SPECIAL COURT FOR SIERRA LEONE
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THE APPEALS CHAMBER

Before: Justice Raja Fernando, Presiding
Justice Emmanuel Ayoola,
Justice George Gelaga King
Justice Geoffrey Robertson, QC
Justice Renate Winter

Interim Registrar: Mr. Lovemore Munlo, SC

Date: 8th December 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-2004-16-AR73)

DECISION ON BRIMA-KAMARA DEFENCE APPEAL MOTION AGAINST TRIAL CHAMBER II MAJORITY DECISION ON EXTREMELY URGENT CONFIDENTIAL JOINT MOTION FOR THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL FOR ALEX TAMBA BRIMA AND BRIMA BAZZY KAMARA

First Respondent:
The Registrar

Second Respondent:
The Principal Defender

Court Appointed Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Court Appointed Counsel for Brima Bazzy Kamara
Andrew K. Daniels
Mohammed Pa-Momo Fofanah

THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice Raja Fernando, Presiding Judge, Justice Emmanuel Ayoola, Justice George Gelaga-King, Justice Geoffrey Robertson and Justice Renate Winter;

BEING SEISED OF "Brima-Kamara Defence Notice of Appeal" and of "Brima-Kamara Defence Appeal Motion Pursuant to Article II of the Practice direction for Certain Appeals Before the Special Court" filed on 2 September 2005 on behalf of Alex Tamba Brima and Brima Bazzy Kamara (the "Appeal") pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("Rules");

CONSIDERING the "Defence Office Response to Brima-Kamara Defence Appeal Motion Pursuant to Article II of the Practice Direction for Certain Appeals Before the Special Court" filed by the Defence Office on 9 September 2005 (the "Defence Office Response") and its Corrigendum of 13 September 2005;

CONSIDERING the "1st Respondent's Response to the Interlocutory Appeal of Alex Tamba Brima and Brima Bazzy Kamara" filed by the Registrar on 12 September 2005 (the "Registrar's Response");

CONSIDERING the "First Respondent's Additional Motion to the Interlocutory Appeal of Alex Tamba Brima and Brima Bazzy Kamara and the Response by the Principal Defender (the Second Respondent)" filed by the Registrar on 13 September 2005 (the "Registrar's Additional Motion");

CONSIDERING the "Second Respondent's Response to the First Respondent's Additional Motion to the Interlocutory Appeal of Alex Tamba Brima and Brima Bazzy Kamara and the Response by the Principal Defender (Second Respondent)" filed by the Principal Defender on 16 September 2005 (the "Principal Defender's Response to the Registrar's Additional Motion");

CONSIDERING "Brima-Kamara Joint Defence Reply to 1st Respondent's Response to the Interlocutory Appeal of Alex Tamba Brima and Brima Bazzy Kamara" filed on the behalf of Alex Tamba Brima and Brima Bazzy Kamara on 16 September 2005 (the "Reply");

NOTING the "Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to

Trial Chamber II for Clarification of its Oral Order of 12 May 2005" rendered by Trial Chamber II on 9 June 2005 (the "Impugned Decision");

NOTING the "Decision on Brima-Kamara Application for Leave to Appeal from Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel" rendered by Trial Chamber II on 5 August 2005 (the "Decision Granting Leave to Appeal the Impugned Decision");

NOW DETERMINES THIS APPEAL ON THE BASIS OF THE WRITTEN SUBMISSIONS OF THE PARTIES

I. PROCEDURAL HISTORY OF THIS APPEAL

1. This is an appeal by Alex Tamba Brima and Brima Bazzy Kamara ("the Appellants") against the Impugned Decision in which their motion for the re-assignment of Kevin Metzger and Wilbert Harris as their Lead Counsel was dismissed.

2. The procedural history in this matter is set out in the Impugned Decision and does not need to be repeated here in detail. The following summary is sufficient for present purposes. By an oral order of 12 May 2005[1] and a written decision filed on 20 May 2005, the Trial Chamber permitted former Lead Counsel for the Appellants to withdraw from the case to which they had been assigned on the grounds of the threats to former Lead Counsel and their families.[2] By a Motion filed on 24 May 2005, the Appellants sought an Order: (i) that the Registrar re-assign former Lead Counsel; (ii) to the Acting Principal Defender to immediately enter into a legal services contract with former Lead Counsel; (iii) that Justices who re-confirmed the order not to re-appoint be recused from hearing he motion; (iv) declaring as null and void the decision of the Registrar not to re-assign Counsel; and (v) any other relief deemed fit and appropriate.[3] Trial Chamber II dismissed the Motion to Re-appoint finding that it was frivolous and vexatious. On 5 August, the Trial Chamber allowed an appeal by the Appellants and they filed notice of appeal on 2 September 2005.

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[1] *Prosecutor v. Brima, Kamara, Kanu,* T. 12 May 2005, 2.00 p.m., lines 13-16 ("Oral Order Permitting Withdrawal").
[2] Decision on the Confidential Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, 20 May 2005.
[3] Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Former Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, Pursuant to Articles 17(4)(C) and 17(4)(D) of the Statute of the Special Court for Sierra Leone and Rule 54 of the Rules of Procedure and Evidence and the Inherent Jurisdiction of the Court, filed on 24 May 2005 ("Motion to Re-Appoint").

II. NOTING THE SUBMISSIONS OF THE PARTIES

3. The Impugned Decision dismissed the Motion filed by the Defence for Brima and Kamara (the "Appellants") on 24 May 2005 for the re-appointment of their respective Lead Counsel as "frivolous and vexatious" and refused the following relief prayed for, namely (a) an Order to the Registrar to ensure that Counsel Metzger and Harris are re-assigned as Lead Counsel for Brima and Kamara; (b) an Order to the Acting Principal Defender to immediately enter into a legal services contract with the two Counsel; (c) that the Judges who reconsidered not to re-appoint the two Counsel as indicated in a letter from the Registrar's Legal Adviser recuse themselves from hearing the Motion; (d) an Order to declare as null and void the decision of the Registrar not to re-assign Counsel which was made without legal or just cause; (e) a public and open court hearing of the Motion and Cross Motion filed by the Principal Defender.

A. The Appeal Motion:

4. After submitting that the current appeal fully fulfils the requirements of the Practice Direction for Certain Appeals, the Defence raises the following grounds of appeal:

(i) The Defence refers to a decision of the Registrar refusing the re-appointment of former Lead Counsel and submits that it amounted to a breach of the right of the Appellants to choose their own Counsel. The Defence submits that the Registrar might only refuse the Appellants' wishes regarding the appointment of their Counsel on reasonable and valid grounds, which were lacking in the current case. The Defence further submits that the Trial Chamber had no power or authority to interfere in the statutory right of an accused to choose his or her assigned Counsel by giving directives that are contrary to that choice to the Registrar.

(ii) The Defence challenges Trial Chamber II decision not to exercise its inherent jurisdiction to judicially review the administrative actions of the Registrar and the Acting Principal Defender. According to the Defence, the Trial chamber erred in law by stating that it had no power to order the Acting Principal Defender to enter into a Legal Services Contract with the Counsel.

(iii) The Defence further challenges the denial of an order for a public hearing on its application. The Defence submits that Rule 73(A) gives the Trial Chamber the power and discretion to hear motions in open court and that the Trial Chamber misinterpreted this Rule in a way which erodes the rights of the Appellants under Article 17 of the Statute.

(iv) The Defence submits that the Trial Chamber erroneously considered its Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara of 24 May 2005 (the "Motion to Re-Appoint") as a Motion to Withdraw Counsel under Rule 45(E), and therefore dismissed it as "frivolous and vexatious", when it was filed pursuant to Rule 54, Article 17(4)(d) and the inherent power of the Court.

(v) The Defence further submits that that the Trial Chamber erred in law and/or in fact considering the Motion to Re-Appoint as a continuation or extension of the earlier application to Withdraw Counsel under Rule 45(E) and that this confusion prevented it from considering the merits of the Motion to Re-Appoint.

(vi) The Defence submits that the Trial chamber erred in law and/or in fact by considering that former Lead Counsel were not eligible to be re-appointed since they were no longer on the list of qualified Counsel required to be kept under Rule 45(C), when their removal was effected by the Registrar when the Motion to Re-Appoint was pending judicial consideration by the Trial Chamber.

(vii) Finally, the Defence submits that the Trial Chamber erred in law and/or in fact by ruling that there were no grounds for submitting that any Judge recuse himself or herself, when, according to Justice Sebutinde's observations in her dissenting opinion, the two other Justices expressed their preference or otherwise for Counsel, thereby giving an impression of partiality, bias and unsolicited and unwarranted interference with the statutory rights of the Appellants.

5. For the foregoing reasons, the Defence prays the Appeals Chamber to (a) make a declaration that refusal of the Registrar and the Trial chamber to re-appoint Counsel Metzger and Harris as Lead Counsel amounted to a violation of the statutory rights of the Accused under Article 17(4)(d) of the statute; (b) make a declaration that the Registrar's

decision against the re-assignment of Counsel Metzger and Harris and the removal of their names from the list of eligible Counsel was *ultra vires* and null and void; (c) order the reinstatement of Counsel Metzger and Harris on the list of qualified counsel; (d) declare that the Trial Chamber has both the inherent jurisdiction and the power to review the Registrar's decision not to re-assign Counsel Metzger and Harris, as well as the Registrar's decision to remove their names from the list of qualified Counsel; (e) declare that Justices Doherty and Lussick, having advised the Registrar against the re-appointment of the two Counsel, should have recused themselves from hearing the Motion on their re-appointment; and (f) declare that the Trial Chamber erred in law by not considering the Motion before it on its merits as a separate and distinct application.

B. Defence Office's Response:

6. The Defence Office supports the ground tendered by the Defence in its Appeal by adding the following submissions:

(i) On the first ground of appeal, the Defence Office submits that, although the right of the Appellants to Counsel of his own choosing is not absolute, if the withdrawn Counsel fulfil the criteria for eligibility to be placed on the list of qualified Counsel, have a good rapport with their client, and are knowledgeable about their case, they should, in the interest of justice, have been re-assigned considering the stage at which the case has reached.

(ii) On the Second Ground of Appeal, the Defence Office submits that the Trial Chamber could, as did Trial chamber I in a former Decision in the *Brima* case,[4] have exercised its inherent jurisdiction to entertain a motion on the ground of denial of request for assignment of Counsel and to prevent a violation of the rights of the accused.

(iii) On the Third Ground of Appeal, the Defence Office admits that the motion is not a hearing *per se*, but submits that it was brought during the process of trial and fits within the precincts of Article 17(2) of the Statute. The Defence Office further submits that the application for a public hearing was made upon the discovery that the Registry

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[4] *Prosecutor v. Brima*, Case No. SCSL-2003-06-PT, Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal services Contract for the Assignment of Counsel, 6 May 2004 (the "6 May 2004 Decision in the *Brima* case").

had de-listed both Lead Counsel from the roll of eligible Counsel before the Special Court, and that the Trial Chamber erroneously considered that the request for public hearing should not have been made within the Reply, when it did not constitute a claiming for additional relief. The Defence Office submits that the Article 17(2)(d) guarantee of the right to a public hearing should prevail Rule 73(A) provision that the Trial Chamber shall rule interlocutory Motions based solely on the written submissions of the parties unless it is otherwise decided.

(iv) On the Fourth and Fifth Grounds of Appeal, the Defence Office submits that the Trial Chamber erroneously considered the Motion to Re-Appoint as a Request for review of its earlier decision on Motion for Withdrawal filed by their former Counsel and, consequently, had no regard to the request of the Accused to have their withdrawn Counsel re-assigned, which it dismissed as "vexatious and frivolous" and without *bona fide* motive. The Defence Office emphasises that the Accused genuinely wanted their Lead Counsel to be re-appointed and that the Motion was filed under Rule 54 and 73(a) of the Rules and the inherent jurisdiction of the Court.

(v) On the Sixth Ground of Appeal, the Defence Office challenges the Trial Chamber's finding that the Registrar has the power to remove Counsel from the list of eligible Counsel on the basis of "security concerns" and stresses that the role of assignment, withdrawal and replacement of Counsel is essentially a role and function of the Principal Defender. The Defence Office further submits that the "security concerns" on which the removal was based were not investigated by the Registrar before taking its decision and are not even prescribed by the Rules or the Directive on the Assignment of Counsel. The Defence Office notes that the Acting Registrar requested the Deputy Principal Defender to strike Counsel off the list and that his request was declined on the grounds that the matter was sub-judice. The Defence Office thus emphasises that the Lead Counsel were struck off the list by the Acting Registrar without the consent and despite the legal advice from the Defence Office.

(vi) On the Seventh Ground of Appeal, the Defence Office supports the Appeal on the ground of extra judicial interference in the re-appointment of Counsel by Justices Doherty and Lussick.

