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Odsjek Krivične Odbrane
CRIMINAL DEFENCE SECTION

MEMORANDUM OF UNDERSTANDING BETWEEN OKO AND OLAD

Signed 9th May 2006

Memorandum of Understanding between the Criminal Defence Section (OKO) of the Court of Bosnia and Herzegovina (Court of BiH) and the Office for Legal Aid and Detention Matters (OLAD) of the International Criminal Tribunal for the former Yugoslavia (ICTY) on the Transfer of Defence Files

Introduction

1. A number of individuals are expected to be transferred from the ICTY to the Court of BiH for trial. In many of these cases, existing lawyers (ICTY lawyers) and their teams have been preparing the case for a period of time, sometimes years. The law in Bosnia and Herzegovina (BiH) allows foreign lawyers to be 'specially admitted' to defend cases before the Court of BiH. All lawyers acting before the Court of BiH (BiH lawyers), including foreign lawyers specially admitted, will be paid according to the BiH "State Tariff", which provides for substantially lower fees than those payable under the legal aid regime at the ICTY.
2. The transfer of the defence files and passing of information to a new lawyer (BiH lawyer) is a difficult but important process. An adequate transfer of the file will ensure the proper continuation of the accused's legal representation and thereby the protection of the accused's rights and avoid duplication of work by the ICTY and BiH lawyers.
3. Relying on the ethical duty of lawyers to transfer the defence files properly is not sufficient to ensure a smooth transfer, as the only sanction is an ethical complaint, which can only be submitted after substantial time and resources are spent and which does not necessarily yield results. Hence, it is considered desirable to establish a basic formal protocol.

Legal basis for transfer of defence files

4. Pursuant to Article 9(D) of the ICTY Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal (Code of Conduct), "upon termination or withdrawal of representation, counsel shall take steps to the extent reasonably practicable to protect the client's interests, such as giving sufficient notice to the client, surrendering papers and property to which the client or the Tribunal is entitled and refunding any advance payment of fee that has not been earned." The ICTY Code of Conduct confers an obligation on the ICTY lawyer to protect the client's interests upon termination or withdrawal. In cases of referral under Rule 11 *bis*, this reasonably includes the obligation to ensure a proper transfer of the case file to a new lawyer.
5. This Memorandum of Understanding, while not in and of itself creating legal obligations for either the ICTY or OKO, establishes a basic protocol for facilitating the transfer of defence files.

Retention of existing lawyer

6. When the ICTY renders a decision to refer a case under Rule 11 *bis* (Referral Decision), OLAD shall contact the ICTY lawyer without delay to ascertain whether s/he is prepared to continue to represent his/her client under the terms and conditions of the Court of BiH.

7. If the ICTY lawyer accepts to continue the representation of the accused before the Court of BiH, OKO shall inform the Court of BiH of that intention and assist with the preparation of such applications as may be necessary under the Additional Rules of Procedure for Defence Advocates appearing before the Court of BiH.
8. Consequently, the lawyer should plan for the physical transfer of the files to Sarajevo, for which s/he will be reimbursed in accordance with OLAD's policies.

Transfer of a case to a new lawyer

9. Where there is a change in the representation of the accused before the Court of BiH, a new lawyer shall be appointed in accordance with the law of BiH. Under the law of BiH, a lawyer cannot be appointed until the accused is within the jurisdiction of the Court of BiH. Therefore, the defence file transfer procedure can only commence upon the accused's arrival in Sarajevo.
10. Whilst awaiting the physical transfer of an accused, the ICTY lawyer shall prepare a workplan detailing the activities necessary to make the transfer of the defence file to the BiH lawyer. The workplan shall be submitted to OLAD as soon as possible but no later than two weeks from the date of the Referral Decision and shall include at least the following:
 - Activities to ensure that all documents are properly filed;
 - Activities to ensure that all documents are properly indexed;
 - Activities to ensure that confidential information which is not related to or relevant for the case or is not permitted to be transferred is excluded from the defence file;
 - All steps considered necessary by either the ICTY lawyer or the new lawyer to amend orders for confidentiality with regard to information within the defence file, sufficient to allow access for the new lawyer, either by application to the Trial Chamber directly or to seek the OTP's request to the Trial Chamber to lift the confidentiality and/or the protective measures of witnesses for the new lawyer;
 - Activities to type up essential handwritten work products which are otherwise illegible;
 - An overview of all work product which is not provided in the local language (Bosnian-Croatian-Serbian), and a proposal for which documents need translation;
 - A proposed schedule of briefings with the new lawyer in order to discuss the strategy of the case and/or any other important matter for the transfer of the defence file;
 - A proposed schedule for the transfer of the files directly to the new lawyer;
 - Any other necessary activity for a proper transfer of the defence file;
 - A timetable for all of the above actions.
11. The documents that should be transferred to the new lawyer shall include subject to confidentiality restrictions, *inter alia*:
 - a. Any statements or notes arising out of interviews with potential witnesses;
 - b. Any other material collected in the course of the defence investigation;
 - c. Any filings, whether they originated from the ICTY lawyer, the prosecution or the Court, that are in the possession of the ICTY lawyer;
 - d. Any disclosure material received from the prosecution that is not subject to confidential or protective measures;

- e. A detailed list of measures taken to prepare the case for trial.
12. The following documents shall be transferred to the new lawyer only with the written permission of the accused:
 - a. Any communication between defence counsel and the accused;
 - b. Any communication between defence counsel and third parties involved in the case;
13. Upon receipt, OLAD shall assess the workplan and approve it or request further information from the ICTY lawyer if needed.
14. The workplan shall be implemented within one month of being approved, or if a new lawyer has not been appointed at that time, within one month of the appointment of the new lawyer.
15. In order to prove implementation of the workplan, the new lawyer shall send a written and reasoned confirmation of satisfactory receipt of the defence file to OKO. OKO will inform OLAD accordingly.
16. Should the ICTY lawyer fail to transfer the defence file properly as detailed in this Memorandum of Understanding, thus breaching his/her ethical obligations, s/he may be subject to a disciplinary complaint as envisaged in the Code of Conduct. This remedy is without prejudice to any other legal action which could be brought against the ICTY lawyer at the domestic level.
17. Upon receipt of confirmation from the new lawyer that the ICTY lawyer has transferred the defence file satisfactorily, through OKO, the ICTY lawyer will be reimbursed for the completion of the tasks described in the workplan in accordance with OLAD's policies.
18. In case an accused has been transferred but the assignment of a new lawyer is delayed or poses problems, OKO and OLAD will consult as to the custody of the defence file awaiting the assignment of a new lawyer.

Payment

19. OLAD policies provide for a standard maximum allotment of hours for the ICTY lawyer in the amount of 150 counsel hours and 100 support staff hours to complete the tasks described in the workplan.
20. In addition, OLAD will reimburse a return trip to BiH and up to one week (five days) daily subsistence allowance to the ICTY lawyer (and a translator if necessary) for meetings with the new lawyer in order to discuss the strategy of the case and/or any other important matter for the transfer of the defence file as contained in the workplan.
21. Finally, OLAD policies provide for a single allotment of, at maximum, 1,500 Euros per case for the physical transfer of files to BiH.

Amendments

22. Both OLAD and OKO can propose amendments to the present Memorandum of Understanding. Amendments shall be adopted if jointly agreed by OLAD and OKO.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto, have signed this Memorandum of Understanding.

Hans Holthuis
Registrar
International Tribunal for the former Yugoslavia

Fidelma Donlon
Acting Registrar
Court of Bosnia and Herzegovina