



### SPECIAL COURT FOR SIERRA LEONE

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### THE APPEALS CHAMBER

**Before:** Justice Emmanuel Ayoola, Presiding  
Justice Raja Fernando  
Justice Gelaga King  
Justice Renate Winter

**Registrar:** Robin Vincent

**Date:** 23 November 2004

<b>PROSECUTOR</b>	<b>Against</b>	Issa Hassan Sesay Morris Kallon Augustine Gbao (Case No.SCSL-04-15-AR73)
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### GBAO - DECISION ON APPEAL AGAINST DECISION ON WITHDRAWAL OF COUNSEL

Office of the Prosecutor:  
Luc Coté  
Lesley Taylor

Defence Counsel for Issa Hassan Sesay:  
Wayne Jordash  
Serry Kamal  
Sareta Ashraph

Defence Counsel for Morris Kallon:  
Shekou Touray

Defence Counsel for Augustine Gbao:  
Girish Thanki  
Andreas O'Shea  
John Cammegh

SPECIAL COURT FOR SIERRA LEONE
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23 NOV 2004
NAME <i>Neil Gibson</i>
SIGN <i>Neil Gibson</i>
TIME <i>17:00</i>

THE APPEALS CHAMBER of the Special Court for Sierra Leone (“Special Court” or “Court”);

SEIZED of the Appeal of Decision on Withdrawal of Counsel of 6 July 2004 (“Appeal”) filed on behalf of Augustine Gbao (“Accused”) on 15 September 2004;

NOTING the Notice and Grounds of Appeal of Decision on Withdrawal of Counsel filed on 1 September 2004;

NOTING the Order on Time Limits filed on 8 September 2004 in which the Appeals Chamber stated that it would decide the appeal without an oral hearing unless otherwise directed by the Presiding Judge;

NOTING the Prosecution Submissions to Gbao’s “Appeal from Decision on Withdrawal of Counsel of 6 July 2004” filed on 22 September 2004;

NOTING that the Defence did not file a Reply;

HEREBY DECIDES:

### I. PROCEDURAL HISTORY

1. On 6 July 2004, the Accused Gbao made a statement which was interpreted by the Trial Chamber as an application to withdraw his counsel on the grounds that he did not recognize the legitimacy of the Special Court.
2. In its Decision on Application to Withdraw Counsel of 6 July 2004, the Trial Chamber found that the Accused had not established exceptional circumstances as required by Rule 45 (E) of the Rules of Procedure and Evidence (“Rules”) in order to withdraw his Counsel, and that the Defence team must continue to represent the Accused to the finality of the proceedings.
3. On 7 July 2004, Gbao indicated in the form of a written declaration (“Declaration”) that he would not be attending hearings that day or on succeeding days.<sup>1</sup>

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<sup>1</sup> *Prosecutor v Sesay, Kallon and Gbao*, SCSL-2004-15-T, Exhibit 1.

4. The Trial Chamber issued an oral Ruling on Issue of the Refusal of Gbao to Attend Hearings on the same day, 7 July 2004, acknowledging that Gbao had expressly waived his right to be present at his trial. Its written reasons followed on 12 July 2004 ("Ruling").<sup>2</sup> The Trial Chamber stated that "Pursuant to Rule 60 (B) of the Rules, the Chamber also directs that Mr. Andreas O'Shea and other members of this 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".
5. On 9 July 2004, the Accused filed an Application for Leave to Appeal the Gbao Decision on Application to Withdraw Counsel. The Prosecution filed its Response on 19 July 2004. The Defence filed a Note on Pleadings on 21 July 2004 stating that it would not file a Reply because the Prosecution supported the Application.
6. On 23 July 2004, Gbao wrote a letter to the Trial Chamber stating that he did not want any legal Counsel to appear for him and attaching a document headed "Response to Trial Chamber Decision of the 6th July 2004".<sup>3</sup>
7. On 4 August 2004, the Trial Chamber rendered its Decision on Application for Leave to Appeal; Gbao - Decision on Application to Withdraw Counsel ("Decision on Application for Leave to Appeal"), granting the Defence leave to file an interlocutory appeal against the Decision on Application to Withdraw Counsel (Judge Thompson dissenting).
8. On 1 September 2004, the Defence for Gbao filed its Notice and Grounds of Appeal of Decision on Withdrawal of Counsel of 6 July 2004.
9. On 8 September 2004, the Appeals Chamber issued an Order on Time Limits for the filing of full submissions in the appeal.
10. On 15 September 2004 the Defence filed its Submissions on Appeal from Decision on Withdrawal of Counsel of 6 July 2004.
11. On 22 September 2004, the Prosecution filed its Submissions to Gbao's "Appeal from decision on Withdrawal of Counsel of 6 July 2004".