7. In addition to the above Grounds of Appeal, the Defence Office adds the following "Additional Grounds and Arguments":

(i) Firstly, the Defence Office submits that the Trial Chamber erred in endorsing the general submissions of the Registrar concerning his administrative role and the lack of statutory authority of the Principal Defender. The Defence Office submits that it was mandated under Rule 45 and vested with legal duties to assign Counsel, to compile and maintain the list of qualified Counsel under Rule 45(C), to place Counsel on the List if they meet the criteria stipulated in Rule 45(C) and to deal with matters pertaining to their removal or withdrawal. It further submits that, while the Registrar is expected to exercise administrative and financial oversight over it and to give its logistical and other administrative support, he should not assume the function of the Defence Office or veto the decisions of its officials made in pursuance of its mandate. The Defence Office emphasises that it should exercise its functions independently of the Registrar and that, although a consultative process should be encouraged in practice, any attempt to interfere with these functions would be tantamount to an infringement upon the rights of the Accused. The Defence Office submits that, in the absence of the Principal Defender, it relied on the Deputy Principal Defender to carry on her task in an acting capacity, without this provisional vacuum becoming an occasion for the Registrar to arbitrarily take over the duties of the Defence Office.

(ii) The Defence Office challenges the Trial Chamber's finding that the Deputy Principal Defender went out of her way to undermine an order of the Trial Chamber or was unwilling to do her job or to follow the directions of the Registrar.

(iii) The Defence Office submits that the consultation between the Registrar and the Trial Chamber, which was conceived to be under Rule 33, was not notified to the Appellants nor their Counsel, when the matter was very crucial to their rights. The Defence Office relies on Justice Sebutinde's Dissenting Opinion to challenge the Registrar's submission that the representations he made to the Chamber were to clarify and inform himself of the view of the Trial Chamber on the order it made on the withdrawal of Counsel, when the issue at stake was not the withdrawal of Counsel but their re-assignment and, had it been the withdrawal, there was then no need to approach the Trial Chamber.

(iv) Finally, the Defence Office submits that the Trial Chamber erroneously leaned to the Registrar's submissions to the detriment of fairness, without elaborating on the applicability of the "reasonable and valid grounds" test to satisfy for denying the Appellants' request to have their Counsel reassigned, and without considering that the role of the Registrar to assign Counsel before the ICTR and ICTY is parallel to that of the Principal Defender before the Special Court.

8. In conclusion, the Defence Office supports the Relief sought by the Defence in the Appeal Motion and requests the Appeals Chamber to give direction on the role of the Defence Office in view of its Mandate pursuant to Rule 45 and its interaction with the Registrar with regard to the assignment and re-assignment of Lead Counsel for the Appellants.

C. Registrar's Response:

9. The Registrar opposes all the Grounds of Appeal, for the following reasons:

(i) On the First Ground of Appeal, the Registrar supports the finding made by the Impugned Decision that the Appellants have no absolute right to Counsel of their choosing and refers to the finding of the Oral Order Permitting Withdrawal of 12 May 2005 on the application for withdrawal of Counsel that "Lead Counsel with their present difficulties would not be capable of acting in the best interests of their clients". He further refers to the fact that both Lead Counsel applied to withdraw from the trial on the basis that they were not receiving full instructions from their clients and that they had received unspecified threats; this application was granted by the Trial Chamber on the basis that Counsel were not able to represent their clients to the best of their ability. The Registrar further submits that the Principal Defender acted reasonably within his powers under Rule 45(C) in refusing the request for the re-appointment of Counsel by the Appellants, particularly when there were no new circumstances.

(ii) On the Second Ground of Appeal, the Registrar submits that the Trial Chamber does not have the power to force parties to enter into a contract, but can only order parties to enter negotiations to enter into a contract. The Registrar submits that although the Trial Chamber has power to review administrative decisions of the Registrar and the Principal Defender when it affects the right of the Accused to a fair

trial under Article 17(4)(d) of the Statute, all the Trial Chamber can do is order the Principal defender to enter negotiations for a contract, but not simply order him to enter a contract.

(iii) As regards the Third Ground of Appeal, the Registrar challenges the Defence assumption that the right to a hearing in open Court is absolute and submits that reasons must be presented to the Trial Chamber as to why there should be an open Court hearing. The Registrar further recalls that, as mentioned in the Impugned Decision, the application for a hearing in open court was made in the Defence Reply and, as such, gave no opportunity to the Respondents to present submissions.

(iv) On the Fourth Ground of Appeal, the Registrar supports the finding by the Impugned Decision that the application was confusing because of the unclear pleading of the Appellants who cannot now complain that the Trial Chamber did not consider the basis of their argument under Rule 54.

(v) On the Fifth Ground of Appeal, the Registrar supports the finding by the Impugned Decision that the Motion was a backdoor attempt to review the original order of the Trial Chamber permitting Counsel to withdraw and challenges the Defence assumption that the Motion to withdraw and the Motion to Re-Appoint were separate.

(vi) On the Sixth Ground of Appeal, the Registrar submits that, after the Trial Chamber ordered the withdrawal of Counsel, the Acting Registrar decided to remove them from the list of qualified Counsel on the basis of unresolved security concerns that Counsel had raised in their application to withdraw, without even trying to seek the assistance of the Registrar to deal with these security issues and when they expressly refused to disclose the sources of the alleged threats. The Registrar submits that he is entitled to act immediately upon his authority and discretion to seek the removal of Counsel from the List of Qualified Counsel if their appointment raises concerns for the security of the court and the personnel within it.

(vii) On the Seventh Ground of Appeal, the Registrar submits that there were no grounds upon which to seek the recusal of Judges of the Trial Chamber. The Registrar submits that, pursuant to Rule 33(B), he is entitled to make oral or written representations to Chambers on issues arising in the context of a specific case which

affects or may affect the implementing of judicial decisions and that this regulation implies that Chambers can make comments on the matters raised by the Registrar. The Registrar states that his representation to Chambers in the case was to clarify and inform himself of the views of the Trial Chamber on the 12 May 2005 Order and was pursuant to Rule 33(B). The Registrar further submits that it was the inherent power of the Trial Chamber, acting in order to ensure the Appellants right to a fair trial, to express its view on the attempt to have Counsel re-assigned in contravention of the Order.

10. Consequently, the Registrar prays for the Appeals Chamber to dismiss the Appeal and refuse the relief sought.

D. Registrar's Additional Motion:

11. As regards the "Additional Grounds and Arguments Submitted by the Defence Office" in its Response, the Registrar submits that the Defence Office is not entitled to plead additional grounds outside the grounds of appeal filed by the Appellants, but could have sought leave to appeal and then filed its own grounds of appeal. The Registrar submits that this use of pleadings prevented the Registrar from responding to the additional Grounds raised by the Defence Office. The Registrar submits that the Additional Grounds raised by the Defence Office should not be considered by the Appeals Chamber and, should the Appeals Chamber consider these additional Grounds, the Registrar requests that he be given the opportunity to file a Response.

E. Defence Office's Response to the Registrar's Additional Motion:

12. The Defence Office submits that the Registrar's Additional Motion is not admissible for lack of legal basis because there was no original motion to which this Motion may be "additional", and because the Registrar failed to provide the statutory basis or the Rules under which he was proceeding. The Defence Office challenges the Registrar's characterisation of his statements as "Grounds of Appeal" and submits that its "additional grounds and arguments" were only intended to further articulate the Appellants Grounds 1, 5 and 6. As such, they should be construed in their very original literal meaning as valid points to raise in any appeal proceeding and any suggestive interpretation other than what the Defence Office intended them to mean is vigorously resisted. The Defence Office finally submits that the Registrar has been accorded a fair opportunity to present his arguments

in support of all the issues and matters pertaining to the Appeal and should not seek to enlarge that time frame and waste the resources of the Court.

F. Defence Reply:

13. In Reply, the Defence makes the following submissions:

(i) On the First Ground of Appeal, the Defence submits that it is disingenuous for the Registrar to deny the Appellants their choice of Counsel on the grounds that such a denial will ensure them an "effective defence" , more so when the Appellants have unequivocally expressed their own choice or preference for Counsel.

(ii) On the Second Ground of Appeal, the Defence submits that legal services contracts are more or less standard and leave little room for negotiation, apart for the composition of the team and the allocation of billable work hours, and that the Trial Chamber has an inherent jurisdiction to give orders which will have the effect of ensuring that a legal services contract is entered into between the Principal Defender and the Lead Counsel.

(iii) On the Third Ground of Appeal, the Defence submits that the Trial Chamber erroneously dismissed the application for a public hearing on the ground that it was an application for additional relief, when its principal purpose was to ensure that the Appellants receive a fair and public trial.

(iv) On the Fourth Ground of Appeal, the Defence submits that the Motion was properly made, *inter alia*, pursuant to Rule 54 and the inherent jurisdiction of the Trial Chamber and that non-submission of arguments under Rule 54 was not fatal to the Motion to Re-Appoint because of its inherent jurisdiction leg.

(v) On the Fifth Ground of Appeal, the Defence emphasises that the Motion to withdraw was brought by the Counsel, when the Motion to Re-Appoint was brought by the Appellants.

(vi) On the Sixth Ground of Appeal, the Defence submits that it is not within the power of the Registrar to de-list or remove the names of Counsel from the list of assigned Counsel without just and reasonable cause, especially when the matter is

pending before the Trial Chamber and that the de-listing of Counsel was an improper and pre-emptive strike designed to present the Trial Chamber with a *fait accompli* in respect of the re-appointment of Counsel.

(vii) On the Seventh Ground of Appeal, the Defence submits that by expressing their opinion against the re-appointment of the Lead Counsel, Justices Doherty and Lussick were not in a position to impartially consider the Motion to Re-Appoint and therefore aught to have properly recuse themselves. The Defence also challenges the Registrar's submission that Justice Sebutinde's Dissenting Opinion can not be relied upon because of the factual disputes among the Chamber.

14. The Defence finally questions the legal validity of Justice Doherty's Comment appended to a totally unrelated matter and takes issue with this procedure engendering a serious violation of the Accused rights to fair trial. The Defence submits that this "personal comment" was intended to unduly influence the Appeals Chamber and makes Justice Doherty a party to the Appeal, which she is not. The Defence therefore appeals the Appeals Chamber not to consider Justice Doherty's Comment.

III. DECIDES AS FOLLOWS

15. Before going to the merits, the Appeals Chamber deems it necessary to address several preliminary issues of procedure that are raised in this Appeal.

A. Preliminary Issues

16. The preliminary issues raised in this Appeal relate to:

a. Trial Chamber II's Leave to Appeal the Impugned Decision;

b. Time Limits for Filing Submissions in Appeal;

c. Admissibility of New Grounds and/or New Requests Submitted in Response or Reply Before the Appeals Chamber;

d. Admissibility of the Registrar's Additional Motion.

1. First Preliminary Issue: Trial Chamber II's Certification to Appeal the Impugned Decision

(a) Summary of Issue

17. In Section II of its Appeal Motion, the Defence submits that it perfectly fulfilled the requirements of the Practice Direction for Certain Appeals. Although the Appeals Chamber agrees with the submissions made by the Defence in support of this assertion, the question of admissibility of Appeals is not that simple and may raise problems from different aspects. In particular, this Appeals Chamber, concurring on this aspect with the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR")[5], has already admitted and exercised its jurisdiction on the standards for certification of appeal.[6] These standards are set out in Rule 73(B) of the SCSL Rules, which provides, in particular that decisions rendered on interlocutory motions are "without interlocutory appeal", but that leave to appeal may be granted "in exceptional circumstances" and "to avoid irreparable prejudice to a party" where the appellant applies for "within 3 days of the decision".[7]

18. The Appeals Chamber notes that the Appellants application for leave to appeal was filed on 14 July 2005[8] when the Impugned Decision is dated 9 June 2005. Although the Impugned Decision was appended a Dissenting Opinion filed by Justice Sebutinde on 11 July 2005[9], it is the view of the Appeals Chamber that the application for leave to appeal was out-of-time pursuant to Rule 73(B).

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[5] ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Case No. 98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 4-5.
[6] *Prosecutor v. Norman, Kondewa, Fofana*, Case No. SCSL-2004-14-A, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.
[7] Rules 73(B) of the SCSL Rules.
[8] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-14-T, Brima-Kanu Defence Application for Leave to Appeal from Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, 14 July 2005.
[9] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-14-T, Dissenting Opinion of the Hon. Justice Julia Sebutinde from the Majority Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005", 11 July 2005 ("Justice Sebutinde's Opinion Dissenting from the Impugned Decision").

(b) Applicable Standards

19. Rule 73(B) of the SCSL Rules of Procedure and evidence provides that application for leave to appeal interlocutory decision shall be filed within 3 days of the impugned decision. This Rule does not make any exception as regards the later filing of concurring/dissenting opinions appended to the impugned decision.

20. The Appeals Chamber takes this opportunity to emphasise that Article 18 of the Statute provides that judgements – or decisions – shall be accompanied by a reasoned opinion, which in practice embodies the reasoning of the decision, to which separate or dissenting opinions may be appended. Article 18 does not provide a time difference between the filing of the Decision and the filing of any concurring/dissenting opinion and the word "appended" clearly means that, in the spirit of the Statute, those opinions shall be filed at the very same time as the majority decision.

