68 SCSL-2004-16-PT 5276

(5276 - 5326)

SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

Before:	Judge Bankole Thompson, Presiding Judge Judge Benjamin Mutanga Itoe Judge Pierre Boutet
Registrar:	Robin Vincent
Date:	06 May 2004

PROSECUTOR	Against	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-04-16-PT)

BRIMA - DECISION ON APPLICANT'S MOTION AGAINST DENIAL BY THE ACTING PRINCIPAL DEFENDER TO ENTER A LEGAL SERVICE CONTRACT FOR THE ASSIGNMENT OF COUNSEL

1st Respondent:
Sylvain Roy

2nd Respondent:
Robin Vincent

3rd Respondent:
Robert Kirkwood

Defence Counsel for Alex Tamba Brima:
Terence Terry

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THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Judge Bankole Thompson, Presiding Judge, Judge Benjamin Mutanga Itoe and Judge Pierre Boutet;

SEIZED of the Applicant's Motion against denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel for and on behalf of the Accused Tamba Alex Brima, the Applicant, herein pursuant to Rule 72 (B) (iv) of the Rules of Procedure and Evidence of the Special Court ("Rules") and pursuant to Article 12 (A) of the Directive on the Assignment of Counsel of the Special Court for Sierra Leone, and under the inherent Jurisdiction of the Trial Chamber of the Special Court for Sierra Leone ("Motion") filed on 5 January 2004;

NOTING the Responses filed to the Motion on 16 January 2004 by the Acting Principal Defender ("A/PD") and by the Registrar, ("A/PD's Response" and "Registrar's Response" respectively) and the Accused's replies to both Responses filed on 19 January 2004 ("Reply to A/PD" and "Reply to the Registrar" respectively);

NOTING FURTHER that on 12 February 2004 the Chamber heard oral arguments from the Parties *in camera*;

MINDFUL of the Provisions of Article 17(4)(b), 17(4)(c) and 17(4)(d) of the Statute of the Special Court ("Statute");

MINDFUL of the Rules of Procedure and Evidence an in particular Rules 5 and 45;

MINDFUL of the Provisions of the Directive for the Assignment of Counsel for the Special Court for Sierra Leone promulgated by the Registrar o the 3rd of October, 2003 and in particular Articles 12, 13, 14, and 16 of the said Directive;

MINDFUL of the necessity to ensure the respect of the rights of defence and to guarantee to the accused his right to a fair and expeditious trial;

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NOTING the interim Order of the Trial Chamber dated 12 February, 2004;

CONSIDERING THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES:

INTRODUCTORY PREVIEW OF THE MOTION

1. This Motion before Their Lordships of the Trial Chamber is filed and premised principally on the extent of the powers of the "Acting Principal Defender", 1st Respondent, on the one hand, and on the other, the rights of the accused person as guaranteed and enshrined in the provisions of Article 17(4)(d) of the Statute.

2. It also raises issues related to the extent to which those rights, including those of the designated Counsel, should be ensured by the Principal Defender (1st Respondent) under the authority and supervision of the Registrar, (2nd Respondent), in their application of the provisions of the Directive on the Assignment of Counsel promulgated by the 2nd Respondent on 3 October, 2003, pursuant to the provisions of Article 17 of the Statute and Rules 44, 45, 45 bis and 46 of the Rules.

3. Furthermore, it raises questions of conflict of interest and the more fundamental jurisdictional question of whether the Trial Chamber is competent to entertain and adjudicate on this Motion which has resulted from a dispute arising from the application by the 1st Respondent, of the legal instruments referred to above. We consider it necessary therefore, before examining the merits of the Motion, to reproduce here, the relevant provisions of these legal instruments:

Article 17(4) of the Statute provides:

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"In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality"

Article 17(4)(d) of the Statute provides:

"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; to have legal assistance assigned to him or her in any case where the interests 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"

4. In addition, Article 2(A) of the Directive on the Assignment of Counsel provides:

"Any person detained on the authority of the Special Court has the right to Counsel in terms conclusively defined in Article 17(4)(d) of the Statute."

Article 3 of the Directive on the Assignment of Counsel provides as follows:

"If a suspect of Accused cannot engage Counsel by his or her own means and he wishes to be represented by Counsel, he shall be assigned a Counsel in accordance with this Directive, if the interests of justice so require."

5. The choice of and the criteria for qualifying to be appointed as assigned Counsel are governed by the provisions of Rule 45(C) of the Rules of Procedure and Evidence as well as by Article 13 of the Directive on the Assignment of Counsel.

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6. It should be noted that in the event of listed Counsel being retained by the Principal Defender to assume and ensure the defence of the accused, the Principal Defender is supposed to enter into a Legal Services Contract with the retained Counsel and this, in accordance with the provisions of Articles 14(A) and 16 of the Directive on the Assignment of Counsel.

7. One of the criteria to be fulfilled by the Assigned Counsel seeking to enter into a Legal Services Contract, according to Rule 45(C)(iv) of the Rules of Procedure and Evidence as restated in by Article 13(B)(v) of the Directives, is that he or she must "have indicated their willingness and fulltime availability to be assigned by the Special Court to suspects or accused".

8. Article 14(C) of the Directive provides as follows:

> "No Counsel shall be assigned to more than one Suspect or Accused unless the concerned Suspects or Accused have received independent legal advice and have waived their right to be represented by separate Counsel. Any application by Counsel to be assigned to more than one suspect or Accused must be made through the Principal Defender, to the Presiding Judge of the appropriate Chamber."

THE BASIS OF THE MOTION

9. The Applicant in this Motion, Tamba Alex Brima, is indicted and detained for crimes which come under the jurisdiction of the Special Court.

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10. He made his initial appearance before Hon. Judge Itoe on the 15th and 17th of March, 2003, pleaded "Not Guilty" to all the counts of the indictment, and was remanded into the custody of the Special Court.

11. On the 19th of March, 2003, Judge Itoe issued an Order for legal assistance to be provided to him. The Applicant accordingly filed a Power of Attorney designating Mr. Terrence Michael Terry as Counsel of his choice, to defend his interests. On the 15th of April, 2003, the Registrar assigned Mr. Terry as Provisional Counsel for 2 months until such a time as he enters into a Legal Services Contract with the Principal Defender of the Defence Office who at that time, was not yet appointed.

12. Mr. Terry, notwithstanding the expiry of the stipulated time limit of 2 months of his provisional designation, has, with the tacit approval of the 1st and 2nd Respondents, continued to act as the assigned Counsel to Mr. Brima until the dispute now under litigation with Mr. Sylvain Roy, Defence Advisor in the Defence Office, acting as Principal Defender and the 1st Respondent in this motion, arose following 2 letters dated 10th November, 2003 and 12th December, 2003, respectively, which the 1st Respondent addressed to the Applicant's Counsel.

13. In the letter dated 10th November, 2003, Mr. Sylvain Roy, the 1st Respondent, purportedly acting as the Principal Defender, rejected Mr. Terry's request for him to sign a Legal Services Contract and formulated the following conditions before he could sign the said contract:

I. That Mr. Terry undergoes a medical examination at the expense of the Defence Office to confirm that he is medically fit to permanently and at all times, be at the disposal of his client, the Applicant.

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II. That Mr. Terry's Legal Services Contract with the Principal Defender for the defence of the Applicant, could not be signed because this would violate the provisions of Article 14(C) of the Directive on the Assignment of Counsel. This provision stipulates as follows:

> "No Counsel shall be assigned to more than one Suspect or Accused unless the concerned Suspects or Accused have received independent legal advice and have waived their right to be represented by separate Counsel."

14. Mr. Terry contested and rejected these conditions. As a follow up and in response, Mr. Sylvain Roy, the 1st Respondent, in another letter dated 12th December, 2003, and purportedly acting as Principal Defender under the provisions of Article 16(C) of the Directive, withdrew and indeed, terminated the provisional agreement of 15 April, 2003, signed by the 2nd Respondent, assigning Mr. Terry as Counsel for the Applicant. The reasons the 1st Respondent advanced to justify this withdrawal were that Mr. Terry was not willing to have the issue of his (Terry's) health status verified and clarified as requested by the 1st Respondent and further, that signing a Legal Services Contract with Applicant's Counsel, Mr. Terence Michael Terry, would be in violation of Article 14(C) of the Directive on the Assignment of Counsel.

