

UNITED
NATIONS

IT-02-60-PT
D 7800-D 7795
09 December 2002

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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-02-60-PT
Date: 9 December 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar: Mr. Hans Holthuis

Decision of: 9 December 2002

PROSECUTOR

v.

**VIDOJE BLAGOJEVIĆ
DRAGAN OBRENOVIĆ
DRAGAN JOKIĆ
MOMIR NIKOLIĆ**

DECISION ON ORAL MOTION TO REPLACE CO-COUNSEL

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Vidoje Blagojević
Mr. David Wilson and Mr. Dušan Slijepčević for Dragan Obrenović
Mr. Miodrag Stojanović and Ms. Cynthia Sinatra for Dragan Jokić
Mr. Veselin Londrović and Mr. Stefan Kirsch for Momir Nikolić

TRIAL CHAMBER II ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal"),

BEING SEISED OF the oral motion of the Accused, Vidoje Blagojević, submitted at the Status Conference held on 27 November 2002 in which the Accused stated that defence counsel had been appointed to him, that he does not agree to the counsel being appointed, and therefore that "certain problems have arisen that may impair the work and may lead to certain further consequences which I may not envisage,"¹

CONSIDERING THE FURTHER SUBMISSIONS made by the Accused during a motion hearing held in closed session on 27 November 2002 ("Motion Hearing"), in which he specified that his complaint is limited to the assignment of his co-counsel, whom the Accused believes "ha[s] to be elected and assigned in accordance with the request and the interests of the client, which was not done in [this] case,"²

NOTING that Rule 73 of the Rules provides, in part:

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

NOTING that Rule 45 of the Rules of Procedure and Evidence of the Tribunal ("Rules") provides for the appointment of counsel by the Registrar for a suspect or accused who lacks the means to remunerate such counsel "whenever the interests of justice so demand", pursuant to the Directive of Assignment of Defence Counsel, as amended on 12 July 2002 ("Directive"),

NOTING that Section III of the Directive, and specifically Article 11, provides for the assignment of counsel, and that, pursuant to Article 16(c) of the Directive, "[i]n the interests of justice and at the request of the person assigned as counsel," co-counsel may be assigned by the Registrar,

NOTING that in accordance with the Directive, the Registrar appointed Michael Karnavas as lead counsel for the Accused on 31 August 2001, and Suzana Tomanović as co-counsel on 25 September 2002.

NOTING that Article 19 (A) of the Directive provides that, in the interests of justice, the Registrar may: (i) at the request of the accused or his counsel, withdraw the assignment of counsel; or (ii) at the request of lead counsel, withdraw the assignment of counsel,

NOTING that Rule 46 provides that a Chamber may refuse audience to counsel after a warning if, in its opinion, the conduct of that counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings, and that a Chamber may determine that counsel is not longer eligible to represent a suspect or accused before the Tribunal pursuant to Rules 44 and 45,

NOTING however that there is no explicit provision in the Rules or in the Directive conferring on a Trial Chamber the mandate to review decisions by the Registrar on the assignment of co-counsel,

NOTING that the appointment and qualification of counsel is regulated by Rule 44 of the Rules which reads, in part:

(A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. Subject to any determination by a Chamber pursuant to Rule 46 or 77, a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that the counsel is admitted to the practice of law in a State, or is a University professor of law, speaks one of the two working languages of the Tribunal, and is a member of an association of counsel practising at the Tribunal recognised by the Registrar.

[...]

(C) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel set out by the Registrar and approved by the permanent judges.

CONSIDERING that the basis for action in this matter by a Trial Chamber rests with its inherent power and duty to guarantee a fair trial and the proper administration of justice, as set forth in Articles 20 and 21 of the Statute of the Tribunal,³

CONSIDERING that the Trial Chamber deems that the issue of assignment or replacement of counsel, when raised as a matter of procedural fairness and proper administration of justice, is open to judicial scrutiny; difficulties relating to the defence of an accused will affect the conduct of a case over which a Trial Chamber has not only the power but also the duty to regulate in accordance with the statutory requirements for a fair and expeditious trial; and that these problems, therefore, are justiciable,

¹ Status Conference, 27 November 2002, Transcript page ("T.") 46.

² Motion Hearing, 27 November 2002, T. 107. (closed session)

³ See, e.g., *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-A, Order on Esad Landžo's Motion for Expedited Consideration, 15 September 1999; *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002.

CONSIDERING that the Chamber wishes to emphasise that although it considers that it is vested with the power to review a decision of this type in the interests of justice, it is not obliged to intervene in every complaint regarding the assignment of counsel. It recognises that the Registrar has the primary responsibility in this matter and that, if the Registrar was not properly informed of necessary facts, he would be entitled to reconsider his previous decision on the basis of new information hitherto unavailable to him,

CONSIDERING that with regard to the present motion, the Trial Chamber is responding to a specific request relating to the decision taken by the Registrar and raised by the Accused during his Status Conference,

NOTING that the Registry informed the Trial Chamber at the Motion Hearing that co-counsel in this case was appointed "according to the policy [...] of the Registry",⁴ that she was qualified and that she had worked previously on this case as a legal assistant,