21. This interpretation is consistent with this Appeals Chamber's jurisprudence that the Statute and Rules of the Special Court should be interpreted according to the purpose of enabling "trials to proceed fairly, expeditiously and effectively".[10] An expeditious determination of interlocutory motions would be favoured by a time-limit running from the date of the appealed decision itself. At the same time, to compel the parties to decide whether or not they should request leave to appeal without knowing the entire considerations having led to the decision and the reason why a judge of the bench may dissent from the majority decision, would be unfair and would jeopardise the effective right of the parties to appeal interlocutory decisions. Although the applicant is not supposed to submit his/her grounds of appeal in his/her application for leave to appeal, concurring/dissenting opinions may bear on his/her decision to appeal the majority decision. The Appeals Chamber therefore finds that those concurring/dissenting opinions shall be filed together with the majority decision, in order to put the parties in a position to decide whether or not to apply for leave to appeal.

22. This interpretation is also confirmed by the common practice before other International Tribunals, which is to file, at the same time, the decision and its

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[10] *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-A, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 45; *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-A, Decision on Defence Appeal Motion Pursuant to Rule 77 (J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii), 23 June 2005, para. 28.

concurring/dissenting opinions, without any delay. This Appeals Chamber has always followed this practice of other International Tribunals on the filing of concurring/dissenting opinions.

23. Both Trial Chambers of the Special Court for Sierra Leone have on occasions departed from this common practice and have filed concurring/dissenting opinions after the related decision is rendered. A review of the Trial Chambers practice shows that the time difference between the filing of the decisions and the concurring/dissenting opinions has sometimes reached several months, thereby delaying substantially the proceedings and casting uncertainty on the opinion of Judges on important legal issues. The Appeals Chamber notes that this practice does not occur in every case and that some opinions are filed on the same day as the related decisions.

24. The Appeals Chamber deems it necessary to put an end to the regrettable practice that has developed in the Trial Chambers and clearly finds that, pursuant to article 18 of the Statute, the concurring/dissenting opinions that are not properly "appended" to the decision they relate to, and filed together with it, are not admissible and shall be disregarded.

25. This being said, the 3-day time limit for filing an application for leave to appeal under Rule 73(B) obviously runs from the date when the decision the applicant wishes to appeal is filed, without any exception on the ground of the later filing of a dissenting/concurring opinion being admissible.

(c) Application to the Current Case

26. In the instant case, the application for leave to appeal was filed more than three days after the appealed Decision was rendered. This application was therefore out of time and should have been dismissed accordingly. However, taking into account the fact that neither of the Respondents have objected to the Applicants' non-compliance with the Rules and the fact that the application for leave to appeal was filed on credence of a wrong precedent established by Trial Chamber I[11], and in accordance with the practice of the

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[11] Prosecutor v. Norman, Fofana, Kondewa, Case No. SCSL-2004-14-T, Decision on Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", 15 December 2004.

ICTR Appeals Chamber[12], the Appeals Chamber considers that it is nevertheless properly seized of the Appeal.

2. Second Preliminary Issue: Time Limits for Filing Submissions in Appeal

27. Another preliminary issue raised in this Appeal relates to the time limits for filing submissions in appeal.

(a) Summary of Issue

28. On 5 August 2005 Trial Chamber II granted the Appellants leave to appeal pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("the Rules"). On Friday 2 September 2005 at 5.13 p.m. the accused, Brima and Kamara, filed a Notice of Appeal. On 5th September 2005 at 1.40 p.m., Court Management emailed the Notice of Appeal to the Registry and other parties including the Appeals Chamber. On 5th September 2005, the paper copy was stamped as a true copy by the Chief of Court Management. On Friday 9 September 2005 at 4.59 p.m., the Office of the Defence filed a Response to the above Notice of Appeal. On Monday 12 September 2005 at 2.12 p.m., the Registrar (First Respondent) filed his Response to the above Notice of Appeal. On Tuesday 13 September 2005 at 3.50 p.m., the Registrar filed his Additional Motion to the Interlocutory Appeal. On 16 September 2005 at 12.00 noon, the Defence Office filed its Response to the Registrar's Additional Motion. On the same day at 2.43 p.m., the Defence filed its Reply.

29. The time frame of those filings raises an issue as regards to the time limits for filing submissions in appeal, which manifestly need some clarification and which the Appeals Chamber deems necessary to address.

(b) Applicable Standards

30. Rule 108(C) provides that "[i]n appeals pursuant to Rules 46, 65 and 73(B), the notice and grounds of appeal shall be filed within 7 days of the receipt of the decision to grant leave." This Rule is implemented by Article 11 of the Practice Direction for Certain

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[12] ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Case No. 98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 4-5.

Appeals before the Special Court (the "Practice Direction for Certain Appeals")[13] which provides that "[t]he appellant's submissions based on the grounds of appeal shall be filed on the same day as the Notice of Appeal...."

31. Article 12 of the Practice Direction on Certain Appeals, which also applies to leave conditioned appeals, further provides that "[t]he opposite party shall file a response within seven days of the filing of the appeal. This response shall clearly state whether or not the appeal is opposed, the grounds therefore, and the submissions in support of those grounds."

32. Those time limits shall be computed in accordance with Rule 7 (A) and (B), which provide as follows:

> (A) Unless otherwise ordered by a Chamber or by a Designated Judge, or otherwise provided by the Rules, where the time prescribed by or under the Rules for the doing of any act shall run from the day after the notice of the occurrence of the event has been received in the normal course of transmission by the Registry, counsel for the Accused or the Prosecutor as the case may be.
>
> (B) Where a time limit is expressed in days, only ordinary calendar days shall be counted. Weekdays, Saturdays, Sundays and Public Holiday shall be counted as days. However, should the time limit expire on a Saturday, Sunday or Public Holiday, the time limit shall automatically be extended to the subsequent working day.

33. On computation of time, Article 18 of the Practice Direction for Certain Appeals before the Special Court adds:

> In accordance with the Rules, the time-limits prescribed under this Practice Direction shall run from, but shall not include, the day upon which the relevant document is filed. Should the last day of time prescribed fall upon a non-working day of the Special Court it shall be considered as falling on the first working day thereafter.

34. The Practice Direction on Filing Documents before the Special Court for Sierra Leone (the "Practice Direction on Filing of Documents")[14] regulates the format and contents of documents. Its Article 9 – Method of Filing Documents - provides:

> (B) The official filing hours are from 9:00 to 17:00 hours every weekday, excluding official holidays. However, documents filed after 16:00 hours shall be served the

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[13] Practice Direction for Certain Appeals Before the Special Court, 30 September 2004.
[14] Practice Direction on Filing Documents Before the Special Court for Sierra Leone, 27 February 2003, Amended on 1 June 2004.

> next working day. Documents shall not be accepted for filing after 17:00 hours except as provided under Article 10 of this Practice Direction.[15]
>
> (C) The date of filing is the date that the document was received by the Court Management Section. The Court Management Section shall stamp the document legibly with the date of its receipt, subject to the provisions of Articles 4 to 8 of this Practice Direction [...]

(c) Application to the Current Case

35. Since leave to appeal was granted by the Trial Chamber on Friday 5 August 2005 and the Summer Recess froze all time-limits for filing submissions from Monday 8 August 2005 until Sunday 28 August 2005[16], Rule 108(C) 7-days time-limit ended on Friday 2 September 2005. According to Article 9(B) of the Practice Direction on Filing of Documents, the Notice and grounds of Appeal were to be filed at the latest on 5.00 p.m. The stamp on the Notice of Appeal shows that it was received by the Court Management Section of the Special Court at 5.13 p.m., in violation of Article 9(B) of the Practice Direction.

36. As a consequence of this first breach, the Notice of Appeal was circulated to the Parties on Monday 5 September 2005 only. The Defence Office's Response was timely filed on Friday 9 September 2005 at 4.59 p.m. but the Registrar filed his Response on Monday 12 September only. This filing would be out-of-time, if the date of reference for computation of Article 12 of the Practice Direction on Certain Appeal 7-days time-limit for filing responses was computed from the date of filing of the Notice of Appeal, namely Friday 2 September 2005. But since the late filing of the Notice of Appeal consequently led to a late circulation of the Notice of Appeal to the Parties, the useful date for computation of time to file a response was the date of circulation of the Notice of Appeal, namely Monday 12 September. In that respect, the Registrar's Response was filed in time.

37. As regards the Additional Motion filed by the Registrar on 13 September 2005, however, and depending on the Appeals Chamber's determination on its nature, i.e. should it be considered as an amplification of the Registrar's Response,[17] it would be clearly out-of-time.

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[15] Article 10 deals with urgent measures.
[16] *See* Order Designating Judicial Recess, 23 June 2005.
[17] *See below*, Fourth Preliminary Issue.

38. For the foregoing reason, the Appeals Chamber finds that the Court Management Section erred by accepting the filing of the Defence Notice of Appeal after the 5.00 p.m. time limit provided by Article 9(B) of the Practice Direction on Filing of Documents. The Appeals Chamber finds consequently that the Defence Notice of Appeal was filed out-of-time pursuant to Rule 108(C) and Article 9(B) of the Practice Direction on Filing of Documents. However, taking into account the fact that neither of the Respondents have objected to the Applicants' non-compliance with the Rules and Practice Directions on that ground and the fact that part of the responsibility for the mistake visibly bears on the Court Management Section of the Special Court which was not strict enough as regards the respect of time limits, the Appeals Chamber considers that it is nonetheless properly seized of the Appeal.

3. Third Preliminary Issue: Admissibility of New Grounds and/or New Requests Submitted in Response or Reply Before the Appeals Chamber

(a) Summary of Issue

39. In Section IV of its Response to the Appeal Motion, the Defence Office submits what is entitled "Additional Grounds and Arguments". These "Additional Grounds and Arguments" relate to: (i) the mandate of the Defence Office and its relation with the Registry; (ii) the finding by the Trial Chamber that the Deputy Principal Defender undermined its Order or was unwilling to do her job; (iii) the consultation between the Registrar and the Trial Chamber; (iv) the Trial Chamber's evaluation of the Registrar's action.

40. In his Additional Motion, the Registrar submits that the Defence Office is not entitled to plead additional grounds outside the grounds of Appeal raised by the Appellants; that if the Defence Office wanted to raise grounds of appeal, it should have sought leave to appeal from the Trial Chamber; and that this way of proceeding prevents the Registrar from responding to the Additional Grounds raised by the Defence Office. The Registrar therefore prays the Appeals Chamber not to consider these Additional Grounds and, in the alternative, requests to be given the opportunity to file a Response.

41. In its Response to the Registrar's Additional Motion, the Defence Office challenges the characterisation of its statements as "Grounds of Appeal" and submits that the issues addressed in the "Additional Grounds and Arguments" contained in its Response are not

new but have already been deliberated upon by the Trial Chamber, or submitted upon by the Registrar, and were only intended to further articulate Grounds 1, 5 and 6 developed by the Appellants.

42. The same issue of admissibility is also raised by the submissions made in the Defence Reply with regard to the validity of Justice Doherty's Comment appended to the Decision granting leave to appeal: the Defence submits that this comment engenders a serious violation of the Accused rights to fair trial and was intended to unduly influence the Appeals Chamber. The Defence therefore requests the Appeals Chamber not to consider this "personal comment".

(b) Applicable Standards

43. On the issue of new grounds developed by a respondent in response to a motion filed before the Trial Chamber, Trial Chamber I of the Special Court for Sierra Leone already ruled in another case:

> The Chamber wishes to express its strong disfavour of the practice of expanding the nature of submissions in response to a motion to the extent of introducing specific, new and separate arguments amounting to, as it has been identified by the Defence in its Response, a "counter motion". The proper course of action in order to avoid confusion with reference to the nature and time limits for subsequent responses and replies is for the Defence to identify and distinguish the new legal issue, and then file a separate and distinct motion.[18]

44. In the *AFRC* Case, on the issue of new requests sought for the first time in Reply, Trial Chamber II already held:

> The Trial Chamber notes that, in its Reply, the Defence sought to substantially modify the relief sought. This is a practice that must be discouraged. A Reply is meant to answer matters raised by the other party in its Response, not to claim additional relief to that sought in the Motion. Obviously the other party, having already filed a Response to the Motion, has no way under the Rules to answer the new prayer, except to apply to the Trial Chamber for leave to do so. In future, the Trial Chamber will not hear claims for additional relief contained in a Reply.[19]

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[18] *Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, para. 28.
[19] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-T, Decision on Joint defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigator's Notes Pursuant to Rule 66 and/or 68, 4 May 2005, para. 20. See also *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-T, Decision on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227, 15 June 2005, para. 43.