15. It is this withdrawal of the Applicant's Counsel's provisional assignment and the refusal by the 1st Respondent, purportedly acting as the Principal Defender, to enter into a Legal Services Contract with the Applicant's Counsel, that triggered this dispute under examination.

16. The Application is brought under the provisions of Article 17 of the Statute of the Special Court for Sierra Leone, under Rule 72(B)(iv) of the Rules of Procedure and

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Evidence and under Article 12(A) of the Directive on the Assignment of Counsel. The Applicant in addition to the above, urges Their Lordships to invoke the inherent jurisdiction, an attribute, of the Trial Chamber of the Special Court, to seize itself of the matter and the issues canvassed in the Motion, for purposes of a determination, and this, in the overall interests of justice.

SUBMISSIONS BY THE PARTIES

A) The Applicant's

17. 1. The Applicant, Mr. Brima, is seeking specific remedies against the "Acting Principal Defender" Mr. Sylvain Roy, for the latter's refusal to enter into a Legal Services Contract with his duly appointed Provisional Counsel, Mr. Terrence Michael Terry.

2. The Applicant argues that by his power of Attorney, he appointed Mr. Terry as his Defence Counsel and that since the 26th of March, 2003, Terrence Michael Terry, his appointed Counsel, has been acting and performing his duties faithfully and "non stop" as his Counsel and that this is to the knowledge and approbation of the Registrar (the 2nd Respondent), and this, notwithstanding the fact that a Legal Services Contract had not yet been concluded with his Counsel.

3. He objects to the refusal of the Acting Principal Defender to enter into a Legal Services Contract with his Counsel and contests the reasons given for such a refusal namely:

(a) That Mr. Terence Michael Terry must undergo a medical examination and

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(b) That Mr. Terence Michael Terry is presently representing Mr. Charles Ghankay Taylor and that Article 14(C) of the Directive precludes Counsel from representing more than one Accused

4. The Applicant contests the legality of the refusal by the "Acting Principal Defender" to enter into a Legal Services Contract with his Counsel because according to him, such a refusal can only be made by the substantive holder of the post and not by Mr. Sylvain Roy who was "acting" as Principal Defender.

5. The Applicant further argues that the refusal by the 1st Respondent to enter into this contract on the grounds that his Counsel is not well and will therefore not be able to complete his case is not "only arbitrary but also contrary to all known principles and canons of fundamental fairness".

6. On the refusal to sign the contract on the grounds that it would be in violation of Article 14(C) of the Directive, the Applicant contends that this is "premature and that proceedings involving Ex President Charles Ghankay Taylor... is limited to a procedural bar and does not as yet extend to the actual Trial if at all the matter gets to that stage".

7. Furthermore, the Applicant argues that as far as Ex President Charles Ghankay Taylor is concerned, "the question of funding his legal representation could only have arisen if the could properly be described as an indigent Accused; which is not the case here".

8. It addition the Applicant, on the issue of the rejection based on Article 14(C) of the Directive, argues that "the said Ex President Charles Ghankay Taylor has

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not even been served with either the Indictment or the Warrant of Arrest to warrant his taking his plea before the said Trial Chamber of the Special Court of Sierra Leone... that any reference to likely conflict of interests as of now is "premature"

9. That the refusal to enter into the Legal Services Contract constitutes a violation of the rights guaranteed to the Applicant by the provisions of Article 17 of the Statute and that the two reasons given by the "Acting Principal Defender" for the refusal to enter into the Legal Services Contract with his Counsel, Mr. Terry were... "contrary to the letter and spirit of the provisions of Articles 13(A) and 14(C) of the Directive on the Assignment of Counsel".

B) The 1st Respondent's

18. 1. That he was appointed Acting Principal Defender on 7 July, 2003.

2. That as Acting Principal Defender, he is mandated to fully exercise the authority of the Principal Defender as referred to under the provisions of Rule 45 of the Rules of Procedure and Evidence.

3. That this Motion cannot be heard by the Trial Chamber under Rule 72(B)(vi) of the Rules nor even under Article 17 of the Statute or Article 12(A) of the Directive on the Assignment of Counsel for the following reasons.

(a) That under Rule 72, any preliminary motion must be filed within 21 days following disclosure. That this was done on the 17th of April, 2003, by the Prosecutor and that all preliminary motions should have been filed by the 8th of May 2003.

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(b) That the issue raised by the Applicant before the Trial Chamber does not turn on "denial of request for assignment of Counsel" but rather on Counsel complying with the requirements of availability of Counsel and his fitness to conduct a proper defence of the Accused pursuant to Rule 45 of the Rules.

(c) That the Order for legal assistance granted by the Court to the Applicant is clearly in force and has not been set aside.

4. That Counsel for the Applicant is on record as representing both the Applicant and another accused, Mr. Charles Ghankay Taylor in the same Tribunal and that this is contrary to the provisions of Article 14(C) of the Directive particularly so, because as he argues, there is a possibility that the joinder application of the RUF/AFRC groups made by the Prosecution is granted and a joint trial against all of them proceeds. The 1st Respondent urges the Chamber to closely consider those issues and determine whether or not the possibility of a conflict of interest has arisen or that there is a reasonable possibility that such a conflict will arise. (We now know that the RUF/AFRC joinder application was rejected by the Trial Chamber.)

5. On the issue of the medical examination, the 1st Respondent argues that he was justified in asking for it for the following reasons:

(a) Counsel for the Applicant had absented himself on 2 occasions from ensuring the defence of the Applicant on medical grounds and that is was necessary for him to undergo the medical examination in order to ensure compliance with Rule 45(C) of the Rules.

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(b) That Article 13 (D) of the Directive confers a discretion on the Principal Defender to verify "Counsels qualifications for the list of Qualified Counsel by any means". Such means, the 1st Respondent submits, may include the undergoing of a medical examination.

(c) That the Applicant's allegation that it is discriminatory is unfounded as it was occasioned only by the need for information on the health status of the Applicant's designated Counsel.

6. That the motion be dismissed.

The 1st Respondent has cited some cases to support his submissions. These include:

NTAKIRUTIMANA (ICTR) DUSKO KNEZEVIC, THE PROSECUTOR VS NYIRMSUHEKO AND NTAHOBALI (ICTR) AND THE PROSECUTOR VS DELALIC.

C) The 2ND Respondent's

That he appointed Mr. Sylvain Roy, (Defence Advisor) as Acting Principal Defender on the 7th of July, 2003.

19. That the Principal Defender is fully competent to enter in a Legal Services Contract.

20. That Article 16(C) of the Directive provides that "if the Assigned Counsel and the Principal Defender cannot agree upon the terms of a Legal Services Contract within 90 days of the provisional assignment of Counsel, the provisional assignment may

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be withdrawn by the Principal Defender and other Counsel shall be assigned to the Suspect or Accused".

21. That the Directive does not contain any provisions which would allow such withdrawal by the Principal Defender to be reviewed or invalidated.

22. That the decision of the Acting Principal Defender to withdraw the provisional assignment of Mr. Terry "should therefore be considered final".

D) The Applicant's Reply

23. That no evidence regarding the appointment of the Acting Principal Defender was disclosed by the Registrar.

24. That the Acting Principal Defender does not have the right to enter or refuse to enter into a Legal Services Contract but only the Principal Defender.

25. That there is no basis for the requirement for him to satisfy the Acting Principal Defender of his being fit and able to represent the Accused as there was no such "creature or person referred to as the Acting Principal to be found in the Statute of the Special Court of Sierra Leone" or any other legal act of the Tribunal.

26. That if the issue of a potential conflict were founded, this should have been raised by the Appeals Chamber when he appeared before it on behalf of Taylor.

27. That this case is within the inherent jurisdiction of the Chamber as it is the duty of the Trial Chamber of the Special Court to do substantial justice to the Accused.

