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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Hon. Judge Benjamin Mutanga Itoe, Presiding Judge
Hon. Judge Bankole Thompson
Hon. Judge Pierre Boutet

Registrar: Robin Vincent

Date: 4 August 2004

PROSECUTOR **Against** Issa Hassan Sesay
Morris Kallon
Augustine Gbao
(Case No.SCSL-2004-15-T)

**DECISION ON APPLICATION FOR LEAVE TO APPEAL
GBAO - DECISION ON APPLICATION TO WITHDRAW COUNSEL**

Office of the Prosecutor:

Luc Côté
Lesley Taylor

Defence Counsel for Issa Hassan Sesay:

Timothy Clayson
Wayne Jordash

Defence Counsel for Morris Kallon:

Shekou Touray
Raymond M. Brown

Defence Counsel for Augustine Gbao:

Girish Thanki
Andreas O'Shea



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

SEIZED of the Application for Leave to Appeal Gbao - Decision on Application to Withdraw Counsel ("Application") filed on 9 July 2004 by Counsel for Mr. Augustine Gbao ("Defence") pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("Rules") as well as the Corrigendum to Application for Leave to Appeal Gbao - Decision on Application to Withdraw Counsel filed on 15 July 2004;

NOTING the Response filed on behalf of the Office of the Prosecutor ("Prosecution") on 19 July 2004 ("Response");

NOTING ALSO the Note on Pleadings Re Leave to Appeal Gbao - Decision on Application to Withdraw Counsel filed by Defence on 21 July 2004 in which the Defence stated it would not be filing a Reply because the Prosecution supports the Application;

CONSIDERING THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES:

I. THE MOTION

A. The Defence Submissions:

1. Pursuant to Rule 73(B) of the Rules, the Defence seeks leave to file an interlocutory appeal in respect of the Decision of the Special Court on the Gbao Application to Withdraw Counsel dated 6 July 2004, in which the Chamber found that the Accused Gbao had not established exceptional circumstances as required by Rule 45(E) in order to withdraw his Counsel and ordered that Counsel currently on the Accused Gbao's Defence Team must continue to represent the Accused and conduct the case to its finality.¹

¹ *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, Gbao - Decision on Application to Withdraw Counsel, 6 July 2004 ("Gbao Decision").

2. The Defence application is based on the assertion that there exist exceptional circumstances and that leave to appeal should be granted in order to avoid irreparable prejudice to a party.

3. The Defence submits that exceptional circumstances that justify the desirability of an appeal include:

- a) The right to legal representation and the right to defend oneself are fundamental aspects of the right to a fair trial;
- b) The novelty of the issue in question, since the Accused wishes to defend himself after having employed the services of counsel throughout the Pre-Trial period and he now wants to dispense with Counsel;
- c) The possibility of creating new jurisprudence in international criminal procedure since no Appeal Chamber has been directly seized with the issue of the right to self-representation, and there have only been three cases before international tribunals dealing with the right to self-representation, each providing a different result and solution to the problem;
- d) The Trial Chamber's decision entails implications not only for the Accused but for his Counsel, since it requires counsel to remain until the end of the case and does so in circumstances where they would normally be professionally embarrassed by the Accused's refusal to provide instructions and entitle them to withdraw, thus placing Counsel in a difficult position; and
- e) The Defence's view that the Decision impacts on all aspects of the Trial.²

4. The Defence avers that if leave to appeal is not granted, it may suffer the following irreparable damage:

- a) A conviction could be based on a trial where explanations, denials and assertions of the Accused were never proffered because of the absence of the Accused, in combination with the refusal to provide instructions. It is the contention of the Defence that the fact that the Accused has brought this situation upon himself does not divert from the fact that irreparable prejudice may be caused for the purposes of Rule 73(B);
- b) The Defence submits that cross-examination in the absence of proper instructions from the Accused would render the process ineffective and could potentially lead to the wrong