This same finding was made in the Impugned Decision.[20]

45. Trial Chamber II also stressed that such practice casts confusion with reference to the nature and time limits for subsequent responses and replies:

> The Trial Chamber wishes to express its strong disfavour for the practice of combining pleadings or submissions for which the Rules prescribe different filing time limits. As the Defence has rightly observed, Rule 7 (C) of the Rules provides that "unless otherwise ordered by the Trial Chamber, a response to a motion shall be filed within ten days while a reply to response shall be filed within five days." We note that in this case the Prosecution's Combined Reply comprises two pleadings, namely the Prosecution Response to the Defence Reply (for which a filing time limit of five days is applicable), and the Prosecution's Reply to the Defence Notice and Request (for which a filing time limit of ten days is applicable). The proper and preferred course of action is for the parties to file the various responses and replies in separate documents in order to avoid confusion over issues as well as time frames. In the present case we observe that the irregularity by the Prosecution has not occasioned a miscarriage of justice as their "Combined Reply" was filed on the 18 May 2005, five days after the filing of the Defence Reply. The Prosecution therefore appears to have complied with both time limits prescribed by Rule 7 (C). The preliminary objection is accordingly overruled.[21]

46. As regards new grounds made in a response before the Appeals Chamber, it must first and foremost be reminded that the requirement for leave to submit grounds to the Appeals Chamber prevents a party which did not apply for leave to appeal from submitting new grounds of appeal. The Appeals Chamber already ruled that:

> for the need to deal with the issue raised in these proceedings once and for all in order to clear any doubt as to the limits of the Court's inherent jurisdiction, it would have been in order to refuse to entertain the proceedings on the ground that there is no procedural foundation for approaching the Appeals Chamber in matters such as this, touching on a decision of the Trial Chamber rendered in a motion under Rule 73(A), without prior leave of the Trial Chamber.[22]

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[20] *Prosecutor v. Brima, Kamara*, Case No. SCSL-2004-16-T, Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross-Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, 9 June 2005, para. 20.
[21] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-T, Decision on Prosecution request for Leave to Call an Additional Witness (Zainab Hawa Bangura) Pursuant to Rule 73*bis*(E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs Bangura) Pursuant to Rule 94*bis*, 5 August 2005, para. 27.
[22] *Prosecutor v Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-A, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para. 24.

Consequently, a party who has not applied for a leave to appeal cannot take advantage of the leave granted to another party to raise grounds of appeal in its response to the appeal motion.

47. As regards new grounds or requests made by the appellant in its reply, Paragraph 10 of the Practice Direction for Certain Appeals provides that, where leave to appeal is granted, the appellant shall, in accordance with the Rules, file and serve on the other parties a notice of appeal containing, notably, (c) the grounds of appeal and (d) the relief sought. A new ground or request made by the appellant in its reply cannot, by that very fact, comply with Paragraph 10 of the Practice Direction since it was not mentioned in the notice of appeal. Moreover, the above comments made by Trial Chambers about "confusion with reference to the nature and time limits for subsequent responses and replies" cast on the trial proceedings are equally applicable in appeal. For these reasons, the Appeals Chamber finds that such new grounds or requests are inadmissible.

48. This finding, however, shall not apply to new submissions made in response or reply by the Parties in connection with the grounds and requests properly submitted in the appeal. The confusion met in the current Appeal between, on the one hand, grounds and requests, and, on the other hand, submissions, requires some urgent clarification by the Appeals Chamber.

49. "Grounds" are defined in Paragraph 10(c) of the Practice Direction for Certain Appeals which provides that they consist of "clear concise statements of the *errors* complained of".[23] Although Article 20(1) of the Statute and Rule 106 apply to appeals from convicted persons, the list of errors referred to in these provisions may provide some guidance, albeit limited, to interlocutory appeals under Rule 73(B). These errors are "(a) A procedural *error*; (b) An *error* on a question of law invalidating the decision; (c) An *error* of fact which has occasioned a miscarriage of justice."[24] To that list, a decision of Trial Chamber I in the *RUF* Case added appeals based on a legal issue that is of "general significance to the Tribunal's jurisprudence"[25], but that extension of the standard grounds of appeal relied on a prior version of the International Criminal Tribunal for the Former

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[23] Paragraph 10(C) of the Practice Direction on Certain Appeals (Emphasis added)
[24] Article 20(1) of the Statute; Rule 106 of the Rules of Procedure and Evidence (Emphasis added).
[25] *Prosecutor v. Gbao*, Case No. SCSL-2004-15-T, Decision on Application for Leave to Appeal Decision on Application to Withdraw Counsel, 4 August 2004, para. 54-55, 57.

Yugoslavia ("ICTY") Rule 73(B)[26] and goes against the otherwise established jurisprudence of the Special Court for Sierra Leone on the matter.

50. As regards "requests", Paragraph 10(d) of the Practice Direction provides that the notice of appeal shall mention "the relief sought". On the nature of that relief, Article 20(2) of the Statute and Rule 106(B) may also be of some guidance in reaching the finding that it may consist in the reversal or revision of the decision taken by the Trial Chamber.[27]

51. When new grounds or requests not mentioned in the notice of appeal are, for the above reasons, inadmissible, new arguments, that are related to, either supporting or challenging, the appellant's admissible grounds and requests may be considered admissible in a response to the appeal motion. Submission of these new arguments is the main purpose of a response to an appeal motion and does not cast any "confusion with reference to the nature and time limits for subsequent responses and replies" in the proceedings: indeed, they can only be replied by the appellant in the normal way provided by the Rules and do not create a new right to respond for the other Parties.

52. New arguments in reply may also be deemed admissible, with the limitation that they should be strictly limited to the purpose of replying to the arguments developed in response to the appeal motion. New arguments supporting the appeal motion which do not reply to the Respondent's arguments challenging it shall accordingly not be admitted. To rule otherwise would jeopardize the Respondent's right to challenge the appeal motion.

(c) Application to the Current Case

53. In the instant case, the Appeals Chamber needs to determine the following preliminary issues in relation to the Admissibility of New Grounds of Appeal or Requests Submitted in Response/Reply:

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[26] For an application of that old Rule by the ICTY Appeals Chamber, see *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 247; *Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 22. Rule 73(B) of the ICTY currently provides: "Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.(Amended 12 Apr 2001, amended 23 Apr 2002).

[27] *See* also *Prosecutor v. Sesay*, Case No. SCSL-2004-15-T, Decision on Defence Motion, 15 July 2004, para. 13 and *Prosecutor v. Kallon*, Case No. SCSL-2004-15-T, Decision on Confidential Motion, 11 October 2004, para. 21, on the nature of "requests" before the Trial Chambers.

a. The admissibility of the "Additional Grounds and Arguments" submitted by the Defence Office in its Response;

b. The admissibility of the Defence Request, in its Reply, not to consider Justice Doherty's "Personal Comment".

(i) Admissibility of the "Additional Grounds and Arguments" Submitted by the Defence Office in its Response

54. Although the entitling of this section of the Defence Office's submissions in Response may be awkward, the Registrar's formal approach, requesting the Appeals Chamber to reject these "Additional Grounds and Arguments" as a whole, is not satisfactory. As mentioned earlier, a distinction must be made between "Additional Grounds" – which are inadmissible at this stage – and "Additional Arguments" in relation with the Appellants' grounds of appeal, – which may be admitted under the conditions set forth above.

55. A careful reading of the "Additional Grounds and Arguments" section of the Response filed by the Defence Office reveals that some of the submissions it contains are closely related to and support the Appellants Grounds of Appeal:

1. The Defence Office's submissions on the mandate of the Defence Office and its relation with the Registry (Section 1 of the Defence Office's Additional Grounds and Arguments) and the Trial Chamber's evaluation of the Registrar's action (Section 4 of the Defence Office's Additional Grounds and Arguments) are supporting the Appellants' sixth Ground of Appeal on the lack of power of the Registrar to strike Counsel out of the list of Eligible Counsel.

2. The Defence Office's submissions on the consultation between the Registrar and the Trial Chamber (Section 3 of the Defence Office's Additional Grounds and Arguments) are supporting the Appellants' seventh Ground of Appeal on the impartiality of the Trial Chamber and the recusation of its Judges.

56. These additional arguments are submissions supporting the Appellants' Grounds of Appeal and are admissible in Response to the Appeal Motion. They do not require a further Response from the Registrar.

57. On the contrary, the Defence Office's submission relating to the Trial Chamber's finding that the Deputy Principal Defender undermined its Order or was unwilling to do her job (Section 2 of the Defence Office's Additional Grounds and Arguments) does not relate to any of the Appellants' Grounds of Appeal. Rather, the Appeals Chamber is of the view that this submission is an attempt to appeal the Trial Chamber's determination of the Deputy Principal Defender's Cross Motion in the Impugned Decision. If the Defence Office wanted to appeal the Trial Chamber's Decision on its Cross Motion, it should have applied for a leave to appeal. Since it did not, this additional ground of appeal is inadmissible.

(ii) Admissibility of the Defence Request, in its Reply, not to Consider Justice Doherty's "Personal Comment"

58. This request was not mentioned in the original Notice of Appeal filed by the Defence. The submissions supporting it do not relate to the grounds of appeal developed by the Defence in its Appeal Motion. In accordance with the above mentioned applicable standards, the Appeals Chamber considers that this new request is inadmissible and, consequently, dismisses it.

4. Fourth Preliminary Issue: Registrar's Additional Motion

(a) Summary of Issue

59. In addition to his Response to the Appeal Motion, the Registrar also filed, on 13 September 2005, an "Additional Motion". The purpose of this Additional Motion is to challenge the "Additional Grounds and Arguments" submitted in its Response by the Defence Office. The Registrar submits that the Defence Office is not entitled to plead additional grounds to the grounds of appeal set out in the Notice of Appeal and that, if it wished to do so, it should have applied for leave to appeal, but it did not. The Registrar submits that these new Grounds should not be considered by the Appeals Chamber and, should the Appeals Chamber nonetheless decide to consider them, requests to be given the opportunity to file a response.

60. In its Response to the Registrar's Additional Motion, the Defence Office submits that this Additional Motion is not admissible for lack of legal basis and challenges the characterisation of his statements as "Grounds of Appeal". The Defence adds that the Registrar has been accorded a fair opportunity to present his arguments and opposes the Registrar's request to be given the opportunity to file another response.

(b) Merits of the Registrar's Additional Motion

61. The Registrar's Additional Motion requests the Appeals Chamber not to consider the "Additional Grounds and Arguments" raised by the Defence Office in its Response, or, in the alternative, that the Appeals Chamber leaves the Registrar respond them. The Appeals Chamber will address these two alternative requests separately.

62. As regards the request for the Appeals Chamber not to consider the "Additional Grounds and Arguments" raised by the Defence Office in its Response to the Appeal, Rule 113(B) specifically provides that no further submissions, but the appellant's submissions in appeal[28] and reply[29] and the respondent's response[30] may be filed, except with leave of the Appeals Chamber. In particular, the Statute and the Rules nowhere provide for a right of a respondent to reply/rejoin another respondent's response. It is therefore the view of the Appeals Chamber that the proper way to address the new grounds and arguments raised in the Defence Office's Response was for the Registrar to address them in his own Response and that the request not to consider the Defence Office's "Additional Grounds and Arguments" was anyway to be filed within the time-limit for filing the Registrar's Response pursuant to Paragraph 12 of the Practice Direction for Certain Appeals. In the current case, and for the reasons set out earlier,[31] the time-limit for filing responses to the Appeal expired on 12 September 2005. Since the Registrar's Additional Motion was filed on 13 September 2005 and no application for extension of time under Rule 116 was filed by the Registrar, the Appeals Chamber finds that the Registrar's request not to consider the Defence Office's "Additional Grounds and Arguments" was out-of-time. The Registrar's Additional Motion is therefore dismissed on this aspect.

63. The second request mentioned above seeks leave to respond the Defence Office's "Additional Grounds and Arguments". Such response to grounds and arguments brought in another Respondent's response can only be made, pursuant to Rule 113(B), with the Appeals Chamber's express leave. Rule 113(B) does not specify the criteria to be satisfied for such leave, but it is obvious that such leaves shall remain very exceptional and be granted only where the respect of the adversarial character of the proceedings strongly

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[28] Rule 111 of the Rules of Procedure and Evidence.
[29] Rule 113(A) of the Rules of Procedure and Evidence.
[30] Rule 112 of the Rules of Procedure and Evidence.
[31] *Supra*, Second Preliminary Issue.

requires so. Since the Appeals Chamber has already decided that the additional ground raised in the Defence Office's Response was inadmissible, there is no need for the Registrar to respond it. Leave to do so under Rule 113(B) is accordingly denied. As regards the application for leave to respond the Defence Office's additional arguments, the Appeals Chamber is of the view that these arguments were properly made in the Defence Office's Response, that the Registrar has already been given full opportunity to respond the Appeal Motion and that he did so, that the Statute and Rules do not provide for a right of a respondent to reply/rejoin another respondent's response and that there is consequently no reason for leaving the Registrar to file further submissions in relation to these arguments.

64. The Registrar's Additional Motion is therefore denied in its entirety. This finding does not vary, however, the Appeals Chamber's earlier finding on the admissibility of the Defence Office's "Additional Grounds and Arguments".[32]

B. Merits of the Appeal

1. Defence First Ground of Appeal

65. In its First Ground of Appeal, the Defence challenges the alleged Registrar's Decision not to reassign Counsel and the Trial Chamber's power or authority to interfere in the statutory right of the Accused to choose their assigned Counsel.