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IN CAMERA HEARING IN CHAMERS

28. We would like to recall that on the 12th of February, 2004, The Chamber decided to hold a hearing of this Motion in Chambers in order to hear Counsel on new issues if any, which had not already been raised in their written submissions, or on clarifications relating to the filed submissions.

At the end of this hearing, given the consequences which the decision by the 1st Respondent to withdraw and cancel the provisional assignment of the Applicant's Counsel would have on the Applicant, and in order to ensure the availability of Counsel to the Applicant at all times, the Trial Chamber made an Interim Order to the effect that the Provisional Counsel, Mr. Terence Michael Terry, continues to represent the Accused in all matters before the Special Court until further Order.

This Order was made pending the ruling on the deliberations on this Motion which were still in process, with a view to ensuring the protection of the rights of the Applicant under the provisions of Articles 17(4)(b) and 17(4)(d) of the Statute.

DELIBERATION

JURISDICTIONAL ISSUES

OBJECTIONS TO THE JURISDICTION OF THE TRIAL CHAMBER TO ENTERTAIN THE MOTION

29. We note from the submissions of the 1st and the 2nd Respondents that they have both raised jurisdictional issues and are contesting the competence of the Trial Chamber to entertain this Motion. We would first of all proceed to examine these

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issues of our competence, indeed, issues of our jurisdiction so raised, and to determine whether they are founded on any legal basis, before we proceed to examining the merits of the motion.

30. The 1st Respondent submits that the Motion cannot be heard by the Trial Chamber either under Rule 72(B)(iv) of the Rules or under Article 17 of the Statute or even under Article 12(A) of the Directive, firstly because the Motion was not filed within twenty one days after disclosure was effected in Applicant's case on the 17th of April, 2003, pursuant to the provisions of Rule 66(A)(i) of the Rules.

31. The 1st Respondent further submits that the issue raised by the Applicant does not turn on denial of request for assignment of Counsel, but rather, on Counsel complying with the requirements of availability of Counsel and his fitness to conduct the proper defence of the Accused pursuant to Rule 45(C) of the Rules.

32. The Applicant further argues that since there is no refusal of assignment of Counsel to the indigent Applicant, Rule 72(B)(iv) cannot and should not be invoked in the instant case to confer jurisdiction on The Chamber to entertain this application.

33. The 1st Respondent further submits that 'the inherent jurisdiction of the Trial Chamber cannot be invoked in the instant case as Counsel has not formulated a complaint supported by the Statute, by the Rules and the by Directive on the Assignment of Counsel.'

34. The 2nd Respondent for his part in his submissions argues inter alia, that;

"The Directive does not contain any provisions which would allow such a withdrawal by the Principal Defender to be reviewed or invalidated" and further,

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that "The decision of the Acting Principal Defender to withdraw the provisional assignment of Mr. Terry should be considered final".

35. We agree with the submission of the 1st Respondent questioning the propriety of the Applicant bringing this motion under Rule 72(B)(iv) of the Rules and this, because the provisions of the Directive on the Assignment of Counsel promulgated by the Registrar on the 3rd of October, 2003, cannot operate to either replace or to amend the Rules of Procedure and Evidence adopted by the Plenary of Judges of the Special Court.

36. Article 12(A) of the Directive on which the Applicant is relying to base his motion cannot in these circumstances therefore, apply to sustain it.

37. In this regard it is our opinion that motions brought under Rule 72(A) and 72(B) can only be brought within 21 days following disclosure to the Defence of all material envisaged by Rule 66(A)(1).

38. Accordingly, this motion, not having been brought within the time limits of 21 days after the said disclosure, cannot be entertained under Rule 72(B)(iv) as provided for in the Directive for the Assignment of Counsel.

39. This said however, the Chamber is of the opinion that the motion, even though brought under the wrong Rule, can, and so do we decide, in the overall interests of justice and to prevent a violation of the rights of the Accused, be examined by invoking our inherent jurisdiction to entertain it and to adjudicate on it on the ground of a denial of request for assignment of Counsel within the context of Article 17(4)(d) of the Statute.

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40. In this regard, The Chamber observes that Article 17(4)(d) of the Statute guarantees to the Applicant, as an indigent, the right to be represented by a Counsel 'of his or her own choosing'.

41. It should be noted that this provision is mandatory and even though jurisprudential and interpretational evolutions have significantly whittled down this right which is now more qualified than it is absolute, The Chamber will not, given the particular circumstances of this and of each case, particularly those involving allegations of serious breaches of the rule of law and the due process, lose sight of the pre-eminently mandatory and defence protective character of the provisions of Article 17(4)(d) of the Statute.

42. It is by virtue of this provision that the Registrar of the Special Court, on the strength of the power of attorney signed by the Applicant and designating Terence Michael Terry, as his Counsel, that the latter was provisionally assigned to ensure the Applicant's Defence even before the Directive on the Assignment of Counsel was promulgated by the 2nd Respondent on the 3rd of October, 2003.

43. There is no suggestion that Mr. Terry at any time did not assume this role diligently. In fact, he alleges that the relationship with his client, the Applicant and the Defence Office was cordial until Mr. Sylvain Roy, a Defence Advisor acting as the Principal Defender, raised questions about his (Terry's) health and subjected him to the obligation of undergoing a medical examination. This, we understand, arose as a result of two Motions for extension of time filed by Mr. Terry to file Motions for his client, the Applicant. The reasons advanced by Mr. Terry for not filing them within the time limits on the two occasions were that he was ill. This

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was what gave the 1st Respondent cause to suspect his health status and his readiness to be available at all times to defend his client's interests within the meaning, according to him, the 1st Respondent, of the provisions of Rule 45(C) of the Rules of Procedure and Evidence.

44. The Applicant's Counsel rejected that suggestion because he maintains and even reiterated this fact during the oral hearing of this Motion, that his indisposition on these occasions is a bygone and that he has fully been living up to his obligations to his client, the Applicant. We note that this assertion is neither contradicted by the Respondents nor by the Applicant.

45. Given the above facts, The Chamber is of the opinion that the withdrawal by the 1st Respondent for the reasons he has advanced, of the provisional assignment of Applicant's 'chosen Counsel' within the meaning of Article 17(4)(d) of the Statute, tantamounts to a violation by the 1st Respondent of the rights of the accused as guaranteed under Article 17(4)(d) of the Statute, particularly so because the withdrawal itself was premised on an illegality and a misconception in the interpretation and in the application of the provisions of Rule 45(C) of the Rules under which he purports to have acted.

46. We have taken note of the 1st Respondent's argument that withdrawing the provisional assignment of Mr. Terry or refusing at this stage of the proceedings which we consider advanced, to enter into a Legal Services Contract with him in order to ensure the defence of the Applicant, does not violate the latter's rights under Article 17(4)(d) of the Statute because according to him, some other Counsel can and will indeed be assigned to him.

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47. This argument, in our opinion, is superficial, cosmetic, unimpressive and unconvincing for the following reasons:

(i) The new Counsel to be assigned to the Applicant may not be of his real "choosing" as required by the Statute, particularly having regard to the manner in which the 1st Respondent has terminated the otherwise apparently healthy and confidence-inspiring statutory Counsel/Client relationship that so far exists between the Applicant and his Counsel, Mr. Terence Michael Terry.

(ii) More importantly, we observe that at this stage of the proceedings when we are at the door steps of the trial procedures, a newly assigned Counsel, having regard to the bulk and intricacies of the work involved in the preparatory stages for trial that started since March, 2003, will not be able to provide to the Applicant, the same services that will properly, convincingly, effectively, and adequately ensure his defence and protect his equally important and vital statutory entitlement to a fair and expeditious trial.

48. We infact therefore find that the 1st Respondent's impugned decision, viewed from this perspective, a fortiori, violated, for no legal or just cause, the mandatory statutory provisions of Article 17(4(d) of the Statute of the Special Court particularly so because we note from the records that the Applicant has hitherto been happy with and has never expressed any dissatisfaction against his 'chosen' and assigned Counsel nor did he ask or have any reason to request his withdrawal in preference of another assigned Counsel who the 1st Respondent volunteers to provide for him in replacement of Mr. Terry.

