The Assignment of Defence Counsel Before the International Criminal Tribunal for Rwanda

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Abstract: In light of serious problems with the assignment of counsel to defendants before the ICTR, this article examines the freedom of choice of assigned defence counsel before both *ad hoc* International Criminal Tribunals. International legal instruments guarantee free legal assistance for indigent defendants but do not recognize an unrestricted free choice of such counsel. International case law, however, recognizes that an effective defence can hardly arise from a client-counsel relation that is not based on trust and confidence. Trust and confidence are therefore decisive for a proper understanding of the right to have free legal assistance. Unlike the practice of the ICTY of recognizing the importance of these factors, the Registrar of the ICTR seems to give more weight to geographical distribution of lawyers and other discriminating factors. The Appeals Chamber of the ICTR dealt with this policy in the Akayesu case and overturned the decision of the Registry to refuse the counsel of the defendant's own choosing.

1. INTRODUCTION

In the fall of 1998, the Registrar of the International Criminal Tribunal for Rwanda (ICTR) received a letter signed by the majority of detainees in the ICTR Detention Facilities indicating that they had embarked on a hunger strike. The detainees claimed to have adopted this course of action because of an alleged denial of their human rights in the assignment of defence counsel to them by the Registrar. The letter vented a general feeling of discomfort about the way the Registrar discretionally exercised his powers under the legal framework of the ICTR to assign counsel to indigent persons. Most complaints were related to the policy of the Registrar to allow detainees only a very limited choice of counsel (and co-counsel) cumulating in a moratorium on the right of indigent persons to select French and Canadian counsel to represent them before the ICTR. The Registrar alleged that a small group of lawyers, mainly from Canada and France, monopolized the defence of persons accused by the Tribunal so that they could determine the course of events, including blocking the Tribunal's judicial pro-

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ceedings as they saw fit. This policy resulted in a procedure between Mr Akayesu and the Registrar about the refusal to assign new counsel from Canada to replace a previously assigned counsel. Recently, the Appeals Chamber ruled that there was no reason to deny this replacement and the Registrar was instructed to compensate counsel financially from the date of refusal. This procedure led to the writing of this article in which the freedom of choice of defence counsel before the ICTR will be examined.

2. THE ROLE OF THE DEFENCE

Political and public attention focus primarily on the vigorous prosecution of alleged war criminals. It is equally important to remember that professional defence of the accused is vital to the legal and political legitimacy of any effort to extend the rule of law internationally. The principle of the rule of law within the criminal justice system does not only depend on the way in which investigative, prosecutorial and adjudicatory institutions fulfil their duties, but also on the proper fulfilment by the defence counsel of his duties. A full and fair defence is an essential element of any claim to conduct a fair trial and enforce the rule of law. When the ICTY and the ICTR were set up, little attention was paid to the role of defence counsel in the effectuation of the defendants rights.[1] This is surprising given the considerable influence on the way rights of the defendant are applied in the framework of both ad hoc Tribunals. Counsel does not only exercise the defendants right on his behalf, but he also has rights of his own to ensure that the rights of the defendant are effectuated.

The most important duty of the counsel is that of defender. Defence counsel exclusively defends the interests of his client; he does not defend any other interests which may conflict with his client's interests. He fights any and all infringements on the rights of the defendant's and will always strive to achieve the most favourable outcome for his client. He is obliged to employ his juridical expertise unreservedly for the benefit of his client. The fulfilment of his duty entails that he maximally exploits all possibilities of defence afforded by law. Simultaneously, defence counsel is also an interpreter, who explains the criminal justice system to his client and interprets the defendant's viewpoint to the other participants in the system. The most important issue here is to shed light on the

1. The same is true for the ICC. Defence counsel is only mentioned in four articles of the Statute: Arts. 48, 55, 65 and 67 (*see* UN Doc. A/Conf.183/9 of 17 July 1998). The role of the defence counsel is currently debated at the PrepCom drafting the Rules of Procedure and Evidence of the ICC in the context of the proposal to establish a Defence Unit (UN Doc. PCNICC/1999/WGRPE(4)DP.2), but not the mechanism of assignment of counsel. Under the auspices of the International Criminal Defence Attorney Association and the Leiden University an international conference took place at the ICTY where these matters were discussed on 1-2 November 1999.

facts and circumstances from the defendant's perspective and to question the criminal aspects of such facts and circumstances

The duties of the defence counsel entail, however, first and foremost that he acts as a confidant. He must be able to empathize with his client's situation and must become involved to a certain degree. That is not the same as totally identifying with the viewpoint or the position of the defendant. Being remanded at the seat of the Tribunal far away from home, often the defence counsel is the only person with whom the defendant can communicate on a regular basis. Moreover, such communication is confidential. Defence counsel is pledged to secrecy.