66. The "Registrar's Decision" referred to in this ground is embodied by a Letter from the Legal Adviser of the Registrar, Mr. Kevin Maguire, to Ms. Elizabeth Nahamya, Deputy Principal Defender, of 19 May 2005.[33] This decision by the Registrar follows several correspondences addressed to him by the Deputy Principal Defender in which she informed him of her intention to reassign the withdrawn Counsel[34] and requested his written instructions. [35] In the Letter of 19 May 2005, Mr. Maguire writes:

> I have been asked by the Registrar to confirm formally with you that Counsel WILBERT HARRIS and KEVIN METZGER are not to be reappointed as lead counsel in the AFRC trial in Trial chamber 2.

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[32] *Supra* Third Preliminary Issue.
[33] *See* Attachment C to the Motion for Reappointment.
[34] *See* Interoffice Memorandum, re: "Re-appointment of Mr. Kevin Metzger and Wilbert Harris as Lead Counsel", 17 May 2005, in Attachment A to the Defence Office's Response.
[35] *See* e-mail, re: :Re-assignment of Mr. Metzger and Harris", 19 May 2005, in Attachment C-1 to the Defence Office's Response.

> The reason was conveyed to you verbally early this afternoon by the Registrar in his office which was that the trial chamber had made an order allowing counsel to withdraw and that order was to stand.
>
> The trial chamber confirmed this order again on 16 May following an oral notification of the desire to re-appoint counsel and the court said that the order had been made and any letters, correspondence or documents that seek to go behind that decision cannot be countenanced by the court.

67. In the view of the Appeals Chamber, the First Ground of Appeal raises three questions: First, did the Trial Chamber have jurisdiction to judicially review the decision of the Registrar? If the Chamber had jurisdiction, then, second, could the Registrar decide on the issue of the reassignment of the withdrawn Counsel? And, third, was the Trial Chamber right, in the Impugned Decision, in confirming that decision from the Registrar? The Appeals Chamber now addresses those three issues consecutively.

(a) Trial Chamber's Jurisdiction to Judicially Review the Decision not to Re-assign Counsel

68. The Motion to re-assign specifically requested the Trial Chamber to declare null and void the Registrar's decision not to re-assign the withdrawn Counsel. Trial Chamber II addressed that issue in the Impugned Decision and proceeded to a review of the motives of the Registrar's decision, thereby implicitly exercising its jurisdiction to judicially review a decision of an administrative nature without further justification. It is the view of the Appeals Chamber that the Trial Chamber's jurisdiction to judicially review the Registrar's decision was not that obvious and deserved some explanations.

69. Rule 45 is mute on the remedy against a decision refusing the assignment of Counsel. This issue is specifically addressed in the Directive, which provides:[36]

> The Suspect or Accused whose request for assignment of counsel has been denied or who is subject to a demand under Article 9(A)(ii) of this Directive may bring a Preliminary Motion before the appropriate Chamber objecting to the Principal Defender's decision in accordance with Rule 72(B)(iv) of the Rules.

70. It is obvious that the disposition of Article 12(A) of the Directive do apply only in the case of the initial assignment of Counsel, at a stage where Preliminary Motions can be

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[36] Article 12(A) of the Directive.

filed pursuant to Rule 72(A), namely "within 21 days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i)". The possibility that Article 12(A) of the Directive may derogate Rule 72(A) of the Rules of Procedure and Evidence by allowing the filing of Preliminary Motions at other stages of the procedure, especially once the trial has started, cannot be contemplated since the Directive was precisely issued by the Registrar acting upon the authority given to him by the Rules. The Appeals Chamber concurs on this point with the finding of Trial Chamber in its decision of 6 May 2004 in the *Brima* Case, that "the provisions of the Directive on the Assignment of Counsel promulgated by the Registrar on the 3rd 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".[37] The remedy contemplated in Article 12(A) is therefore not applicable in the current case, since the stage of Preliminary Motions is far overstayed.

71. The Appeals Chamber notes that the jurisprudence of other sister Tribunals has admitted, in the silence of the Rules and Directive applicable before those Tribunals, that the Registrar's administrative decision denying the assignment of Counsel could be reviewed by the President, when the Accused had an interest to protect.[38] However, such power to judicially review an administrative decision of the Registrar is denied to the Trial Chamber.[39]

72. The requirement for a judicial review of administrative decisions where the Accused has an interest to protect was perfectly justified by Justice Pillay, the then President of the International Criminal Tribunal for Rwanda, in her decision of 13 November 2002:[40]

> Modern systems of Administrative Law have built in review procedures to ensure fairness when individual rights and protected interests are in issue, or to preserve the interests of justice. In the context of the Tribunal, Rules 19 and 33(A) of the

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[37] *Prosecutor v. Brima*, Case No. SCSL-2004-16-PT, Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, para. 35.
[38] *See* ICTR, *Prosecutor v. Nzirorera*, ICTR-98-44-T, President's Decision on Review of the Decision of the Registrar Withdrawing Mr. Andrew McCartan as Lead Counsel of the Accused Joseph Nzirorera (President Pillay), 13 May 2002, p. 3, sect. (xi); ICTY, *Prosecutor v. Hadzihasanovic et al.*, IT-01-47-PT, Decision on the Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura (TC), 26 March 2002, para. 12-13; ICTY, *Prosecutor v. Delalic et al.*, IT-96-21-PT, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged Between Zejnil Delalic and Zdravko Mucic (President Cassese), 11 November 1996.
[39] ICTR, *Prosecutor v. Ntahobali*, ICTR-97-21-T, Decision on Ntahobali's Extremely Urgent Motion for the Re-instatement of Suspended Investigator, Mr Thaddée Kwitonda (TC), 14 December 2001, para. 17.
[40] ICTR, *Prosecutor v. Ntahobali*, ICTR-97-21-T, Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decisions Pertaining to the Assignment of an Investigator"(President Pillay), 13 November 2002, para. 4-5.

> Rules ensure that such review is available in appropriate cases. While the Registrar has the responsibility of ensuring that all decisions are procedurally and substantially fair, not every decision by the Registrar can be the subject of review by the President. The Registrar must be free to conduct the business of the Registry without undue interference by Presidential review.
>
> In all systems of administrative law, a threshold condition must be satisfied before an administrative decision may be impugned by supervisory review. There are various formulations of this threshold condition in national jurisdictions, but a common theme is that the decision sought to be challenged, must involve a substantive right that should be protected as a matter of human rights jurisprudence or public policy. An application for review of the Registrar's decision by the President on the basis that it is unfair procedurally or substantively, is admissible under Rules 19 and 33(A) of the Rules, if the accused has a protective right or interest, or if it is otherwise in the interests of justice.

73. The Appeals Chamber concurs with Justice Pillay's view on the need for a juridical review of administrative decisions affecting the rights of the Accused. However, the Appeals Chamber is not convinced that, in the specific situation of the Special Court, this judicial power should necessarily fall within the exclusive province of the President for the following reasons.

74. First, the Appeals Chamber notes that Article 24 (E) and (F) of the Directive submits the Principal Defender's decision to withdraw Counsel to the judicial review of "the presiding Judge of the appropriate Chamber". This regulation is not problematic when, as in the current case, the trial is pending before a Trial Chamber, since the question is then submitted to the Presiding Judge of the Trial Chamber; but, once the case has reached the appeal phase, then the decision to withdraw Counsel would be submitted to the President of the Appeals Chamber, who is, pursuant to Article 12(3) of the Statute, the President of the Special Court. In that situation, would the decision to assign Counsel fall in the exclusive province of the President of the Special Court, he would be the only authority to judicially review the administrative decision to withdraw Counsel and then, once again, the decision denying the assignment of Counsel. That may put the President of the Special Court in a difficult situation.

75. Second, although the remedy provided by Article 12(A) of the Directive is not applicable in the current case, the Appeals Chamber notes that this Article gives jurisdiction to the Trial Chamber to review, by way of Preliminary Motion, the administrative decision on assignment of Counsel. The Appeals Chamber sees no reason to depart from that solution and considers that Article 12(A) should apply *mutatis mutandis*

in the present situation and allow to seize the Trial Chamber by way of an interlocutory Motion pursuant to Rule 73(A) of the judicial review of the administrative decision on assignment of counsel.

76. Third, the Appeals Chamber concurs with the finding made by Trial Chamber I in its decision of 6 May 2004 in the *Brima* Case, that such judicial review falls, due to the silence of the regulations applicable before the Special Court, within the inherent jurisdiction of the Trial Chamber:[41]

> [T]he 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.

77. The Appeals Chamber refers to the above quoted reasoning of President Pillay as regards the reasons for exercising such inherent jurisdiction.

78. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber had jurisdiction to judicially review the Registrar's Decision not to re-assign Counsel.

(b) The Decision of the Registrar not to reassign Counsel

79. It is the view of the Appeals Chamber that the Statute, the Rules of Procedure and Evidence and the Directive on the Assignment of Counsel describe a coherent system in which the main responsibility for assigning Counsel to the Accused is given to the Defence Office set up by the Registrar pursuant to Rule 45.

80. The Defence Office and, at his head, the Principal Defender are notably responsible for:

- Ensuring the rights of suspects and accused;[42]
- Providing *representation* to the suspects and accused;[43]

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[41] *Prosecutor v. Brima*, Case No. SCSL-2004-16-PT, Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, para. 39.
[42] Rule 45(*Chapeau*) and Article 1(A) of the Directive.
[43] Rule 45(A) (Emphasis added).

- Maintaining a list of highly qualified criminal defence counsel who are appropriate to act as duty counsel or to lead the defence or appeal of an accused;[44]
- Determining the suspect or accused requests for assignment of Counsel;[45]
- Assigning Counsel;[46]
- Assigning Counsel in the interests of justice;[47]
- Notifying *his* Decision to assign Counsel to the suspect or accused and his Counsel;[48]
- Negotiating and Entering Legal Services Contracts with the Assigned Counsel;[49]
- Determining requests for replacement of assigned Counsel;[50]
- Withdrawing Counsel when the Suspect or Accused is no longer indigent;[51]
- Withdrawing Counsel in other situations;[52]
- In the event of the withdrawal of a Counsel, *assigning another Counsel* to the Accused.[53]

81. On the other hand, the Registrar is given the responsibility :

- for the administration and servicing of the Special Court;[54]
- for establishing, maintaining and developing a Defence Office, for the purpose of ensuring the rights of suspects and accused;[55]
- for assisting the Principal Defender in the performance of his functions;[56]
- for maintaining and developing a Defence Office, for the purpose of ensuring the rights of suspects and accused.[57]

82. The Appeals Chamber notes that the Statute itself does not mention the Defence Office, or the Principal Defender, and is mute on which organ is given the responsibility for ensuring the rights of the Accused provided in Article 17 of the statute. Article 16(1) of the

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[44] Rule 45 (C) and Articles 13 and 23(B)(iii) of the Directive.
[45] Article 9(A) and 12(B) of the Directive.
[46] Article 9(A)(i) of the Directive.
[47] Article 10 of the Directive.
[48] Article 11 of the Directive (Emphasis added).
[49] Article 1(A), 14 and 16(C) to (F).
[50] Rule 45(D).
[51] Article 23 (A) of the Directive.
[52] Article 24 (A) and (B) of the Directive.
[53] Rule 45(E) and Article 23(D) of the Directive. (Emphasis added).
[54] Article 16(1) of the Statute and Rule 33(A);
[55] Rule 45 (*Chapeau*).
[56] Rule 33(A).
[57] Rule 45 and Article 1(A) of the Directive.

Statute provides that the Registry is responsible for the administration and servicing of the Special Court, which duty may include some aspects of protection of the rights of the Accused, but is nevertheless quite distinct. On the other hand, Rule 45 does provide for the establishment of a Defence Office by the Registrar and that this Defence Office is given the main responsibility for ensuring the rights of suspects and accused.

83. It results from the Statute and Rules that the Defence Office is not an independent organ of the Special Court, as Chambers, the Office of the Prosecutor and the Registry are pursuant to Articles 11, 12, 15 and 16 of the Statute. As a creation of the Registrar, the Defence Office and at its head, the Principal Defender, remain under the administrative authority of the Registrar. Although the Defence Office is given the main responsibility for ensuring the rights of the accused by accomplishing the functions mentioned above, it is supposed to exercise its duty under the administrative authority of the Registrar who, notably, is in charge of recruiting its staff, including the Principal Defender, in accordance with his general responsibility on administration pursuant to Article 16(1) of the Statute.

84. It may be inferred from the creation of the Defence Office by the Registrar pursuant to Rule 45 that the Registrar bore the primary responsibility for ensuring the rights of the Accused pursuant to Article 17 of the Statute and that, by establishing the Defence Office, he delegated this responsibility to it. But this interpretation would be contrary to the Statute of the Special Court according to which the responsibility for ensuring the rights of the Accused does not fall on any organ in particular but rather appears, in the silence of Article 17, as a common duty shared by the three organs. The Rules cannot vary the responsibilities of the organs of the Court under the Statute. Moreover, other Rules provide the responsibility of the other organs of the Special Court, notably Chambers,[58] for other aspects of ensuring the rights of the accused. The delegation given by the Registrar to the Defence Office is therefore limited to certain aspects of the Registrar's responsibility for ensuring the rights of the accused under the Statute, namely the administrative aspect of the task, which includes notably, assignment, payment, withdrawal and replacement of Counsel. On his part, the Registrar still keeps the responsibility for ensuring certain aspects of the rights of the Accused, notably as regards their rights in detention pursuant to Rule 33(C).