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<sup>2</sup> *Prosecutor v Sesay, Kallon and Gbao*, SCSL04-15-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.

<sup>3</sup> Attached as exhibits to Decision on Application for Leave to Appeal, SCSL04-15-T, 7519-7526.

12. On 23 September, Court Management provided the Appeals Chamber with the documents comprising the Index on appeal by e-mail.
13. The Defence did not file a Reply within the time limit.

## II. BACKGROUND FACTS

14. The background facts taken largely from the Trial Chamber's Decision on Application for Leave to Appeal are as follows:
  15. During the first day of the trial on 5 July 2004, following the completion of the opening statement by the Prosecutor, Counsel for Gbao first expressed the intention of the Accused to make an opening statement to the Court but not pursuant to Rule 84 of the Rules.
  16. When told by the Trial Chamber that the right could only be exercised pursuant to Rule 84 which entails the Accused being put to his election, namely, to make an opening statement after the Prosecution's opening statement and lose his right to do so at the beginning of the presentation of his evidence, Counsel indicated that the request to make an opening statement was being sought under Rule 84 of the Rules.
17. Rule 84 of the Rules of Procedure and Evidence provides as follows:

After 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 interest of justice.
18. The Chamber granted the application, warning both Counsel and Accused to confine the statement to the provisions of Rule 84 and reiterated that each Accused would have to elect to make an opening statement either after the Prosecution's opening statement or at the opening of the Defence case. The Court further granted an adjournment until the following morning for the Accused to consult with his Counsel in order to affirm the Accused's desire to deliver an opening statement and that the contents thereof would comply with the provisions of Rule 84.

19. During the hearing held the morning of 6 July 2004, Counsel for the Accused confirmed the Accused's intention personally to proceed with a brief opening statement. Once again, the Trial Chamber warned the Accused to confine his statement within the plain scope and reading of Rule 84 and allowed the Accused to proceed.
20. Despite these warnings of the Trial chamber, the Accused in his statement persistently asserted that he considered the Court to be of a political nature, thereby falling completely outside the scope of Rule 84 of the Rules. Once again, the Trial Chamber warned the Accused to refrain from making statements with a political connotation. After several interventions and observing that the Accused resolutely persisted in making a political statement which is outside the scope of Rule 84, the Trial Chamber decided to stop him from proceeding further.
21. Reacting to comments from the Accused, Counsel applied that the matter be stood down for five minutes to permit a discussion with his client. This was granted by the Trial Chamber. When the session recommenced, Counsel stated that he believed the Trial Chamber should hear representations from the Accused. When he was provided with the opportunity to address the Trial Chamber, the Accused stated that he had decided not to recognize this Court any longer and wanted to withdraw his defence counsel.
22. His exact words as contained in the transcripts are as follows:

Let me hasten to tell the people who set up the Special Court - the countries forming the Special Court and the entire world that we, the indictees, now held as forerunners of the RUF organization for bearing the greatest responsibility, are not afraid of any court system that constitutionally carry the mandate of the people of Sierra Leone. But we are strongly against the manner in which the Special Court of Sierra Leone was established.<sup>4</sup>

23. After several exchanges between the Accused and the Bench, the Accused finally said:

So, I don't think that I can recognize the Special Court.... Let them try me .... Let them take me anywhere.<sup>5</sup>

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<sup>4</sup> SCSC04-15-T, Transcript, 6 July 2004, p. 7.

<sup>5</sup> Ibid, p.10.

