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

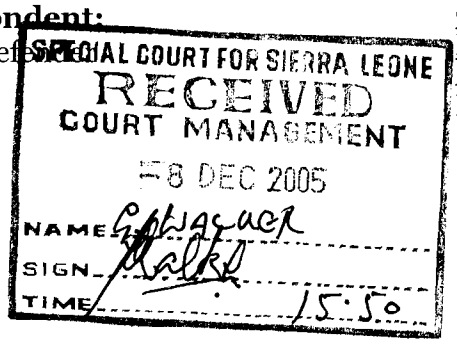
Date: 8th December 2005

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.

(i) ———————————

[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.

[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

5. The first reason is that it is in breach of the Statute of the Special Court for Sierra Leone, which is this court's constitution. Article 18 states:

> The judgement shall be rendered by a majority of the judges of the Trial Chamber... It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

By no stretch of language can a dissenting opinion be said to be "appended" to a decision of the court when it is filed two months after that decision. "Appended" means annexed or attached to, i.e. added in writing at the end.[2] Article 18 does not comprehend the delivery of a separate or dissenting opinion at some later date.

6. Quite apart from the Statute, simultaneous delivery of judicial opinions has been the invariable practice in this Appeal Chamber and in other international courts, and in the Supreme courts of nations with developed legal systems. It is not only good administrative practice, but essential for fairness to the parties: how else are they to know whether and how to appeal, or how otherwise to conduct themselves, until they are able to read all the judgements in a case? It is also essential for collegiality: the public and the parties are entitled to expect judges to discuss each other's opinions with open minds, and to consider points made in each other's drafts. How can the necessary collegiality be maintained when one judge declines to submit a draft to colleagues, yet publishes a critique of their efforts, in the form of a dissent, several months later?

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15 June 2005). In the RUF Case, Dissenting opinion of Judge Thompson on decision on application for leave to appeal – Application to withdraw counsel, 7 September 2004 (Decision on 3 August 2004); Partially dissenting opinion of Hon. Justice Benjamin Mutanga Itoe on the chamber majority decision of the 9th of December, 2004 on the motion on issues of urgent concern to the accused Morris Kallon, 18 March 2005 (Decision on 9 December 2004). In the AFRC Case, Separate and dissenting opinion of Justice Sebutinde in the decision on the confidential joint Defence motion to declare null and void the testimony of Witness TF1-023, 8 August 2005 (Decision on 25 May 2005); Separate and Concurring Opinion o f Justice R.B. Lussick on Brima-Kamara Application for Leave to Appeal from decision on the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel, 14 September 2005 (Decision on 5 August 2005).

[2] See Concise Oxford Dictionary: the verb append means "hang on, annex, add in writing (from the Latin "appendere", and hence appendage), "a thing attached; addition; accompaniment".

In this case, we have the spectacle of one judge belatedly making factual assertions to which her colleagues have taken issue, and they have given their different version of events at the only time possible to bring them before the appeal chamber, namely when granting leave to appeal. Moreover, the practice has led to confusion as to the point from which time-limits for appeal are to run: is this from the date of the decision of the court (i.e. the majority), or the date on which the last judicial opinion in the case is filed?

7. This problem can be illustrated by the present appeal. Rule 73B provides that any application to appeal an interlocutory decision must be made "within three days of the decision". The decision, obviously, is that of the court, whether unanimous or by majority. The court's majority decision in this case was rendered on 9th June 2005 and the time for interlocutory appeal ran out on 12th June, by which point no such appeal had been lodged. The application was not made until 14th July, well out of time but within three days of the dissent filed by Judge Sebutinde on 11th July – this dissent evidently inspiring the application. The Trial Chamber granted leave notwithstanding, although Judge Lussick noted that technically the application was out of time. In future, time limits for interlocutory appeals should be strictly enforced and practitioners and judges must realise that time runs from the date at which the reasoned judgement of the court is first delivered to the parties.

