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**NEW ENGLAND SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES PROJECT  
RWANDA GENOCIDE PROSECUTION**

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**MEMORANDUM FOR  
OFFICE OF THE PROSECUTOR**

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**ISSUE # 9:**

**DOES A DEFENDANT HAVE UNLIMITED  
ENTITLEMENT TO BE REPRESENTED  
BY THE ATTORNEY OF HIS/HER CHOICE,  
WHEN THE ATTORNEY IS  
APPOINTED BY THE TRIAL CHAMBER?**

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## I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

### A. ISSUE

This research memorandum seeks to examine the following issue:

Does a Defendant have an Unlimited Entitlement to be Represented  
by the Attorney of his/her Choice When the Attorney will be  
Appointed by the Trial Chamber and Paid by the Tribunal?<sup>1</sup>

### B. SUMMARY OF CONCLUSIONS

An indigent defendant does not have an unlimited entitlement to be represented by the attorney of his or her choice. The ICTR Rules of Procedure and Evidence clearly state in Rules 44 and 45 that assignment of counsel is administered by the Registrar of the Tribunal. The Registrar provides a list to the defendants of counsel that are authorized to appear before the tribunal. The defendant then requests certain counsel members and the Registrar takes the preferences of the defendant into consideration when it issues its decision on the assignment.

This memorandum is organized as follows. Part II briefly describes the factual background of the issue of the appointment of counsel. Part III assesses the international precedent relevant to the assignment of counsel up through and including the practice of the ICTR and the ICTY. Finally, Part III discusses national laws and precedent governing how various countries treat the issue.

Part II explains that under the law of the ICTR Statute and the Directive on the Assignment of Defense Counsel, accused defendants have the right to be assisted by counsel. This right to counsel, as argued by ICTR indigent defendants, encompasses the “right” to choose their counsel from the list of qualified attorneys. The practice of the ICTR Registrar has enabled indigent defendants to submit requests for appointment of counsel. However, this practice of choosing appointed counsel remains subject to the final approval of the Registrar.

Part III establishes the procedural basis of the assignment of defense counsel for the ICTR. Rules 44 and 45 of Procedure and Evidence for the ICTR are similar to the ICTY but the Rules have expanded to include extra requirements such as the defense

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<sup>1</sup> See United Nations International Criminal Tribunal for Rwanda [hereinafter ICTR], Office of the Prosecutor, Legal Research Topics No. Nine, Facsimile dated 27 August 2000. The focus of this paper is derived from the facsimile that stated and asked the following. “The Registry generally provides a defendant with a list of approved attorneys from which one may be selected. Some defendants have requested specific attorneys who are not on the list. If the attorney agrees to accept the case and is otherwise qualified, the Registry will usually accommodate the defendant by placing the attorney on the list and appointing him/her to represent the defendant. However, in some circumstances this might not be possible. For instance, the attorney might not meet the Tribunal’s requirement of experience. Or, the attorney might have a perceived conflict of interest that the defendant and the attorney would be willing to ignore, but the Tribunal would not.”

counsel for the ICTR must have at least ten years relevant experience. The ICTR decisions from both the Trial Chamber and Appeals Chamber have affirmed that an indigent defendant does not have the “right” to choose their own counsel. The precedent established by past war crimes tribunals have been in practice to appoint counsel that the defendant requests. However the decision on the appointment has always been subject to the Registrar’s final acceptance. The ICTR is the first time in which an indigent defendant has argued that he has a “right” to choose his own counsel. International standards and guidelines originating from the European Court of Human Rights and the United Nations Human Rights Committee have affirmed that legal counsel should be appointed for the defendant, with a caveat that the Court has the final decision of who is appointed to represent indigent defendants.

The second section of Part III, discusses national precedents and practices in the appointment of counsel. The United States unequivocally appoints all indigent defendants counsel and maintains public defender programs where attorneys are selected by the courts specifically to represent indigent defendants. In Canada, the administration of justice is under the jurisdiction of each province. However, even the Supreme Court of Canada has held that there is no constitutional right to be assigned counsel of a defendant’s own choosing if the accused is indigent and subject to a provincial legal aid program. England is the opposite of the United States in terms of appointing counsel. Pursuant to their Legal Aid Act, an indigent defendant in a criminal case has a choice as to which solicitor and counsel he employs. Lastly, South Africa before their new Constitution in 1994 allowed indigent defendants to choose their own counsel. Yet, since the new Constitution was adopted, there exists no right to choose appointed defense counsel in South Africa.

## **II. FACTUAL BACKGROUND**

There is no question that each accused defendant has the right to be assisted by defense counsel. This is the law as it appears under Article 20 of the ICTR Statute and Article 2 of the Directive on the Assignment of Defense Counsel. However, in the case of the ICTR defendants, all of whom have satisfied the requirement of indigency, the issue that arose is whether they have a “right” to choose their counsel from the ICTR’s Registrar’s list or whether they must accept counsel selected by the Registrar.

In practice, the ICTR Registrar has provided indigent defendants with a list of the qualified defense counsel and curricula vitae and *enabled them to choose*.<sup>2</sup> However, two or three detainees have insisted on requesting defense counsel who are not on the Registrar’s list. In doing this, the defendants have sought to turn the privilege afforded to them by the Registrar, into a “right,” which historically, does not exist in any of the international tribunals and most national laws. The practice of choosing appointed counsel has always remained subject to the stated rules and procedures of the tribunal, allowing the Registrar the final choice.

## **III. LEGAL DISCUSSION**

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<sup>2</sup> International Criminal Tribunal for Rwanda, *Press Releases, ICTR Updates and Bulletins: Note on Assignment of Defence Counsel*, (Arusha, 22 Feb. 1999) <<http://www.ictt.org/ENGLISH/PRESSREL/defence.html>>. [Reproduced in the accompanying notebook at TAB #5]

## **A. THE ICTR STATUTE AND THE RULES OF PROCEDURE AND EVIDENCE**

The International Criminal Tribunal for Rwanda was established in 1994 when the United Nations Security Council adopted Resolution 955.<sup>3</sup> In Article 14 of the Statute annexed to that resolution, the Council provided that the judges should adopt the rules of procedure and evidence “for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.”<sup>4</sup> Article 17 of the Statute, *Investigation and preparation of indictment*, provided that “If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it. . . .”<sup>5</sup> These two articles, when read together, form the basis for the present day rules of procedure and evidence which has since been amended to include some additional requirements for the attorney’s counsel to meet in order to represent the indigent defendant or the accused.

The ICTR Statute, in Article 20(4)(d), *Rights of the accused*, guarantees the defendant’s right to legal assistance, in the following terms:

the accused shall be entitled to the following minimum guarantees. . . to be tried in his presence, and to defend himself in person or through 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;<sup>6</sup>

The question of the right to appointment of counsel and ultimately who makes the choice of an indigent defendants’ counsel emerge within several of the tribunal’s rules of procedure.