Defence work before both Tribunals is extremely difficult. The defence counsel cannot follow the beaten track, he is working outside his own jurisdiction with limited legal instruments. The alleged crimes stem from political armed conflicts and are unprecedented in courts. His client is from a different cultural background and speaks a different language. The requirement of a counsel-client relation based on trust and confidence is a vital and vulnerable element.

3. THE LEGAL FRAMEWORK

The ICTR was established on 8 November 1994 by Resolution 955 of the Security Council[2] providing for the Statute of the Rwanda Tribunal (the Statute). The right of the accused to be represented by counsel of his choice is contained in Article 20 of the Statute in the following terms:

> (1): All persons shall be equal before the International Criminal tribunal for Rwanda. [...] (4): In determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...] (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; [...] (d) To be tried in his of her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of his right, and to have legal assistance assigned to him or her, in any case were the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it; [...].[3]

These minimum guarantees for a fair trial are based on those of the International Covenant on Civil and Political Rights[4] and resemble those of both the African

2. SC Res. 955 (1994), UN SCOR, UN Doc. S/RES/955 (1994), modified by SC Res. 1165 (1998), UN SCOR, UN Doc. S/RES/1165 (1998), *see* annex (8 Nov. 1994), reprinted in 33 ILM 1598 (1994).
3. The same guarantees are reiterated in Art. 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).
4. See Article 14 ICCPR (GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171.

Charter on Human and Peoples' Rights[5] and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[6]

Pursuant to Article 14 of the Statute, the judges of the ICTR adopted the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY) with such amendments as they deemed necessary.[7] Section 2 of Part Four of the ICTR Rules of Procedure and Evidence (RPE) dealing with defence counsel differs from the same section of the ICTY RPE. Rule 45 on the assignment of counsel of ICTR reads (with the difference to Rule 45 ICTY in italics):

> (A) A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, *have at least 10 years of relevant experience*, and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar. [...] (C) In assigning counsel to an indigent suspect or accused, the following procedure shall be observed: (i) a request for assignment of counsel shall be made to the Registrar; [...] (iii) if [the Registrar] decides that the criteria [of indigence] 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. (D) If a request is refused, a further reasoned request may be made by the suspect or accused to the Registrar upon showing a change in circumstances. [...] *(H) 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. [...].*

Pursuant to Rule 45 of the RPE the Registrar of the ICTR issued a Directive on the Assignment of Defence Counsel (the Directive).[8] Article 2 of the Directive, dealing with the right to counsel, stipulates:

> (A) Without prejudice to the right of an accused to conduct his own Defence, a suspect who is to be questioned by the Prosecutor during an investigation and an accused upon whom personal service of the indictment has been effected shall have the right to be assisted by counsel provided that he has not expressly waived his right to counsel. (B) Any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90bis, also has the right to be assisted by counsel provided that the person has not expressly waived his right to counsel. [...].

When he is satisfied that the accused is indigent, the Registrar shall assign counsel and pursuant to Article 10(A)(i) of the Directive "choose for this purpose a name from the list drawn up in accordance with Article 13" of the Directive, dealing with pre-requisites for assignment of counsel. In accordance with Article

5. *See* Art. 7 of the ACHPR (OAU Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 ILM 58, 1982).
6. *See* Art. 6 ECHR (UNTS 221, 1950).
7. Adopted on 29 June 1995 and since then amended; lastly on 1 July 1999 (UN Doc. ITR/3/Rev 7).
8. As approved by the Tribunal on 9 January 1995 and since then amended, lastly on 1 July 1999 (UN Doc. ICTR/2/L.2).

10(A)(ii) of the Directive, "the decision of the Registrar shall be accompanied by a written explanation giving reasons therefor", when a request for assignment of counsel is not granted. In that case Article 12 of the Directive provides a remedy: the suspect may seek the President's review of the decision of the Registrar and the accused may make a motion to the Trial Chamber to have the Registrar's decision reviewed.