² Motion, para. 6.

questions being asked, with the potential of causing prejudice not only to the Accused but to the co-Accused as well; and

- c) Prejudice might result from investigations and calling of witnesses that might actually damage the Accused's case.³

5. The Defence further submits that irreparable prejudice may arise for the Prosecution by virtue of its inability to cross-examine the defendant and the inability of the Prosecution witnesses to identify the Accused.⁴

B. The Prosecution Response:

6. The Prosecution concurs with the Defence request for leave to appeal and submits that it merits the careful consideration of the Trial Chamber.⁵

7. The Prosecution submits that the following exceptional circumstances would justify granting leave to appeal:

- a) There is no guiding jurisprudence on the issues of the nature of and possible limitations on the right to self-representation. The Prosecution submits that this, coupled with the complexity of the trial, the gravity of the crimes, the non-recognition of the Court by the Accused and the joint trial, may be considered exceptional;⁶ and
- b) The failure of the Decision to address Gbao's request to exercise his right to self-representation, may in itself constitute an exceptional circumstance.⁷

8. The Prosecution submits that there will be irreparable prejudice to the Accused if leave to appeal is denied. The Prosecution assumes that the denial of the right of the Accused to represent himself entailed his resolution to abstain from the proceedings as well as his refusal to provide Defence with instructions. Based on this assumption, the Prosecution agrees that Defence's conduct of the case without the instructions or presence of the Accused may entail irreparable prejudice.⁸

9. The Prosecution states that the interests of justice and the principle of finality will best be served by a consideration of this matter by the Appeals Chamber. It also states that this will prevent

³ *Id.*, para. 7.

⁴ *Id.*, para. 8.

⁵ Response, para. 15.

⁶ *Id.*, para. 9.

⁷ *Id.*, para. 10.

the issue from constituting a ground for appeal at the end of this trial and will ensure that the integrity of the trial is not compromised by the Defence's dilatory strategies or other frivolous actions.⁹

10. The Prosecution emphasizes that granting the Motion will not delay the current proceedings, since applications for leave to appeal, in accordance with Rule 73(B) "shall not operate as a stay of proceedings unless the Trial Chamber so orders." It submits that the matter does not require a lengthy appeal procedure pursuant to Rule 117(A) which stipulates that "any appeal under Rules 46, 65, 73(B), 77 or 91 shall be heard expeditiously and may be determined entirely on the basis of written submissions."¹⁰

II. FACTUAL BACKGROUND

11. In order to address the issues raised in this Motion, this Chamber considers that it is imperative that the factual background in this case be properly examined.

12. The Accused Gbao was transferred into the custody of the Special Court pursuant to the granting of a request from the Prosecution for an order under Rule 40bis of the Rules on 20 March 2003.¹¹

13. After his transfer into the custody of the Special Court, the Accused appeared before Hon. Judge Benjamin Mutanga Itoe as suspect pursuant to Rule 40bis(J) on 21 March 2003 in order to ensure that his rights as suspect were respected. In that instance, the Accused was assisted by a duty counsel provided by the Defence Office.

14. On 21 March 2003, the Accused filed a waiver to his right to a counsel assigned by the Special Court pursuant to Rule 45 of the Rules on the basis that he decided to retain his own counsel.¹²

⁸ *Id.*, para. 11.

⁹ *Id.*, para. 12.

¹⁰ *Id.*, paras 13 and 14.

¹¹ *Prosecutor v. Gbao*, Case No. SCSL-03-09-PD, Order for Transfer and Provisional Detention Pursuant to Rule 40(J). The Accused was at that point in time detained by the authorities of the Government of Sierra Leone pursuant to a request made to them by the Prosecution under Rule 40 of the Rules.

¹² Waiver of the Right to Counsel, 21 March 2003. See also Order for Provisional Detention, 22 March 2003.