24. Later in the course of the proceedings on the same date, Mr. O'Shea, Counsel representing the Accused, informed the Trial Chamber that the Accused wished to address the Chamber again "under Rule 17 of the Statute" and that the Accused was raising questions about his representation.<sup>6</sup> He elaborated further in the following words:

The position is that Mr. Gbao's position, and you have heard his position with regard to recognition of the Court and I am not going to go into that, but because of his position on that he now says that he does not wish to participate in these proceedings.<sup>7</sup>

25. The Accused himself said:

My position in this case is very simple and since my right under Article 17 had been denied, I have decided not to recognize 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.<sup>8</sup>

26. Later, the position of the Accused in the proceedings was clarified when the Presiding Judge stated to the Accused:

You have made an application to this Court, you say you don't want any lawyer to appear for you here any more. That is the application you have made.<sup>9</sup>

27. The Accused answered "Yes".

28. The Trial Chamber thereupon on 6 July 2004 delivered the Decision which is the subject of this appeal.

### III. SUMMARY OF DECISION ON APPLICATION TO WITHDRAW COUNSEL

29. The Trial Chamber decided, with reference to Articles 17(4)(d) and 45(E) of the Rules that "most exceptional circumstances" would need to be established in order to allow Defence Counsel to withdraw from the case at the start of trial and that no such circumstances had

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<sup>6</sup> Ibid, p. 15, lines 23-26.

<sup>7</sup> Ibid, page 26, emphasis added.

<sup>8</sup> Ibid, page 34.

<sup>9</sup> Ibid.

been advanced. In particular, Gbao had stated that he wanted his counsel to withdraw on the basis that he (Gbao) did not recognize the legitimacy of the Special Court which was not, according to the Trial Chamber, an “exceptional circumstances” under Rule 45(E). Thus, the application was denied.

#### IV. DEFENCE GROUNDS OF APPEAL

30. The Defence grounds of appeal are as follows:

- a) The Trial Chamber erred in addressing the issue as one of withdrawal of counsel under Rule 45(E) rather than as an application not to have counsel.
- b) The Trial Chamber erred in not having regard to the fundamental nature of the right to defend oneself in Article 17 of the Statute.
- c) The Trial Chamber failed to apply measures that were necessary and proportional for the protection of a fair trial without denying the Accused his freedom to dispense with representation or to take into account the problems connected with a hostile lawyer-client relationship.
- d) The Trial Chamber erred in failing to hear counsel for the Accused and co-accused before ruling on Gbao's application.
- e) The Trial Chamber failed to consider that counsel issues are first within the discretion of the accused, second within the discretion of counsel and finally within the discretion of the principal defender.
- f) The Trial Chamber erred in treating Gbao's application for self-representation differently from Norman's application for self-representation<sup>10</sup> without giving reasons for distinguishing the two cases when both were brought by the accused rather than being applications by counsel to withdraw.
- g) The Order to counsel to continue to represent the accused even in the absence of authority and instructions from the client requires counsel to do the impossible.

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<sup>10</sup> See *Prosecutor v Norman, Fofana and Kondewa*, 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 (Norman Decision on Self-Representation”).

- h) The Trial Chamber failed to have regard to the public image that would be created by pretending that the Accused is properly represented.

## V. DEFENCE SUBMISSIONS

31. The Defence elaborates upon its grounds of appeal as follows:

- i) The test to be applied when considering the question whether counsel may withdraw from a case or whether an accused may choose to have or not to have counsel are different. Where counsel applies to withdraw the test is one of 'most exceptional circumstances' under Rule 45(E). The test for permitting an accused person to decide whether or not to have counsel must be different, particularly since the right to choose whether to have counsel is a minimum guarantee. Even if Rule 45 had been applicable, the Trial Chamber applied the test incorrectly and should have afforded its own interpretation to Article 17 of the Statute providing for the right to have or not have counsel and devised a test based on general principles of law and the object of the right. Further, even if it were clear that Gbao did not intend actively to appear and defend himself, this would not justify reliance on an incorrect Rule.
- ii) The Trial Chamber failed to consider the right not to have counsel and the right to defend oneself, made no finding on whether it was dealing with a case of self-representation, and/or misunderstood the meaning and import of the right to self-representation. The Accused may waive his right to counsel and the question whether he intends actively to defend himself is a separate question which does not affect his right not to be represented, this being a decision for him alone. The right to self-representation is in any case not conditional on appearance or active participation in court and should be understood as essentially the same as the right not to have counsel. Self-representation is the opposite of having legal representation and is a right to choose between two alternatives: representation or no representation. Thus, no distinction should be drawn between the situations where an unrepresented accused does not appear, where the unrepresented accused attends court but remains silent, or where the unrepresented accused actively defends himself but does so incompetently. Further, the Trial Chamber erred in not



exploring Gbao's actual intentions in the light of his statement "I stand to do defend myself". The Trial Chamber also erred in failing to have regard to the fundamental nature of the right to choose whether to have representation or even to consider whether the right was fundamental or a minimum guarantee.