Rule 42, *Rights of Suspects during Investigation*, outlines a suspects rights when questioned by the Prosecutor. It provides:

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<sup>3</sup> J. Oppenheim & W. van der Wolf, *Global War Crimes Tribunal Collection*, 247, 247 (J. Oppenheim & W. van der Wolf eds, 2000). [*Reprinting* of U.N. Security Council Resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda and the Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995.] [Reproduced in the accompanying notebook at TAB #25]

<sup>4</sup> Id. at 253. [Reproduced in the accompanying notebook at TAB #25]

<sup>5</sup> Id. at 254. [Reproduced in the accompanying notebook at TAB #25]

<sup>6</sup> International Criminal Defence Attorneys Association, *ICDAA Reports, Publications and Resolutions Online*, at 1 (visited Nov. 24, 2000) <<http://www.hri.ca/partners/aiad-icdaa/icc/counsel.html>>. [Reproduced in the accompanying notebook at TAB #2]

- A) A suspect who is to be questioned by the Prosecutor shall have the following rights of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:
- (i) the right to be assisted by counsel of his choice **or** to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;<sup>7</sup>

The right to be assisted by counsel is an unfettered guarantee in this rule; however the choice of counsel is limited if the defendant is indigent. The language and phrasing of the rule clearly indicates that if the defendant is able to pay for legal counsel, there is a right to be assisted by counsel of the defendant's own choosing provided counsel meets the Tribunal's qualifications. However, if the defendant is indigent, then the later part of the sentence applies, namely that legal assistance will be "assigned to him." This language suggests no choice on the part of the defendant.

Rule 44 of the rules of procedure and evidence as amended on June 26, 2000, sets out the following requirements for the appointment and qualifications of counsel:

- B) Counsel engaged by a suspect or an accused shall file his power of attorney with the Registrar at the earliest opportunity. Subject to verification by the Registrar, a counsel shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law.
- 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 Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defense Counsel.<sup>8</sup>

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<sup>7</sup> 3 J. Oppenheim & W. van der Wolf, *Global War Crimes Tribunal Collection*, 247, 269 (J. Oppenheim & W. van der Wolf eds., 2000). (*Reprinting* of U.N. Security Council Resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda and the Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995.) (Emphasis added.) [Reproduced in the accompanying notebook at TAB #25]

<sup>8</sup> International Criminal Tribunal for Rwanda: *Rules of Procedure and Evidence*, U.N. Doc. ICTR/3.Rev. 8 (1996), *adopted by* the Tribunal on July 5, 1995, <<http://www.icttr.org/ENGLISH/rules/260600/index.html>>. In this latest version, there is a new section as

Rule 45, *Assignment of Counsel*, describes the list of counsel, how the attorneys apply to have their names added to the Registrar's list, the procedure for assigning counsel to indigent defendants and the mention of circumstances in which the Registrar would replace counsel. Pursuant to this Rule, the Registrar maintains a list of counsel who "speak one or both of the working languages of the tribunal [French or English], meet the requirements of Rule 44, have at least 10 years' relevant experience, and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused...."<sup>9</sup> It is worth noting that although the ICTR Rules of Procedure were modeled after those adopted by the International Criminal Tribunal for the Former Yugoslavia,<sup>10</sup> the requirement of ten years of relevant experience is unique to the ICTR. The ICTR has greatly expanded the initial version of the rules to give greater meaning to ambiguous phrases.

The procedure for assigning counsel to an indigent defendant in Rule 45 has three parts. The first part provides that a request for assignment of counsel is to be made to the Registrar. Pursuant to the second part, the Registrar inquires into the financial means of the suspect or accused and makes a determination of indigence. "To date, all of the accused persons in the custody of the ICTR have claimed to be indigent, requiring

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part of Rule 44 that deals with Duty Counsel. Duty counsel, as stated in this rule, is subject to the same requirements as assigned counsel under Rule 45. Their purpose is to provide an accused defendant with counsel at the detention facility or if a suspect is transferred under Rule 40 and is unrepresented at any time after being transferred to the Tribunal. The Registrar will appoint duty counsel from a list maintained by the Registry. Duty counsel will represent the accused or suspect and provide initial legal advice and assistance until such time when counsel is engaged by the suspect, or assigned under Rule 45. [Reproduced in accompanying notebook at TAB #4]

<sup>9</sup> Id. at 5. [Reproduced in accompanying notebook at TAB #4]

<sup>10</sup> The International Criminal Tribunal for the Former Yugoslavia hereinafter will be referred to as the ICTY.

appointed defense counsel.”<sup>11</sup> The third part states that “If he [Registrar] decides that the criteria are met, he shall assign counsel from the list; if he decides to the contrary, he shall inform the suspect or accused that the request is refused.”<sup>12</sup> This rule clearly establishes the fact that the Registrar is the person who assigns counsel for indigent defendants, not the converse that defendants themselves have a right to choose counsel from the Registrars’ list.

Rule 45, sections (D), (H) and (I) delve deeper into the procedural problems if a request is refused, when and who replaces an assigned counsel and lastly, when counsel would be permitted to withdraw. Rule 45(d) states that “If a request is refused, a further reasoned request may be made by the suspect or the accused to the Registrar upon showing a change in circumstances.”<sup>13</sup> Section (H) of the same rule addresses the situation where “Under exceptional circumstances, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.”<sup>14</sup> Lastly in section (I), the rule speaks about the duty of assigned counsel and contemplates the situations where counsel is permitted to withdraw from a case. It states:

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<sup>11</sup> International Criminal Tribunal for Rwanda, *Press Releases, ICTR Updates and Bulletins: Note on Assignment of Defence Counsel*, (Arusha, 22 Feb. 1999) <<http://www.ictr.org/ENGLISH/PRESSREL/defence.html>>. [Reproduced in accompanying notebook at TAB #5]

<sup>12</sup> International Criminal Tribunal for Rwanda: *Rules of Procedure and Evidence*, U.N. Doc. ICTR/3.Rev. 8 (1996), *adopted by* the Tribunal on July 5, 1995, <<http://www.ictr.org/ENGLISH/rules/260600/index.html>>. [Reproduced in accompanying notebook at TAB #4]

<sup>13</sup> *Id.* at 5. [Reproduced in accompanying notebook at TAB #4]

<sup>14</sup> *Id.* at 5. [Reproduced in accompanying notebook at TAB #4]

It is understood that Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances.<sup>15</sup>

These sections when combined as a whole relate to the situations wherein the Registrar has already appointed counsel. Yet, the ICTR Statute is silent with respect to the issue of an indigent defendant's choice of his own counsel if that counsel is not on the list maintained by the Registrar. This silence suggests that the drafters of the Rules did not envision that indigent defendants would be given a choice, because the decision was left to the discretion of the Registrar who assigns counsel if a defendant is indigent. However, the question arose in a case before the ICTR as to whether an indigent defendant could be represented by a Canadian lawyer not presently available on the Registrar's list.

## **B. THE ICTR's CASE LAW**

Both the ICTR Trial Chamber and ICTR Appeal Chamber decisions affirm Rules 44 and 45 of Procedure and Evidence for the Tribunal. The cases uphold an indigent defendant's right to counsel but not of their own choosing. The Registrar maintains the right to appoint counsel for indigent defendants from its list of qualified counsel. The standards for appointing counsel are found in the Directive on the Assignment of Defense Counsel.