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[58] e.g. Rule 26*bis*.

85. Having clarified the repartition of responsibilities between the Registrar and the Defence Office, it appears that the responsibility to reassign the withdrawn Counsel, or to assign other Counsel in compliance with Trial Chamber II's express order, fell in the province of the Defence Office pursuant to Rule 45(E) and Article 23(D) of the Directive.

86. Does that mean that the Registrar could not interfere in the matter? The Appeals Chamber does not find so for two reasons. First, the above mentioned correspondences of the Deputy Principal Defender to the Registrar show that she expected and requested his *written instructions* on the matter, thereby putting him in a position of administrative authority under which the Deputy Principal Defender intended to act. Second, having found that, by creating the Defence Office, the Registrar delegated part of his power and responsibility in the enforcement of the rights of the Defence to it, it results from English administrative law[59], that the Registrar did not divest himself of his power and can therefore act concurrently with the Principal Defender, in particular when she requires him to do so as in the current case.

87. The Appeals Chamber therefore finds that the Registrar had the power to decide on the issue of the re-assignment of the withdrawn Counsel, especially when he had expressly been seized of the matter by the Deputy Principal Defender, thereby deferring to his administrative authority on the Defence Office. The Appeals Chamber observes that the Registrar was extremely cautious in not interfering in the Principal Defender's province by limiting his intervention to instructions, when he may have decided to appoint by himself new Counsels to the Accused. The Appeals Chamber now turns to the question of whether the Registrar did take the right decision.

88. Rule 45(E) of the Rules of Procedure and Evidence provides that in the event of the withdrawal of a Counsel, "the Principal Defender shall assign another Counsel who may be a member of the Defence Office, to the indigent accused". Article 24 – Withdrawal of Assignment in Other Situations - of the Directive, applicable in the current case, provides in Paragraph (D) that "[t]he Principal Defender shall immediately assign a new Counsel to the Suspect or Accused". Neither Rule 45(E) nor Article 24(D) does provide, in the circumstances of the withdrawal of Counsel, discretion of the Principal Defender to

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[59] *Huth v. Clarke* (1890) 25 QBD 391. *See also* the Local Government Act 1972 s 101(4); and *Halsbury's Laws of England*, Administrative Law, 2. Administrative Powers.

reassign the same Counsel as withdrawn. The choice of the new Counsel to be assigned belongs to the Principal Defender, in consultation with the suspect or accused, pursuant to Article 9(A)(i) of the Directive, but Rule 45(E) and Article 24(D) make it clear that the assigned Counsel shall be different from the withdrawn one.

89. The Appeals Chamber does not see any merits in the Defence allegation that the exclusion of the withdrawn Counsel from re-assignment violates the accused's right to a Counsel of their own choosing. On this aspect, the Appeals Chamber concurs with the Trial Chamber's finding in the Impugned Decision[60], agreed upon by both Respondents[61], that the right to counsel of the Accused's own choosing is not absolute, especially in the case of indigent accused, and observes that the conditions of exercise of this right are set up by the Directive. In particular, the indigent Accused shall be consulted on the choice of his counsel pursuant to article 9(A)(i) of the Directive and he may only elect one Counsel from the list of qualified counsel set up by the Principal Defender in accordance with Rule 45(C) and Article 13 of the Directive. The Appeals Chamber notes that this consultation process goes substantially further in the protection of the indigent accused right to a counsel of their own choosing than the regulations applicable before other sister Tribunals, which provide that the Registrar chooses and appoints Counsel but does not mention any consultation with the Accused.[62] The SCSL regulations are also fully consistent with the jurisprudence of the European Court for Human Rights, in particular its Decision in the *Mayzit v. Russia* Case relied upon by the Applicants:[63]

> Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to choose one's own counsel cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Croissant v. Germany*, judgment of 25 September 1992, Series A no. 237-B, § 29).

90. It is therefore the view of the Appeals Chamber that the aforementioned regulations applicable before the Special Court are fully consistent with Article 17(4)(d) right of the Accused to a counsel of his own choosing.

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[60] Impugned Decision, para. 44.
[61] Defence Office's Response, p. 6-7; Registrar's Response, para. 2, 15.
[62] Article 10(A)(i) of the ICTR Directive on Assignment of Counsel; Article 11(A)(i) of the ICTY Directive on Assignment of Counsel. See also the jurisprudence referred to at para. 45 of the Impugned Decision.
[63] *Mayzit v. Russia*, ECHR (2005), 20 January 2005, para. 66.

91. In his decision embodied by Mr. Maguire's Letter of 19 May 2005, the Registrar did nothing more than restate the order "allowing counsel to withdraw" made by Trial Chamber II on 12 May 2005[64] and confirmed "again on 16 May following an oral notification of the desire to re-appoint counsel" when "the court said that the order had been made and any letters, correspondence or documents that seek to go behind that decision cannot be countenanced by the court".[65]

92. In the view of the Appeals Chamber, the Registrar may have made his decision clearer by referring to the Trial Chamber's orders directing "the Principal Defender to assign another counsel as lead counsel to" Brima and Kamara[66] and to the relevant dispositions of Rule 45(E) and Article 24(D) of the Directive. But it is the Appeals Chamber's view that the Registrar's decision that the withdrawn Counsel shall not be re-assigned was fully consistent with these regulations and did not violate in any way the Accused right to Counsel of their own choosing.

93. The Appeals Chamber therefore finds that the Registrar had the capacity to take the decision embodied by Mr. Maguire's letter of 19 May 2005 and that the decision he made was correct.

(c) The Trial Chamber's Refusal to Declare the Decision of the Registrar Not to Re-assign Counsel Null and Void

94. To deny the Applicants' request to declare the Registrar's decision not to re-assign Counsel null and void, the Trial Chamber first justifies the intervention of the Registrar in that matter on the ground that, "in the absence of the actual Principal Defender, certain obligations to carry out duties fall out upon the Registrar".[67] The Appeals Chamber disagrees with that opinion of the Trial Chamber. As held by Trial Chamber I in its decision of 6 May 2004 in the same case:[68]

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[64] *See Prosecutor v. Brima, Kamara, Kanu,* Case No. SCSL-2004-15-T, Transcript of 12 May 2005, p. 2, annexed to the Defence's Reply.
[65] *See Prosecutor v. Brima, Kamara, Kanu,* Case No. SCSL-2004-15-T, Transcript of 16 May 2005, p. 2, quoted in Defence Office's Response, p. 3.
[66] Transcript of 12 May 2005, p. 2, lines 17-20, annexed to the Defence's Reply.
[67] Para. 38 of the Impugned Decision.
[68] *Prosecutor v. Brima,* Case No. SCSL-2004-16-PT, Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, para. 78-79.

> 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 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.
>
> 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.

The Appeals Chamber concurs with this opinion of Trial Chamber I and considers that, in the absence of the actual Principal Defender, the duty to decide on the reassignment of the withdrawn Counsel automatically fell on the Deputy Principal Defender in her acting capacity.

95. However, the Appeals Chamber agrees with the Trial Chamber's next finding that the Registrar "has a further overall duty to act as principal administrator of the Court". The Appeals Chamber finds that the Registrar's capacity to decide not to re-assign Counsel derived from his administrative authority on the Defence Office and, as explained above, from the delegation of his statutory prerogatives as regards the enforcement of the rights of the Defence pursuant to Articles 16(1) and 17 of the SCSL Statute, which did not divest him from his powers in the matter.

96. As regards the substance of the Registrar's decision, the Appeals Chamber has already found that it was fully compliant with Rule 45(E) and Article 24(D) of the Directive, applicable in the case, and did not violate in any way the Accused's statutory right to have a Counsel of their own choosing. The Registrar's decision was furthermore in perfect accordance with the Trial Chamber's oral ruling of 12 May 2005, as confirmed on 16 May 2005. The Appeals Chamber therefore finds that the Impugned Decision rightly dismissed the Applicants' request to declare the Registrar decision null and void.

97. For the foregoing reasons, the Appeals Chamber dismisses the Appellants' first ground of appeal in its entirety.

2. Defence Second Ground of Appeal

98. In their second ground of appeal, the Appellants challenge the Trial Chamber's refusal to order the Acting Principal Defender to immediately enter into a legal contract with Messrs. Metzger and Harris.[69] The Appeals Chamber notes that the Impugned Decision denies the Applicants request on that aspect on the ground that it does "not have the power to interfere with the law relating to privity of contract".

99. Without need to enter the details of privity of contract and of the way Legal Services Contracts are concluded, the Appeals Chamber observes that, pursuant to Article 1(A) of the Directive, the Legal Services Contract is defined as an "agreement between Contracting Counsel and the Principal Defender for the representation of a Suspect or Accused before the Special Court for Sierra Leone outlined in Article 16 of this Directive". As confirmed by Article 16(C) of the Directive, which provides that it is entered "as soon as practicable after assignment", the Legal Services Contract is passed between the assigned Counsel and the Principal Defender. Since Mssrs. Metzger and Harris were no more assigned after their voluntary withdrawal on 12 May 2005, and could not be reassigned pursuant to Rule 45(E), Article 24(D) of the Directive and the Trial chamber's express order, there was no way a Legal Services Contract could be concluded between them and the Principal Defender.

100. Although the reason given by the Trial Chamber in the Impugned Decision is incorrect, the Appeals Chamber agrees with the denial of the request to order the Principal Defender to enter a Legal Services Contract with the withdrawn Counsel and therefore dismisses the second ground of appeal in its entirety.

3. Defence Third Ground of Appeal

101. As Third Ground of Appeal, the Defence challenges the denial of an order for a public hearing on its application. The Defence submits that the right of the Accused to a fair and public trial is guaranteed by Article 17(2) of the Statute and that the only statutory restriction upon that right is that of measures imposed by the Trial chamber for the protection of victims and witnesses. The Defence submits that Rule 73(A) gives the Trial Chamber the power and discretion to hear motions in open court and that the Trial

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[69] Para. 37 of the Impugned Decision.

Chamber misinterpreted this Rule in a way which erodes the rights of the Accused under Article 17 of the Statute.

102. Article 17(2) of the Statue provides that the accused shall be given a fair and public hearing the purpose of which is to "protect litigants from the administration of justice in secret with no public scrutiny".[70] This right can be restricted as provided for in Article 17(2) of the Statute in order to protect victims and witnesses. This right is implemented in the Rules of Procedure and Evidence, in particular Rule 78 which provides that "[a]ll proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided".

103. The issue of publicity of the proceedings shall however be distinguished from the issue of their written or oral character. Written submissions are, unless otherwise specifically provided, public. Article 4(B) of the Practice Direction on Filing Documents provides:

> "Where a Party, State, organization or person seeks to file all or part of a document on a confidential basis, the party shall mark the document as 'CONFIDENTIAL' and indicate, on the relevant Court Management Section form, the reasons for the confidentiality. The Judge or Chamber shall thereafter review the document and determine whether confidentiality is necessary. Documents that are not filed confidentially may be used in press releases and be posted on the official website of the Special Court."

104. The publicity of written submissions and decisions implies, as mentioned in Article 4(B) of the Practice Direction on Filing of Documents, their potential use in press releases and their accessibility through the Special Court's Website. In these circumstances there is no question of justice being administered secretly.

105. The Appeals Chamber therefore finds no merits in the assertion that Rule 73(A) provision according to which interlocutory motions may be ruled "based solely on the written submissions of the parties, unless it is decided to hear the parties in open Court", is, or may be interpreted, in contradiction with the Accused right to a fair and public hearing pursuant to Article 17(2) of the Statute. In the current case, all the submissions

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[70] *Pretto v. Italy* (A/71): (1984) 6 E.H.R.R. p. 182.

filed in relation to the Motion to re-assign before the Trial Chamber were filed publicly and are freely accessible on the Special Court's Website, as well as the Impugned Decision.

106. The Appeals Chamber further finds that Rule 73(A) provides for a discretion of the Trial Chamber to determine on the opportunity of having an hearing, which may not be public if the Chamber decides so pursuant to Rule 79, and that Trial Chamber II did not err in law in deciding to determine the Motion to re-assign without organising such hearing in the Impugned Decision. This decision in no way could jeopardize the Accused right to a fair and public hearing pursuant to Article 17(2) of the Statute.

107. For the foregoing reasons, the Appeal is dismissed on this ground.

4. Defence Fourth and Fifth Grounds of Appeal

108. In their fourth ground of appeal, the Appellants submit that the Trial Chamber erroneously considered the Motion to re-assign as a Rule 45(E) application. In their fifth ground of appeal, the Appellants submit that the Trial Chamber erroneously considered the Motion to re-assign as an application for review of its earlier Decision to withdraw. The Appeals Chamber deems appropriate to address those two grounds together.