8. The practice that seems to have developed in both Trial Chambers must not continue. This Appeal Chamber should henceforth not read dissents or concurring opinions which are not "appended" to the court decision. It is often necessary for a Trial Chamber to give an *ex tempore*, "off the cuff" decision with reasons to follow later, and this practice is to be encouraged in the interests of expedition of trial proceedings. But the delay should at most be measured in weeks, and never in months: it is the primary role of Trial Chamber judges to get on with the trial as fairly and expeditiously as possible, and only to produce lengthy interlocutory disquisitions on interesting points of law in the rare case

where this is necessary, for fairness and expedition. Otherwise, such academic exercises should be left to the Appeal Chamber, which is best placed to consider them. The Trial Chamber should dispense practical legal wisdom in language comprehensible to defendants as well as counsel, and dispense it either on the spot or shortly after oral or written argument. It is the function of the Presiding Judge to ensure that Trial Chamber judgements are expeditiously delivered, and there are obviously limits to the time (which I would measure in weeks - four at the outside) that a dissenter can be permitted to take to produce an opinion to be "appended". If a dissenter cannot write his or her opinion within a reasonable time, then the Presiding Judge would be entitled to proceed to file the court's decision: the dilatory dissenter would lose his or her conditional right under Article 18 of the Statute to "append" reasons to justify their dissent. That Article provides that "separate or dissenting opinions may be appended" (my italics) and "may" does not mean "must". A tardy dissenter cannot be allowed to hold up the delivery of a judgement. But if the dissent is ready at much the same time as the majority decision, the judgements should all be published simultaneously. The majority, or the Presiding judge, have no power to prevent publication of a dissent which is available, within reasonable time, to be "appended".

9. The importance of collegiality must be emphasised. Each judge is independent, but a condition of independence is a willingness to consider the arguments of colleagues. Where opinions differ, collegiality requires at least a consideration of other arguments and a willingness to divulge and discuss drafts before the judgements are published, all within an atmosphere of good faith. Any allegations of impropriety against judicial colleagues should be made to the President of the Court. Rule 29 should be respected, at least in keeping documentary communications between judges confidential. These principles are readily observed in national courts, where judges (however much their personalities clash) emerge from the same professional background: they should apply in international courts, notwithstanding differences in approach and experience between judges from different national systems.

B) Confidential Filings

10. The other point of general importance that emerges from scrutiny of the record in this Appeal is the unsatisfying and somewhat cavalier approach to the filing of "confidential" motions and responses. The Special Court, like all true courts, has a rule that presumes that its justice will be done in public and that unless very good reasons are advanced and accepted, the evidence and arguments will be accessible to the public. This not only presumes that hearings will be in open court but that all motions and responses and documentary material submitted to the court will be placed on an open file. There may, on occasion, be good reason to keep such material confidential to the parties, but that good reason must be established in open court and secrecy must be limited to what is absolutely necessary to serve the purpose for which it is ordered.[3] In this case, however, the written motions by lead counsel to withdraw from the case, and the responses by the Principal Defender and the prosecution, were all designated and treated as "confidential" – with the consequence that the arguments before the Trial Chamber on the withdrawal application cannot be appreciated, other than by passing references in the majority and minority judgements.

11. From a study of the transcripts, it appears that lead counsel Mr Metzger first trailed the need for a "closed session" for what he described as "sensitive matters" in open court on 6th May 2005 – the last of three open hearings of his application to withdraw. The prosecution assumed that this "sensitivity" related to lawyer-client confidentiality and its concern was only to ensure that its counsel had access to any material that would be considered by the court. The Trial Chamber, without hearing further argument, ordered that "All documents are to remain confidential. Oral submissions, if any, relating to matters of a sensitive nature shall be in closed session."[4] Thereafter, submissions in what was labelled "*The Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara*" were filed and circulated in secret. Article 4B of the

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[3] See *Attorney General v Leveller Magazine Limited* (1979) A.C. 440
[4] See AFRC transcript, p15

Practice Direction on Filing Documents provides that documents filed as "Confidential" should indicate the reason for confidentiality on a Court Management Form, and "The Judge or chambers shall thereafter review the document and determine whether confidentiality is necessary." I have seen no evidence of compliance with Article 4B in this case. Where is the decision reviewing the claim for "confidentiality"? Henceforth, confidential filings should explain, at the outset, the reasons for the claim of confidentiality, and chambers must give judgements – in open court as far as possible – upholding or rejecting the claim.

12. Trial Chambers and all who practice in them are reminded of the fundamental importance of the open justice principle. In the words of Jeremy Bentham, "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all safeguards against improbity. It keeps the judge himself, while trying, under trial". Not only the judge, of course, but counsel and other professionals who must also be subject to informed public scrutiny, especially in a case of this kind where they sought permission to withdraw from a trial commitment that they had undertaken both professionally and contractually. The open justice principle serves other forensic interests: publicity deters perjury and encourages witnesses to come forward, while resultant media reportage enhances public knowledge and appreciation of the workings of the law. Trials derive their legitimacy from being conducted in public: judges preside as surrogates for the people who are entitled to scrutinise and approve the power exercised on their behalf. No matter how fair, justice must still be seen before it can be said to be done.