The ICTR in amendments adopted on June 6, 1997 to the Directive on the Assignment of Defense Counsel reference the scope of the assignment of counsel when

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<sup>15</sup> Id. at 5. [Reproduced in accompanying notebook at TAB #4]

appointed by the Registrar. Article 3 of the Directive states clearly that a person who has insufficient means and is being prosecuted before the Tribunal may be assigned counsel free of charge.<sup>16</sup> Article 10(A)(I) of the same directive states that after the suspect has been deemed indigent, the Registrar shall decide “to assign Counsel and choose for this purpose a name from the list drawn up in accordance with Article 13.” Article 15(A)(ii), states that “no counsel shall be assigned to more than one suspect or accused unless the case involve the same suspect or accused.”<sup>17</sup>

## 1. ICTR TRIAL CHAMBER DECISIONS

The ICTR, in a decision rendered by Trial Chamber I on June 11, 1997, *In the Matter of Ntakirutimana* affirmed the Registrar’s power as the final decision-maker for assignments of defense counsel. The decision offered some suggestions on how to balance an indigent suspects’ right to a fair trial and the rules established by Tribunal.

The Chamber stated:

Whereas, the principle having thus been set out that the final decision for the assignment of counsel and of the choice of such counsel rests with the Registrar, the Tribunal submits nonetheless that, mindful to ensure that the indigent accused receives the most efficient defense possible in the context of a fair trial, an indigent accused should be offered the possibility of designating the counsel of his or her own choice from the list drawn up by the Registrar for this purpose, pursuant to Rule 45 of the Rules and Article 13 of the Directive, the Registrar having to take into consideration

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<sup>16</sup> International Criminal Tribunal for Rwanda: *Directive on the Assignment of Defence Counsel*, U.N. ICTR/2/L.2, January 9, 1996, amended on July 1, 1999. <<http://www.ictt.org/ENGLISH/basicdocs/directiveadc.html>>. [Reproduced in accompanying notebook at TAB #3]

<sup>17</sup> 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 74, 85 (1998). [Reproduced in accompanying notebook at TAB #22]

the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused.<sup>18</sup>

The principle of a fair trial through the assignment of counsel is restated in the aforementioned decision by the ICTR Trial Chamber with an added caveat that an indigent accused “should be offered the possibility” of designating the counsel of his own choice from the Registrar’s list.<sup>19</sup> The language of the decision continues in the same tone, when the Court stated the Registrar should “take into consideration the wishes” of the accused as if to say the Registrar may tolerate the practice of choosing counsel. But the Court does not use words like “shall,” “must,” “command,” or “order” to describe how the accused’s choice should be factored into the Registrar’s decision. It is simply a request made by the accused, in the hope of retaining the counsel he has chosen.

The ICTR Registrar issued a moratorium on the assignment of French and Canadian lawyers to indigent suspects on November 18, 1998. The Registrar stated that the ban on these lawyers was a temporary measure to combat the “over-representation” of lawyers from these two countries. Furthermore, the Registrar said it was imposed not only to obtain a “better distribution in the representation of different legal systems” but also because “a certain group of lawyers was trying to take over all the legal

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<sup>18</sup> International Criminal Defence Attorneys Association, Documents presented during the United Nations Preparatory Conference on ICC Rules of Procedure and Evidence 26 July-13 August 1999, Freedom of Choice of the Defence Counsel at 8 (July, 1999) <<http://www.hri.ca/partners/aiad-icdaa/icc/counsel.html>>. [Reproduced in accompanying notebook at TAB #1]

In the case of *Pauline Nyiramasuhuko*, the accused raised the issue regarding the assignment of co-counsel. The ICTR decided using similar language as above, that the Registrar must also take into account, among other things, “the resources of the Tribunal, the proven skill and experience of the legal systems, without distinction, and consider the age, gender, race or nationality of candidates.”

See also International Criminal Tribunal for Rwanda, *The Prosecutor v. Pauline Nyiramasuhuko*, ICTR-97-21-T, *Decision on Nyiramasuhuko’s Preliminary Motion Based on the Defects in the Form and the Substance of the Indictment* (Nov. 1, 2000)

<<http://www.ictt.org/ENGLISH/cases/Nyiramasuhuko/decisions/011100.html>>. [Reproduced in accompanying notebook at TAB #17]

<sup>19</sup> Id. [Reproduced in accompanying notebook at TAB #1]

representation” of ICTR detainees.<sup>20</sup> To date, the ICTR had appointed defense counsel from these two countries in disproportionate numbers- -nearly one-half of all appointments.<sup>21</sup> The ban that lasted until October 27, 1999 meant that these French and Canadian lawyers, though on the Registrar’s list, could not be assigned.

## 2. ICTR APPEALS CHAMBER DECISIONS

An Appeals Chamber decision on October 27, 1999 ended the moratorium on French and Canadian lawyers’ assignment to indigent defendants. The first indigent defendant to receive counsel after the ban was former Rwandan Mayor, Jean-Paul Akayesu. The Registrar was ordered by the Appeals Chamber to assign Canadian lawyer, John Philpot to Akayesu’s defense. When asked about the practice of assigning counsel, the Registrar, Dr. Agwu Okali, said that “an indigent accused would be asked to choose three or four lawyers as alternative choices from the overall list of approved counsel.” But, he added “we will assign, and we may or may not choose a Canadian lawyer.”<sup>22</sup> The Registrar justified this by stating, “ICTR judges had made it clear that the assignment of defense counsel remained the domain of the Registrar.”<sup>23</sup>

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<sup>20</sup> *ICTR Registrar Lifts Ban on French and Canadian Lawyers*, Fondation Hirondelle Online, [Information, Documentation and Training Agency, (IDTA) Arusha (Tanzania): The Project, The ICTR on-line] ICTR/REGISTRAR (Oct. 27, 1999) <<http://www.hirondelle.org>>. [Reproduced in accompanying notebook at TAB #6]

<sup>21</sup> International Criminal Tribunal for Rwanda, *Press Releases, ICTR Updates and Bulletins: Note on Assignment of Defence Counsel*, (Arusha, 22 Feb. 1999) <<http://www.ictor.org/ENGLISH/PRESSREL/defence.html>>. [Reproduced in accompanying notebook at TAB #5]

<sup>22</sup> *ICTR Registrar Lifts Ban on French and Canadian Lawyers*, Fondation Hirondelle Online, [Information, Documentation and Training Agency, (IDTA) Arusha (Tanzania): The Project, The ICTR on-line] ICTR/REGISTRAR (Oct. 27, 1999) <<http://www.hirondelle.org>>. [Reproduced in accompanying notebook at TAB #6]

<sup>23</sup> *Id.* [Reproduced in accompanying notebook at TAB #6]

In the Trial Chamber's *Judgement* ruling issued on September 2, 1998, in the case of Jean-Paul Akayesu, paragraph 13 outlines the many assignments of counsel the Registrar made during the course of the defendant's trial. The Registrar assigned first John Sheers, then Michael Karnavas, John Philpot, Nicolas Tiangaye and Patrice Monthé.<sup>24</sup> Each time an attorney withdrew from representation, the Registrar assigned new counsel to represent Akayesu pursuant to the Trial Chamber's orders. The Trial Chamber wanted to ensure that Akayesu was represented by counsel throughout his trial.