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49. Could the 1st Respondent therefore, one may ask, in these circumstances, afford to withdraw the accreditation of the Applicant's assigned Counsel? We do not think he could.

50. We would now proceed to address our minds to the arguments and submissions by the 2nd Respondent that 'the Directive does not contain any provisions which would allow such a withdrawal by the Principal Defender to be reviewed or invalidated' and further, "that the decision of the Acting Principal Defender to withdraw the provisional assignment of Mr. Terry should be considered as final".

51. We understand by this submission that the 2nd Respondent is claiming immunity from judicial review by this Chamber, a legally constituted International Tribunal, in exercise of its inherent jurisdiction, of the decisions which are the subject of the litigation, made by an Official of the Registry of the the Chamber. In the same vein, we observe that the 2nd Respondent contests the Chamber's inherent jurisdiction.

52. In this regard, we are of the opinion that an arbitrary and illegal withdrawal, as we find in this case, of the Applicant's 'chosen' Counsel by the 1st respondent, is tantamount to a denial of his statutory right to a Counsel 'of his own choosing', and hold more importantly that this Motion, brought and even entertained under Rule 17(4)(d) of the Statute, is properly before us within the context of the exercise of our inherent jurisdiction.

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INHERENT JURISDICTION AS A BASIS FOR ASSUMING JURISDICTION TO HEAR THE APPLICANT'S MOTION

53. In his Motion, the Applicant has, in addition to relying on Rule 72(B)(iv) to base his Motion, also invokes the inherent jurisdiction of the Chamber to grant the relief sought. In reply to this, the 1st Respondent submitted that the inherent jurisdiction cannot be invoked in the instant case as Counsel for the Applicant has not formulated a complaint supported by either the Statute, the Rules or the Directive on the Assignment of Counsel. The 2nd Respondent for his part, as we have observed, claims immunity from a review or an invalidation of the administrative decision and further contends that the 1st Respondent's decision to withdraw should be considered as final.

54. The Chamber will proceed therefore to examining the propriety of invoking its inherent jurisdiction as canvassed by the Applicant so as to determine whether his Motion can also be entertained on this ground or not.

MEANING OF INHERENT JURISDICTION

55. The Editors of Halsbury's Laws of England articulate the concept of inherent jurisdiction in these terms:

> "...Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called 'the inherent jurisdiction of the court'. In the ordinary way, the Supreme Court as a superior Court of record, exercises the full plenitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive

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law, both civil and criminal, except in so far as that has been taken away in unequivocal terms by statutory enactment. The term 'inherent jurisdiction' is not used in contradistinction to the jurisdiction of the Court exercisable at common law or conferred on it by statute or rules of court, for the Court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or Rule of Court...In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression".

56. As to its juridical basis, the orthodox view is that the authority to exercise inherent jurisdiction derives not from any statute or rule of law, but from the very nature of the court as a Superior Court of law. LORD MORRIS in the case of CONNELLY V. D.P.P (1964) A.C. at p.1301 had this to say on inherent jurisdiction:

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy some powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

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57. In essence, the juridical basis of this head of a Court's jurisdiction is the very authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.[1]

58. The Chamber notes that the doctrine of inherent powers has recently been invoked by our Sister Tribunals - The ICTY and The ICTR. In PROSECUTOR V. TADIC,[2] The Appeals Chamber concluded that the Tribunal did have jurisdiction, to examine the plea against its own jurisdiction reasoning that such authority is "inherent in every judicial organ."[3]

59. Furthermore, in the case of THE PROSECUTOR V. BLASKIC,[4] the issue was that of the validity of a *subpoena* which Judge Macdonald in Trial Chamber II had issued both to the Republic of Croatia and to its Defence Minister personally. On the issue of inherent jurisdiction, the Appeals Chamber observed:

> "The power to make this judicial finding is an inherent power: the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded."[5]

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[1] Jacob, *supra* note 2, p.28.
[2] Decision on the Defence Motion for Interlocutory Appeal for Jurisdiction, Case IT - 94 - 1, 2 October 1995, Appeals Chamber (Tadic (Jurisdiction)), referred to in an instructive article on the subject by Louise Symons entitled "The inherent power of the ICTY and ICTR" in *International Criminal Law Review* 3: 369-404, 2003.
[3] Ibidem. p.238.
[4] Judgement on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case IT-95-14, 29 October 1997, Appeals Chamber.
[5] Ibidem para. 33

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60. The *BARAYAGWURIZA* (Abuse of Process) Decision of the ICTR[6],also lends credit to the recourse to inherent jurisdiction principle by Tribunals. In that case, the central issue was that of abuse of process by the Prosecutor, for which the Appeals Chamber found it necessary to invoke its inherent power to dismiss the indictment. The Trial Chamber had dismissed the Applicant's motion for orders to review or nullify his arrest and provisional detention. He appealed against the decision. Allowing the appeal, the Appeals Chamber alluded to the inherent jurisdiction or supervisory powers of a Court to curb an abuse of process or a travesty of justice.

61. We further note here that our Sister Tribunals have not hesitated to invoke their inherent jurisdiction to control and supervise Officials of the Court on the reasoning that such control and overseeing responsibility is fundamental to a Court's ability to regulate its own process and to ensure a fair trial.[7] In this regard and to make the point we are driving home, we refer to the ICTY decision in the case of THE PROSECUTOR Vs MOMCILO KRAJISNIK Case No IT-00-39-PT of 20th January, 2004. In this case, the Registrar who, in ICTY, cumulates the functions of the Principal Defender, arbitrarily and unreasonably assessed the means of an indigent accused, MOMCILO KRAJISNIK, and declared him only partially indigent for legal aid purposes. Their Lordships, Judge Alphons Orie (Presiding) Judge Amin El Mahdi and Judge Joaquin Martin Canivell, in the exercise of similar powers that we are invoking to assume jurisdiction in this Motion, concluded their judgement on an appeal against their Trial Chamber decision which quashed the Registrar's decision, in the following remarks:

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[6] Case ICTR-97-13, 3 November 1999, Appeals Chamber.

[7] See *Delalic and Ors* (Withdrawal of Counsel) Nyiramasukuko and Ntahobali (Withdrawal of Counsel) and *Ntabakuze and Kabiligi* Motion to Counter Indictment Void)

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"It should be clear from the analysis in the previous section that the incidence of error and unreasonableness in the Registrar's decision is such as to justify an order quashing the Registrar's Decision" The Registrar, Their Lordships added, "should reconsider his position in the light of the Chamber decision".

62. This Chamber strongly adheres to the view that the Special Court for Sierra Leone, as an international judicial entity, in addition to its statutory jurisdiction as provided for in the Founding Instruments of the Court, is endowed with an inherent jurisdiction to enable it to act effectively in pursuance of its mandate. Indeed, we firmly so hold. Likewise, in principle, consistent with the aforementioned decisions of our Sister Tribunals, we rule that the Court's inherent jurisdiction does extend to the control and supervision of officers of the Court in the exercise of their statutory and related functions. The next question we have to address is whether the impugned decision by the First Respondent is judicially reviewable as to its validity or otherwise, by The Chamber under the aforesaid jurisdiction.

63. We note in the case of the CHIEF CONSTABLE OF NORTH WALES POLICE VS EVANS (1982) 1 WLR 1155 at 1174, that Lord Birngham defined a Judicial review as a "review of the manner in which the decision was made", requiring that statutory powers be exercised reasonably, in good faith, and on correct grounds,[8] evidently implicating the parameters of the doctrine of *ultra vires*.

64. In the Chamber's view, the subject-matter of the application before the Court is essentially one that goes to the issue of the legality or the reasonableness of the

[8] Wade, H.W.R and C.F Forsyth, *Administrative Law*. 7th Edition Oxford: Clarendon Press, 1994 at 380-381; see also de Smith, S.A. *Judicial Review of Administrative Action*, 3rd Edition, London: Stevens, 1973.

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exercise of the statutory power by the 1st Respondent in refusing to conclude a Legal Services Contract for the assignment of Counsel to the Accused, the Applicant herein, and in fact, withdrawing, by his letter dated 12th of December, 2003, the Provisional Assignment of Counsel to the Applicant.

