

I. INTRODUCTION

1. I agree with the Majority Decision of Trial Chamber I, but propose to offer some further supporting reasons for this Decision that concern the jurisdiction of the Trial Chamber to determine the application by Mr. Tim Owen, Q.C. for withdrawal as Court Appointed Counsel for the First Accused.

II. JURISDICTION OF THE TRIAL CHAMBER

2. The responsibility for establishing and maintaining a Defence Office is entrusted to the Registrar of the Special Court for Sierra Leone pursuant to Rule 45 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules"). Rule 45 provides that the Defence Office shall be headed by the Special Court Principal Defender. The Registrar, considering the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone signed on 16 January 2002 ("Agreement"), the Statute of the Special Court for Sierra Leone ("Statute") and the Rules, in consultation with the President of the Special Court for Sierra Leone, issued a Directive on the Assignment of Counsel ("Directive") on 2 October 2003.

3. The role of assignment and withdrawal of Counsel is delegated by the Registrar to the Principal Defender in this Directive. Article 5 of the Directive provides for the assignment of Counsel; while Articles 23, 24 and 25 of the Directive provide for the withdrawal and replacement of Assigned Counsel. These Articles provide as follows:

Article 5: Request for assignment of Counsel

Subject to the provisions of Article 14 of this Directive, a Suspect or Accused who wishes to be assigned a Counsel shall make a request to the Defence Office by means of the appropriate form established by the Principal Defender in consultation with the Registrar. A request shall be lodged with the Defence Office, or transmitted to it, by the Suspect or Accused himself or by a person authorised by him to do so on his behalf.

Article 23: Withdrawal of assignment when the Suspect or Accused is no longer indigent

(A) Assignment of Counsel may be withdrawn by the Principal Defender if, after his decision, the Suspect or Accused comes into means which, if available at the time the request in Article 5 of this Directive was made, would have caused the Principal Defender not to grant the request.

(B) Assignment of Counsel may be withdrawn if information obtained according to Article 8 of this Directive establishes that the Suspect or Accused has sufficient means to allow him to pay for the cost of his defence.

(C) Where the Principal Defender receives information that establishes that an Accused or Suspect has become partially indigent he may demand that individual pay such amount as he deems necessary to the Registrar in trust for the payment of Counsel.

(D) The decision to withdraw the assignment, or demand payment in the case of a partially indigent Suspect or Accused, shall be accompanied by a written explanation giving reasons for such decision and the Suspect or Accused and the Assigned Counsel shall be so notified. Such withdrawal or demand shall take effect from the date of receipt of the notification.

(E) After the notification of the withdrawal of the assignment of Counsel, all the costs and expenses incurred by the representation of the Suspect or Accused shall cease to be met by the Special Court.

(F) Where a Suspect or Accused who has become partially indigent fails to comply with the demand made pursuant to (C) above the assignment of Counsel may be withdrawn until such time as the Suspect or Accused complies with the demand.

(G) The provisions of Article 12 of this Directive shall apply to decisions made under this Article, as to withdrawing the assignment of Counsel or, in the case of a partially indigent Suspect or Accused, demanding payment to the Registrar.

Article 24: Withdrawal of assignment in other situations

(A) The Principal Defender may:

(i) in exceptional circumstances, at the request of the Suspect or Accused, or his Assigned Counsel, withdraw the assignment of Counsel;

(ii) in exceptional circumstances, at the request of the Assigned Counsel withdraw the nomination of other Counsel in the Defence Team;

(B) The Principal Defender shall withdraw the assignment of Counsel or nomination of other Counsel in the Defence Team:

(i) in the case of a serious violation of the Code of Conduct;

(ii) upon the decision by a Chamber to refuse audience to Counsel for misconduct under Rule 46 of the Rules;

(iii) where the name of the Assigned Counsel has been removed from the list kept by the Principal Defender under Rule 45(C) and Article 13 of this Directive.

(C) The Accused, the Counsel concerned and his respective professional or governing body shall be notified of the withdrawal.

(D) The Principal Defender shall immediately assign a new Counsel to the Suspect or Accused, and where appropriate, authorise the nomination of other Counsel in the Defence Team. The Legal Service Contract resulting from the assignment of a new Counsel shall be limited to funds remaining in the allocation made by the Principal Defender for the defence of the Suspect or Accused.

(E) Where a request for withdrawal, made pursuant to paragraph (A), has been denied, the person making the request may seek review of the decision of the Principal Defender by the presiding Judge of the appropriate Chamber.

(F) Where the assignment of Counsel or nomination of other Counsel in the Defence Team is withdrawn by the Principal Defender, pursuant to paragraph (B) (i) and (iii), Counsel affected by withdrawal may seek review of the decision of the Principal Defender by the presiding Judge of the appropriate Chamber.

Article 25: Replacement

(A) Where the assignment of Counsel is withdrawn by the Principal Defender or where the services of Assigned Counsel are discontinued, Duty Counsel of the Defence Office, including the Principal Defender, shall give the Suspect or Accused legal assistance until a new Counsel is assigned unless the Suspect or Accused waives the right to such assistance in which case he shall represent himself until a new Counsel is assigned.

(B) Where the assignment of Counsel is withdrawn by the Principal Defender, or where the services of Assigned Counsel are discontinued, said Counsel must deliver within 15 days of withdrawal all the original documents in the file to the Counsel who succeeds him or to the Defence Office who will then forward the materials to new Assigned Counsel or, where the Suspect or Accused has chosen to represent himself, to the Suspect or Accused.