4. CASE LAW OF THE ICTR

In a few cases before the ICTR the question was raised how the right of indigent persons to have counsel assigned to them should be interpreted. In the first case, the *Ntakirutimana* case[9], the Trial Chamber noted that the principle had been explained in such a way that the final decision for the assignment of counsel and of the choice of such counsel should rest with the Registrar. However, the judges submitted that, mindful to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial, and convinced of the importance to adopt a progressive practice in this area, an indigent accused should be offered the possibility of designating the counsel of his or her choice from the list drawn up by the Registrar for this purpose, pursuant to Rule 45 of the Rules and Article 13 of the Directive, the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused. This decision confirms the importance of having counsel of his own choice assigned to the accused as a matter to be recognised by the Registrar when applying his authority under the Rules and Directive to assign counsel to an accused indigent.

In a separate and dissenting opinion, Judge Ostrovsky, considering that the interpretation of the right of legal representation in the Statute of the ICTR and in the ICCPR cannot be the same, underlined that there is a substantial difference between these two documents. The Covenant deals with domestic legal systems, applicable in member states. The Statute on the other hand provides for the situation related to rights of the accused before the International Tribunal. But Judge Ostrovsky also held that the accused has the right to choose his or her defence counsel from the list drawn up by the Registrar in accordance with Rules 44 and 45 of the Rules. The Registrar may refuse to assign a counsel to the accused of his or her choice if there are reasonable grounds for doing so. But in the light of Article 20(4)(d) of the Statute, the Registrar cannot impose his or her decision about the assignment of a defence counsel on the accused without taking his or her opinion into account.

9. Prosecutor *v.* Elizaphan Ntakirutima, Decision on the Motion by Accused to be Assigned New Counsel, Case No. ICTR-96-10-T/ICTR-96-17-T, T.Ch.I, 11 June 1997.

In the *Nyiramasuhuko* and *Ntahobali* case[10] the judges took the matter further by pointing out that the Registrar should also take the resources of the Tribunal, competence and recognized experience of counsel, geographical distribution and a balance of principal legal systems of the world into consideration. This case law seems to appeal to the sense of the responsibility of the Registrar to strike the balance between his authority to assign counsel to his own discretion on the one hand, and the wish of an accused to have counsel of his choice assigned to him on the other.

The practice of assignment of counsel before the ICTY is less rigid. In the *Mucić et al.* case[11] the judges of the ICTY considered that 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 he is 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 (emphasis added). The Trial Chamber supports this practice, within practical limits. The Court recognized the importance of the attorney-client relation by underlining that this relationship is based on trust and confidence. The Court also pointed out that where a complete breakdown of communication had occurred between the accused and his counsel, such breakdown could adversely affect the rights of the accused. In these circumstances, it would be unfair to both the accused and assigned counsel to require them to continue in a professional relationship.

In the *Kupreskić et al.* case[12] the judges of the ICTY also allowed the assignment of counsel of their choice to each of the accused even if that counsel does not speak either of the two working languages of the International Tribunal, provided however that, should the accused later seek the assignment of co-counsel such co-counsel must speak one of the working languages of the International Tribunal. In the *Simić et al.* case[13] the ICTY considering the conflict of interest between counsel and client also stroke the balance in favour of the accused by giving weight to the right of the accused to counsel of his own choice

10. Prosecutor *v.* Pauline Nyiramgcuhnko & Aisène Shalom Ntahobali, Requète d'extrème urgence de la défense en exception préjudicielle fondée sur le rejet d'une demande de commission d'office d'un conseil, Case No. ICTR-97-21-T, Tr.Ch.I, 13 March 1998.
11. Prosecutor *v.* Zejnil Delalić, Zdravko Mucić a/k/a "Pavo", Hažim Delić, Esad Landžo a/k/a "Zenga", Decision on the Request by Accused Mucić for Assignment of new Counsel, Case No. IT-96-21-T, Tr.Ch.I, 24 June 1996.
12. Prosecutor *v.* Kupreškić *et al.*, Decision on Defence Requests for Assignment of Counsel, Case No. IT-95-16-T, Tr.Ch.III, 10 March 1998.
13. Prosecutor *v.* Simić *et al.*, Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević, Case No. IT-95-9-T, Tr.Ch.III, 25 March 1999.

pursuant to Article 21, paragraph 4(b) of the Statute.[14] It appears to me that the ICTY is taking a general stand in favour of the rights of the accused by allowing him a free choice of defence counsel, as long as the counsel is on the list of Rule 45.