65. On these jurisdictional objections, it is our considered opinion, from the foregoing analysis, that the Trial Chamber, in view of the mandatory provisions of Article 17(4)(d) of the Statute can, as it does now, invoke its judicial prerogative based on the concept of our inherent jurisdiction, to entertain and adjudicate on a motion of the nature of the one under consideration.

66. We would like to say here that dismissing this Motion either on the merits or on the jurisdictional grounds as the Respondents urge us to do, would amount to conceding to the merits of the objections of both the 1st and 2nd Respondents to our jurisdiction and competence to entertain it and in particular, would be approving a judicial endorsement of the 2nd Respondent's submissions, claiming immunity from a Judicial review of 1st Respondents acts which are palpably arbitrary, ultra vires and offensive to the law.

67. This, in our opinion, would further amount to a total abdication on our part, of our sovereign obligation and judicial responsibility as a Court and as Judges, to subject questionable administrative acts to Judicial scrutiny and review in order to check and curb arbitrary acts, conduct, or decisions taken by our Administrative Officials in particular, and by the Executive Organs in general.

68. In this regard, we cite the remarks of LORD REID in the case of PADFIELD VS. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD [1968] AC 997 which

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we consider and analogous to the Brima/Terry situation now in our hands and where His Lordship had this to say:

> "... In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act for any reason, so uses his discretion as to thwart or run counter the policy and objects of the Act, then our Law would be defective if persons aggrieved were not entitled to the protection of the Court."

69. The Applicant and his Counsel, in the situation in which they find themselves, and given the dictum of LORD MORRIS in CONNELLY VS THE D.P.P., certainly deserve the relief envisaged in LORD REID'S dictum, notwithstanding the jurisdictional objections raised by both the 1st and the 2nd Respondents which we dismiss as frivolous, unfounded and bereft of any merits.

70. The stand we have taken in this regard is consonant with the justification the Learned Editors of Halsbury's Laws of England advance to justify the utility of the inherent jurisdiction of the court in terms of a residual source of power to enable the court ..."in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression" such as the Applicant and his Counsel were indeed subjected to by the 1st Respondent in the instant case.

71. The further justification for our stand is based on the dictum of Lord Morris in the case of CONNELLY VS. D.P.P. (already cited), where the Lord Justice said, and I quote:

> "A court must enjoy some powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its

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process". This tendency, we observe, is clearly manifested by both Respondents in their submissions which we are reviewing."

THE MERITS OF THE MOTION

72. Having so far outlined the basic facts of the Motion, The Chamber will now proceed to examine the substantive issues raised in the oral and written submissions of the Parties.

73. The Chamber observes that the dispute that has given rise to this Motion essentially centres around the 1st Respondent, Mr. Sylvain Roy, a Defence Advisor in the Principal Defender's Office, in the course of his acting as the Principal Defender. It is important and necessary therefore, for us to examine his administrative position, his status, the decisions he took, and how they have impacted on the dispute under determination

THE POSITION AND ANALYSIS OF THE ROLE OF THE 1st RESPONDENT AS ACTING PRINCIPAL DEFENDER

74. On this issue, Mr. Sylvain Roy, acting as Principal Defender, did affirm in his submissions that he was appointed Principal Defender on the 7th of July, 2003. However, during the oral hearing of the motion in Chambers on the 12th of February, 2004, and in reply to a question from The Chamber, he admitted in contradiction to his earlier assertion, that there was no document appointing him. To quote him, he said: "there was never such a document signed."

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75. Still on this issue, the Registrar, the 2nd Respondent, in his written submissions affirms that he appointed Mr. Sylvain Roy, as the Acting Principal Defender on the 7th of July, 2003. Contrary to these affirmations, in fact, the document dated 7th July, 2003, did not appoint Mr. Sylvain Roy as an Acting Principal Defender. It instead only delegated authority to him as a Defence Advisor to act as a "Certifying Officer" on all Defence Office financial and budgetary accounts. As a prelude to this written delegation, this document says: "...In accordance with your appointment to the Special Court for Sierra Leone, as Defence Advisor, I hereby delegate to you, the signing authorities on my behalf as follows...".

76. However, and again during this same oral hearing, the 2nd Respondent, confirmed and admitted that there was no such appointment of or delegation of powers to the 1st Applicant to assume the role of Acting Principal Defender. The Registrar however, explained that where the head of a particular Section is absent, some other person in that Section can step in to perform his duties and that an appointment or delegation of powers is not necessary for the person to temporarily assume those functions.

77. On this issue, the Applicant in this motion concedes that the 1st Respondent is the Acting Principal Defender but argues that even in that capacity, only the Principal Defender is vested with the power and authority to take the decisions in dispute and not the 1st Respondent in his acting capacity.

78. The Chamber does not accept the Applicant's argument in this regard. In fact, in view of the very nature and functioning of public or private services, it is, and, should always be envisaged, that the substantive holder of the position is not

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expected to be there at all times. In order to ensure a proper functioning and a continuity of services with a view to avoiding a disruption in the administrative machinery, the Administration envisages and recognizes the concept of "Acting Officials" in the absence of their substantive holders.

79. The Chamber, contrary to the Applicant's submission on this issue, is of the opinion that where an official is properly appointed or designated to act in a position during the absence of the substantive holder of that position, the Acting Official enjoys the same privileges and prerogatives as those of the substantive official and in that capacity, can take the decisions inherent in that position. We therefore have no hesitation in arriving at the conclusion that the Applicant's argument in this regard is flawed and accordingly reject it.

80. This said however, The Chamber would like to observe that to perform such functions which could give rise to far reaching and contentious confrontations as has happened in the instant case where the Official, like the 1st Respondent in this case, should be, and should indeed have been regularly, clearly, and expressly appointed or designated by the 2nd Respondent as the Acting Principal Defender whilst waiting for the recruitment of the substantive holder of the position.

81. We say this because the exercise of administrative duties, functions or discretions, is founded on the notion of empowerment to exercise the duties that go with that office or the discretions that relate to it. This empowerment is conferred on the official purporting to so act, by a legislative, statutory, regulatory or administrative instrument which clearly defines his competence, and on which the substantive holder of the position functions and takes decisions.

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82. In this regard, we observe that the most apparently contested decision taken by the 1st Respondent, is that contained in his letter dated 12th December 2003. In that letter, the 1st Respondent acting under Article 16 (C) of the Directive,

i) refused and rejected the Applicant's Counsel's request to enter into a Legal Services Contract with the latter and

ii) withdrew the provisional assignment of the Applicant's Counsel to defend the interests of the Applicant for reasons contained in the said letter addressed by the 1st Respondent, Mr. Sylvain Roy, to the applicant's Counsel, Mr. Terry, which we would reproduce here to illuminate this deliberation:

> "RE: Prosecutor vs Alex Tamba Brima aka Tamba Alex Brima
>
> Subject: Legal Service Contract.
>
> Sir, I hereby acknowledge having received your letter of 11 December 2003, in reply to my letter of the same day and earlier exchange of correspondences, in November 2003, this in the context of our discussions towards the signing of a Legal Service Contract, to provide for the legal representation of Mr. Brima before the Special Court for Sierra Leone.
>
> I do not intend to respond to the insults, some of a racial nature, nor the unfounded accusations made against me or the threats you have proffered towards me, but, as you requested, want to inform you of the decision concerning your appointment under a Legal Service Contract.

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In no uncertain terms, and given your position, your responses to my requests and statement by yourself that this is your final position, I am not prepared to enter into a Legal Service Contract with you, this based on the following reasons:

- You are not willing to have the issue of your health status clarified and, therefore, I cannot ensure that you will remain available to continue to represent Mr. Brima to the finality of the proceedings before the Special Court, this in accordance with Article 13(A) of the Directive on the Assignment of Counsel

- You continue to refuse to follow procedure indicated in Article 14(C) of the Directive on the Assignment of Counsel, regarding representing more than one defendant before the Special Court.