13. There will, in war crimes courts which sit in countries recently torn asunder by war, always be occasions when justice can only be done if certain evidence is withheld. For example, the identity of protected witnesses or of sources of information may have to be suppressed. When that is done, however, the suppression order must be strictly limited to what is necessary to serve the overriding security interest. It follows that applications for the confidentiality of

hearings or of motions should be made in public and the reasons explained so far as possible in open court. Counsel for other parties should be alert to resist unnecessary secrecy applications, unless persuaded of their merit. The court should consider such applications with the above principles in mind and grant them only, and only to the extent that, secrecy is essential. In this case, the prosecution did not demur and the court made no enquiry as to the nature of the "sensitivity" and whether, for example, confidentiality was really being sought for the illegitimate reason of protecting counsel from embarrassment. The court order clothed with secrecy some important and novel submissions that could and should have been advanced in open court.

14. Given that the Defence had labelled its motion "confidential" it was ironic that belatedly, in the Reply, the Defence should urge the Trial Chamber to order an oral hearing so that the matter could be ventilated in public. This application was misconceived since all hearings must presumptively be held in open court: see Article 17(2) and Rule 78. The point to which the Defence request should have been directed was whether there needed to be a "hearing" at all. Motions will only be "heard" – with all the consequent delay in assembling the court and the expense of paying counsel and court staff – if the judges think that oral argument is necessary to assist their decision-making, e.g. by questioning counsel or hearing live evidence or further oral development of an argument. There had been oral hearings enough on this matter and the Trial Chamber judges were perfectly entitled, in their discretion, to reject the request because they had no need of the assistance of counsel to decide the legal issues raised by the motion. There is, however, one rule of prudence that judges should try to follow, namely that if they are minded to make a serious criticism of a lawyer or court official that goes to his integrity rather than to his tactical sense or ability, it is only right and fair to "hear the other side". In advancing their state of fear as a reason for withdrawal, Messrs Harris and Metzger were open to comment and criticism, but the Trial Chamber's conclusion that they were "insincere" in making this application suggests they were guilty of unprofessional conduct. Fairness required that these two advocates at least be given an opportunity to refute this

allegation, which had not been suggested in the written submissions of other parties. It was not, as it turned out, a finding that was necessary for the Trial Chamber's decision to dismiss this motion, which could be amply supported on other grounds.

THE FACTS

15. Although this appeal has produced a great deal of evidence and argument, the key facts can be summarised quite shortly. In March 2005, in the AFRC case, there was an unfortunate incident when a protected witness was threatened after court by four women, including the wives of the two appellants. The women were arrested, together with an investigator for the defence team who was accused of betraying the identity of this witness. The Trial Chamber suspended the investigator and barred access by the women to the public gallery. It ordered an independent counsel to consider the matter, received his confidential report and authorised him to prosecute all five persons for contempt. In taking these steps, so the Appeal Chamber subsequently held, the Trial Chamber acted properly and reasonably and according to the Rules of Evidence and Procedure.[5] However, its actions understandably upset the defendants, who were personally blameless, but upset them to such an extent that they boycotted the trial by refusing to come to court. They withdrew all instructions from their counsel, other than instructions to appeal all of the Trial Chamber decisions in relation to the contempt matter. By these actions, they sought not merely to protest the Trial Chamber decision, but to disrupt the adversary process of their own trial, so it could not continue effectively (i.e. with fully instructed counsel testing the prosecution evidence) until either the Trial Chamber reversed its decision to authorise the contempt prosecution, or the appeal against that authorisation was decided by the Appeal Chamber – some months in the future. No court can buckle under this kind of

[5] See *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-AR77, Decision on the 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; *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-AR77, Decision on the joint Defence Appeal against the Decision on the Report of the Independent Counsel pursuant to Rule 77(C)(iii) and 77(D), 17 August 2005.

pressure from defendants and although some allowance might be (and in this case, was) made so that they could reconsider their boycott and discuss its consequences fully with their counsel, it must be said that this disruptive action of the defendants initiated the unhappy series of events that followed.