5. THE AKAYESU CASE

When it became clear in the fall of 1998 that the Registrar understood that he would be allowed to impose a moratorium on the assignment of counsel from specific jurisdictions, serious problems started. A hunger strike broke out in the ICTR Detention Facilities and lawyers filed petitions in protest. Initially, the Registrar alleged that a small group of lawyers were monopolizing the defence of persons accused by the Tribunal so that they could determine the course of events, including blocking the Tribunal's judicial proceedings. Later, the Registrar argued that the moratorium was brought about in order to achieve a better geographic balance and better representation of the principal legal systems of the world.

It was during this period that the Registrar refused to assign new counsel from Canada to replace the previous assigned counsel in the *Akayesu* case. The relations between Akayesu and previous assigned counsels had been problematic, leading to five subsequent requests to replace counsel because of lack of confidence, which were all honoured by the Registrar. The last request for the replacement of assigned counsel was filed after the verdict. The refusal to do so took place after a notice of appeal had been filed. Article 12 of the Directive, providing for a right of recourse against a decision not to assign counsel, does not extend this right of recourse in relation to an appeal before the Appeals Chamber. The Registrar denied the standing of Akayesu when he filed a motion for judicial review addressed to the Appeals Chamber. Recently,[15] the Appeals Chamber considered however, that in respect of a decision to assign or not to assign counsel to represent an appellant before the Appeals Chamber, a right of recourse to the Appeals Chambers is required for the effective exercise of the appellant's right under Article 20(4) of the Statute and has been allowed by the Appeals Chamber of the ICTY.[16]

The judges observed that the practice of the Tribunal has been to provide a list of approved counsel from which an accused may choose and that the Canadian counsel was included in this list by the Registrar upon the insistence of Mr

14. Art. 21 of the ICTY Statute is identical to Article 20 of the ICTR Statute.
15. Prosecutor *v.* Jean-Paul Akayesu, Decision on the Assignment of Defence Counsel, Case No. ICTR-96-4-A, A.Ch., 27 July 1999.
16. In the Order Regarding Esad Landžo's Request for Removal of John Ackerman as Counsel on appeal for Zejnil Delalić of 6 May 1999 (Case IT-96-21-A) and the Order on the Motion to Withdraw as Counsel due to a conflict of Interest of 24 June 1999 (Case IT-96-21-A).

Akayesu who desired that the Canadian counsel be assigned to him. In line with ICTY case law the Appeals Chamber struck the balance in favour of the accused's wish to have counsel of his own choosing assigned to him, as no reason to deny the Canadian counsel requested by Mr Akayesu was found. The Appeals Chamber instructed the Registrar to assign the Canadian counsel to Akayesu and moreover to compensate this counsel financially from the date of refusal.

6. INTERNATIONAL CASE LAW

The Constitution of the International Military Tribunal (Nurnberg Tribunal) stated in Article 16(d):

> [a] Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel.[17]

In the second clause of Article 23, it is stated that:

> [t]he function of Counsel for a Defendant may be discharged at the defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorised thereto by the Tribunal.[18]

Case law on the issue of free choice of assigned counsel is hard to find, but in his article *Nurnberg Trial Procedure and the Rights of the Accused*'[19] Benjamin B. Ferencz, one of the Nurnberg prosecutors, writes that accused persons before the Nurnberg Tribunal had the right to be represented by counsel of their own selection providing such counsel was qualified to conduct cases before German courts or was specifically authorized by the Tribunal. Besides counsel from the jurisdictions of the Allied Powers German lawyers also appeared as defence counsel before the Tribunal. In practice, no lawyer had ever been excluded after being requested as counsel for a defendant. In fact, most of the German counsel chosen were themselves subject to arrest or trial in German courts under German law for membership of the Nazi Party or the criminal SS. If tried, many of them would have been barred from legal practice but they were given immunity from prosecution in their own courts in order to ensure that war criminals could have a free choice of counsel among those Germans whom they considered best suited to defend them. It is interesting to note that the national origin of counsel was not a factor for exclusion.

17. Charter of the International Military Tribunal, 82 UNTS 279, Art. 16(d).
18. *Id.*, Art. 23(2).
19. B. Ferencz, *Nuremberg Trial Procedure and the Rights of the Accused*, The Journal of Criminal Law and Criminology, at 144-147 (1948).