Given these facts, I hereby inform you that, in accordance with Article 16(C) of the Directive on the Assignment of Counsel, I am withdrawing your Provisional Assignment to represent Mr. Brima under the Legal Assistance program of the Special Court.

Since Mr. Brima has the right to choose his own Counsel, he can decide to continue having you as his Counsel but, this will not be under the auspices of the Legal Assistance program provided by the Special Court. You will have to be retained privately."

83. As can be gleaned from this correspondence, both the refusal to enter a Legal Services Contract with the Applicant's Counsel and the withdrawal of the latter's provisional assignment to act as Counsel for the Applicant are premised, firstly on

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the unwillingness of Mr. Terry to have this issue of his health status clarified in accordance with the provisions of Article 13(A) and secondly, on the violation by Mr. Terry, of the provisions of Article 14(C) of the Directive on the Assignment of Counsel, and his refusal to follow the procedure indicated therein.

LEGAL BASIS OF THE 1ST RESPONDENT'S DECISIONS

A) TO SUBJECT APPLICANT'S COUNSEL TO A MEDICAL EXAMINATION

84. Since the 1st Respondent stands by the legality of his decision to subject the Applicant's Counsel to a Medical Examination before entering into a Legal Services Contract with him in conformity, as he affirms, with the provisions of Article 13(A) of the Directive, it is necessary for us to examine the texts which he, the 1st Respondent alleges, empower him to base his decision on those grounds.

85. In this regard, we note that even though the Applicant and his Counsel contest the legality and fairness of this decision, they do not contest the fact that Counsel, Mr. Terry, due to ill-health , failed on 2 occasions, to assume his statutory responsibility of ensuring the defence of the Applicant. However, in his written submissions, the Applicant had this to say on this issue and I quote:

> "First, it is submitted by Counsel for the Applicant that the position taken by the Acting Principal Defender relating to the fact that Mr. Terrence Michael Terry was ill long ago does not with respect warrant any finding by the Acting Principal Defender to the effect that Mr. Terrence will not be able to complete the case for the Accused Alex Tamba Brima, the Applicant herein. In any event, it is further submitted that the Acting Principal Defender is not a Doctor and therefore cannot be seen to make judgments and/or express opinions on medical matters however

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strongly he may feel regarding the state of health of the Counsel for the Applicant herein. The discretion therefore exercised by the Acting Principal Defender in this regard, it is submitted, was not only arbitrary at best but also contrary to all known principles and canons of fundamental fairness."

The Applicant has again, in our opinion, side-tracked the issue and instead, articulated arguments on issues which, even though relevant to his case, do not touch on nor do they address the core problem.

86. The issue which The Chamber considers crucial to examine in this matter is not whether the 1st Respondent is a Medical Officer or not, but whether he could, under Rule 45(C) of the Rules of Procedure and Evidence, or even under any of the provisions of the Directive on the Assignment of Counsel, impose on the Applicant's Counsel, the obligation to produce a medical certificate of fitness or in the alternative, subject him to undergoing a medical examination as he did in his letter to him dated the 10th of November, 2003, albeit at the expense of the "Defence office but from a budget other than that for the defence of Brima" to quote the 1st Respondent's letter to Counsel for the Applicant.

Rule 45(C) of the Rules of Procedure and Evidence provides as follows:

(a) The Principal Defender shall, in providing an effective defence, maintain a list of highly qualified criminal defence counsel whom he believes are appropriate to act as duty counsel or to lead the defence or appeal of an accused. Such counsel who may include members of the Defence shall:

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(i) Speak fluent English

(ii) be admitted to practice law in any state

(iii) have at least 7 years experience and

(iv) have indicated their willingness and full-time availability to be assigned by the Special Court to suspects or accused.

These same provisions have been incorporated in Article 13(B) of the Directive on the Assignment of Counsel.

87. The Chamber observes that based on the ordinary traditional canons of statutory interpretation, nowhere, in an ordinary reading and meaning of these 2 texts, is the presentation of a medical certificate or even undergoing a medical examination, made one of the conditions precedent for Counsel's qualification either to enter into a Legal Services Contract with the Principal Defender, or to be included on the list of assignable Counsel.

88. The only reason the 1st Respondent has put across to justify the presentation of a medical certificate or undergoing a medical examination is that it is a means to ensure the fitness of the Counsel to conduct a proper defence for the Accused pursuant to the provisions of Rule 45 of the Rules and those of Articles 13(B) and 13(D) of the Directive, and that this exigency is more in the interest of protecting the rights of the Accused under Article 17 of the Statute and Rule 45(C) of the Rules.

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89. We neither share this interpretation nor the submission of the 1st Respondent in relation to the provisions of Rule 45(C) of the Rules and of Articles 13(B) and 13(D) of the Directive. In this regard, we would like to recall in order to emphasize, that in interpreting statutory or regulatory instruments, due regard should primarily be paid to their ordinary and natural meaning so as to avoid, like the 1st Respondent is urging us to accept, importing extraneous interpretations to statutory provisions or regulations which are as clear as those we have just reproduce for purposes of scrutinous examination.

90. To underscore the importance of this approach, the Chamber would like to refer to and adopt the dictum of LORD HERSCHEL in the case of THE BANK OF ENGLAND VS. VAGLIANO BROTHERS [1891] AC 107 at 144, where His Lordship had this to say:

> "I think the proper cause is in the first instance, to examine the language of the Statute and to ask what its natural meaning is."

91. This dictum of Lord Herschell which was relied on by This Chamber in interpreting Section 125 of the Constitution of Sierra Leone when adjudicating on the Habeas Corpus Application of this same Applicant in Case No. SCSL-03-06-PT of 22nd July 2003, has stood the test of time because it limits the prevalent temptation to import into a clearly enacted Statute or Regulation, extraneous meanings and interpretations which, in the long run, not only enable the authority to assume legislative functions which is ultra vires, but also produces a result that is directly contradictory or even contrary to the necessary intendment of the legislative or regulatory instrument.

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92. We observe, contrary to the 1st Respondent's submissions to this effect, that the provisions of Article 13(A) of the Directive did not intend to, nor do they justify his insistence, on a medical verification of the Applicant's Counsel. Indeed, holding otherwise would be attributing to a very clear regulatory instrument, a strange and extraneous interpretation and meaning which was never envisaged especially so because the Applicant contends that his Counsel is the only one of all others on the list of Defence Counsel, who has been subjected to a medical scrutiny, a fact which he contends, is discriminatory.

93. We accordingly hold that the decision by the 1st Respondent to withdraw the Applicant's Counsel's Provisional Assignment on the grounds of his refusal to undergo a medical examination, having been made without any statutory or regulatory authority to do so, is *ultra vires*, and deserves to be quashed as being both arbitrary and unlawful.

94. On this score, and in light of the above, we declare the withdrawal of the provisional Assignment based on the refusal by Mr. Terry to conform to the medical examination exigency of the 1st Respondent null and void.

THE LEGALITY OF THE EXERCISE OF A DISCRETION BY THE 1ST RESPONDENT

95. The Chamber has observed that Article 16(C) under which the 1st Respondent purportedly acted to withdraw the Provisional Assignment of the Applicant's Counsel, confers a discretion on the Principal Defender to withdraw or not to. We also observe that Article 13(D), which the 1st Respondent has invoked as giving him a leeway to probing into the medical history or fitness of the Applicant's Counsel,

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also confers on him, a discretion to inquire into what is enumerated in D(i), D(ii), D(iii), and D(iv).

96. Should it be conceded that he could, under this provision, insist on a medical certification of Mr. Terry, the question we would like to address is whether it is reasonable to precipitate into medical verifications just because Counsel was sick on two occasions only, assuming that this were even statutorily provided for or permitted

97. As a matter of law, and so we hold, a discretion cannot be exercised when the issue in respect of which it is purported to be exercised, is not provided for by law, or where the exercise of such discretion is either contrary to the law or manifestly unreasonable.

98. This view is supported by the decision in the case of LAW SOCIETY OF NEW BRUNSWICK VS. RYAN [2003] 1SCR 247 where JUSTICE LACOBUCCI characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand."In yet another Canadian case of THE CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 963 VS NEW BRUNSWICK LIQUOR CORPORATION, "CUPE" [1979] 2 SCR, 227, LORD JUSTICE DICKSON stated that a 'decision is unreasonable if it cannot be rationally supported by the relevant legislation'.