- iii) The Trial Chamber should have considered options for preserving the fairness of the trial that would be proportionate such as appointing counsel to act on behalf of the court. Imposing counsel on an accused has damaging consequences such as: creating an assumption that the accused is properly represented so that the Court feels it has no need to actively ensure the rights of the accused in the same as for an accused who represent himself, and creating an assumption that counsel's acts necessarily reflect the wishes of the accused; placing counsel in a fictitious position; potentially creating a hostile relationship between the client and lawyer; potentially allowing the accused to play the lawyer off against the court; and placing the accused in a position whereby he is unable to challenge the acts of counsel as counsel has complete control over the case.
- iv) The Trial Chamber erred in ruling on Gbao's application before hearing from Counsel, and indeed from all parties including counsel for co-accused, on the appropriate course to be taken. Moreover, the Trial Chamber should have sought guidance from Counsel as to where its decision might place him personally and professionally.
- v) The issue of appointment, assignment or dismissal of counsel, in other words the lawyer-client relationship, is not one within the judicial province but is one within the discretion of the accused, counsel and the principal defender subject to the supervisory jurisdiction of the court. The Trial Chamber may take other measures for the maintenance of the integrity of the proceedings such as the appointment of *amici curiae* or standby counsel. While it is within the discretion of the judge whether to allow an accused to dismiss his counsel, this discretion is more a matter of review of the client's decision than the Court's prerogative and should be exercised exceptionally where there is no reasonable alternative for preserving the integrity of the proceedings.

- vi) The Trial Chamber erred in not explaining why it distinguished the Gbao case from the Norman case when in both cases the accused indicated they did not wish to be represented by counsel and in both cases the legality of the Special Court was raised in opening statements. Therefore the Trial Chamber's decision at a minimum fails to take into account its approach in Norman and at its highest violates Article 17(1) of the Statute. The absence of Gbao from the proceedings was not highlighted as a distinction but in any case does not constitute a legitimate distinction. Gbao absented himself after the decision was rendered and it is consequently unknown whether he would have done so had his request to dispense with counsel been granted. There is no reason why Gbao should not have standby counsel as opposed to legal representation.
- vii) Without authority or instructions it is impossible for counsel to represent an accused person. On the other hand, counsel appointed to act on behalf of the court as standby counsel or amicus could act appropriately in the context of a real mandate and this would force the court to take a more proactive role in ensuring the fairness of the proceedings.
- viii) The pretence that an accused is properly represented masks the reality of the situation to the public.

32. The Defence seeks the following relief:

- i) That the Accused be accorded his right not to have counsel representing him;
- ii) That the Trial Chamber be ordered to consider alternative measures for the protection of the integrity of the proceedings and the fairness of the trial such as the appointment of standby counsel; or
- iii) That the Trial Chamber reconsider its decision having heard counsel for the Defence and Prosecution and in the light of the findings of the Appeal Chamber.

## VI. PROSECUTION RESPONSE

33. The Prosecution submits that:

- i) The Accused's specific request remains unclear and even though it is capable of being characterized as one for self-representation, the Accused's statements and submissions are ambiguous. The Prosecution argues further that the confusion and disagreement over the nature of the application is reflected in the Trial Chamber's Decision on Application for Leave to Appeal and recommends sending the matter back to the Trial Chamber for further inquiry as to the nature of the application and appropriate disposition.
- ii) In relation to the first ground of appeal, the Prosecution agrees with the Defence that the Trial Chamber erred in applying Rule 45(E) and addressing the issue before it as one of withdrawal of counsel, as a literal reading of Rule 45(E) suggests that it only applies when counsel for the accused makes an application to withdraw from the proceedings. The Prosecution also agrees with the Defence that the Trial Chamber erred in applying the holding of *Prosecutor v. Barayagwiza*<sup>11</sup> as that case was one in which defence counsel made a formal application to withdraw from the proceedings. The Prosecution argues that the standard to be applied to the situation where an Accused attempts to dispense with legal representation must be different than the test to be applied where counsel applies to withdraw.
- iii) In relation to the second ground, the Prosecution agrees with the Defence that the actual issue before the Court is not a matter of withdrawal of counsel but rather one of the status and nature of the right to legal representation. However, the Prosecution does not agree that the right to self-representation equates to the right not to have counsel. According to the Prosecution, there are three distinct scenarios: (a) having a lawyer; (b) representing oneself; and (c) taking no part, and Accused has been ambiguous as to which one he seeks, thus in the interests of safeguarding the effective and fair administration of justice, the status and nature of the Accused's representation needs to be fully clarified.
- iv) In relation to the third ground, the Prosecution submits that had the Trial Chamber ruled that the Accused's application was one of self-representation, it should have considered three possible alternative measures to the withdrawal of counsel, namely