NOTING that the Registry informed the Trial Chamber at the Motion Hearing that it was "aware of some problem with the accused [...] who disagreed with the choice of Mr. Karnavas [for his co-counsel]."⁵ In the understanding of the Registry, the problem had already been solved,⁶

NOTING FURTHER that the Trial Chamber was informed that the Accused had proposed a third party to be appointed co-counsel in place of Ms. Tomanović,

CONSIDERING that the Trial Chamber finds that pursuant to Article 16(c) of the Directive it is in principle for the lead counsel to request co-counsel, and that both counsel and co-counsel were assigned by the Registrar in conformity with the Rules of the Tribunal and the Directive,

NOTING that the Trial Chamber heard both lead counsel and co-counsel for the Accused on this issue,

CONSIDERING that the Trial Chamber did not observe an atmosphere of distrust between the lead counsel and co-counsel, but rather found there to be confidence expressed in co-counsel by lead counsel,

NOTING that at the Motion Hearing, the Accused did not present any factual submissions as to the concrete reasons for his seeking the dismissal of his co-counsel or any specific act of misconduct by

⁴ T.118. (closed session)

⁵ The Accused sent at least two letters to the Office of Legal Aid and Detention Matters in October 2002 on the issue of the appointment of his co-counsel.

⁶ T.118. (closed session)

his co-counsel, stating only that “assignment of co-counsel in my case was not carried out pursuant to my suggestions and with my consent,”⁷

CONSIDERING that the Trial Chamber cannot find that co-counsel is incompetent and acting in any way contrary to the best interests of her client,⁸

CONSIDERING that the Appeals Chamber for the International Criminal Tribunal for Rwanda (“ICTR”) held that:

in principle, the right to free legal assistance of counsel does not confer the right to counsel of one’s own choosing. The right to choose counsel applies only to those accused who can financially bear the costs of counsel.⁹

The Appeals Chamber further found that:

[t]o be sure, in practice an indigent accused may choose from among counsel including [sic] in the list and the Registrar generally takes into consideration the choice of the accused. *Nevertheless, in the opinion of the Appeals Chamber the Registrar is not necessarily bound by the wishes of an indigent accused. He has wide discretion, which he exercises in the interests of justice.*¹⁰

CONSIDERING that it is not permissible for an accused to deliberately destroy the atmosphere of trust and to make unsubstantiated claims that no co-operation between himself and co-counsel is possible in order to have new co-counsel appointed,

CONSIDERING that the Trial Chamber took into consideration the alleged problems between the Accused and the defence team, and that the alleged problems were based on the desire of the Accused to have an unknown third person assigned as co-counsel, and not due to any misconduct, incompetence or any conflict of interest on the part of co-counsel,

⁷ T.107. (closed session)

⁸ The Trial Chamber takes note of the decision by the Trial Chamber in *Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision of Defence Counsel Motion to Withdraw, 2 November 2000 in which the Trial Chamber found the fact that the accused in that case did not lack confidence in his lawyers and that he did not argue that they were incompetent to be relevant factors in deciding upon the motion for withdrawal of counsel. This Trial Chamber observes that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (“Rules of the ICTR”) with regard to the Assignment of Counsel (Rule 45) and Availability of Counsel (Rule 45 *ter*) are different than the Rules of the ICTY (no such Rule as 45 *ter* of the Rules of the ICTR and no Rule similar to Rule 45(I) of the Rules of the ICTR: “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.”). This Trial Chamber further observes that the obligations of counsel to a particular accused are reflected in *inter alia* the “Code of Professional Conduct for Counsel Appearing before the International Tribunal”. See, e.g., Article 8 (Scope of Representation) and Article 9 (Declining, Terminating or Withdrawing Representation).

⁹ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 (“*Akayesu* Appeal Judgement”), para. 61. The Appeals Chamber further cited the Appeals Judgement in *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-A, 19 October 2000, para. 33: “The Appeals Chamber [...] concludes, in the light of a textual and systematic interpretation of the provisions of the Statute and Rules, read in conjunction with relevant decisions from the Human Rights Committee and the organs of the 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.”

¹⁰ *Akayesu* Appeal Judgement, para. 62. Emphasis added.

CONSIDERING that the Trial Chamber cannot identify any ground which would amount to an insufficient atmosphere of trust between the Accused and the defence team or which would otherwise show that co-operation between the Accused and his team is no longer possible,

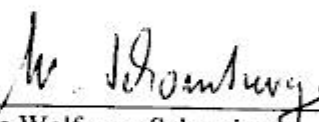
CONSIDERING that no prejudice can be suffered by the Accused by maintaining Ms. Tomanović as co-counsel, and that to replace co-counsel at this point in the proceedings may cause prejudice to the Accused by causing *inter alia* a delay in the proceedings and thereby infringe his right to be tried expeditiously,

CONSIDERING, therefore, that no good cause has been shown to intervene in the Registrar's decision,

PURSUANT to Articles 20 and 21 of the Statute of the Tribunal, and Rules 54 and 73 of the Rules of the Tribunal,

HEREBY DISMISSES the motion,

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



Judge Wolfgang Schomburg
Presiding

Dated this ninth day of December 2002,
At The Hague,
The Netherlands

[Seal of the Tribunal]