16. As the defendants must have realised, their withdrawal of instructions put their lead counsel in some professional difficulty. It is not easy for any barrister bred, like Messrs Harris and Metzger, in the traditions of the English bar to conduct a defence without the full confidence and support of his client. When that confidence is lacking or where other "professional difficulties" arise (this phrase being sometimes a euphemism for a client's inadvertent admission of guilt), a barrister's conscientious decision to withdraw is usually accepted by English criminal courts. However, for reasons which will be explained below, international criminal courts cannot and do not adopt the same permissive attitude. From bitter experience, they have made strict rules about this situation. In this court, the relevant rule is found in Rule 45:

> Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances.

The Application for Withdrawal

17. After wrestling with their clients and their consciences, two lead counsel - Messrs Harris and Metzger - decided that they could not continue. They made their application to withdraw from their contractual and professional engagement on four grounds. Principally, they claimed that withdrawal of their instructions by their clients put them in an impossible ethical position. Secondly, they asserted - somewhat faintly - a potential embarrassment should they be summonsed to appear as witnesses in the contempt proceedings. Thirdly, and mistakenly, they urged that they would be in potential conflict with the code of conduct of the English Bar. Fourthly, and dramatically, they claimed to have

received threats to their lives and that of their families. They declined to give any details of these threats, which had never been mentioned to court security or to the Registrar. All they said was that the threats had not emanated from defendants and were directed against "all court-appointed counsel working at the Special Court". Mr Harris added that he had received three telephone calls threatening his safety – he declined to say from whom. This was a point capable of argument – I can fully understand the risks inherent in defending in international criminal proceedings – but in this case neither counsel seems to have argued that the Court could not discharge the duty imposed on all international criminal courts to ensure the safety of all parties involved in the trial process (be they prosecutor or defence advocates, witnesses, court staff, defendants or judges).

18. The Principal Defender opposed this application: the interests of justice required that the lead counsel be held to their contracts and any concern for their safety might be met by redesignating them as "amicus" counsel rather than as lead counsel. The prosecution submitted that the four grounds, whether individually or conjunctively, fell far short of "the most exceptional circumstances" which alone would justify the disruption, expense and unfairness of permitting them to withdraw.

19. On 12th May the Chamber delivered orally its majority decision, with reasons to follow later. It granted the two lead counsel their application to withdraw and it directed the Principal Defender, who was in court, to assign new lead counsel. "We are confident that the co-counsel can carry the case in the meantime, as they have been doing for long sessions in any event" said Judge Lussick. "Thank you for that clarification" said the Principal Defender. "That just leads me to know that we have to assign other people in due course." The situation, it might have been thought, at this point was clear: the motion had been granted and Messrs Harris and Metzger had been permanently removed, at their own request, from the case and from the court.

20. This order would have administrative repercussions, of course. Their names had been on a "list" of available defence counsel which is kept by the office of the Principal Defender (the "Defence Office"), and in due course and as a purely tidying-up exercise, their names would have to be removed, since they had made themselves unavailable and the Court had ordered that they be replaced. Clause 13(b) of **The Directive on the Assignment of Counsel** defined those barristers eligible for inclusion on the list: paragraph 13(b)(v) says specifically that they "*must... have indicated their willingness and availability to be assigned by the Special Court to an accused*". Since Messrs Harris and Metzger had spent the proceeding fortnight forcefully indicating their *unwillingness* to be so assigned, they had effectively removed themselves from the list in any event. There was a court order that they should be replaced and the only way they could revert to their pre-existing role would be to approach the court and persuade it to rescind or vary that order. On 12th May, the Court had plainly ordered that the trial would continue with co-counsel, and fresh lead counsel would in due course be instructed by the Principal Defender.

21. The situation was clear and all that was needed to make it pellucidly clear was the court's reasoning, to explain which of the four grounds had led it to take the wholly exceptional step of permitting these two lawyers to abandon their clients. Since most of the argument had been directed to the primary ground, i.e. withdrawal of instructions, the Principal Defender might be forgiven for thinking that this was the basis of the court's decision. When the reasons for the decision were delivered, 8 days later (20th May) it transpired that this ground had been firmly rejected and the court had made its order solely on the fourth ground, i.e. that the two counsel were in a state of fear. Had that fact been known, even in outline, on 12th May, the subsequent confusion might have been less confounded.