99. In the present Motion, the decisions taken by the 1st Respondent do not, and indeed, cannot stand the standard set in these two cases whose dicta we approve and adopt in annulling as illegal, the exercise of a discretion by the 1st Respondent, in a manner which the Chamber deems to be without any legal authority. Indeed,

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as was held in the case of PUBLIC SERVICE OF NEW SOUTH WALES VS OSMOND (1986) 60 ALJ 209, for a discretion to be exercised validly, it must be seen to have been exercised reasonably, fairly, and justly. This, we find, was not the case with the decision of the 1st Respondent, in the case under examination where we hold that he could not exercise any powers or discretion whatsoever because he lacked the statutory authority to take the decision he took.

B . CONFLICT OF INTEREST -APPLICATION OF ARTICLE 14(C) OF THE DIRECTIVE ON THE ASSIGNMENT OF COUNSEL

100. The other reason advanced by the 1st Respondent in his letter to the Applicant's Counsel to justify his refusal not only to enter into a Legal Services Contract with the latter, but also to withdraw his provisional assignment as Counsel for the Applicant is that Mr. Terry refused to follow the procedure indicated in Article 14(C) of the Directive on the Assignment of Counsel, on the issue of representing more than one defendant before the Special Court.

101. In this regard, the 1st Respondent alleges that the Applicant's Counsel is also representing another accused, Charles Ghankay Taylor, who has been indicted before the Special Court for offences related to war crimes that are within its jurisdiction.

The provisions of Artcle 14(C) of the Directive which is in issue read as follows:

> "No Counsel shall be assigned to more than one Suspect or Accused unless the concerned Suspects or Accused have received independent legal

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advice and have waived their right to be represented by a separate Counsel. Any application by Counsel to be assigned to more than one Suspect or Accused must be made, through the Principal Defender to the Presiding Judge of the appropriate Chamber."

102. The Applicant's Counsel does not deny the fact that he is representing the interests of Ex President Charles Taylor but argues that it is premature to raise the issue of conflict of interest at this stage as the Taylor matter is, according to Counsel, "limited to a procedural bar and does not as yet extend to the actual trial if at all the matter gets to that stage".

103. On this issue, the Chamber observes that although the Taylor Indictment is approved and a warrant of arrest issued, he has not yet made his initial appearance to take a plea as he is yet to be arrested and physically brought within the jurisdiction of the Special Court. It is only at that stage that his status will be verified vis a vis the Applicant's situation with a view to determining whether the Applicant's Counsel is in breach of the provisions of Rule 14(C) of the Directives on the Assignment of Counsel or not.

104. Consequently, we find and accordingly so hold, that the decision to refuse to enter into a Legal Services Contract with the Applicant's Counsel and to withdraw and cancel the Provisional Assignment of the Applicant's Counsel on the grounds of a violation of Article 14(C) of the Directive, a fact which is yet to be verified and determined, is premature and illegal as such a ground cannot be invoked at this early stage when the alleged conflict of interest is yet to be established by the 1st Respondent.

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105. We accordingly, without going further into the merits of the reasons so far advanced, declare that decision null and void since which we find it speculative, and also in the circumstances, quash and set aside at this uncertain phase of the exiled Taylor proceedings.

THE STATUS AND VALUE OF THE DECISIONS OF THE 1ST RESPONDENT ACTING AS PRINCIPAL DEFENDER

106. In arriving at these conclusions on the issues raised so far, The Chamber has taken cognizance of an Administrative Law Treatise on this subject which succinctly sums up the law as follows:

> "An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the courts are rigorous in requiring the power to be exercised by the precise person or body stated in the Statute, and in condemning as ultra vires, action taken by agents, sub committees or delegation however expressly authorized by the authority endowed with the power." See H.W.R. Wade and C.F. Forsyth – Administrative Law, 7th Edition: P- 347.

107. In the Motion under examination, we have noted that the 2nd Respondent, in a document dated 7th July 2003, only gave limited express delegation of powers to the 1st Respondent on Financial and Budgetary matters. It is expressly silent on whether

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he was made the Acting Principal Defender or whether those powers were delegated to him in that capacity.

108. We further note that the 2nd Respondent who affirmed during the oral hearing in Chambers that he enjoys a very wide discretion from the Management Committee in the exercise of his powers under the Statute and the Rules, did not expressly designate the 1st Respondent as Acting Principal Defender so as to enable the latter to lawfully exercise the prerogatives that are so conferred on, and exercisable only by the Principal Defender under the provisions of Rule 45 of the Rules of Procedure and Evidence and under the Directive on the Assignment of Counsel. This was and is still, in our opinion, necessary particularly within the present context of a decision as grave in nature and in its consequences as that provided for in Article 16(C) of the said Directive which confers on the Principal Defender, a power coupled with a discretion, to exercise that power or not.

109. The troubling issue in this case is as we have observed, the absence of an appointment or an express designation of Mr. Sylvain Roy, a Defence Advisor in the Principal Defender's Office, to act in that substantive position, a fact which, as a result, has occasioned a total lack of authority under which he purported to have acted in taking such vital decisions which legally and administratively, could only have been, and can only be taken by a substantively appointed Principal Defender or someone duly and regularly designated or appointed to act on his behalf.

110. It is the absence of this regular designation or appointment of the 1st Respondent to so act for the Principal Defender, as he was infact doing, and the manner in which he interpreted and applied the instruments under which he so acted to arrive at the

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decisions which are contested by the Applicant, coupled with the content of the said decisions, that have contributed to this dispute in which the Applicant and his Counsel, Mr. Terence Michael Terry, are contesting and questioning the regularity and validity of these decisions, and do invite The Chamber, to quash and set them aside.

111. It is the finding of The Chamber therefore, in the light of the above analysis, that Mr. Sylvain Roy, a Defence Advisor in the office of the Principal Defender, in the absence of an express appointment to the position of Acting Principal Defender, could not perform the duties that he purported to be performing nor could he take decisions in relation thereto and that if he did, as he indeed did, it was ultra vires his powers and that consequently the said decisions were null and void.

112. It is our view and conviction as a Chamber, that the legal doctrine of Ultra Vires on which the dispensation of administrative law is principally founded, is a very vital component of the principle of the Rule of Law and of the Due Process. It constitutes an important substratum in the edifice of judicial administration without which it can easily crumble. Indeed, what accounts for and justifies the perenity of this vital doctrine is the role it has played and continues to play in the protection of rights of all sorts, individual and collective, against the formidable armada of the privileged and the ruling class, to which anybody or group, particularly the less privileged, and including of course, even erstwhile omnipotents who at times end up in stormy waters, could fall a victim. It is that vital weapon in the armory of the judicial machinery that checks, controls, mitigates and combats administrative despotism, illegalities and arbitrariness which could otherwise

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become the order of the day even in the most advanced democracies, and nip in the bud, the implantation of the doctrine of good governance that is rapidly perfecting its grip on the judicial, administrative and political cultures of emerging societies around the world.

113. We note that even if the 1st Respondent were regularly appointed as "Acting Principal Defender" and vested with the legal authority to take the contested decisions which he has taken pursuant, according to him, to the provisions of Rule 45(C) of the Rules and Article 16(C) of the Directive, The Chamber is firmly of the opinion that those decisions, given their content and their consequences, vis-à-vis the provisions of the enabling enactments referred to above, can still be set aside as infringing the principle of ultra vires, the grounds being that those provisions do not provide for the presentation of a medical certificate nor do they require that the Applicant's Counsel be certified as being medically fit as a condition precedent for his inclusion on the list of Defence Counsel, eligible for assignment to indigent Accused or Suspects.

114. In this regard, we again refer to the Legal Treatise, WADE & FORSYTH: ADMINISTRATIVE LAW ,7th Edition, P.41, where The Learned Authors have this to say:

> "A public authority may not act outside it powers' (ultra vires). Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. This is because in order to be valid, it needs statutory authorization and if it is not within the powers given by the Act, it has no leg to stand on. The

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Court will then quash it or declare it to be unlawful or prohibit any action to enforce it."