Another case before the Appeals Chamber involved, the ex-Rwandan Prime Minister, Jean Kambanda, who had been sentenced to life imprisonment on September 4, 1998, after pleading guilty to genocide and crimes against humanity, asserted a claim that he had been denied the right to a lawyer of his choice. On October 19, 2000, the Appeals Chamber answered the claim by stating that there was no automatic right for receiving legal assistance to have a lawyer of their own choosing and "If Kambanda was unhappy with his lawyer, he had ample time to complain but did not do so."<sup>25</sup> The Appeals Chamber refers on this point "to the reasoning of Trial Chamber I in the *Ntakirutimana* case and concludes, in the light of a textual and systematic interpretation of the provisions of the Statute and the Rules, read in conjunction with relevant decisions from the Human Rights Committee and the organs of the

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<sup>24</sup> International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, *Judgement* (Sept. 2, 1998) <<http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.html>>. [Reproduced in accompanying notebook at TAB #15]

<sup>25</sup> *UN Appeals Court Rejects Former Rwandan Premier's Appeal, Confirms Sentence*, Fondation Hirondelle Online, ICTR/KAMBANDA (Oct. 19, 2000) <<http://www.hirondelle.org>>. [Reproduced in accompanying notebook at TAB #7]

European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel."<sup>26</sup>

In February of 1999, the ICTR Registrar issued a Position Paper explaining its position on the assignment of defense counsel. The Paper states:

under law, there exists a right to have defense counsel; secondly, that this right is universally understood as a right to have defense counsel assigned to one if one is unable to retain a lawyer for himself or herself; and thirdly, that in the case where defense counsel is being appointed free of charge, there does not exist any right to choose a particular individual to serve as appointed defense counsel.<sup>27</sup>

The ICTR has provided the indigent suspects with a list of qualified defense counsel and curricula vitae and “*enabled them to choose*. This was first done by providing successive short lists to the detainees, and later modified by presenting the full list of lawyers at once.”<sup>28</sup> In practice, at the request of some detainees, the ICTR Registrar has added some defense counsel not originally on the list in order to facilitate the detainees’ choice of counsel.<sup>29</sup> Moreover, two to three detainees have insisted on requesting defense counsel outside the established guidelines.<sup>30</sup> By asking the Registrar for these defense counsel, the detainees are arguing that they have a right to choose their own counsel, but because the suspects are indigent, the right that exists is actually only to be assigned counsel.

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<sup>26</sup> International Criminal Tribunal for Rwanda, *Jean Kambanda v. The Prosecutor*, Case No. ICTR 97-23-A, *Judgement* at 7 (Oct. 19, 2000) <<http://www.icttr.org/ENGLISH/cases/Kambanda/judgement/191000.html>>. [Reproduced in accompanying notebook at TAB #16]

<sup>27</sup> International Criminal Tribunal for Rwanda, *Press Releases, ICTR Updates and Bulletins: Note on Assignment of Defence Counsel*, (Arusha, 22 Feb. 1999) <<http://www.icttr.org/ENGLISH/PRESSREL/defence.html>>. [Reproduced in accompanying notebook at TAB #5]

<sup>28</sup> *Id.* at 2. [Reproduced in accompanying notebook at TAB #5]

<sup>29</sup> *Id.* at 3. [Reproduced in accompanying notebook at TAB #5]

<sup>30</sup> *Id.* at 3. [Reproduced in accompanying notebook at TAB #5]

## C. THE PRECEDENT OF OTHER INTERNATIONAL TRIBUNALS

### 1. ICTY DECISIONS

The ICTY Trial Chamber I, interpreted the right of a defendant to the assignment of counsel in its decision dated June 24, 1996 in the cases of *Delalić*, *Mucić*, *Delić* and *Landžo*. The ICTY Trial Chamber stated:

The Statute does not specifically state that the right to assigned counsel is also a right to assigned counsel of the accused's own choosing. Indeed, the right to assigned counsel under the Directive is not totally without limit- -counsel may only be assigned if they are on a list maintained by the Registrar of the International Tribunal...however, the practice of the Registry of the International Tribunal has been to permit the accused to select any available counsel from this list and to add counsel to the list if selected by an accused, provided that such counsel meets the necessary criteria. The Trial Chamber supports this practice, within practical limits.<sup>31</sup>

The ICTY thus recognized that indigent defendants do not have a right to choose their own counsel. The opinion suggests that the practice of the Registry *permitting* the accused to select any available counsel from the list is not a right, but a privilege. The language in the decision is carefully worded to allow the practice to continue if it is “within practical limits.” This means that if the practice impedes the duties of the Registrar in appointment of counsel, the practice should give way to the Rule. The Rules

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<sup>31</sup> John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 259-264 (2d ed. 2000). [Reproduced in accompanying notebook at TAB #23] See also International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Delalic et al. (“Celebici”)*, *Statement of the Trial Chamber at the Judgement Hearing* (Nov. 16, 1998) <<http://www.un.org/icty/pressreal/cel-sumj981116e.html>>. [Reproduced in accompanying notebook at TAB #21]

of Procedure state that the Registrar appoints counsel and empower the Registrar to overrule the practice of permitting indigent accused to select counsel.

In *Erdemovič*, a case before the ICTY, the Trial Chamber grappled with the issue of the Registrar's refusal to assign the counsel requested by the accused because counsel did not meet the language requirement of Rule 45(A). The counsel requested by Erdemovič did not speak either French or English, which are the two working languages of the tribunal. Following applications by the accused and the Prosecutor, Judge Jorda issued an order on May 28, 1996 stating that an exceptional situation existed and that the requested counsel should be assigned to the accused. "The assignment of Mr. Babif to the accused, Dražen Erdemovič did, however, lead to problems of communication and misunderstandings (for example, concerning the effect of a guilty plea and concerning the difference between crimes against humanity and war crimes), which the Appeals Chamber raised *proprio motu* and which let it to remit the case to a new Trial Chamber for a re-plea."<sup>32</sup>

The UN Secretary-General when promulgating the Statute for the ICTY, said the ICTY had to comply with Article 14(3)(d) of the International Covenant on Civil and Political Rights. Embodied in this text are internationally recognized standards regarding the rights of the suspect or accused at all stages of trial proceedings.<sup>33</sup> The Secretary-General of the United Nations noted in his report contained in the Statute of the ICTY

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<sup>32</sup> John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, at 262 (2d ed. 2000). [Reproduced in accompanying notebook at TAB #23]

<sup>33</sup> M. Cherif Bassiouni & Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, at 882 (1996). [Reproduced in accompanying notebook at TAB #24]

(S/25704) that “it was axiomatic that the Tribunal must fully respect internationally recognized standards”<sup>34</sup> as set forth in this instrument.

