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Tribunal Pénal
International pour
l'ex-Yougoslavie

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TRIAL CHAMBER
CHAMBRE DE 1ERE
INSTANCE

The Hague, 7 December 2004
CT/P.I.S./924-e

MILOŠEVIĆ CASE:
ASSIGNED COUNSEL'S APPLICATION TO WITHDRAW DENIED

Today, 7 December 2004, Trial Chamber III consisting of Judge Robinson (Presiding), Judge Kwon and Judge Bonomy determined that the application by court assigned counsel, Mr. Steven Kay and co-counsel Ms. Gillian Higgins, to withdraw from their assignment should be denied. The Trial Chamber instructed the Registrar, pursuant to his powers under Article 19 of the Directive On Assignment of Defence Counsel, to deny the application.

Background

The Decision states that “On 2 September 2004, the Trial Chamber gave an oral ruling in which it determined that it was both competent and appropriate to assign defence counsel to the Accused. The Trial Chamber further ordered the Registrar to endeavour in the first instance to secure the appointment of Mr. Steven Kay QC and Ms. Gillian Higgins as court assigned counsel. On 3 September 2004, the Deputy Registrar issued a decision assigning Mr. Steven Kay QC and Ms. Gillian Higgins as counsel to the Accused following their agreement to act. On the same day, the Trial Chamber issued an ‘Order on the Modalities to be Followed by Court Assigned Counsel’, in which it defined the role of court assigned counsel. On 1 November 2004, the Appeals Chamber issued its ‘Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel’, in which it affirmed the Trial Chamber’s assignment of defense counsel, but reversed its Order on Modalities.

The Trial Chamber decision further states that “On 26 October 2004, subsequent to the hearing of the appeal but prior to determination thereof, court assigned counsel wrote a letter to the Registrar seeking withdrawal from their position as defence counsel under the provisions of Article 19 of the Directive on Assignment of Defence Counsel. On 27 October 2004, the Deputy Registrar issued a Decision referring the request to the Trial Chamber... On 8 November 2004, court assigned counsel filed before the Trial Chamber ‘Assigned Counsel’s Motion for Withdrawal with Annex A’. The Trial Chamber then heard substantial submissions on the matter from court assigned counsel, the Accused and the Prosecution over three days from 9 to 11 November 2004.”

In considering the Application, the Trial Chamber states, inter alia:

“If the submissions of assigned counsel...were correct, that would mean that a Trial Chamber could not effectively assign counsel without the cooperation of the accused. However, the jurisprudence of the Tribunal is that counsel should continue to act in the absence of cooperation. The Appeals Chamber has held that it is competent to assign counsel to an unwilling accused, and that it was within the lawful discretion of the Trial Chamber to do so in the circumstances of this case. If it is competent to assign counsel in the circumstances of this case, then the refusal of the Accused to communicate with or instruct assigned counsel cannot be a basis for withdrawal.

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Furthermore, the Appeals Chamber has ruled that an accused ‘does not have the right unilaterally to destroy the trust between himself and counsel. Similarly, an accused does not have the right to claim a breakdown in communication through unilateral actions.’ The Appeals Chamber went on to hold: In circumstances such as this, where an Appellant unjustifiably resists legal representation from assigned Counsel, Counsel’s professional obligations to continue to represent the accused remain’. Whether or not a relationship of trust ever existed between court assigned counsel and the Accused in this case, the principle applied by the Appeals Chamber is equally relevant. Whether an accused takes action to prevent the creation of a relationship of trust with assigned counsel or to destroy such a relationship, that does not put counsel in breach of any provision of the ICTY Code[Code of Professional Conduct for Counsel Appearing Before The International Tribunal], including Article 14 (A) or (B), which deal with the question of conflict of interest. Equally, there is, on the part of court assigned counsel, no breach resulting from the refusal of the Accused to communicate with or instruct them.