Subsequently, however, on 4 April 2003 the Accused declared himself indigent and filed a Request for Legal Assistance seeking the assignment of counsel by the Court pursuant to Rule 45 of the Rules.

15. On 16 April 2003, an Indictment against the Accused was filed by the Prosecution and approved by Hon. Judge Thompson.¹³

16. On 23 April 2003 the Registrar issued his Decision provisionally appointing Mr. O'Shea as Defence Counsel for the Accused. Mr. O'Shea represented the Accused during his Initial Appearance. The provisional appointment of Mr. O'Shea was subsequently made permanent by a Decision of the Acting Principal Defender on 17 December 2003.¹⁴

17. Mr. O'Shea and other assigned Counsel have acted continuously since their assignment and have appeared on behalf of the Accused Gbao at status conferences, the pre-trial conference and the beginning of trial.

18. In a letter dated 11 June 2004 that was filed with the Court,¹⁵ all three Accused in this case indicated that they would not attend trial or enter pleas of guilt until such time as the application challenging the lawfulness of the Special Court that is pending before the Supreme Court of Sierra Leone is decided and the judgement rendered public.

19. All Accused did, however, appear at the status conference that was held on 23 June 2004 and at the first day of the trial on 5 July 2004.

20. As already noted in the Decision, on the first day of trial, Defence indicated that the Accused Gbao wished to make an opening statement. After legal arguments were heard, the Chamber ordered that the Accused Gbao could make an opening statement pursuant to Rule 84 of the Rules which provides as follows:

At the opening of his case, each party may make an opening statement confined to the evidence he intends to present in support of his case. The Trial Chamber may limit the length of those statements in the interests of justice.

¹³Decision Approving the Indictment, 16 April 2003; Order Confirming Prior Arrest and Transfer and Ordering Continued Detention, 16 April 2003. The Accused held his Initial Appearance pursuant to Rule 61 on 25 April 2003 before Judge Thompson, pleading not guilty on each and all counts contained in the then Indictment against him;

¹⁴ Decision, 27 January 2004.

¹⁵ *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Letter Re Issa Hassan Sesay, 11 June 2004.

21. On 6 July 2004, the Chamber warned the Accused to confine his statement to an outline or an overview of the evidence he intended to present in support of his case in accordance with Rule 84 and allowed the Accused to proceed with his opening statement. Despite these warnings, the Accused contested the constitutionality and the establishment of the Special Court in his statement, thus covering areas outside of the limits of Rule 84. The Court again warned the Accused to refrain from making political statements. After several interventions and observing that the Accused resolutely persisted in making a political statement which is totally outside the scope and purpose of Rule 84, the Court stopped the Accused Gbao from proceeding further.

22. The record shows that at this point, the Accused remarked that if he was not given the opportunity to make this statement, he would "walk out of the court with protest" since he did not recognize the Special Court. He did not, however, immediately leave the Court.

23. Later, the Court noted that the Accused Gbao had his hand raised and suggested that the Defence should speak to him. After doing so, Defence stated that Mr. Gbao wanted to address the Court, not under Rule 84, but under Article 17 as he was raising questions about his representation. Defence was given the opportunity to consult with his client and he then stated that he believed the Court should hear representations from the Accused.

24. When his request to address the Court was granted, the Accused stated the following:

My position in this case is very simple and since my right under Article 17 had been denied, I have decided not to recognise this Court. And henceforth no lawyer should appear here, should represent me, should defend me in this Court until the African Union, European Union and the Commonwealth of Nations interfere into this matter so as to define... what took place in this country.¹⁶

25. Hon. Judge Itoe sought confirmation that the Accused Gbao was saying that he did not recognise the Court and that he didn't want any lawyer to appear for him in Court anymore and that this was the application he had made. The Accused Gbao responded affirmatively. He was then informed that the Court would give him a ruling on this application that afternoon.