(C) In the case of the withdrawal of the nomination of other Counsel in the Defence Team, such delivery of documents shall be made to the Assigned Counsel within 7 days.

(D) Failure by Counsel to comply with the requirement of this article may result in withholding of payment, notification to the professional body regulating the conduct of Counsel in the State in which he is qualified to practice law or such other action as the Principal Defender may deem appropriate.

(E) If Assigned Counsel is temporarily not available for any appearance on behalf of his client before the Special Court, other Counsel in the Defence Team shall assume responsibility for the appearance and carriage of the client's case for such time as Assigned Counsel is unavailable. In exceptional circumstances, if other Counsel in the Defence Team is also unavailable for the appearance, Duty Counsel may appear to advise the Suspect or Accused upon receiving instructions from the Assigned Counsel.

4. There is no express provision in the Directive for the Trial Chamber to assign or withdraw Counsel. From the above recital I conclude that this is essentially a role and function of the Principal Defender.

5. It is notable that Article 19 of the Practice Directive on the Assignment of Defence Counsel of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")¹ provides that applications by Assigned Counsel to withdraw should normally be made to and determined by the Registrar. The Appeals Chamber of the ICTY in the *Delalic* and *Blagojevic* cases has stated that "it is not ordinarily

¹ 28 July 2004.

appropriate for a Chamber to consider motions on matters that are within the primary competence of the Registrar".² The Appeals Chamber in the *Blagojevic* case elaborated on this point, holding that:

The only inherent power that a Trial Chamber has is to ensure that the trial of an accused is fair; it cannot appropriate for itself a power which is conferred elsewhere. As such, the only option open to a Trial Chamber, where the Registrar has refused the assignment of new Counsel, and an accused appeals to it, is to stay the trial until the President has reviewed the decision of the Registrar. The Appeals Chamber considers that it is only by adopting this approach that the Trial Chamber properly respects the power specifically conferred upon the Registrar and the President by the Directive to determine whether an accused's request for withdrawal of Counsel should be granted in the interests of justice.

6. The Appeals Chamber in the *Milosevic* case held that a Chamber has jurisdiction to consider a motion for the withdrawal of Assigned Counsel in circumstances where the initial decision that Counsel should be assigned is made to ensure the fairness of the trial, and where the motion "effectively and fundamentally challenges" that decision.³

7. The Trial Chamber of the ICTR has ruled that it may intervene in administrative matters that are within the responsibility of the Registrar and subject to Presidential review in particular instances where fair trial issues are involved, for example, in the assignment of counsel.⁴

8. Indeed, the Statute and the Rules of the Special Court require the Trial Chamber to ensure that the trial of an Accused persons is fair. Article 17(2) of the Statute states that:

The accused shall be entitled to a fair and public hearing, subject to measures ordered by he Special Court for the protection of victims and witnesses.

9. Rule 26 bis of the Rules provides that:

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

² *Prosecutor v. Delalic et al*, Order on Esad Landzo's Motion for Expedited Consideration, 15 September 1999, cited by the Appeals Chamber in *Prosecutor v. Blagojevic*, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, 7 November 2004.

³ *Prosecutor v. Milosevic*, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel", 1 November 2004, para. 15; *Prosecutor v. Milosevic*, "Reasons for Decision on Assignment of Defence Counsel", 22 September 2004, para. 34. See also Decision of The President of the International Tribunal, *Prosecutor v. Milosevic*, "Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw", 7 February 2005.

⁴ *Prosecutor v. Gatete*, ICTR-00-61-T, Trial Chamber, Decision on the Defence Request for Necessary Resources for Investigations, 2 November 2004.

10. This Trial Chamber in its *Brima – Decision on Applicant’s Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel*,⁵ invoked its inherent jurisdiction to entertain the Motion of the Accused on the ground of a denial of request for assignment of Counsel within the context of Article 17(4)(d) of the Statute, in the overall interests of justice and to prevent a violation of the rights of the Accused.

11. It is significant to note that during this trial the Trial Chamber appointed Counsel as Court Appointed Counsel to represent the First Accused, pursuant to Rule 60(B) of the Rules and in the interests of justice, to ensure a fair trial for the Accused.⁶

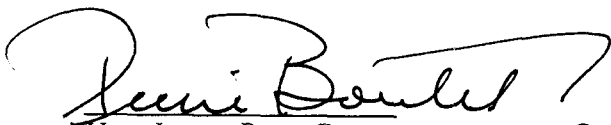
12. In light of the foregoing, I am of the view that the Trial Chamber may exercise jurisdiction in this case to determine the application for the withdrawal of Mr. Tim Owen, Q.C. as Court Appointed Counsel for the First Accused, to ensure the fairness of the trial, pursuant to Rule 45(E), Rule 26 *bis* and Article 17(2) of the Statute. I support the view of the Trial Chamber that there is good cause for justifying withdrawal of this Counsel and the Trial Chamber’s Decision that:

THE TRIAL CHAMBER THEREFORE:

DETERMINES that the Request of Mr. Tim Owen, Q.C. to withdraw as Court Appointed Counsel for the First Accused should be granted; and

INSTRUCTS the Registrar, in consultation with the Principal Defender, pursuant to Article 24 of the Practice Directive, to grant the request for withdrawal of Mr. Tim Owen, Q.C. as Court Appointed Counsel for the First Accused and to take the necessary measures to give effect to this Decision.

Done in Freetown, Sierra Leone, this 1st day of March, 2005


Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

⁵ 6 May 2004, para. 39.

⁶ *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, “Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings”, 1 October, 2004.