109. The Impugned Decision finds that the Motion to re-assign "seeks to reverse an order granting relief which the defence itself sought" and therefore considers it as "frivolous and vexatious".[71] This conclusion relies on the findings that "the two lead counsel were not sincere in their reasons for bringing their motion to withdraw from the case and that they never expected it to succeed"[72], that "it [was] unclear on what legal grounds this application [was] made"[73], and that "this application in reality [was] simply a application to reverse a majority decision given by the Trial Chamber on 12 May 2005 because in that decision all relief prayed for was granted to Counsel".[74] The Appeals Chamber will address these three reasons consecutively.

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[71] Para. 52 of the Impugned Decision.
[72] Para. 48 of the Impugned Decision.
[73] Para. 49 of the Impugned Decision.
[74] Para. 50 of the Impugned Decision.

(a) Sincerity of the Application to Withdraw

110. The Appeals Chamber observes that this finding and the considerations on which it relies are purely findings of fact, namely the absence of direct evidence of a change in the circumstances having led to their withdrawal and the fact that the application to re-assign "emanate[d] from a letter from the accused purportedly written on the same day as the Trial Chamber's order". [75]

111. As regards findings of fact made by the Trial Chamber, the Appeals Chamber recalls that, pursuant to Article 20(1)(c) of the Statute of the Special Court, it can only be seized of "an error of fact which has occasioned a miscarriage of justice" and that, pursuant to Article 20(2), the "Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber". This Appeals Chamber has already held that these dispositions were also applicable to interlocutory appeals.[76]

112. These dispositions are the same as before other sister International Tribunals.[77] They have been interpreted by the Appeals Chamber of both sister International Tribunals as implying a limited control of the Trial Chamber's assessment of facts, which may be overturned by the Appeals Chamber only where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. This Appeals Chamber concurs with the finding made in *The Prosecutor v. Semanza*, which relies on several judgements of both ICTR and ICTY Appeals Chamber:[78]

> As regards errors of fact, as has been previously underscored by the Appeals Chamber of both this Tribunal and of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber. Where an erroneous finding of fact is alleged, the Appeals Chamber will give deference to the trial chamber that heard the evidence at trial as it is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. If the

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[75] Para. 48 of the Impugned Decision.
[76] *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 76.
[77] *See* Articles 24(1)(b) and 24(2) of the ICTR Statute; Articles 25(1)(b) and 25(2) of the ICTY Statute.
[78] *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement, 20 May 2005, para. 8.

> finding of fact is erroneous, it will be quashed or revised only if the error occasioned a miscarriage of justice.[79]
>
> The Appeals Chamber emphasises that, on appeal, a party cannot merely repeat arguments that did not succeed at trial in the hope that the Appeals Chamber will consider them afresh. The appeals process is not a trial *de novo* and the Appeals Chamber is not a second trier of fact. The burden is on the moving party to demonstrate that the trial chamber's findings or decisions constituted such an error as to warrant the intervention of the Appeals Chamber. Thus, arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[80]

113. The Appeals Chamber of the Special Court sees no reason to depart from this common jurisprudence of both sister International Criminal Tribunals' Appeals Chamber and will apply it in the current case.

114. In the present case, neither the Trial Chamber's conclusion as regards the sincerity of the Counsel's application to withdraw, nor the considerations of facts on which this conclusion relies are challenged by the Appellants. The considerations of facts on which the Trial Chamber's assessment of the sincerity of the application to withdraw relies are therefore not challenged by the Appellants.

115. In these circumstances, the Appeals Chamber finds that the Appellants failed to demonstrate that the Trial Chamber's finding that the application to withdraw was not sincere could not have been reached by a reasonable trier of fact or was wholly erroneous and therefore dismisses the grounds on that aspect.

(b) Lack of Legal Basis of the Application to Re-assign

116. The Appeals Chamber notes the finding in the Impugned Decision that:[81]

> it is unclear on what legal grounds this application is made. The application does not say it is founded on Rule 45(D) and makes no submission that there are exceptional circumstances that would allow the Trial Chamber to exercise its jurisdiction under Rule 45(D).

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[79] *Niyitegeka* Appeal Judgement, para. 8; *Krstic* Appeal Judgement, para. 40; *Krnojelac* Appeal Judgement, para. 11-13, 39; *Tadic* Appeal Judgement, para. 64; *Celebici* Appeal Judgement, para. 434; *Aleksovski* Appeal Judgement, para. 63; *Vasiljevic* Appeal Judgement, para. 8.
[80] *See in particular Rutaganda* Appeal Judgement, para. 18.
[81] Para. 49 of the Impugned Decision.

117. Although this finding relates to the legal basis of the application to re-assign, it relies on another finding of facts, namely the fact that the applicants nowhere specify the legal basis of their application in their submissions.

118. The Appeals Chamber finds this finding of fact wholly erroneous and refers to the very title of the Motion to re-assign the Trial chamber was seized of:[82]

> Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, Pursuant to Articles 17(4)(C) and 17(4)(D) of the Statute of the Special Court for Sierra Leone and Rule 54 of the Rules of Procedure and Evidence and the Inherent Jurisdiction of the Court

119. It results from this very title of the application that the Motion to re-assign identified three different legal grounds, namely (i) Article 17(4)(C) and (D) of the Statute, (ii) Rule 54 and (iii) the inherent jurisdiction of the Court. References to Article 17(4)(C) is made at paragraph 25 of the Motion to re-assign. References to Article 17(4) (D) are made at paragraphs 18, 21 and 24. Rule 54 and the inherent jurisdiction of the Court are referred to at paragraph 36.

120. Without assessing in any way on the appropriateness of these legal grounds, the Appeals Chamber therefore finds that Trial Chamber II finding that the Motion to re-assign was not motivated, is wholly erroneous and reverses the Impugned Decision on that aspect.

(c) Attempt to Reverse the Decision to Withdraw

121. Once again, the finding made in the Impugned Decision, that the Motion to re-assign was indeed "an application to reverse a majority decision given by the Trial Chamber on 12 May 2005"[83] relies on factual considerations by the Trial Chamber, namely that the Decision to withdraw granted all relief prayed for by the applicants and the "alacrity with which the accused and their Counsel and the Deputy Principal Defender sought to go behind that order and seek to reverse it".[84]

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[82] *Prosecutor v. Brima, Kamara, Kanu*, Case no. SCSL-2004-16-T, Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, Pursuant to Articles 17(4)(C) and 17(4)(D) of the Statute of the Special Court for Sierra Leone and Rule 54 of the Rules of Procedure and Evidence and the Inherent Jurisdiction of the Court, 24 May 2005. (emphasis added)
[83] Para. 50 of the Impugned Decision.
[84] *Idem.*

122. Neither the fact that the previous oral ruling of 12 May 2005 on the application to withdraw, as confirmed by the written decision of 20 May 2005, did indeed grant all the relief claimed by the applying Counsel, nor the alacrity of the applicant to claim and then move the Trial Chamber for their re-assignment are challenged by the Appellants. The considerations of facts on which the Trial Chamber's finding that the application to re-assign was indeed an application to reverse the majority decision to withdraw Counsel are therefore not challenged by the Appellants.

123. In these circumstances, the Appeals Chamber finds that the Appellants failed to demonstrate that the application to re-assign was not an application to reverse the majority decision of 12 May 2005 on the application to withdraw.

124. This being said, the Appeals Chamber does not find that the sole fact that the application to re-assign was an attempt to reverse the decision on the application to withdraw makes it necessarily a "frivolous and vexatious" motion. An applicant whose application has been fully granted by a Chamber may have reasons to seek review of the Chamber's decision when the circumstances which led to his or her application have changed. This opportunity to seek review of a decision by the same Chamber which rendered it, which is different from the right to appeal the decision,[85] is admitted in the jurisprudence of both sister International Tribunals. The Appeals Chamber of the International Criminal Tribunal for Rwanda clarified the criteria for review in the following terms: [86]

> [...] it is clear from the Statute and Rules[87] that, in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision.

125. This Appeals Chamber considers that the possibility to seek review of a previous decision when the circumstances have changed is broadly admitted at the international

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[85] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on Appellant's Motion for Extension of the Time-Limit and Admission of Additional Evidence (AC), 15 October 1998, para. 30.
[86] ICTR, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration)"(AC), 31 March 2000, para. 41.
[87] Article 25, Rules 120 and 121.

level. Beyond the jurisprudence of the other sister International Tribunals, Article 4, paragraph 2 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides for the reopening of cases if there is *inter alia* "evidence of new or newly discovered facts".[88] Article 14 of the International Covenant on Civil and Political Rights (ICCPR)(1966) refers to the discovery of "newly or newly discovered facts". The International Law Commission has also considered that such a provision was a "necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal."[89] Finally, Article 84(1) of the Rome Statute of the International Criminal Court provides for the revision of judgements on the following grounds:[90]

> "(a) New evidence has been discovered that:
>
> a. Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
>
> b. Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
>
> (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
>
> (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal if that judge or those judges from office under Article 46."

126. The facility to seek review on the ground of a change of circumstances has also been admitted for interlocutory decisions rendered in the course of trials.[91]

127. The Appeals Chamber therefore finds that an application before Trial chamber II seeking review of the Decision to withdraw Counsel based on a change of circumstances

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[88] 22 November 1984, 24 ILM 435 at 436.
[89] *Report of the International Law Commission on the work of its 46th session*, Official Records, 49th session, Supplement Number 10 (A/49/10) at page 28.
[90] Article 84(1) of the Rome statute of the International Criminal Court.
[91] ICTR, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration)"(AC), 31 March 2000, para. 41; ICTR, *Prosecutor v. Ndindiliyimana et al. ("Military II")*, Case No. ICTR-00-56-T, Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004, para. 21; *Prosecutor v. Ndindiliyimana et al. ("Military II")*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision of 14 September 2005 on Admissibility of Witness XXO's Testimony in the *Military I* Case in Evidence, 10 October 2005.

may have been admissible and would not be *per se* "frivolous and vexatious". This finding is without prejudice of the fulfilment of the above mentioned criteria for review by the applicants, which would have been to be determined by the Trial Chamber. The Appeals Chamber notes that such an application should have been filed by the applicants to the previous decision which review was sought, namely the withdrawn Counsel themselves, and not, as in the present case, their clients. However, in the view of the Appeals Chamber, this error on behalf of the Applicants and their Counsel is not sufficient to conclude that the Motion to re-assign, although ill-conceived, was "frivolous and vexatious".

128. As a conclusion on the Fourth and Fifth Grounds, the Appeals Chamber finds that the applicants successfully demonstrated that the Trial Chamber erred in fact by stating that the Motion to re-assign had no clear legal basis and that the Motion was indeed based on Article 17(4)(C) and (D) of the Statute, Rule 54 and the Inherent Jurisdiction of the Court. The present finding by the Appeals Chamber does not imply any judgement on the relevance of these legal bases. However, the applicants failed to demonstrate that the Trial Chamber's findings that the application to withdraw was not sincere and that the Motion to re-assign was indeed an application to reverse the Decision to withdraw could not have been reached by a reasonable trier of fact or were wholly erroneous. Nevertheless, the Appeals Chamber finds that Trial Chamber II erred in law by considering that the fact that the Motion to re-assign was an application to reverse the Decision to withdraw did make this application "frivolous and vexatious".

5. Defence Sixth Ground of Appeal

129. The Defence submits that the Trial chamber erred in law and/or in fact by considering that former Lead Counsel were not eligible to be re-appointed since they were no longer on the list of qualified Counsel required to be kept under Rule 45(C), when their removal was effected by the Registrar when the Motion to Re-Appoint was pending judicial consideration by the Trial Chamber. Accordingly, the Applicants pray the Appeals Chamber to declare the Registrar's decision to remove Counsel from the list null and void as *ultra vires*, to declare that the Trial Chamber erred in law by considering that it had no jurisdiction to review this decision, and to review it.

(a) The Acting Registrar's Decision to remove Counsel from the List of Qualified Counsel

130. The decision of the Registrar to withdraw Counsel from the List of qualified Counsel referred to at paragraph 51 of the Impugned Decision results from several correspondences attached to the submission of the Parties before the Trial Chamber. On 25 May 2005, Mr. Robert Kirkwood, the then Deputy Registrar, wrote in his capacity of Acting Registrar to Ms. Elizabeth Nahamya, Acting Head of the Defence Office:[92]

> One of the main considerations for allowing Counsel to withdraw from the trial was the ongoing security concerns that counsel had for themselves. To date this matter has not been resolved nor have the counsel sought to have these matters investigated by court security. They represent an ongoing security issue for the court and at this point of time are not suitable to be considered as counsel in any trial before the court.
>
> Any request for an investigation into these security issues may take some months to satisfactorily resolve. In these circumstances it is not appropriate to have these counsel on the list of qualified counsel. You are therefore directed to immediately remove Kevin Metzger and Wilbert Harris from the list of qualified counsel who may be assigned as counsel.