Events between Decision (12 May) and Reasons (20 May)

22. This was not known, because on 12th May the court did not even give short reasons for its decision. At some time later that day the two defendants did a *volte face*. They wrote to the Principal Defender, with copies to Harris and Metzger, a letter that is dated 12 May:

> We now deem it necessary to withdraw the limited instruction and instruct them to fully participate in our case, as there was a good relationship existing between us, as lawyer and client, and we have confidence, truth and belief in them as our lead counsel. We want to maintain our two lead counsel more so as they have spent a lot of time working on our case and already have started interviewing our witnesses. In the light of the fact that we want this case to end with out any undue delay as we are young men who want to continue with our lives after this case, we do not want new counsel to be brought in at this trail (sic) stage. In the least we have some information on the contempt of proceedings. We have also implored our lawyers to come back to court. We would join them at a later stage in court.

23. The lawyers in the Defence Office believed that the withdrawal of instructions had been the reason for the court's decision, so they thought that restoration of those instructions, as indicated by the letter, should have the effect of reversing the order. So on 16th May an assistant Principal Defender, Ms Claire Carlton-Hanciles, appeared before the Trial Chamber and sought to table the defendant's letter. She was given very short shrift:

> The order was made. Any letters, correspondence or documents that seek to go behind that decision cannot be countenanced in this court. The decision was made.

24. The court's refusal to "enter into correspondence" was understandable, since it was doubtless in the process of finalising its reasoned judgement.

Nonetheless, it was regrettable that the Trial Chamber did not take this opportunity to consider the change of circumstances and to invite Mr Harris and Mr Metzger to attend court if they had any application to vary the order. The court's incantation that "the decision was made" may reflect an entirely mistaken notion that it had no jurisdiction to reconsider its order. As will be explained (para 49): every court may, if justice requires, vary or rescind an earlier order or reconsider an interlocutory decision because of fresh evidence or changed circumstances. However, in the absence of any application from Harris and/ or Metzger, no such reconsideration would have been fruitful, given the reasoning – as yet, unrevealed - upon which the Trial Chamber majority had decided this matter.

25. The public defenders, sent off from court with a flea in their ear on 16th May, were not prepared to give up. They were committed to the interests of Brima and Kamara and believed that these interests would be best served by reassigning their counsel of choice, now that they had agreed to re-instruct them. In this exercise, the Defence Office received scant assistance from Harris or Metzger, neither of whom seems to have volunteered to appear before the court to ask for an unconditional return to the case. It appears that they had left for England, leaving the matter for lawyers in the defence office to resolve, telling them in e-mails that the security problem was "secondary"[6] but their re-assignment was "a matter now for you and the Chamber".[7] There seems to have been no appreciation that they would have to appear themselves in the chamber to unravel a problem of their own making. The defendants, meanwhile, were refusing to consider any of the alternative lead counsel suggested to them by lawyers from the Defence Office and were insisting that the Office re-assign Messrs Harris and Metzger. Given the unaccommodating attitude of the Trial Chamber judges on 16th May, the public defenders were being put in an unenviable position.

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[6] Email from Metzger to Defence Office, 18th May 2005.
[7] Email from Metzger to Defence Office, 14th May 2005

26. On 17th May, the public defenders wrote to the Registrar a considered letter setting out in some detail the reasons why they believed it would be in the best interests of the defendants, and the best interests of expediting the trial and of fiscal economy if Messrs Harris and Metzger were "appointed afresh". This was a reasonable position to take if (as they obviously believed) the reason for the court's order had been the original withdrawal of instructions. Their letter to the Registrar failed to mention the Trial Chamber's refusal on 16th May to enter into any dialogue on what turned out to be the all-important security issue: they merely said that counsel would be willing to continue with the case "if reasonable steps can be taken to address their concern" – whatever this might mean.

27. I would interpret the Defence Office letter to the Registrar as a cry for help rather than, as the Court later came to think, an attempt to circumvent its order. The Registrar interpreted it as a request for his assistance, and so used his power under Rule 33B to make representations to the Trial Chamber for help in discharging his functions. Given the urgency of the situation and the fact that he was about to leave Freetown, the Registrar simply submitted the public defender's memorandum of 17th May to the Presiding Judge of the Trial Chamber, with a hand-written request for the court's urgent advice on whether these two counsel should be reappointed. His note, hastily written in the circumstances, said that "as a matter of expediency" there were reasons to support their return but "my view is that it would be counterproductive to reassign them" and he thought the Trial Chamber should have "at least a say, if not the final say" on the question.