The Secretary-General was referring to the ICTY when he addressed his comments but the same is true for the ICTR. He further says that:

Articles 18 and 21 of the Statute [ICCPR] provide, *inter alia*, for the suspect during the investigation, and the accused, from the time of his indictment, to have the right to legal assistance from a counsel of his own choice or, if indigent, to free legal assistance.<sup>35</sup>

The International Covenant on Civil and Political Rights<sup>36</sup> does not grant the accused choice of counsel if he is found to be indigent. The only entitlement that is allowed to indigent defendants is the right to free legal assistance. This is similar to Rules 44 and 45 of the ICTR, which guarantee the right to counsel and confer on the Registrar the responsibility for appointing said counsel to indigent defendants.

## 2. NUREMBERG TRIBUNAL

The practice of issuing indigent defendants free choice in the selection of court appointed defense counsel is not unique to the ICTR; however the issue has never been argued to be a “right” until now. Dating back as far as the Nuremberg Tribunal, in a 1948 article by the Prosecutor of Nuremberg, Benjamin Ferencz, entitled, “Nurnberg Trial Procedure and the Rights of the Accused”<sup>37</sup> reports that each accused defendant had

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<sup>34</sup> Id. at 882. [Reproduced in accompanying notebook at TAB #24]

<sup>35</sup> Id. at 882. (Emphasis added) [Reproduced in accompanying notebook at TAB #24]

<sup>36</sup> *Hereinafter* the International Covenant on Civil and Political Rights will be referred to by its initials, ICCPR.

<sup>37</sup> Benjamin B. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, *The Journal of Criminal Law and Criminology* 144 (1948). [Reproduced in accompanying notebook at TAB #27]

the right to representation by an attorney of his choosing. Moreover, many of the accused had assigned counsel who were former members of the Nazi Party or the SS:

Every defendant has had the right under the law to be represented by counsel of his own selection providing such counsel was qualified to conduct cases before the German courts or was specifically authorized by the Tribunal. In practice this has meant that no German lawyer has ever been excluded if he was requested as counsel for a defendant. In fact most of the German counsel chosen are themselves subject to arrest or trial in German courts under German law for membership in the Nazi Party or the criminal SS. If tried, many of them would be barred from legal practice but they have, through the intervention of the American authorities, even been given immunity from prosecution in their own courts in order to ensure that accused war criminals will have a free choice of counsel from those Germans whom they consider best suited to defend them. Only three defendants requested American counsel. Two of these requests were promptly approved. The other, which was a request made late in the trial to have an American substituted for one of the German counsel who had previously been selected by the defendant himself, was disapproved. The Tribunal expressed doubt of the sincerity of the application when pointing out that the American was not, in fact, available. It was the opinion of the Judges before whom he was to appear that the attorney had by his previous conduct defying orders of the Military Governor and by his violation of standing Military Government regulations disqualified himself. The right of a Tribunal to protect itself from abuse by unscrupulous practitioners is inherent in every court and, in exercising that right in the one case, the Nurnberg judges made it clear that they did not intend to bar the defendants from the ethical employment of reputable American counsel. This same tribunal later approved American counsel for another defendant.<sup>38</sup>

The nationality of the defense counsel was not a factor in exclusion from representation by the Tribunal. In fact, “the attorneys were paid by the Tribunal, since all of the bank accounts had been seized.”<sup>39</sup>

The practice of permitting indigent defendants the choice of court appointed counsel from the Registrar’s list may have originated due to the concern that the accused

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<sup>38</sup> Id. (Emphasis added.) [Reproduced in accompanying notebook at TAB #27]

<sup>39</sup> Ann Tusa and John Tusa, *The Nuremberg Trial* 216 (New York, Anthenum) (1984). [Reproduced in accompanying notebook at TAB #28]

would try to argue on appeal that they did not receive a fair trial. “The London Charter stated unequivocally that defendants were to be allowed the counsel of their choice...the point...was that these men must not be given the slightest excuse to protest afterward that they had been denied a fair trial.”<sup>40</sup>

### **3. TOKYO TRIBUNAL**

In the Tokyo Tribunal, the procedure of the tribunal was similar to the ICTR wherein “each of the accused had a Japanese chief counsel and at least one Japanese associate counsel of his own choosing.”<sup>41</sup> Similarly, the Tokyo Tribunal like the ICTR Registrar can appoint a co-counsel to assist the assigned counsel, but only whenever appropriate and at the request of the assigned counsel.<sup>42</sup>

### **4. EUROPEAN COURT OF HUMAN RIGHTS**

In the European Court of Human Rights, Article 91 of its Rules, dated on November 4, 1998, allows for persons who are declared indigent to obtain legal assistance. One judgment decided on August 28, 1992, *Croissant v. Germany* dealt with the issue of court appointed counsel. The defendant, was appointed three court appointed attorneys, the last was not his preferred choice. Mr. Croissant wanted the appointment of

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<sup>40</sup> Joseph E. Persico, *Nuremberg-Infamy on Trial 94* (New York, Penguin Books) (1994). [Reproduced in accompanying notebook at TAB #29]

<sup>41</sup> John R. Pritchard, “An Overview of the Historical Importance of the Tokyo War Trial,” in C. Hosoya and al, *The Tokyo War Crimes Trial – An International Symposium*, (Tokyo, Kodansha Ltd., 1986) at 93. [Reproduced in accompanying notebook at TAB #30]

<sup>42</sup> 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 74, 85 (1998). [Reproduced in accompanying notebook at TAB #22]

an attorney who presented a probable conflict of interest situation. The European Court, in paragraph 29 of its decision stated:

It is true that Article 6 para. 3 (c) entitles everyone charged with a criminal offense to be defended by counsel of his own choosing (see the *Pakelli v. Germany* judgment of 25 April 1983, Series A no. 64, p. 15, para. 31). Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defense counsel the national courts must certainly have regard to the defendant's wishes; indeed, German law contemplates such a course (Article 142 of the Code of Criminal Procedure; see paragraph 20 above). However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.<sup>43</sup>

The European Court held that there are limitations on the right to counsel of a suspect's own choosing in a criminal case, where free legal aid is concerned and a defendant is indigent. Even in situations where the Court deems that a defendant should be represented because it is in the best "interests of judgment," the Court appoints the defense counsel. In this case, the Stuttgart Regional Court appointed a third defense counsel to the defendant to ensure that he was adequately represented throughout the trial due to the length, size, and complexity of the case. However, the defendant raised an objection to the appointment of this defense counsel because the attorney was a member of the Socialist Democratic Party (SDP), which the defendant opposed.

