come to no other conclusion than that national practices differ so much from each other on even the principal issues behind the question with which the Chamber is confronted, that it can derive no guidance from national practices, in the absence of applicable provisions in the *Rules*, the *Directive*, and the *Code of Conduct* of the International Tribunal itself.

43. Notwithstanding the conclusion that the Chamber receives very limited guidance from its own laws and national practices, it is still confronted with the question and obliged to answer whether, in the case at hand, the assignment of co-counsel to the accused is consonant with the interests of justice. In the matter before it, the Chamber also recalls that the interests of justice must be considered as well from the point of view of the Prosecution.

44. Before being able to answer this question, it needs to be determined which test should be applied here. In the absence of clear guidance, the Chamber must respect its obligation under the Statute and the Rules to ensure the integrity of the proceedings as the guiding principle. This obligation means also that the Chamber must ensure that justice is done and seen to be done and includes ensuring the accused' right to a fair and expeditious trial. This implies that the Chamber is careful to make sure that the proceedings are not halted by foreseeable and, thereby, avoidable risks.

45. The Chamber first observes that the Registry Submission notes the lack of proof to justify a finding that Mr. Dixon's prior association with the Prosecution "would be likely to prejudice the outcome of the trial improperly". This submission is given in terms of potential prejudice, but it

[6] This article was adopted in May 1996 by the People's Congress and amended in December 2001.
[7] Bundesrechtsanwaltsordnung of 1 August 1959.
[8] In Germany, in addition, Section 356 of the General Part of the German Penal Code (*Strafgesetzbuch*) on "Betrayal of a Party", in a legal system where the Prosecutor is not considered a party to the proceedings, even provides that the rendering of legal assistance in the same legal matter to both parties is a punishable offence. The underlying principle

also states that the available evidence has not indicated the existence of such potential prejudice. The Chamber takes cognisance of the criterion used in the Registry Submission for establishing the existence of a conflict of interest. The filing states in conclusion that:

> In the event that the Prosecutor obtains previously unavailable material that would demonstrate the probability of a serious conflict, then the Registry would be prepared to reconsider its decision.

In an earlier passage, the Registry Submission distinguishes probability from possibility in relation to the point that different results arise from using the two criteria to determine whether a person like Mr. Dixon had access to confidential information during his prior association with the Prosecution. Stated otherwise, the Registrar argues that the possibility that a person had access to such information is not accepted as a criterion for disqualifying him as a counsel whereas the probability of such access is. However, in the view of the Chamber, in judicial proceedings a misstep in procedure with "possibly" adverse consequences will affect the integrity of the proceedings just as one will with "probably" adverse consequences.[9] The Chamber also considers that the probability test would be too high a standard as the harm from an erroneous assignment may be too great to redress for the integrity and expediency of the proceedings and the interests of witnesses and victims. This is even more the case in light of the very complex and often considerable time-consuming trials this Tribunal normally faces. The Chamber cannot wait until foreseeable harm is done to the proceedings. It is for the Chamber to prevent such foreseeable harm.

46. The Chamber is of the opinion that the appearance of a just procedure is as important as a just result for a fair trial. This is not to say that any challenge to the integrity of the proceedings, however artificial or theoretical, should form the basis of a reaction from the Chamber. Only when that challenge is real, some reaction is required. It thus follows that the Chamber will always guard the integrity of the proceedings before it, and any real possibility that the integrity of the proceedings before it may be affected adversely will lead the Chamber to remedy the cause of that real possibility. In other words, the Chamber will apply as a test for determining the question

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there is that a lawyer is disqualified from representing more than one party in one and the same case, i.e. on the same factual basis in an adversarial procedure.

[9] In this respect, reference can be made to two examples from national practices. First, Section 602 of the Code of Conduct for the Bar of England and Wales (7th edn., July 2000), requires a lawyer not to accept a brief or case "(d) if the matter is one in which he has reason to believe that he is likely to be a witness or in which whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced; (e) if there is or appears to be a conflict or *risk* of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting the instructions)." (italics added) Second, Rule 86 of the New South Wales (Australia) Barristers' Rules of 17 April 1994 requires that a barrister is to refuse a brief or to appear before a court if he has information confidential to "any other party in the case other than" his client and the information may, "as a real possibility", be helpful to his client's case and that party has not consented to his using the information in the case.

before it whether there was a real possibility of a conflict of interest in relation to Mr. Dixon who first worked with the Office of the Prosecutor and is now assigned as co-counsel to the Accused Kubura. Should such a conflict of interest exist, the Chamber would have to conclude that Mr. Dixon should be disqualified from representing the accused in this case and would have to order the Registrar to withdraw Mr. Dixon's assignment.

47. Involvement of counsel with one of the parties *in the same case* is incompatible with representing the opposite party. Were this not so, the very essence of professional independence and integrity would be shattered and the duty of confidentiality towards the party he first represented irremediably compromised.

48. On the other hand, working in part on the same factual basis alone does not create a conflict of interests. The interest of the Prosecution is to guide the proceedings as close as possible to truth and justice. The knowledge of all available facts is also in the legally protected interests of the accused. See in this respect Rule 68 which is based on the fundamental principle of the right to be informed and heard.