28. The Registrar is entitled, by Rule 33(B) to

> make oral or written representation 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.

This sub-rule means that he may intervene, himself or by his legal adviser or counsel, in any Trial Chamber motion that touches his responsibilities. He may also approach and address the court on any difficulty that he or the departments under his supervision would encounter in implementing court orders. When he approached the court on 18th May he had not been told of its firm endorsement of its order on 16th May and he was under pressure from the Defence Office to take action which would seemingly (and in reality) have breached the 12th May order to appoint other lead counsel. In these circumstances his action is explicable although it should have been made as a formal application with notice to all parties: such a notice was obviously "necessary". Regrettably, and probably because of pressures arising from the resignation of the Principal Defender and his own imminent travel, the Registrar approached the court privately and informally.

29. The Registrar's request was discussed by the trial chamber judges, after which the Presiding Judge wrote a robust reply to the Registrar. It referred to the "no correspondence" order of 16th May and added

> That ruling stands and the order stands. The court will not give audience to counsel who make an application to withdraw on one day on various grounds, particularly security, and then come back the day after and basically say they retract. They cannot make fools of the court like this, nor can they do it in a "backdoor" way through the Principal Defender's and Registrar's power to appoint counsel.

30. The Registrar was mistaken to write privately to the Trial Chamber and it was injudicious to reply by a private inter-office memorandum. The court should, consistently with its treatment of the Principal Defender on 16th May, have sent the Registrar away with the same ruling: no correspondence would be entered into, at least until its reasoned judgement was delivered. Then, at a proper hearing attended by Harris and Metzger, views about "making a fool of the court" could be canvassed. The Presiding Judge was perfectly entitled to hold

and to express these sentiments, but not to express them privately in a memorandum of "advice" to the Registrar.

31. Justice Sebutinde now leapt into the fray with a judgement-length "inter-office memorandum" produced overnight. It was copied not only to her colleagues and to the Registrar but to the Prosecutor and to the Deputy Principal Defender, thereby ensuring that it was seen by the defence teams. In somewhat extravagant terms, it expressed her opinion that the Registrar's request for advice was *ultra vires* and that any answer from her colleagues would be grossly improper and reveal their bias and conflicts of interest and would compromise the fair and impartial conduct of the trial. Judge Sebutinde's irritation at the turn of events can be well understood, but what was required from her – and from the other judges – was not an inter-office memo but reasoned judgements, so the matter could get back on track. The Registrar's private application for advice was a mistake and so was the Presiding Judge's private answer, but these mistakes came about because of the delay in delivery of the reasoned judgement. The next day, 20th May, Judges Doherty and Lussick handed down their reasons. Judge Sebutinde's dissent was not appended. It did not appear until 5th August, two and a half months later. That I find its reasoning in some respects persuasive does not excuse the fact that it was unavailable at the time it was required by the rules and needed by the parties, and when it might well have been used as the basis for a successful application to appeal the majority judgement.

The Reasons: Majority (20 May) Dissenter (5 August)

32. The court's judgement, delivered on 20th May, at last revealed the reason why the application to withdraw had succeeded. The court firmly rejected, by reference to ICTY precedents, the argument that lack of instructions could constitute "most exceptional circumstances". It pointed out that "by withdrawing instructions from their counsel, the accused are merely boycotting the trial and

obstructing the course of justice".[8] Counsel's concern that they might be called as witnesses in the contempt case was nothing to the point and there was no prospect of any breach of the English bar code. "If such difficulties were lead counsel's only arguments, then the motion must fail". It succeeded only and solely because of the court's "grave concern... at the threats made to lead counsel and their families". The court took everything that counsel said at face value ("We do not think that they have made the application lightly. They are experienced barristers fully aware of their professional obligations to their clients and to the court") and concluded

> We are of the view that lead counsel with their present difficulties, would not be capable of acting in the best interests of their clients. We doubt that they would be able to represent their clients to the best of their ability when, apart from everything else, their concern is for their own safety and that of their families.

33. In other words the court thought that counsel were too scared to concentrate sufficiently on the defence of their clients. On that novel ground, advanced in brief paper submissions without any supporting facts or information, without medical or psychiatric evidence of their trauma or inability to concentrate, or even evidence that they had taken the elementary step of seeking extra security or reporting the "threats" to anyone, these two lead counsel were permitted to part company with their clients and their contracts.