26. The following exchange then occurred between the Accused Gbao and Hon. Judge Itoe:

THE ACCUSED GBAO:

¹⁶ *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, Transcripts of open session proceedings of 6 July 2004 at 34.

Yes, sir, I want to make a further application.

MR. PRESIDENT:

Will you –

THE ACCUSED GBAO:

I want to make a short statement about my standing before Your Lordship.

MR. PRESIDENT:

Yes, yes, what statement? Yes, go ahead.

THE ACCUSED GBAO:

My standing before Your Lordship, together with the other Accused, does not bind me to them in any way from taking any independent action deemed proper for my defence in the interests of transparent justice.

MR. PRESIDENT:

I hope he is – the records have got Mr. Gbao in what – so you think they can defend you in a way, your other colleagues in the interests of justice?

THE ACCUSED GBAO:

In the interests of justice it does not bind (*inaudible*) if they want to go their own way, let them go.

MR. PRESIDENT:

Yes.

THE ACCUSED GBAO:

I stand to defend myself, I wish to fight my – to fight this case anyhow I see proper I will bring total justice.¹⁷

27. Before the Court recessed, Mr. Côté of the Prosecution sought clarification of whether the application from the Accused was to replace his lawyer, to have no lawyer or to represent himself. He indicated that there was a provision under the Rules that was relevant. The Hon. Judges Itoe and Thompson stated that they understood that the Accused Gbao was applying not to have any counsel represent him due to the fact that he did not recognise the Court.¹⁸

28. Later that day, this Court delivered the Gbao Decision which is the subject of this Application.

29. On 7 July 2004, the Accused Gbao did not attend the trial proceedings. The Court was informed by Defence for Gbao that the Accused had indicated in the form of a written declaration that he would not be in attendance at the hearing of the Court on 7 July 2004 and on succeeding

¹⁷ *Id.*, at 35.

¹⁸ *Id.*, at 36.

days because, as he stated, he did not recognise the Special Court. The Accused Gbao states the following in his declaration:

- i. I do not recognise the Special Court of Sierra Leone as a properly constituted court of law.
- ii. As such, I am resolved to take no part in the proceedings at the Special Court, since to do so would indicate recognition of the Special Court's legitimacy as a properly constituted court of law.
- iii. Further, and to protect the integrity of my position, I wish to dispense with the services of my legal representatives forthwith.
- iv. Given that the Trial chamber of the Special Court has ordered that I should retain their services I will henceforward refuse to furnish my former legal representatives with any further instructions whatsoever.
- v. Further, I shall demand they take no active part in the proceedings before the Special Court whatsoever on my behalf.¹⁹

30. In its Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, this Trial Chamber ordered that:

1. In the light of the foregoing evidence, this Court is satisfied that the Third Accused has expressly waived his right to be present at his trial and this Court has no other option but to permit the joint trial of all the three Accused persons to proceed in the absence of the Third Accused pursuant to Rule 60(A)(i) of the Rules and it is so ordered;
2. Pursuant to Rule 60(B) of the Rules, the Chamber also directs that Mr. Andreas O'Shea and other Members of his team will continue to represent the Third Accused in accordance with the Chamber's Decision of 6 July 2004 on his Application to Withdraw his Counsel;
3. The Chief of the Detention Facility of the Special Court shall maintain on a daily basis a record of the waiver of the Third Accused to appear in court, during each trial session of the RUF group of indictees.²⁰

¹⁹ *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, Exhibit 1.

31. The Accused Gbao has not subsequently appeared before this Court.

32. On 23 July 2004, the Principal Defender forwarded a letter from the Accused Gbao written to the Trial Chamber Judges.²¹ In his letter, the Accused Gbao reiterated his position that he did not want any legal counsel to appear for him before the Court. He also requested that the attached document "In Response to Trial Chamber Decision of 6th July 2004" be forwarded to our attention. The said letter has not been filed with the Court and is not part of the record. A copy of the letter is therefore appended to this decision.