49. What is the evidence presented by the parties in the present case, and does this evidence lead the Chamber to the conclusion that there is a real possibility of a conflict of interest which should lead to the disqualification of Mr. Dixon to represent the Accused Kubura? On the basis of the submissions of the parties, the following facts should be considered the core elements in determining the outcome of the application of the "real possibility test":

- During his time with the Prosecution, Mr. Dixon worked on a number of cases pending before the International Tribunal; at least some of these cases related to the Lašva Valley area;

- The case of the Accused Kubura also relates to the Lašva Valley area;

- The Lašva Valley cases Mr. Dixon worked on relate to armed conflicts between the government forces of Bosnia and Herzegovina and the Bosnian Croat forces in 1993-1994;

- The case of the Accused Kubura and of the two other co-accused in the present case relate to Bosniak military leaders;

- As conceded by Mr. Dixon, he had access to witness statements and affidavits in *Prosecutor v. Kordić and Čerkez*; in addition, he provided legal advice on potential legal defences and substantive issues, including that of command responsibility;

- In several documents attached to the Motion of 20 December 2001, the names of the co-accused Hadžihasanović and Alagić were mentioned and evidence relating to their actions was given. The same documents do not contain any reference to Mr. Kubura himself;

- Mr Dixon never worked in the case of the Accused Kubura in any capacity.

50. It is undoubtedly the case that the prior association with the Prosecution has provided Mr. Dixon with certain advantages. He knows how the Office of the Prosecutor functions, he became familiar with the Prosecution strategies at that time and, in general, acquired knowledge about the cases of the Bosnian Croats, the so-called "flip side'-cases.

51. Considering , however, the nature and extent of the prior association of Mr. Dixon, the Chamber is not convinced that the advantage was such that it would amount to *undue* advantages that might have an impact on the fairness of this trial.

52. Further, Mr. Dixon has not only undertaken in writing not to violate the confidentiality of any information he had access to while working for the Prosecution, but also consulted with his Bar authorities before accepting the defence of the Accused Kubura. The Chamber observes in this context, that it might have been useful if certain general guidelines or rules had been established in the past that would have provided guidance as to how to avoid having former Prosecution office employees resign and start working as a defence counsel before this Tribunal. This guidance would have avoided, or at least controlled, the issue of advantage or undue advantage. However, as discussed at length above, no such norms have been established and, so far as the Chamber is aware, no steps have ever been taken by the Office of the Prosecutor to put such norms in place. Failing such norms, it is not for the Chamber itself to "legislate" and develop them.

53. In both the Registry's decision of 26 November 2001 and the Registry Submission, doubt is expressed as to whether, on the basis of the submissions by the Prosecution, Mr. Dixon's previous association with those other cases may affect, actually or potentially, the proper conduct of the present case. As observed, Mr. Dixon's knowledge of the cases of the Bosnian Croat accused might have provided some advantage in relation to the defence of his present client. The Chamber, however, wishes to stress that, in its view, prior association alone does not justify disqualification of a former employee of the Prosecution from becoming a defence counsel. A party seeking disqualification of counsel under the pretext of fair trial interests always bears the burden of persuading and convincing a Chamber that such prior association is such that it would amount to a real possibility of a conflict of interests.

54. Taking into account all the submissions of the parties and the Registrar, the Chamber concludes that the Prosecution has not been able to demonstrate that the prior association of Mr. Dixon with the Prosecution and the work he was required to do at that time provide a sufficient basis to conclude that a real possibility of a conflict of interest exists. Mr. Dixon was involved in cases factually related to the one in which he now is assigned as co-counsel but has not been working on the case against the accused he now represents.

IV. CONCLUSION

55. The Registrar of the International Tribunal has the primary responsibility in determining which counsel it may appoint or assign, in accordance with the *Rules*, the *Directive*, and the *Code of Conduct*. The Chamber, however, is authorised to review such a decision by the Registrar because of its power and duty to ensure the integrity of the proceedings. This includes the obligation for the Chamber to ensure that justice is done and seen to be done and to ensure that the accused will have a fair and expeditious trial not interrupted or halted by a foreseeable risk that a counsel has to be dismissed.

56. On the specific question of how to assess possible conflicts of interest between former employees of the Prosecution now assigned to defend an accused before the Tribunal, the Chamber had to conclude that both the law of this Tribunal and national practice provide very little guidance. Although such guidance would certainly have made the task of deciding this case much easier, it is not the task of the Chamber to elaborate such general norms and apply them to the question before it. The Chamber could therefore only address this question by remaining as close as possible to the general, but fundamental, duty to ensure the integrity of the proceedings. The Chamber has developed the test that a real possibility must be proved that there is a conflict of interest between the former and present assignment of counsel. The most obvious example of such a conflict would be if the counsel, now representing the accused, had worked for the Prosecution on the very same case against this very accused. That has not been established. In all other possible cases, the Chamber must be careful in drawing conclusions too readily. The Prosecution has established only that, while working for the Prosecution, Mr. Dixon worked on a number of cases to a certain extent factually related to the case in which his client is now involved. Because of a lack of more concrete indicators of a real possible conflict of interests, the Chamber is not satisfied that Mr. Dixon should have been disqualified as counsel in this particular case.

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V. DISPOSITION

57. The Chamber hereby dismisses the Motion of 20 December 2001.

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

Wolfgang Schomburg
Presiding Judge

Done this 22 day of March 2002
At The Hague,
The Netherlands

[Seal of the Tribunal]