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Focus

SCSL case law

Prosecutor v. Sam Hinga Norman,
Case No. SCSL-04-14-T, Decision
on the Application of Samuel Hinga
Norman for Self Representation
under Article (17 (4) (d) of the
Statute of the Special Court, 8 June
2004.

Prosecutor v. Sam Hinga Norman,
Case No. SCSL-04-14-
T, Consequential Order on
Assignment and Role of Standby
Counsel, 14 June 2004.

ICTY case Law

Prosecutor v. Slobodan Milosevic,
Case No. IT-99-37-PT, 30 August
2001.

Prosecutor v. Vojislav Seselj, Case
No. IT-03-67-PT, 9 May 2003.

ICTR case Law

*Prosecutor v. Jean Bosco
Barayagwiza*, Case No. ICTR-97-
19-T, 2 November 2000

*Prosecutor v. Pauline
Nyiramasuhuko and Arsène S.
Ntahobali*, Case No. ICTR-97-21-T,
22 June 2001.

**Article 17 (4) (d) SCSL, 20 (4) (d)
ICTR, 21(4) (d) ICTY Statute:**

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

d. To be tried in his or her presence,
and to defend himself or herself in
person or through legal assistance
of his or her own choosing; to be
informed, if he or she does not have
legal assistance, of this right; and to
have legal assistance assigned to
him or her, in any case where the
interest 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;”

The Right to Self Representation before the Special Court for Sierra Leone

The right to self-representation is considered to be a fundamental right of an accused, and is enshrined in various human rights treaties such as Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights. Even though this right is recognised by all statutes of the current war crimes tribunals, it seems that the judges sitting in these bodies are not particularly keen on granting this right to defendants. This attitude may be explained by the complexity of the cases, what is at stake for the defendant, and the fear that due to an unprofessional self-defence the trials could be generally considered unfair. The core issue is therefore to find a balance between two fundamental principles: the right to defend oneself in person and the right to ensure a fair trial. This issue, that was already examined by the ICTY and the ICTR, has become the focus of one of the latest decisions of the Special Court for Sierra Leone. Interestingly, all tribunals took different approaches despite the existence of more or less identical statutory provisions. The solutions to this crucial subject range from an appointment of a counsel in the interest of justice (ICTR: *Barayagwiza*), as *amicus curiae* (ICTY: *Milosevic*), as duty counsel (ICTR: *Ntahobali*), and as standby counsel (ICTY: *Seselj*, ICTR: dissent Judge Gunawardana in *Barayagwiza*, and SCSL: *Norman*).

Sam Hinga Norman, former Minister of Interior Affairs of Sierra Leone charged with crimes against humanity and war crimes, was arrested on 7 March 2003. He is jointly tried with two other persons, Allieu Kondewa and Moinina Fofana, in the so called Civil Defence Forces (CDF) trial. On 3 June 2004, just after the opening statements of the prosecutor, Norman notified the judges that he wished to represent himself. In the pre-trial stage he had been represented by a team of defence counsels of his own choice. The Trial Chamber rejected his request for three core reasons. Firstly, the accused was not tried alone but with two fellow accused. Granting the right of self-representation in such circumstances could potentially lead to a negative impact on the fairness and expeditiousness of the trial of the two co-accused. Secondly, the defendant did not indicate such a request from the outset of the trial, and thirdly, the right to self-representation was only a qualified and not an absolute right. The trial judges also referred to the fact that the exercise of such right could have a major impact on the court's timetable, which created serious cause of concern due to the limited mandate of the court. Unfortunately, the judges did not specify in which capacity – in the interest of justice, *amicus curiae*, or standby counsel – the defence counsel should appear for the accused and left this decision to the Principle Defender, the head of the unique Defence Office created under Rule 45 of the Rules of Procedure and Evidence. Later, in an additional decision, the judges clarified that the defence counsel should be assigned to Norman as standby counsel. The judges further defined the role of the standby counsel stating that such role entailed, *inter alia*, legal representation and advice, investigations, presentation of the case, counsel-client privilege and questioning of witnesses in cases of sensitive or protected witnesses.

This decision departs from the solution chosen in the *Milosevic* case to appoint *amicus curiae* defence counsel in order to assist the court in a proper administration of justice. This unique solution seemed to be generally in compliance with the provisions of the statute as it did not impose a defence counsel on the defendant and, at the same time, did not compromise the right to self-representation. However, this concept has some deficits as the *amicus* counsel is not a party in the trial and may disturb the adversarial nature of the proceeding. In the *Barayagwiza* case the ICTR decided that a counsel could be imposed on a defendant in “the interest of justice”. It relied on the statute which provides the right “to have legal assistance assigned to him or her, in any case where the interest of justice so require.” As the defendant Barayagwiza boycotted the trial proceedings the Trial Chamber considered that a defence counsel had to be assigned to the accused in order to ensure a fair trial. In another case the ICTR Trial Chamber did not allow the accused Ntahobali to defend himself in person for a shorter period during the replacement of his counsels as the judges were anxious about the cross-examination of rape victims by the defendant. In the interest of justice it was decided to appoint a duty counsel for the conduct of such cross-examinations.

Even though the statutory provisions do not provide for a standby counsel, such a possibility derives from the wording of Article 17 (4) (d) SCSL Statute that provides that legal assistance could be assigned to a defendant “in any case where the interest of justice so require”. This concept – first suggested by ICTR Judge Asoka Gunawardana in his dissenting opinion in the *Barayagwiza* case – appears to be more in harmony with the adversarial nature of the proceeding.

In any event it is evident that the judges are not at ease with the right to self representation and would actually favour a *mandatory defence counsel* given the complexity of the cases in international tribunals.

Responsibility

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