The policy of free choice of court-appointed counsel was unequivocally voiced by Judge Biddle who said that "these men" must not be given the slightest excuse to protest that they had been denied a fair trial.[20] Before the Tokyo Tribunal the practice was the same: each of the accused had a Japanese chief-counsel and at least one Japanese associate counsel of his own choosing.[21]

Article 14(4)(d) ICCPR stipulates that an accused is entitled to the following minimum guarantees:

> [...] to defend himself in person or through legal assistance of his own choosing [...] 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.[22]

The interpretation of these rights was raised in four cases, all against Jamaica.[23] The Human Rights Committee did not recognize an absolute free choice of court appointed counsel and noted that the provision merely ensures effective representation. However, the specific and domestic circumstances of these cases give rise to the opinion that the Committee might have had a different view if the accused was being prosecuted for serious crimes which carry life sentences.

Article 6(3)(c) ECHR phrases the issue in almost the same wording:

> to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.[24]

The former European Commission of Human Rights understood Article 6(3)(c) to mean: a guarantee of the right of an accused to legal assistance of his own choosing – only where he has sufficient means to pay for such assistance. If this is not the case, the person's right is limited to free assistance of counsel appointed by the court when the interests of justice so require.[25] This view stems

20. Joseph E. Persico, Nuremberg – Imfamy on Trial, at 94 (1994).
21. John R. Prichard, *An Overview of the Historical Importance of the Tokyo War Trials*, *in* C. Hosoya *et al.* (Eds.), The Tokyo War Crimes Trial – An International Symposium, at 93 (1986).
22. International Covenant on Civil and Political Rights, 19 December 1966, 993 UNTS 3, Art. 14(4)(d).
23. UN Human Rights Committee Communications: Kelly *v.* Jamaica (No. 253/1987), Little *v.* Jamaica (No. 283/1988), Berry *v.* Jamaica (No. 330/1988) and Wright *v.* Jamaica (No. 459/1991).
24. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 218 UNTS 221, Art. 6(3)(c).
25. App. 127/55, 30 May 1956, 1 Yearbook 230. The policy of the former Commission may have aimed to contain the financial implications of domestic legal aid systems. In the cases X *v.* Netherlands, X *v.* UK and F *v.* Switzerland the Commission held that the accused is not entitled to choose the lawyer who will represent him on legal aid. The mechanism of assignment of domestic legal aid systems is a matter of state responsibility. None the less, the Commission has never agreed with such restraints on the influence of indigent person in the assignment of counsel that an evident lack of confidence in counsel not wished by the accused would negatively effect the guarantees of Art. 6 of the Convention.

from the *travaux préparatoires.* State delegates expressed their concerns about the financial implications of a legal aid system. Some authors note that the letter of the provision could allow a less restrictive interpretation; the word 'it' in the third clause could be read as referring to 'legal assistance of his own choosing', as guaranteed in the second clause of the provision, and not to 'legal assistance' which is mentioned in the clause setting out the conditions for the third right.[26] Where the former Commission had tended to be reluctant to question the decisions of national authorities, the European Court of Human Rights shows a willingness to follow its own determination on the facts rather than apply the margin of appreciation. The Court discussed the interpretation of the right to assignment of counsel in the *Pakelli* case.[27] The judges recognized that Article 6(3)(c) dealt with three related issues: 1) the right to defend oneself in person; 2) to defend oneself through legal assistance of one's own choosing, and 3) on certain conditions, to be given legal assistance free of charge. The object and purpose of these rights is to ensure effective protection of the rights of the defence. This analysis has not yet focussed on the effectiveness of legal representation deriving from a counsel-client relation on the basis of trust and confidence. That issue was debated in the *Croissant* case.[28] The judges recognized that a court should, as a rule, endeavour to choose counsel in whom the accused places confidence when they held that national courts, when appointing defence counsel "must certainly have regard to the defendants wishes [and] "indeed, German courts contemplates such a course. [...] However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice."[29]

7. OTHER SOURCES

The committee of ministers of the Council of Europe adopted a resolution[30] stating:

> Recommend to governments of member states: [...] 3. To facilitate effective access to justice for the very poor by the following: (a) offering legal aid or any 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 par-

26. *See* S. Stravos, The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights, at 215 (1993).
27. Pakelli *v.* Germany, Judgement of 25 April 1983, ECHR (Ser. A) no. 64.
28. Croissant *v.* Germany, Judgement of 25 September 1992, ECHR (Ser. A) no. 237-B (1993) 16 EHRR 135.
29. *Id.*, para. 29.
30. Committee of Ministers of the Council of Europe, Effective Access to the Law and Justice For the Very Poor, at 6-7 (1994). (Emphasis added).