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<sup>11</sup> *Prosecutor v Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000.

self-representation, the appointment of a standby counsel, and the appointment of an amicus curiae, and that the failure to consider these options constituted an error.

- v) In relation to the fourth ground, while stating that the Defence failed to discharge its duty to ask to be heard on the matter, the Prosecution agrees with the Defence that the Trial Chamber would have benefited from the input of counsel for the Accused and co-accused before issuing its ruling.
  - vi) In relation to the fifth ground, the Prosecution contests the Defence assertion that the issue of appointment, assignment or dismissal of counsel is not in principle a matter within the judicial province, since an accused's right to choose his own representation, although fundamental, is not absolute, and the appointment, assignment or dismissal of counsel can be brought firmly within the judicial province when the integrity of the judicial process requires protection.
  - vii) In relation to the sixth ground, the Prosecution agrees that the Trial Chamber should have considered the Norman Decision on Self-Representation, either by distinguishing it or applying its principles.
  - viii) In relation to the seventh ground, the Prosecution simply states that its interest is to ensure that all of the accused receive a fair and expeditious trial and that permitting the trial to proceed without resolving the precise nature of the application may provide potential grounds for future appeals.
  - ix) The Prosecution states that the seventh ground does not warrant argument or comment.
34. The Prosecution submits that the Appeals Chamber should either overturn the Trial Chamber's decision and send the matter back for further inquiry as to the nature of the application, or, if the Appeals Chamber is convinced that the original application was for self-representation, it should order the Trial Chamber to consider alternative measures to protect the integrity, fairness and speediness of the proceedings.

## VII. APPLICABLE LAW

35. Article 17 of the Statute on Rights of the Accused provides:

1. All accused shall be equal before the Special Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. 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:
5. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
  - (a) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
  - (b) To be tried without undue delay;
  - (c) **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 or her in any such case if he or she does not have sufficient means to pay for it;**
  - (d) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
  - (e) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
  - (f) Not to be compelled to testify against himself or herself or to confess guilt.

[emphasis added]

36. Rule 45 provides in relevant part:

- (D) Any request for replacement of an assigned counsel shall be made to the Principal Defender. Under exceptional circumstances, the request may be made to a Chamber upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.

(E) Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances. In the event of such withdrawal the Principal Defender shall assign another Counsel who may be a member of the Defence Office, to the indigent accused.

37. Rule 45bis(B) states:

(B) If a suspect or an accused elects to conduct his own defence, he shall so notify the Registrar in writing at the first opportunity.

38. Rule 60 states:

(A) An accused may not be tried in his absence, unless:

- (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or
- (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.

(B) In either case the accused may be represented by counsel of his choice, or as directed by a Judge or Trial Chamber. The matter may be permitted to proceed if the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present.

## VIII. DELIBERATION

39. This is an appeal which could have been disposed of in a few short paragraphs but for the fact that the Defence and the Prosecution fell into error in their conception of the context in which the Trial Chamber's Decision on Application to Withdraw Counsel was delivered and did not pay due attention to that context.

40. The context in which the Trial Chamber delivered its decision has been narrated in the background facts but can be summarized again.

41. The Trial Chamber had before it an accused person who repeatedly expressed his refusal to recognize the court and backed up that refusal by persistent denial of the authority of the

Trial Chamber when it repeatedly directed him to conform with the Rules. Ultimately, the Accused not only refused to submit to the authority of the Court but tried to prevent anyone, including Counsel, from submitting to that authority on his account.

42. The Trial Chamber dealt with the situation that has arisen in its decision by answering the following questions:

- i. Did the refusal of the Accused to recognize the Court discharge his Counsel from responsibilities as counsel simply because the Accused wanted to withdraw his Defence Counsel on the basis that he, the Accused, did not recognize the Court?
- ii. In regard to the situation that had arisen, what was best to be done in the interests of justice?