National courts when appointing defense counsel *must* have regard to the defendant's wishes as to who should represent the defendant, but an indigent defendant

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<sup>43</sup> *Croissant v. Germany*, 237 Eur. Ct. H.R. (ser. A) at 23, 33 (1992).  
[Reproduced in accompanying notebook at TAB #26]

still does not have an absolute right to the appointment of counsel of his own choosing. In practice, this means that a national court can either find relevant and sufficient grounds for not appointing the indigent defendant's particular counsel or a national court can find it is in the interests of justice to appoint this counsel themselves without considering the defendant's wishes. The European Court found the later, and held that "the fact that Mr. Hauser was a member of the SDP did not justify revoking his appointment" and "he [Mr. Hauser] was in a position to appear for the defendant in spite of their political differences."<sup>44</sup> The European Court ruled that the appointment of the third counsel to the indigent defendant was proper.

## 5. INTERNATIONAL GUIDELINES

In 1991, a task force of legal experts from numerous countries including the United States of America, the Soviet Union and the United Kingdom convened in Syracuse, Italy. The group addressed human rights in criminal justice systems and set out a general guideline 2.5 that addresses the appointment of defense counsel through legal assistance. It states the following:

2.5 Legal assistance by qualified counsel shall be granted by the competent authority at the request of the defendant or ex officio; as a rule, the lawyer of the defendant's choice shall be appointed; if the defendant wants to defend himself and appears fully capable of carrying out his or her own defense, she or he is entitled to do so.<sup>45</sup>

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<sup>44</sup> Croissant v. Germany, 237 Eur. Ct. H.R. (ser. A) at 23, 26 (1992). [Reproduced in accompanying notebook at TAB #26]

<sup>45</sup> International Criminal Defence Attorneys Association, ICDA A Petition and Appeal Brief, *Jean-Paul Akayesu v. Prosecutor*, Case No.: ICTR-96-4-A, *Brief of the International Criminal Defence Attorneys Association (Article 74 Rules of Procedure and Evidence)* at 16 (June, 1999) <<http://www.hri.ca/partners/aiad-icdaa/petition/ictrbrief.html>>. [Reproduced in accompanying notebook at TAB #14]

The task force made clear that this guideline was only meant to be used in an advisory nature and is not binding on any court. The guideline is similar to most procedural rules governing assignment of defense counsel, with the exception of the phrase “as a rule, the lawyer of the defendant’s choice shall be appointed.” There are no such rules providing that an indigent defendant has an absolute choice of counsel.

Whereas the guidelines of the Conference of Syracuse had no binding authority, the Committee of Ministers of the Council of Europe has actual power. The Council consists of the Heads of State of each member State and is required to meet two times a year to issue general guidelines and objectives of the community. These members on the Council have the capacity and authority to bind the community as acting representatives for their States and can even negotiate treaties.<sup>46</sup> In a resolution adopted on January 8, 1993, the Council set out a recommendation to governments of member States. In paragraph 3, it states:

*Recommend to governments of member States:*

3. To facilitate effective access to justice for the very poor, especially by the following:

a) offering legal aid or any other form of assistance in all jurisdictions (civil, criminal, commercial, administrative, social, etc.) and for all procedures, contentious or free, regardless of the capacity in which these parties intervene;

(...)

c. recognizing the right to assistance of competent counsel, selected freely, to the extent possible, to whom suitable payment shall be granted;<sup>47</sup>

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<sup>46</sup> Professor Thomas C. Fischer’s lecture on September 18, 2000 at the New England School of Law addressing European Union law.

<sup>47</sup> International Criminal Defence Attorneys Association, ICDAAs Petition and Appeal Brief, *Jean-Paul Akayesu v. Prosecutor*, Case No.: ICTR-96-4-A, *Brief of the International Criminal Defence Attorneys Association (Article 74 Rules of Procedure and Evidence)* at 17 (June, 1999)

This resolution is a departure from the standard legal aid programs for indigent suspects because counsel appointments are extended to reach proceedings that are not criminal in nature in section a. However, in section c, the Council restates the same procedures now used by the ICTR. When the Council of Europe recognized the right to assistance of competent counsel, selected freely, they included a restrictive phrase “to the extent possible.” This phrase directly follows the word freely, and indicates that the Council does not recognize a right of an indigent defendant to select his own counsel. But, instead, the language within the guideline stands for the proposition that certain limitations apply to some situations, where it is not possible for a defendant to choose his own counsel freely.

The interpretation of Article 14 of the ICCPR was scrutinized when the United Nations Human Rights Committee decided a series of cases in the late 1980’s and early 1990’s. One such case was *Wright v. Jamaica* in 1995. “The United Nations Human Rights Committee...held that the International Covenant on Civil and Political Rights does not entitle the accused to choose counsel provided to him free of charge.”<sup>48</sup> The UN Human Rights Committee has a different standard for appointed counsel.<sup>49</sup> It gives more responsibility to the State, to ensure effective representation. “In *Kelly v. Jamaica*, the UN Human Rights Committee stated that while Article 14(3)(d) does not allow defendant to choose his or her court-appointed counsel, the state must take steps to ensure that counsel provides effective representation.”

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<http://www.hri.ca/partners/aiad-icdaa/petition/ictbrief.html>>. (Emphasis added) [Reproduced in accompanying notebook at TAB #14]

<sup>48</sup> *Wright v. Jamaica*, Communication No. 349/1989, U.N. Doc. CCPR/C/45/D/349/1989 (1992). [Reproduced in the accompanying notebook at TAB #31]

<sup>49</sup> M. Cherif Bassiouni & Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, at 964 (1996). [Reproduced in the accompanying notebook at TAB #24]

<sup>50</sup> In this case, the appointed counsel abandoned the appeal without consulting the defendant, which in turn, infringed on the suspect's right to counsel.

The other cases consistently found no violations of Article 14. In *Berry v. Jamaica* (1994), the lawyer was privately retained<sup>51</sup> by the defendant, hence the defendant had the choice of his counsel. Accordingly, a violation of Article 14 only arises when the counsel chosen for an indigent defendant violates the court rules or the professional ethics code, similar to the facts in *Collins v. Jamaica* (1992). Although in this case, the Committee held the violation did not rise to the level of professional misconduct due to “the absence of *clear evidence* of professional negligence on the part of counsel, it is not for the Committee to question the latter's professional judgement.”<sup>52</sup> The United Nations Human Rights Committee held in all of these cases that the ICCPR does not entitle the accused to choose counsel free of charge. Many national jurisdictions have similar procedures governing the appointment of defense counsel if a defendant is found to be indigent through the determination of a legal aid office or a court.