> ties intervene; [...] (c) recognizing the right to assistance of competent counsel, *selected freely*, to the extent possible, to whom suitable payment shall be granted.

Indeed, most European jurisdictions have legislation that respects, within reasonable restrictions, the preference of an accused for assignment of counsel of his own choice. For example, in England and Wales free choice by the assisted person is recognised but with restrictions only on the professional qualifications of the chosen lawyer. In Italy any person eligible for a defence at the expense of the state may designate any lawyer who is a qualified member of the relevant bar or association; the same applies for France and The Netherlands.

The situation in the United States is different. Perhaps this is an intrinsic aspect of the wide scope of the Bar, but courts do not recognize the right of an accused indigent to select his own counsel. The judges assume that they can choose a more able attorney than the indigent because they are able to assess the abilities of the available local counsels.[31] The provincial legal system of Canada is compatible to the European system. In the Provinces of Ontario, Quebec and Alberta for instance, freedom of choice is a recognized right. In Nova Scotia the right of the accused to select counsel is also recognised but limited to a list of court appointed lawyers; only British Columbia differs.

8. OBSERVATIONS

The right to free legal assistance for an accused who does not have sufficient means to retain counsel of his own choice is one of the most sensitive issues arising from the principle of a fair trial. This poses a serious challenge for the legal system, as the funding of the defence on an equal footing with the Prosecution is involved. This relates to the fundamental issue of equality before justice, that requires that a legal aid system should be understood in that context. A difference in the quality and experience of and the confidence in chosen counsel and assigned counsel is simply not acceptable. A legal aid system should not discriminate nor endeavour equality of distribution of cases for the sake of lawyers. In other words, it follows from the maxim that justice must be seen to be done – accused persons must have full confidence in counsel assigned to them.

International conventions guarantee that the accused is assisted by assigned counsel free of charge, but the scope of that guarantee should be understood in a domestic setting. It appears to me that the common minimum standards deriving from the case law of the supervising and interpreting international judicial bodies are these. Firstly, an indigent accused does not have an absolute free choice of the lawyer who will represent him on legal aid. Secondly, national authorities, however, should, as a rule, endeavour to assign counsel in whom the accused

31. *Compare* W. B. LaFave & J. H. Israel, Criminal Procedure, at 547 (1992).

places confidence. Thirdly, national authorities should not restrict assignment of counsel to indigent accused persons in any way, unless justice requires this.

Many countries have legal aid systems that go beyond the first standard concerning the scope of the choice by allowing the accused the widest possible choice, i.e. to select counsel freely of a list of available and qualified lawyers. In my opinion the second standard is not met when counsel assigned at random is not able to acquire the confidence of the accused resulting in an infringement of the right to a fair trial. The third standard would, in my opinion, not allow exclusion of lawyers for discriminatory reasons or establishing a geographical distribution of legal aid including a balance of participation of principle legal systems in the jurisdiction. The refusal of specific counsel is only justified when justice requires so, such as in the case of, for example, ineligibility for the case at hand or a reasonable risk of obstruction of the course of justice.

The right to be assisted by assigned counsel recognised in Article 20(4)(d) of the ICTR should not be understood in any other way. There is, in my opinion, no reason to apply a lower standard before the ICTR. It is true that the establishment of the international criminal tribunal created a new legal system fit to deal with the unique characteristics of supra-national trials and the unique needs of prosecuting serious violations of humanitarian law committed in a national setting. Both unique elements may lead to questions where to strike the balance between internationally accepted standards of fair trial and specific needs of the ICTR. The mechanism of assignment of counsel, however, has nothing to do with these specific needs.

The decision of the Appeals Chamber in the *Akayesu* case does not indicate that the ICTR should apply a different standard in its policy concerning the assigning of counsel to accused persons who are indigent. It seems to me that the decision makes it utterly clear that the practise to provide a list of approved counsel from which the accused may choose should be observed by the Registry unless good reasons have been produced why the choice of the accused should not be accepted. The instruction to the Registrar to assign the Canadian counsel to Akayesu *ex tunc* (and implicitly rejecting the exclusion of the counsel for reasons of geographical distribution or a balance of the principal legal systems in the world) seems to me a proper application of the third standard.