It follows from the above legal statement that for the decision to be valid, it must first be authorized by Statute and secondly, it must conform with the power given by the Statute. In this regard Lord MACNAUGHTEN in the case of WESTMINSTER CORPORATION V. L & NW RAILWAY [1905] AC 426 and 430 made the following observations:

"It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not the first."

115. The Chamber finds that the decision of the 1st Respondent did not fulfill any of these enunciated criteria. We accordingly, having regard to the above, declare the said decision to withdraw the Applicant's Counsel's Provisional Assignment as Counsel for the Applicant, and his refusal to enter into a Legal Services Contract with the Applicant's Counsel, Mr. Terry, which decision is contained and conveyed in his letter dated 12th December 2003, null and void, and of no effect. Accordingly we set it aside immediately in order to preempt a possible and continued violation of the Applicant's rights as guaranteed under the provisions of Article 17 of the Statute.

SEMBLANCE OF AUTHORITY OF 1ST RESPONDENT TO ACT AS PRINCIPAL DEFENDER

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116. Having so decided, the Chamber accepts the explanation of the 2nd Respondent on the difficulties encountered in recruiting the right person to that post of Principal Defender and why he had to rely on the 1st Respondent, albeit implicitly, to act in that capacity pending that recruitment.

117. In these circumstances, the public and litigants including the Applicant and Mr. Terry, had already accepted and familiarized themselves with the fact that the 1st Respondent was in fact, the "*de facto*" Acting Principal Defender even though he was not, but could regularly have been, so as to legalise and legitimize at least the form as opposed to the merits of the contentious decisions which he has taken, as emanating from an authority vested with those powers.

118. The Chamber accordingly accepts the legitimacy of all the decision which Mr. Sylvain Roy, Defence Advisor, had taken while purportedly acting as the Principal Defender, and which have so far, not been contested excepting of course, the decisions taken in the matter that is now before us which has been contested by the Applicant.

119. In taking this stand, the Chamber is again comforted in this view by a statement of law in HWR. Wade and Forsyth – Administrative Law 7th Edition: Page 326 where the Learned Authors opine:

> "The acts of the Officer or a Judge may be held to be valid in Law even though his own appointment is involved and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so. In

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such a case he is called an officer or Judge "*de facto*" as opposed to an officer or Judge "*de jure*"."

120. The only observation The Chamber makes here is that those officials referred to in the above authoritative legal statement and who also acted were, unlike the 1st Respondent, regularly appointed, albeit, in a flawed manner, and that they acted with the semblance of authority that is inherent in the positions which they held and by virtue of which they acted.

RELEVANCE OF JURISPRUDENCE CITED BY 1ST RESPONDENT TO SUPPORT HIS ARGUMENTS

121. As we mentioned earlier, the 1st Respondent has, in support of his arguments, cited some cases on the rights of the Accused to Counsel of his choosing. He has in this regard, argued that the Applicant's right to Counsel of his choice is not absolute.

122. The cases are however, distinguishable from this Brima Motion. For instance, in the Gerard Ntakirutiama case, it is the accused himself who requested the change of his Counsel. The request was rejected by the Trial Chamber on the grounds, inter alia, that the statutory entitlement of an accused to Counsel of his choosing is not an absolute right.

123. In the case of THE PROSECUTOR VS DUSKA KUEZEVIC, Case No IT-95-4-PT, IT-95-8/1-PT, it was again the accused who requested a replacement of his Counsel. This request was also rejected basically on the same grounds as in the Ntakirtiama case. Furthermore in the case of THE PROSECUTOR VS PAULINE NYIRAMASUHUKO AND ARSENE SHALOM NTAHOBALI, it was still the

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accused, Ntahobali who requested that his Counsel be replaced. Here the request to withdraw and replace her Counsel was granted.

124. In these cited cases, we observe that the withdrawal of Counsel was expressly requested by the Accused persons. Brima, the Applicant, on the contrary however, has not asked for the withdrawal of his assigned Counsel Terry, who appears up to now, to offer him satisfactory services. The withdrawal has instead been precipitated by the illegal and arbitrary act of the 1st Respondent. We hold therefore, that the cases cited do not, by any stretch of the imagination or of the law, apply in the instant case, and that they do not, in any way whatsoever, strengthen the arguments in the case Respondents are making.

125. On another score, our attention is drawn to Applicant's Counsel's submission where he says that Article 16(C) does not exist according to him, "within the four corners of the Directive on Assignment of Counsel of the Special Court for Sierra Leone" and further, that Mr. Ibrahim Yilla, a Defence Counsel in the Principal Defender's Office, could not make, as he did, written submissions for the 1st Respondent.

126. As regards the first remark, we consider it unfortunate and unprofessional, to in effect, accuse the adverse party of citing a legal text that does not exist when in fact it does exist. This allegation infact implies professional dishonesty on the part of Counsel who has cited the said text. Contrary to this erroneous and false affirmation by the Applicant and Mr. Terry, his Counsel, Article 16(C) in fact exists and is indeed part of the Directive on the Assignment of Counsel. The Applicant

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and his Counsel are cautioned to properly verify their facts and to avoid making such denigrating remarks that turn out to be untrue and unfounded.

127. On the second issue, the 1st Respondent and Mr. Ibrahim Yilla are Colleagues in the Defence Office. The 1st Respondent acted colores offici, albeit, ultra vires. In a matter brought against him for acting colores offici, we hold the view that he himself or a Colleague in the Defence Office, could make submissions and sign them on his behalf as Mr. Ibrahim Yilla did in this case.

128. We dismiss the Applicant's objections in this regard and hold that the submissions are properly before us as we see nothing wrong with this conventional practice.

129. We also would like to observe, and do so hold, that the 3rd Respondent should not have been involved in this Motion since the Registrar, his immediate superior in hierarchy who is the head of the Registry, is included in it as the 2nd Respondent. We hold that his inclusion in it is superfluous, misconceived and without just cause.

CONCLUSION

130. We sum up the role of the 1st Respondent in this matter as that of an official who, even though he acted *colores offici*, did so *ultra vires* not only because he did not have the statutory empowerment to so act, but also because he acted in excess of and beyond the limits of the Statutory empowerment and authorisation of the Principal Defender whose functions he was purportedly exercising.

131. It is therefore our considered opinion, in light of the preceding analysis, that the Trial Chamber has jurisdiction to determine this Motion and that the arguments

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advanced to support it are founded as against those of the Respondents which we find both factually and legally unconvincing.

132. Accordingly, we allow the Motion and make the following Orders.

1. That our Order dated 12th February, 2004, directing that Mr. Terence Michael Terry, continues to represent the Accused in all matters before the Special Court until further Order, is confirmed and remains in force until further Order.

2. That the decision of the 1st Respondent to withdraw the provisional assignment of Mr. Terence Michael Terry as Counsel for the Applicant on the pretext of non-compliance with Rule 45(C) of the Rules and for a violation of Article 14(C) of the Directive on the Assignment of Counsel is null and void and is accordingly quashed and set aside.

3. That the decision by the 1st Respondent to refuse to enter into a Legal Services Contract with the Applicant's Counsel, Mr. Terence Michael Terry, on the pretext of non compliance with the provisions of Rule 45(C) of the Rules and for a violation of Article 14(C) of the Directive on the Assignment of Counsel is null and void and is accordingly quashed and set aside.

4. That the 3rd Respondent is struck out of the Motion as his inclusion in it is superfluous, misconceived and without just cause.

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5. That the Principal Defender immediately enters into a Legal Service Contract with Mr. Terence Michael Terry for the defence of the interests of Alex Tamba Brima

6. That all other reliefs and orders sought by the Applicant are dismissed as they are frivolous, baseless, and misconceived.

7. That these Orders be carried out.

Done at Freetown this 6th day of May 2004

Judge Bankole Thompson
Presiding Judge,
Trial Chamber

Judge Benjamin Mutanga Itoe

Judge Pierre Boutet

[Seal of the Special Court for Sierra Leone]

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