33. The attached document states that the Accused Gbao has chosen to respond to the Gbao Decision by way of writing to the Trial Chamber. In this document, the Accused Gbao states that he stands by his decision as outlined in the declaration of 7 July 2004 not to have counsel represent him. He also explains at length why he continues to contest the legitimacy of the Special Court for Sierra Leone. He does not, at any point in the letter, state that he wishes to represent himself in the trial proceedings before the Court.

HAVING DELIBERATED, THE CHAMBER DECIDES AS FOLLOWS:

III. THE TEST UNDER RULE 73(B)

34. Rule 73(B) of the Rules states:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders [emphasis added].

35. In its twin Decisions on the subject of interlocutory appeals in the RUF Case and in the AFRC Case²² where the Prosecution sought leave of the Trial Chamber to file an interlocutory appeal

²⁰ *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, 12 July 2004, para. 12.

²¹ Annex A.

²² *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Decision on Prosecutor's Application for Leave to File and Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004 and *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-PT, Decision on Prosecutor's Application for Leave to File and Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004 ("Decisions of 13 February 2004").

against its Joinder Decisions in respect of the aforementioned cases, this Chamber took the opportunity to articulate the principles governing applications of this nature.

36. Emphasising that Rule 73(B) of the Rules generally does not confer a right of interlocutory appeal but only grants leave to appeal in exceptional cases, the Chamber opined as follows:

As a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive, not disjunctive; in other words, they must *both* be satisfied.

37. Explaining the rationale behind this Rule, the Court stated:

This interpretation is unavoidable, given the fact that the second limb of Rule 73(B) was added by way of an amendment adopted at the August 2003 Plenary. This is underscored by the fact that prior to that amendment no possibility of an interlocutory appeal existed [sic] and the amendment was carefully couched in such terms so as only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision.

38. In essence, as this Chamber noted in its Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT:²³

[T]he purport of our Decisions of 13 February 2004 can be put this way: that the overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.²⁴

39. As we noted in the Decisions of 13 February 2004, our test for granting leave to file interlocutory appeals is more restrictive in comparison with that applied by International Criminal

²³ *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004.

²⁴ *Id.*, at para. 21.

Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda in the interest of expeditiousness and the peculiar circumstances of this Court's limited mandate.

40. Based on the foregoing restatement of the applicable principles of law, we now proceed to address the key question for determination, that is, whether the Defence, in their application for leave to file an interlocutory appeal, have reached or established that there are exceptional circumstances and that there would be irreparable prejudice.

IV. EVALUATION OF APPLICATION'S MERIT

41. Given the ambiguity of the facts that have given rise to this Application, this Chamber must examine the factual foundation of the Motion before it can properly assess whether the necessary elements of exceptional circumstances and irreparable prejudice have been established.

42. It is clear that both the Defence Motion and the Prosecution's Response are premised on the assumption that the Accused Gbao had made an application before the Court to represent himself when he sought to have his counsel withdrawn. This assumption is based on the statements of the Accused Gbao that "my right under Article 17 had been denied" and later that "I stand to defend myself".²⁵

43. An examination of the entire record, however, reveals that this assertion was not an unequivocal assertion of the Accused's right to self-representation.

44. During his opening statement, the Accused repeatedly stated that he did not recognize the legitimacy of the Special Court for Sierra Leone. As noted above, after several warnings regarding the scope of Rule 84, this Chamber prevented the Accused from continuing with his statement which was purely of a political nature rather than dealing with factual issues. At that point, the Accused Gbao stated that he would walk out of the court in protest. When later given the opportunity to address the Court, the Accused noted that since his right under Article 17 had been denied, he decided not to recognise this Court. He then stated that no lawyer should represent or defend him.

²⁵ Motion, para. 4; Response, footnote 1.