43. It was evident that the Trial Chamber appreciated that there was nothing it could do about the Accused's refusal to recognize the Court. It was thus that it limited its decision to the request of the Accused that as a consequence of his not recognizing the Special Court, no representation of him by counsel should be permitted or recognized by the Trial Chamber.

44. The Trial Chamber may appear, at first blush, to have erred in relying on Rule 45(E) and thereby treating the matter as if it had before it an application by counsel to withdraw his representation. However, reference to exceptional circumstances can be understood as emphasizing that the Accused was not in a position to request or instruct that his counsel withdraw from the case without showing good cause. The Trial Chamber was correct in reaching the conclusion that refusal to recognize the Court did not constitute good cause.

45. Reference to Rule 45(E) seems to be supported by the ICTR Trial Chamber decision in *Prosecutor v. Barayagwiza* of 2 November 2000<sup>12</sup> which our Trial Chamber referred to. It is to be noted, though glossed over by the Defence and the Prosecution, that in the *Barayagwiza* case both the accused and the lawyers asked for withdrawal of the lawyers' mandate. With regard to the request of the accused that Chamber had this to say in response to Mr. Barayagwiza's arguments in which he challenged the ability of the ICTR to render

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<sup>12</sup> Decision on Defence Counsel Motion to Withdraw.

independent and impartial justice and that that was good reason for his instruction that his lawyers ceased to represent him at the trial:

The Chamber finds it obvious that Mr. Barayagwiza's arguments do not constitute exceptional circumstances as required under Rule 45(I). Rather, Mr. Barayagwiza is merely boycotting the trial and obstructing the course of justice. **As such the Chamber shall not entertain the request of the accused for withdrawal of his counsel, on this basis.**<sup>13</sup>

46. In regard to the interests of justice, given the situation that had arisen, the Special Court Trial Chamber said in its Decision on Application to Withdraw Counsel:

It is clear from examining all of the circumstances of this case that the interest of justice would not be served by allowing Mr. Gbao to be unrepresented before this Court. The Trial Chamber accordingly takes the position that it must safeguard the rights of the accused and the integrity of the proceedings before the Court by insisting that Mr. Gbao should continue to be represented by the Counsel that have represented him throughout these proceedings. We hold in this regard that an accused person cannot waive his right to a fair and expeditious trial whatever the circumstances.<sup>14</sup>

47. The statements and conduct of Mr. Gbao at the trial manifest, unmistakably, his settled determination not to recognize the Special Court. This can be reasonably interpreted as an unwillingness to submit to its jurisdiction. The case was thus not at all one of self-representation, as both the Defence and the Prosecution would want us to perceive it, but one of refusal of an accused to participate in the trial before a court which he refused to recognize.

48. On 7 July 2004, the day immediately after the decision of the Trial Chamber, the Accused, rather than notifying the Registrar of his election to conduct his own defence pursuant to Rule 45bis(B), issued a Declaration that was in consonance with his earlier position before that Chamber and that put the reason for his request that he have no representation beyond doubt. The Declaration reads thus:

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<sup>13</sup> Ibid, para. 16, emphasis added.

<sup>14</sup> Decision on Application to Withdraw Counsel, para. 15.



1. I, Augustine Gbao, wish to state the following:
  - (i) I do not recognize 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 any 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.

Paragraphs (i), (ii) and (iii) of the Declaration leave no room for speculation as to the position of the Accused, albeit erroneously taken, in regard to the Court and in regard to his trial by the Trial Chamber as well as to the reason why he requested that the services by his legal representatives be dispensed with.

49. Judicial proceedings are not undertaken in a world of speculation or make-believe, nor would a court create an imaginary ambiguity where none exists. There is no room for doubt that the Accused had on 6 July 2004 made clear his refusal to recognize the Court and had on 7 July 2004 confirmed this refusal and his non-participation in the trial. In the light of these facts, to regard the issue before the Trial Chamber as one of the right to legal representation is to create an imaginary scenario totally divorced from the circumstances and from the plain and express intention of the Accused. A claim to a right to legal representation or self-representation before a tribunal cannot be implied from a persistent posture of non-recognition of the tribunal.

50. In the context in which the Trial Chamber delivered its decision, the issues before that Chamber were not, as the Defence would want this Chamber to hold, as to any of the following:

- The right of the Accused to choose whether to have counsel.
- The right of the Accused not to have counsel.

- The right of the Accused to defend himself.