A critical aspect of the argument of court assigned counsel is that their inability to obtain instructions from the Accused means that they are unable to act in his best interests, as required by Article 11 of the ICTY Code. It is argued that ‘Assigned Counsel are unable to know and therefore cannot protect the Accused’s best interests in circumstances where he will not communicate with them’. The Trial Chamber finds that to be an erroneous analysis of the position of assigned counsel. What is required of counsel is that they act in what they perceive to be the best interests of the Accused. That is what the Trial Chamber clearly anticipated in its Order on Modalities, and it is all that can be reasonably expected of counsel in such circumstances. To hold otherwise would be to allow an accused to frustrate the statutory duty of the Trial Chamber to ensure that a trial is fair.”

Furthermore, the Trial Chamber states that it “observes that assignment of counsel against the wishes of the accused is a developing area of the law both in national and international jurisdictions. In such a situation it is plain that any code regulating the conduct of counsel, drafted at a time when such appointments were not specifically considered, must be construed in light of developments in the law. Thus, where the highest judicial authority in the Tribunal has determined that counsel may be assigned to an accused against his will and in anticipation of his non-cooperation, the ICTY Code and any other applicable Code under Rule 44 must be construed in a manner that takes account of that development. This is so because, as set out earlier in this Decision, the Code, as a subsidiary instrument, must be construed consistently with the Statute. Counsel discharge their duty to represent the interests of the accused to whom they are assigned by acting in what they, in the exercise of their professional judgement, perceive them to be. The refusal of the Accused to instruct or cooperate, let alone his criticism of counsel in the conduct of his defence, all of which was foreseeable by counsel prior to their assignment, cannot be the basis for determining whether counsel are acting in the best interests of the Accused.

In light of the foregoing, the Trial Chamber holds that good cause justifying withdrawal of counsel has not been established. On the contrary, the Trial Chamber remains of the view that the presence of assigned counsel is essential to ensure the fair and expeditious conduct of the proceedings. It is, therefore, plainly in the interests of justice that counsel should remain assigned to the Accused and should not be permitted to withdraw.”

With regard to the possibility of assigned counsel unilaterally terminating their assignment as defence counsel, the Trial Chamber states the following:

“Contrary to the argument made by court assigned counsel, it is not simply a question of a subjective determination by counsel to terminate their assignment. The Appeals Chamber has confirmed that their assignment was lawful, and this Trial Chamber has determined that their withdrawal in the present circumstances would militate against the fair and expeditious conduct of the proceedings and that no good cause therefore exists. It is plain that the same conclusion would apply to a unilateral termination by counsel of their assignment.”

In terms of the continuing role of court assigned counsel the Trial Chamber states that:

“In addition to the two functions outlined by the Appeals Chamber, counsel could continue to serve a valuable function in the filing of written legal submissions on matters such as subpoenas and binding orders in respect of certain witnesses, as well as other important aspects of the conduct of the defence case.”

Furthermore, the Trial Chamber outlined that *“In setting out a potential role for court assigned counsel, the Appeals Chamber was doing no more than acknowledging the Trial Chamber’s rationale for the assignment of counsel: ‘There [is] a real danger that this trial might last for an unreasonably long time or, worse yet, might not be concluded should the Accused continue to represent himself without the assistance of counsel’. The requirement that the trial be fair and that it be concluded in a sufficiently expeditious manner cannot be frustrated by the Accused’s refusal to communicate with or instruct counsel lawfully assigned to him.”*

In conclusion the Trial Chamber states that:

“It follows from the above that court assigned counsel should continue to act in accordance with the modalities set out by the Trial Chamber in its Order of 3 September 2004, subject to the modification of those modalities made by the Appeals Chamber in its Decision, and the possibility...above regarding the filing of written legal submissions on certain matters. The underlying obligation of counsel will be to continue to act in the best interests of the Accused, as defined and explained in this Decision.”

The full text of the Trial Chamber’s Decision is on the Tribunal’s website www.un.org/icty. Hard copies can also be obtained from the Press Office.