45. After confirming that the Accused Gbao was applying not to have any lawyer appear for him since he did not recognise the Court, this Chamber informed the Accused that it would rule on his application.

46. Before the Court recessed, the Accused Gbao stated that he wanted to make a short statement about his standing before the Court. After an exchange occurred between the Accused and the Court, the Accused Gbao stated:

I stand to defend myself, I wish to fight my - to fight this case anyhow I see proper I will bring total justice.²⁶

47. In the context of all of the factual background of this case, as outlined above in detail and as the record shows this Chamber understood the Accused not to be asserting his right to self-representation, but to be stating that he had chosen not to participate in the trial proceedings since he did not recognise the Special Court.

48. This interpretation was confirmed by the subsequent actions of the Accused. As he had threatened to do both in the letter dated 11 June 2004 and orally on 6 July 2004, the Accused Gbao chose not to attend proceedings on 7 July 2004 or on any subsequent date. In the documents that he addressed to the attention of the Trial Chamber on 23 July 2004, the Accused Gbao confirmed that he still does not want to have counsel represent him. He explained that he continues to contest the legitimacy of the Special Court, and did not, at any point, state that he wishes to represent himself before the Court.

49. Thus, this Chamber finds that the Accused Gbao has not actually made a request to represent himself in the trial proceedings before the Court.

50. Having so found, this Chamber is cognisant of the importance of the right of an accused person to self-representation. Article 17(4)(d) of the Statute of the Special Court for Sierra Leone states that every accused is entitled:

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, and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him

²⁶ Transcripts, *supra* note 16 at 35.

or her in any such case if he or she does not have sufficient means to pay for it [emphasis added].

51. In this regard, the Chamber refers to its Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court²⁷ in which the Trial Chamber examined a request by the Accused Norman to represent himself. This Chamber held that the Accused has a right to self-representation, but that such a right is qualified and not absolute and can be derogated from should the interests of justice dictate. The Accused Norman continues to represent himself in the trial proceedings with the assistance of standby counsel. The distinction to be drawn here, however, is that while the Accused Norman made a clear, unambiguous and written application for self-representation in accordance with the prescribed Rule, the Accused Gbao, for his part, has not actually made any such a request with the clarity that is supposed to accompany it.

52. The Accused Gbao's decision not to recognise the Special Court, notwithstanding the Appeals Chamber's Decision on Constitutionality²⁸ and its Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of Special Court Violates Constitution of Sierra Leone, does not make this issue any clearer. In fact, it renders it more uncertain as to what his intentions really were.

53. As noted above, in order to grant leave to file an interlocutory appeal, this Chamber must be satisfied that both exceptional circumstances and irreparable prejudice have been established.

54. Both the Defence and Prosecution have submitted that exceptional circumstances exist in this case due to the very nature of the request by an accused to exercise his right to self-representation and, we add, the appointment of standby counsel by the Court. They also point out that a decision of the Appeals Chamber on the issues of self-representation and withdrawal of counsel could provide useful guidance on very complex and important issues.

55. This Chamber agrees that the right of an accused to represent him or herself is a fundamental right and an essential component of due process. It is also cognisant that there is no appellate case law in international criminal fora that have addressed the important issues of withdrawal of counsel and self-representation of accused persons and that could provide guidance on this matter. Viewed

²⁷ *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court, 8 June 2004. This decision was delivered orally. See also the subsequent decision in this case, Consequential Order on Assignment and Role of Standby Counsel, 14 June 2004.



from this perspective, the results of the proposed appeal would be "of general importance... in international law".²⁹

56. While the Chamber has found that the Accused Gbao had not clearly stated that he intended to exercise his right to self-representation, the Chamber discerns from the pronouncements of the Accused Gbao that there might be an implied intention to defend himself. In the circumstances and out of an abundance of caution, the Chamber is of the opinion that this could well be what the Accused was really intending when he made his comments to the Court.