51. In this Appeal, the Defence and, to a large extent, the Prosecution, proceeded on an erroneous footing in arguing as if recognition of these rights (or failure to recognize them) was the issue.

52. Where an accused is present in court but refuses to participate in the proceedings because he does not recognize the court and requests that his counsel do not participate for the same reason, the court should treat the accused as an absent accused and exercise its powers as if Rule 60 applied. Applying that Rule it would be inconsistent with the position taken by such accused to expect the accused to proffer a choice to be represented, in terms of Rule 60(B), "by counsel of his choice". The appropriate thing for the court to do in such circumstances is to ensure that the accused is represented, also in terms of Rule 60(B), as directed by the Trial Chamber. In these circumstances, the Trial Chamber, comprising professional judges, proceeds in the knowledge and awareness that counsel is acting without instructions from the accused when it directs that counsel continue to provide representation whether as 'assigned counsel' or 'court appointed counsel'. While Rule 60(B) could have been drafted to indicate various options open to the Judge or Trial Chamber in terms of the type of representation, this is left to the Judge or Trial Chamber's discretion.

53. From what has been said the conclusion is clear that in substance the Trial Chamber's Decision on Application to Withdraw Counsel, properly understood in the context in which it was made, is correct.

54. In the light of the above, the questions raised by some of the grounds of appeal, namely:

- Whether the Trial Chamber erred in failing to hear counsel for the accused and co-accused before ruling on Gbao's application;
- Whether counsel issues are within the discretion of the accused, counsel and Principal Defender;
- Whether Gbao's application was treated differently from Norman's application for self-representation;

are inconsequential.

55. It is pertinent to observe that in this case the Accused was the applicant and that his counsel had stepped aside for the Accused to make his request. The interests of the co-accused were not involved. The overriding considerations in the circumstances that arose were the interests of justice and fair hearing. The circumstances were not purely ones of "counsel issues" to be left to the discretion of counsel. A decision of a tribunal which is correct will not be set aside merely because it was arrived at without first seeking "guidance" of counsel.

56. The relief sought by the Defence had the appeal succeeded is as follows:

- 1) That the accused be accorded his right not to have counsel representing him;
- 2) That the Trial Chamber be ordered to consider alternative measures for the protection of the integrity of the proceedings and the fairness of the trial such as the appointment of standby counsel; or
- 3) That the Trial Chamber reconsider its decision having heard counsel for the defence and prosecution and in the light of the findings of the Appeal Chamber.

57. As to the first form of relief, the rights which an accused has in regard to the conduct of his defence in terms of Article 17(4)(d) of the Statute are: (i) to defend himself or herself in person; or (ii) to defend himself or herself through legal assistance of his or her own choosing; and (iii) to have legal assistance assigned to him or her, in any case where the interests of justice so require.

58. The first two are within his choice but not the third. The law does not recognise a right "not to have counsel assigned" to an accused who has refused to exercise the choice available to him under (i) and (ii).

59. In regard to the second form of relief sought, it is evident that subsequent events have overtaken the granting of such relief. Since the decision appealed from was delivered on 6 July 2004, the Accused has issued the Declaration mentioned and quoted in paragraph 48 and has, as found by the Trial Chamber, absented himself from the trial. The Trial Chamber on 7 July 2004 exercised its power under Rule 60(B) by a Ruling which has not been appealed. The representation of the Accused from the date of that Ruling is now pursuant to the directive in the Ruling, that is to say, that "Mr. Andreas O'Shea and other

members of his team will continue to represent the Third Accused."<sup>15</sup> That Ruling made on 7 July 2004 is not the subject of this appeal and there is nothing to show that it has been vacated. In the result, the second form of relief sought is inappropriate in the circumstances.

60. As to the alternative form of relief, there is no need for the Trial Chamber to reconsider its Decision on the Application to Withdraw Counsel which was correctly made and which, in any event, has been superseded by subsequent events leading to the unchallenged directive of the Trial Chamber made on 7 July 2004.

### IX. DISPOSITION

61. In conclusion, this Appeal appears to be merely an academic exercise. It lacks merit and it is dismissed.

Done at Freetown this twenty-third day of November 2004

*Justice Ayoola*      *Justice Fernando*      *Justice King*      *Justice Winter*

Justice Ayoola  
Presiding

Justice Fernando

Justice King

Justice Winter



<sup>15</sup> Ruling, para. 12(2).