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<sup>50</sup> Id. at 964. [Reproduced in the accompanying notebook at TAB #24]

<sup>51</sup> *Berry v. Jamaica*, Communication No. 330/1988, U.N. Doc. CCPR/C/50/D/330/1988 (1994). [Reproduced in the accompanying notebook at TAB #32]

<sup>52</sup> *Collins v. Jamaica*, Communication No. 240/1987, U.N. Doc. CCPR/C/43/D/240/1987 (1991). [Reproduced in the accompanying notebook at TAB #33]

## D.NATIONAL LAWS AND PRECEDENT REGARDING APPOINTMENT OF DEFENSE COUNSEL

### 1.UNITED STATES OF AMERICA

In the United States, the courts do not recognize the right of an indigent accused to select his own counsel.<sup>53</sup> The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.”<sup>54</sup> The Federal Statute discusses appointment of counsel in 18 U.S.C.S. §3006A (2000), under adequate representation of defendants. It states “counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan.”<sup>55</sup> Unless an indigent defendant waives his right to be represented by counsel, the United States magistrate judge or the court “shall appoint counsel to represent him.”<sup>56</sup>

The reasoning behind the United States’ reluctance to allow an indigent accused to select his own counsel have been speculated by authors LaFave and Israel. They state three possible justifications:

First, judges assume that they can choose a more able attorney than the indigent because they know the abilities of the available local counsel. Second, there is concern that allowing defendant to choose his own attorney will disrupt the ‘even handed distribution of assignments.’ Accepting defendant’s choice is likely to impose a substantial burden on the more experienced attorneys, as well as give an advantage to repeat offenders, who are most likely to know and select those attorneys. Third, since the Sixth Amendment guarantees the defendant a right only to representation that is competent, and not to that representation that he believes (correctly or not) to be the best, the trial court may value over the defendants’ choice the administrative convenience of an appointment system that ignores defendant’s preference.<sup>57</sup>

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<sup>53</sup> International Criminal Defence Attorneys Association, ICDA A Petition and Appeal Brief, *Jean-Paul Akayesu v. Prosecutor*, Case No.: ICTR-96-4-A, *Brief of the International Criminal Defence Attorneys Association (Article 74 Rules of Procedure and Evidence)* at 21 (June, 1999) <<http://www.hri.ca/partners/aiad-icdaa/petition/ictrbrief.html>>. [Reproduced in the accompanying notebook at TAB #14] See *State v. Stenson* (1997) and *State v. Henry* (1998), *Gideon v. Wainwright* (1963).

<sup>54</sup> Georgetown Law Journal, *Twenty-Fifth Annual Review of Criminal Procedure: III. Trial [Right to Counsel]*, 84 Geo. L.J. 1115, 1115 (1996). [Reproduced in the accompanying notebook at TAB #36]

<sup>55</sup> 18 U.S.C.S. § 3006A(b) (Lexis, LEXSTAT 2000 ). [Reproduced in the accompanying notebook at TAB #34]

<sup>56</sup> Id. [Reproduced in the accompanying notebook at TAB #34]

<sup>57</sup> Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* §11.4, at 547 (2d ed. 1992). [Reproduced in the accompanying notebook at TAB #38]

The first justification, wherein judges can choose a more able attorney for an indigent defendant than if he choose for himself, could be used as an argument by the ICTR Registrar for overruling the practice of a defendants' choosing counsel. Several indigent defendants have chosen counsel that are not on the list maintained by the Registrar of qualified counsel to practice in front of the Tribunal. When counsel was appointed at the request of the indigent defendants there were scheduling conflicts and language barriers that impeded the Tribunal's effectiveness. An appointment system saves time and effort as the Tribunal need not spend time writing letters back and forth to determine an indigent defendant's request for a particular counsel member. Therefore if a conflict does arise in the representation of an indigent defendant, he need only ask for a replacement of appointed counsel.

Local Rule 48(d)(3) governs the appointment of counsel in "capital cases" heard before the United States Court of Appeals for the First Circuit. It states that upon application by the defense and a finding of indigency, "the Court shall...appoint a team of two or more attorneys to represent the defendant."<sup>58</sup> One of the differences between United States laws and the ICTR is that when a criminal is found guilty of a capital offense in the U.S., there is the possibility, varying by state, that an accused defendant may receive a death penalty sentence. In contrast, the maximum sentence an accused can receive in the ICTR is a life imprisonment.

The indigent defendants who are assigned counsel through the ICTR are Hutu people who organized and carried out crimes not just against one individual but a whole population of Tutsi people. They are accused of such crimes as genocide, crimes against

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<sup>58</sup> U.S.C.S. Ct. App. 1<sup>st</sup> Cir, Loc.R. 48(d)(3) Appointment of Counsel in Capital Cases (LEXIS Law Publishing through 2000). [Reproduced in the accompanying notebook at TAB #35]

humanity, and incitement to these crimes. If a defendant in the United States is guilty of a capital offense for the death of just one person, they may face the death penalty in some states. The significance of these facts is that even in the case of an indigent defendant before the ICTR, there is no danger of losing their life if the case is not won. However, where an indigent defendant is not given the right to choose their own counsel, in the U.S. their life is at risk, which is a far worse punishment than a sentence of life imprisonment.

## 2. CANADA

In Canada, the administration of justice is under the jurisdiction of each province.<sup>59</sup> In the case of *Panacui v. Legal Aid Society of Alberta* (1998), the Alberta Court of Queen’s Bench held that there exists no “constitutional right of an accused person to be assigned counsel of his choice.”<sup>60</sup> In Quebec, the issue of the right of a legal aid recipient to choose his own lawyer has not been legally contested.<sup>61</sup> In *R. v. Therens* (1985), the question the court answered (from the Saskatchewan Court of Appeal) was the rights of a “detained” person within the meaning of Section 10(b) of the *Canadian Charter of Rights and Freedoms* “to retain and instruct counsel without

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<sup>59</sup> International Criminal Defence Attorneys Association, ICDA A Petition and Appeal Brief, *Jean-Paul Akayesu v. Prosecutor*, Case No.: ICTR-96-4-A, *Brief of the International Criminal Defence Attorneys Association (Article 74 Rules of Procedure and Evidence)* at 18 (June, 1999) <<http://www.hri.ca/partners/aiad-icdaa/petition/ictrbrief.html>>. [Reproduced in the accompanying notebook at TAB #14]

<sup>60</sup> International Criminal Tribunal for Rwanda, *Press Releases, ICTR Updates and Bulletins: Note on Assignment of Defence Counsel*, at 4 (Arusha, 22 Feb. 1999) <<http://www.ictr.org/ENGLISH/PRESSREL/defence.html>>. Citing the case of *Panacui v. Legal Aid Society of Alberta*, [1988] 1 W.W.R. 60 (Alta. Q.B.). [Reproduced in the accompanying notebook at TAB #5]

<sup>61</sup> International Criminal Defence Attorneys Association, ICDA A Petition and Appeal Brief, *Jean-Paul Akayesu v. Prosecutor*, Case No.: ICTR-96-4-A, *Brief of the International Criminal Defence Attorneys Association (Article 74 Rules of Procedure and Evidence)* at 19 (June, 1999) <<http://www.hri.ca/partners/aiad-icdaa/petition/ictrbrief.html>>. [Reproduced in the accompanying notebook at TAB #14]

delay and to be informed of that right.”<sup>62</sup> The Supreme Court of Canada held that the admission of evidence must be excluded and a new trial ordered because neither of the two rights under Section 10(b) were honored by the police. In an appeal from New Brunswick, the Supreme Court of Canada dealt with voluntary waiver of the right to counsel and the test for the state of mind of the defendant when waiving this right.<sup>63</sup> The Court held that the admissibility of a confession made while the accused is in an intoxicated state and without the benefit of counsel was not a voluntary waiver of her Section 10(b) right to counsel under the *Canadian Charter of Rights and Freedoms*.