57. Having regard to the foregoing and in the interests of justice, we find that the issues raised in the submissions are of a fundamental nature and constitute exceptional circumstances. Moreover, a decision from our Appeals Chamber would provide useful guidelines for the future in such situations and would contribute to the advancement of the jurisprudence of international criminal law on the very important issues raised, this time, in total agreement by the rarely concordant choruses of the Prosecution and the Defence.

58. The Defence and Prosecution have also submitted that irreparable prejudice will occur if leave is not granted to appeal the Gbao Decision. Since the Decision was delivered, the Accused Gbao has not attended trial proceedings. He has also chosen not to provide instructions to his counsel who continue to represent him in accordance with the Court's order.

59. This Chamber acknowledges that the conduct of the Accused has placed Defence Counsel in a difficult position since, as they have stated, they would normally be professionally embarrassed by the Accused's refusal to provide instructions which could, *inter alia*, serve in enhancing their cross-examination of Prosecution witnesses and eventually the examination-in-chief and re-examination of Defence witnesses. While the Chamber does note that the Accused has chosen not to recognise the Special Court and has accordingly decided neither to attend proceedings nor to instruct Counsel, it accepts that irreparable prejudice may arise in these circumstances if leave to appeal were not granted.

60. In conclusion, therefore, the Chamber finds that both the exceptional circumstances and the irreparable prejudice prongs of the test for leave to file an interlocutory appeal have been met in this Application.

²⁸ *Prosecutor v. Kallon*, Case No. SCSL-2004-15-PT, *Prosecutor v. Norman*, Case No. SCSL-04-14-PT, and *Prosecutor v. Kamara*, Case No. SCSL-2004-16-PT, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004.

²⁹ Prior version of Rule 73(B) of the Rules of Procedure and Evidence of the ICTY.

FOR THESE REASONS:

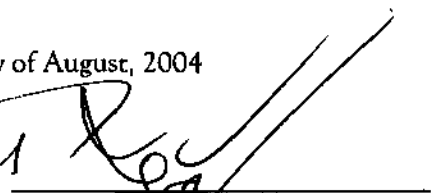
THE TRIAL CHAMBER ALLOWS THIS APPLICATION AND ACCORDINGLY

Grants the Defence leave to file an interlocutory appeal against Gbao - Decision on Application to Withdraw Counsel dated 6 July 2004.

Done at Freetown this 4th day of August, 2004

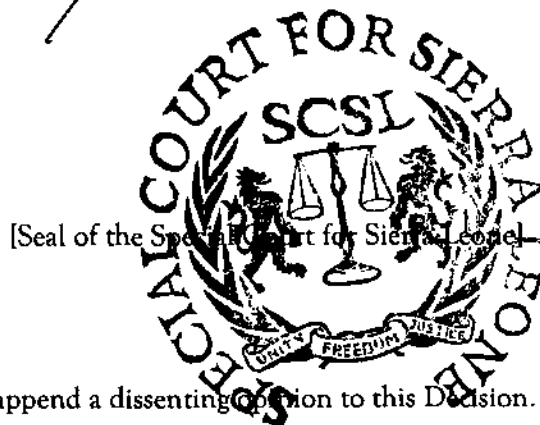


 Hon. Judge Pierre Boutet



 Hon. Judge Benjamin Mutanga Itoe

Presiding Judge,
 Trial Chamber



Hon. Judge Thompson will append a dissenting opinion to this Decision.