131. On 26 May 2005, Ms. Elizabeth Nahamya responded to Mr. Robert Kirkwood:[93]

> Regarding your order to me to withdraw Mr. Kevin Metzger and Mr. Wilbert Harris from the List of Qualified Counsel, the Trial Chamber's Order dated 12 May 2005 and the Decision rendering its reasons issued subsequently on 20 May 2005, did not make a judicial Order instructing the removal of Kevin Metzger and Wilbert Harris. Thus absent a judicial Order to that effect or absent any adjudicated disciplinary findings against Counsel, I cannot remove them from the List. The matter is again a judicial matter that must be decided by Lawyers and Judges.

132. On the same day at 5.33 p.m., Mr Kirkwood sent an e-mail to Ms. Elizabeth Nahamya in which he wrote:[94]

> Your concerns are duly noted and should judicial review overturn my order it is something I am prepared to accept full responsibility for. The order stands as of the date that it was issued to you and therefore Messrs. Harris and Metzger are no longer eligible for consideration.

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[92] *See* Attachment 1 to the Registrar's (First Respondent) Response to the Motion to Re-assign.
[93] *See* Attachment to the Principal Defender's Response to the Motion to Re-assign, pages 8923-8924.
[94] *See* Attachment to the Principal Defender's Response to the Motion to Re-assign, page 8922.

(b) Jurisdiction of the Appeals Chamber to Review the Decision of the Acting Registrar

133. The Appeals Chamber notes the caution taken by Trial Chamber II in the Impugned Decision which limits itself to the finding that "it appears that the said Counsel are not eligible to be reappointed since they are no longer on the list of qualified Counsel required to be kept under Rule 45(C)".[95] It is true that the Trial Chamber was not seized, as the Appeals Chamber is, of a request to judicially review the decision of the Registrar to remove the Counsel from the List of Qualified Counsel. The reason of this is that the Registrar took his decision to remove them from the List on 26 May 2005, when the Motion to re-assign was filed on 24 May 2005.

134. Now the Applicants seek for the first time in this pending appeal a judicial review of the Registrar's decision by the Appeals Chamber. It may be argued that such a new relief cannot be sought for the first time in appeal and shall therefore be denied. But the Appeals Chamber notes that the Parties did not raise any objection as regards this new request, that the Appellants had no knowledge, when they filed their Motion to re-assign before the Trial Chamber, of that decision of the Registrar which was taken while the matter was pending before the Trial Chamber, and that they tried to challenge this decision before the Trial Chamber in a public hearing on the Motion, which was refused by the Trial Chamber. The Appeals Chamber therefore accepts to consider this new request.

135. The Appeals Chamber refers to its above finding on the inherent jurisdiction of Chambers to judicially review administrative decisions affecting the rights of the Accused. The Appeals Chamber restates that such inherent jurisdiction may be exercised only in the silence of the regulations applicable to the matter. [96]

136. The Appeals Chamber notes that Article 13(F) of the Directive provides:

> Where the Principal Defender refuses to place the name of the applicant Counsel on the List of Qualified Counsel, or removes the name of Counsel from the List of Qualified Counsel, the concerned Counsel may seek review, by the President, of the Principal Defender's refusal. An application for review shall be in writing and the Principal Defender shall be given the opportunity to respond to it in writing.

(i) ———————————

[95] Para. 51 of the Impugned Decision.

[96] *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para. 31-32.

137. For the reasons mentioned earlier as regards the Registrar's decision not to re-assign Counsel, the Appeals Chamber considers that where the Registrar uses the powers he keeps in concurrence with the Principal Defender, he shall do so in the same conditions as the Principal Defender would. In particular, where the regulations provide that the Principal Defender's decision may be reviewed, the concurrent decision of the Registrar is submitted to the same condition.

138. Therefore, the Appeals Chamber considers that, pursuant to Article 13(F) of the Directive, the review of the decision to remove a Counsel from the List of Qualified Counsel, either taken by the Principal Defender or the Registrar, falls within the exclusive province of the President of the Special Court.

139. The Appeals Chamber therefore concludes that it has no jurisdiction to review the decision of the Registrar to remove Counsel from the List of Qualified Counsel and denies the ground and the related relief.

6. Defence Seventh Ground of Appeal

140. In their seventh and last ground of appeal, the Appellants challenge the Trial Chamber's ruling, in the Impugned Decision[97], that there were no grounds for submitting that any Judge recuse himself/herself from the deliberation on the Motion to re-assign. In this respect, the Appellants rely on Justice Sebutinde's observations, in her dissenting opinion.

141. The Appeals Chamber refers to its finding under the First Preliminary Issue raised in the current decision that, pursuant to article 18 of the Statute, the concurring/dissenting opinions that are not properly "appended" to the decision they relate to and filed together with it are not admissible and shall be disregarded. Justice Sebutinde's Dissenting Opinion having been filed after the Impugned Decision and separately, the Appeals Chamber considers that it is not admissible and accordingly disregards it.

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[97] Para. 33 of the Impugned Decision.

142. As regards the oral consultation that was admittedly made by the Registrar to the Trial Chamber, the Appeals Chamber observes that the Registrar justifies its oral consultation of the Trial Chamber on the ground of Rule 33(B).[98] Rule 33(B) provides:

> The Registrar, in the execution of his functions, may make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary.

143. The Appeals Chamber recognizes that in the exercise of its administrative functions and servicing of the Special Court pursuant to Article 16(1) of the Statute, the Registrar may need to confer with the Chambers from time to time. These consultations do not necessarily need to be made *inter partes*, namely in the presence of the Parties to the case. Rule 33(B) specifically provides that such notice to the Parties shall be made only "where necessary". Such necessity may arise, in particular, where the interests of the Accused are concerned.

144. The Appeals Chamber notes the Defence Office's submission that "contrary to Rule 33, the [Registrar] did not notify the Accused nor their Counsel about his consultation with the Trial Chamber yet the matter at hand was very crucial to their rights"[99]. The Appeals Chamber agrees that, would this consultation have been crucial to the rights of the Accused, the Registrar should have notified the Parties pursuant to Rule 33(B).

145. But the Appeals Chamber finds that the oral consultation between the Registrar and the Trial Chamber was apparently limited to the re-confirmation of the Oral Decision to withdraw Counsel, which was rendered on 12 May 2005 and confirmed on 16 May 2005 and, in particular, the meaning of the consequential order to appoint *another* Counsel to each Accused pursuant to Rule 45(E). In those circumstances, the Appeals Chamber does not agree that this consultation, which appears to have been only motivated by the Defence Office's insistence to re-appoint the *same* Counsel in contravention with the Trial Chamber's express and repeated order to appoint *another* Counsel, was crucial to the rights of the Accused. The Appeals Chamber therefore concludes that there was no necessity to notify this consultation to the Parties pursuant to Rule 33(B).

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[98] Para. 59 of the Registrar's Response.
[99] Page 20 of the Defence Office's Response.

146. For the foregoing reasons, the Appeals Chamber concludes that the Appellants failed to demonstrate that the Trial Chamber erred in law and/or in fact by stating in the Impugned Decision that there were no grounds for submitting that any Judge should have recused himself or herself. This ground is consequently dismissed in its entirety.

FOR THESE REASONS
THE APPEALS CHAMBER

DECIDES that the Defence application for leave to appeal was filed out-of-time,

DECIDES that the Defence Notice of Appeal and Submissions in Appeal were filed out-of-time,

NEVERTHELESS DECIDES to determine on the merits of the Appeal,

DECIDES that the Defence Office's additional ground raised in Section IV, Sub-section 2 of the Defence Office's Response is inadmissible;

DENIES the Defence's request in Reply not to consider Justice Doherty's Comment appended to the decision granting leave to appeal;

DENIES the Registrar's Additional Motion in its entirety;

PARTIALLY GRANTS the Appeal;

FINDS that the Trial Chamber had jurisdiction to review the Registrar's decision not to re-assign Counsel Metzger and Harris, **BUT FINDS** that the Trial Chamber correctly exercised its jurisdiction by dismissing the request to declare that decision null and void;

FINDS that the Trial Chamber erred in fact by stating that the Motion to re-assign had no clear legal basis;

FINDS that the Trial Chamber erred in law by considering that the fact that the Motion to re-assign was an application to reverse the Decision to withdraw did make this application "frivolous and vexatious";

DISMISSES the Appeal on all other aspects.

Justice Ayoola, Justice King and Justice Robertson are appending their Separate and Concurring Opinions to the present Decision.

Done at Freetown this day 8th of December 2005

Justice Raja Fernando
Presiding Judge,

Justice Emmanuel Ayoola

Justice George Gelaga King

Justice Renate Winter

[Seal of the Special Court for Sierra Leone]

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THE APPEALS CHAMBER

Before: Justice Raja Fernando, Presiding
Justice Emmanuel Ayoola,
Justice George Gelaga King
Justice Geoffrey Robertson, QC
Justice Renate Winter

Interim Registrar: Mr. Lovemore Munlo, SC

Date: 8th December 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-2004-16-AR73)

SEPARATE AND CONCURRING OPINION OF JUSTICE ROBERTSON ON THE DECISION ON BRIMA-KAMARA DEFENCE APPEAL MOTION AGAINST TRIAL CHAMBER II MAJORITY DECISION ON EXTREMELY URGENT CONFIDENTIAL JOINT MOTION FOR THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL FOR ALEX TAMBA BRIMA AND BRIMA BAZZY KAMARA

First Respondent:
The Registrar

Second Respondent:
The Principal Defender

Court Appointed Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Court Appointed Counsel for Brima Bazzy Kamara
Andrew K. Daniels
Mohammed Pa-Momo Fofanah

1. I concur in the result that this appeal be dismissed, although I reach that conclusion on the ground that the motion is an abuse of process, namely a collateral attack on a judgement (that of 20 May 2005) which can only be altered by way of an application to appeal it or revise it, and not by attempting to stop the Registrar from implementing it. I have explained my reasoning in this separate judgement, which deals additionally with a number of important issues that have been fully argued in submissions but have not been addressed in the majority opinion.

2. This interlocutory appeal has generated over 1,000 pages of evidence and argument. It has been costly and time consuming for a court which has little time or money to spare. It has evoked internecine disputes amongst the judges of Trial Chamber II, a heated disagreement between the Defence Office and the Registrar, and severed – then patched up – relationships between counsel and their clients. The only party to emerge unscathed is the prosecution, which sensibly avoided involvement in the imbroglio which ensued when two lead defence counsel sought to withdraw from the AFRC case, claiming to be in fear for their lives. With the hindsight from which an Appeal Chamber always benefits, some of the actions in the court below can be seen as precipitate or ill-advised. In so describing them I do not wish to underestimate the serious and novel ethical problems that can unexpectedly arise in defending people who do not wish to be defended, in a war-crimes court sitting in what was, until recently, a war zone.

3. This judgement begins by making some preliminary points about dissenting judgements and confidential motions in Trial Chambers. There will follow an account of the facts, and then consideration of certain important issues which have arisen in the course of the appeal and have been fully argued, touching the right to counsel and the role of the Defence Office. Although I find

that the Appeal itself goes nowhere – it is brought to review judicially a Registrar's decision, rather than as an appeal against the court order which his decision implemented – nonetheless it has raised in its course a number of issues of general importance for war crimes courts in relation to the duties owed by defence counsel and the extent to which a Trial Chamber may direct the Registrar in respect of his administrative decisions.

PRELIMINARY ISSUES

A) Filing of dissenting judgements

4. This appeal has exposed a systemic procedural aberration in both Trial Chambers, namely a tendency for dissenting judgements, and sometimes individual concurring opinions, to appear weeks and even months after publication of the court's decision. In this appeal, for example, the Trial Chamber's majority decision was delivered by Judges Doherty and Lussick on 9 June 2005; Judge Sebutinde's dissent was not published until 11 July. The Trial Chamber decision to permit the withdrawal of counsel – the decision which should have been the subject of this appeal – was delivered by the same majority on 20 May 2005, but Judge Sebutinde did not vouchsafe her dissent until 8 August – two and a half months later. Upon enquiring into the records, it appears that similar delays have occurred in delivery of decisions in Trial Chamber I. The late filing of individual judicial opinions seems to have become a habit in both chambers.[1] It must stop immediately, for a number of reasons.

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[1] In the CDF Case, Dissenting Opinion of Judge Pierre Boutet on Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's request for Leave to Amend the Indictment of Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 5 August 2004 (Decision on 2 August 2004); Dissenting opinion of Hon. Judge Benjamin Mutanga Itoe, presiding judge, on the chamber majority decision supported by Hon. Judge Bankole Thompson's separate but concurring opinion, on the motion filed by the Second Accused, Moinina Fofana, for service and arraignment on the consolidated indictment and a second appearance, 13 December 2004 (decision on 6 December 2004); Dissenting opinion of Hon. Judge Benjamin Mutanga Itoe, presiding judge, on the chamber majority decision supported by Hon. Judge Bankole Thompson's separate but concurring opinion, on the motion filed by the Third Accused, Allieu Kondewa, for service of consolidated indictment and a further appearance, 13 December 2004 (Decision on 8 December 2004); Confidential Dissenting Opinion of Justice Itoe on Majority decision Regarding Witness TF2-218, 19 September 2005 (Decision on