The Saskatchewan Court of Queen’s Bench decided a case in February of 2000 in which an indigent defendant was convicted of sexual assault and causing bodily harm. The defendant, although indigent, did not qualify for legal aid but was appointed two lawyers by the court in order that he be ensured a fair trial. The Court held:

While every indigent person who is charged with a criminal offense is not automatically entitled to have counsel appointed by the court, s. 7 of the Canadian Charter of Rights and Freedoms entitles a person to have counsel appointed and funded by the state where the issues involved in the case are complex and the consequences are serious.<sup>64</sup>

In a companion case, *R. v. Schafer* (1999), the judge noted that applications for the appointment of counsel for indigent defendants not falling within provincial legal aid plans have increasingly been considered by courts across Canada. “It is now well established that an accused person charged with serious criminal offenses for which (if

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<sup>62</sup> *R. v. Therens* [1985] 1 S.C.R. 613. <<http://www.lexum.umontreal.ca/>>. [Reproduced in the accompanying notebook at TAB #39]

<sup>63</sup> *Clarkson v. The Queen* [1986] 1 S.C.R. 383. <<http://www.lexum.umontreal.ca/>>. [Reproduced in the accompanying notebook at TAB #40]

<sup>64</sup> *R. v. Wabash* [2000] 74 C.R.R. (2d) 324; 2000 C.R.R. LEXIS 80; 2000 SKQB 68. [Reproduced in the accompanying notebook at TAB #44]

convicted) a lengthy period of incarceration is likely is entitled to court authorized appointment of legal counsel if the applicant is indigent and counsel found to be necessary for the accused to obtain a fair trial.”<sup>65</sup>

The Nova Scotia Court of Appeal, in *R. v. Rockwood* (1989) considered the problem of a defendant receiving legal aid to retain counsel, but then discharging that counsel shortly before trial.<sup>66</sup> The issue before the court was “whether Rockwood was entitled to have enough public funding to retain whatever counsel he chose, rather than to be limited to those lawyers willing to work for the legal aid tariff.”<sup>67</sup> The court held that “a person who qualified for legal aid had no right of choice beyond counsel willing to act for legal aid rates. At no point did either the trial court or the appeal court inquire into the reasons for discharge of the earlier counsel.”<sup>68</sup> Even the highest Canadian courts have held that there is no constitutional right to be assigned counsel of a defendant’s own choosing if the accused is indigent and subject to a provincial legal aid program.<sup>69</sup>

### 3. ENGLAND/UNITED KINGDOM

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<sup>65</sup> *R. v. Schafer* [1999] 178 Sask. R. 105 (Q.B.). See also *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 25 O.A.C. 321 (CA). [Reproduced in the accompanying notebook at TAB #46]

<sup>66</sup> *R. v. Anderson* at 6 [2000] W.C.B.J. LEXIS 830; 2000 W.C.B.J. 47372; 46 W.C.B. (2d) 8. [Reproduced in the accompanying notebook at TAB #45]

<sup>67</sup> *R. v. Rockwood* [1989] 49 C.C.C. (3d) 129. [Reproduced in the accompanying notebook at TAB #47]

<sup>68</sup> *Id.* [Reproduced in the accompanying notebook at TAB #47]

<sup>69</sup> International Criminal Tribunal for Rwanda, *Press Releases, ICTR Updates and Bulletins: Note on Assignment of Defence Counsel*, at 4 (Arusha, 22 Feb. 1999) <<http://www.ictor.org/ENGLISH/PRESSREL/defence.html>>. [Reproduced in the accompanying notebook at TAB #5]

The Legal Aid Act of 1988 is designed to provide “advice, assistance, [mediation] and representation which is publicly funded with a view to helping persons who might otherwise be unable to obtain ...[such] on account of their means.”<sup>70</sup> When looking at the criminal legal aid section of the Statute, the relevant sections are §21(2) and (9) Availability of Representation under this Part; §22(2) Criteria for grant of representation for trial proceedings; and the most relevant section is §32(1) Selection and assignment of legal representatives. To answer the question of whether an indigent defendant under the British scheme is able to choose or is appointed counsel, this memo only focuses on section 32 of the Legal Aid Statute.

Section 32(1) of the Legal Aid Act states that “a person is entitled to receive advice or assistance or representation may [select the legal representative to advise, assist or act for him from among the legal representatives willing] to provide advice, assistance or representation under this Act.”<sup>71</sup> Thus, in England, an indigent defendant in a criminal case has a choice as to which solicitor and counsel he employs.<sup>72</sup> Currently, there is not even a public defender’s service, similar to the United States, which would employ barristers and solicitors to defend indigent defendants.<sup>73</sup> In an amendment brought before Parliament, the Lords studied and argued about how best to provide defendants representation under the legal aid scheme.<sup>74</sup> The outcome was that defendants granted

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<sup>70</sup> 24 *Halsbury’s Statutes of England and Wales* [Administration of Justice Act 1985 and Legal Aid Act 1988 §32] (4<sup>th</sup> ed. 1998 Reissue). [Reproduced in the accompanying notebook at TAB #49]

<sup>71</sup> *Id.* at 51. [Reproduced in the accompanying notebook at TAB #49]

<sup>72</sup> UK, Amendments to Justice Bill, PARL. DEB., H.L. (5<sup>th</sup> Series) (990126-07) (1999). <<http://www.parliament.the-stationary-office.co.uk/cgi-bin/html>>. [Reproduced in the accompanying notebook at TAB #53]

<sup>73</sup> *Id.* at 5. [Reproduced in the accompanying notebook at TAB #53]

<sup>74</sup> *Id.* [Reproduced in the accompanying notebook at TAB #53]

representation under the Legal Aid Act can choose who they wish to represent them so long as it does not offend the court's own rules and the legal aid procedures set out under the Statute.

#### 4.SOUTH AFRICA

The Constitution of the Republic of South Africa Act 200 of 1993 ('the Constitution') came into operation on April 27, 1994. Before the new Constitution came into effect, "a legal applicant could choose his or her lawyer from a list, but this system proved ineffective as certain attorneys received a disproportionate share of cases."<sup>75</sup> A letter from the Legal Aid Board of South Africa to the ICTR on January 19, 1999, stated "in criminal cases, legal aid clients do not have a choice of legal representative."<sup>76</sup> Therefore, as a result of the failing system, under the new Constitution, there exists no right to choose appointed defense counsel in South Africa.<sup>77</sup>

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<sup>75</sup> International Criminal Tribunal for Rwanda, *Press Releases, ICTR Updates and Bulletins: Note on Assignment of Defence Counsel*, at 5 (Arusha, 22 Feb. 1999) <<http://www.ictt.org/ENGLISH/PRESSREL/defence.html>>. [Reproduced in the accompanying notebook at TAB #5]

<sup>76</sup> Id. at 5. [Reproduced in the accompanying notebook at TAB #5]

<sup>77</sup> Id. at 4. [Reproduced in the accompanying notebook at TAB #5]