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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

Before: Hon. Judge Benjamin Mutanga Itoe, Presiding Judge
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Registrar: Robin Vincent

Date: 7 September 2004

PROSECUTOR Against Issa Hassan Sesay
Morris Kallon
Augustine Gbao
(Case No.SCSL-04-15-T)

DISSENTING OPINION OF JUDGE THOMPSON ON DECISION ON APPLICATION FOR LEAVE TO APPEAL GBAO - APPLICATION TO WITHDRAW COUNSEL

Office of the Prosecutor:
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SPECIAL COURT FOR SIERRA LEONE	
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DISSENTING OPINION OF JUDGE BANKOLE THOMPSON¹

1. With the greatest respect to my learned Brothers, the Hon. Benjamin Mutanga Itoe, Presiding Judge and the Hon. Judge Pierre Boutet, the Decision to grant leave in this matter to the Defence to file an interlocutory appeal against the Chamber's Decision on the Third Accused's application to withdraw his Counsel from further representing him in this case is seriously flawed for the reasons articulated in the succeeding paragraphs.

2. My primary concern is that the issue which purports to be the legal foundation of the instant application is a glaring and patent mis-characterisation of the actual issue that came up before the Trial Chamber for determination on 6 July 2004. The purported issue which is the basis of the instant application is stated as the right to legal representation and the right to defend oneself. As the records show,² the issue that fell to be determined by the Trial Chamber on 6 July 2004 was whether or not to grant the Third Accused's application not to allow any legal representation on his behalf including his present lawyers in that he did not recognize the Special Court on the grounds that the Court is illegal and political in nature.

3. At no time did learned Counsel for the Third Accused, on behalf of his client, or the Third Accused himself in person, expressly or impliedly, seek leave of the Chamber to be granted the right of self-representation. Neither of these rights was in issue before the Chamber as the main basis for the application or even collaterally or tangentially. It, therefore, defies logic and common sense to suggest that the right of legal representation was in issue in the face of the Third Accused's own unambiguous and emphatic denunciation of the Court as an illegal and a political entity.

4. By parity of reasoning, it is disingenuous to proffer that an accused person who avows his non-recognition of the Court before which he is indicted and protests the legality of the said Court is, by some curious twist of logic, asserting a right to legal representation or self-representation. It is also an example of convoluted legal thinking to suggest that a Court confronted with an issue of withdrawal

¹ On 4 August 2004, the majority of the Trial Chamber rendered its Decision on Application for Leave to Appeal Gbao - Decision on Application to Withdraw Counsel ("Decision"), granting leave to appeal the Decision on Application to Withdraw Counsel of 9 July 2004. As already anticipated in the Decision, Hon. Judge Thompson is hereby appending his Dissenting Opinion thereto.

² *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, Transcripts of open session proceedings of 6 July 2004.

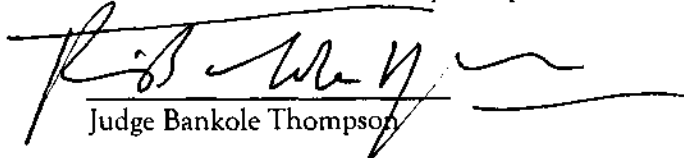


of legal representation should embark, as it were, upon an imaginary and speculative intellectual quest for various legal options open to the accused, and as it were, offer him the right of self-representation as a judicial carrot in return for his recognition of the legality and legitimacy of the Court. Courts do not have a mandate to try hypothetical issues.

5. To adopt such an approach as articulated in paragraph 4 above is, in my considered judgement, equivalent to a form of judicial condonation of political blackmail and a fiat to politically-motivated accused persons to hold the judicial process to ransom by threats of non-recognition and challenges to its legality, thereby making a mockery of the rule of law. It would seem to be an abuse by the Court of its process.

6. It seems to me that the application must fail for the reasons articulated in the foregoing paragraphs, since, in my judgement, the mis-characterisation of the legal issue forming the basis of the impugned Decision is fatal to the instant application. It must also fail for the additional reason that the Accused is in breach of Rule 45bis(B) of the Rules of Procedure and Evidence of the Special Court ("Rules") if it was ever his intention to apply for self-representation. Hence, it is not necessary for me to evaluate the said application as to its merits in terms of Rule 73(B) of the Rules.

Done at Freetown this 7th day of September 2004



Judge Bankole Thompson

Trial Chamber