34. Judge Sebutinde's dissent, when it eventually appeared, was a refutation of the arguments that had persuaded the majority. She pointed out the gravity of the decision to abandon a client in mid-trial and the breach of contract and breach of trust involved, as well as the consequent expense and delay for the Special Court. She pointed out that the threat had not been substantiated other than by averments of counsel themselves in a written document, not even made from the Bar table. Counsel had chosen to "throw in the towel" without reporting

[8] Citing *Prosecutor v Baragwiza*, 2nd November 2000, p14

the threats to any person in authority. Mr Metzger, she concluded, had no credible reason to feel threatened while Mr Harris, who said he had received three threatening phone calls, had recently written to newspapers attacking the Trial Chamber and identifying himself as Brima's counsel: he may well by that action have made himself a target. The interests of justice, she argued, required both men to do their duty and remain in place. As I have already explained, her reasoning was of no use to the defendants because it was not appended to the court's decision and did not appear until 5th August – 2½ months later.

The Consequences of the Decision

35. It is important to emphasise what had happened by this point, because the reality was lost sight of by the parties in arguing this appeal. The two lead counsel, by their own volition and after anxious consideration, had decided they could not properly or professionally represent their clients. They had persuaded the court, by majority, to endorse that decision. Their application had been couched and granted in terms of a "permission to withdraw" but the decision – as sought and as delivered – operated as a finding that they were incapable of continuing as counsel, not because they lacked instructions but because they were in a state of personal fear that that would disable their performance even if they *were* to receive instructions. The decision, made expressly to relieve them from any professional or contractual obligation to represent their clients, operated logically to exclude them from any list of counsel available and willing to lead for the defence. It meant – and on 20th May the Trial Chamber repeated its orders of 12th May – that the Defence Office had to fill the two lead counsel positions with other available candidates, and as soon as possible.

36. As a result, there was no way back for Messrs Harris and Metzger, unless they themselves were prepared to ask the Trial Chamber to revoke the decision they had sought and obtained. If, prior to the instruction of new lead counsel in their place, circumstances were to change – if the threat to their lives proved less serious than they had at first apprehended - then they could ask the Trial

Chamber to reinstate them. They would need to persuade one or both of the judges who had endorsed their incapacity that they were now unfrightened and unfazed: that they had the fortitude to carry out their former client's instructions. Unless and until they were prepared to make such an application to the Trial Chamber, Messrs Harris and Metzger could not logically be considered as counsel available for the defence: in so far as there was a list of such counsel, they had by their own actions effectively removed themselves from it. The lawyers in the Defence Office did not appreciate this: they viewed the issue, simplistically, as a matter of the defendant's right to choose his counsel. (It was, of course, more a matter of counsel's right to chose not to represent his client.) The defendants' decision to re-instruct counsel in the future would not bring back Mr Harris or Mr Metzger. They would have to bring themselves back and satisfy the court that they had fully regained their concentration and resolution. It may have been their reluctance to do so that caused the Defence teams and the Defence Office to seek another route to reunite the defendants with their erstwhile counsel.

THE PROCEEDINGS UNDER APPEAL

37. These proceedings were launched on 24th May, by co-counsel for Brima and Kamara, as an *Extremely Urgent Confidential Joint Motion for the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazi Kamara.* There was of course no basis for confidentiality (see above) but that was the least of the problems confronting those who brought this motion, in the teeth of the orders of the court on 12th May, confirmed by the judgement of 20th May. Until those orders were varied or vacated, this motion could not get off the ground.

38. The motion itself makes only passing reference to the court orders of 12th and 20th May and the judgement of the latter date. The Registrar was made the first respondent and the Acting Principal Defender the second respondent, and the motion focuses on a letter from a legal adviser to the Registrar sent on 19th

May to the Principal Defender, described as a formal communication of the Registrar's decision "not to allow the reappointment" of Messrs Harris and Metzger. This was hardly an apt description: the letter did no more than communicate the Registrar's decision to obey the orders of the court. The letter stated

> ...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 16th May following an oral notification of the desire to reappoint counsel and the court said that the order had been made and any letter, correspondence or documents that seek to go behind that decision cannot be countenanced by the court.

39. This motion, in a nutshell, seeks judicial review of the Registrar's decision to obey the court order, communicated in the above letter and confirmed by a subsequent decision, on 25th May, to remove Harris and Metzger from the Defence Office "list". As such, the motion was from the outset a contradiction in terms. There can be no basis in law for challenging an official's willingness to obey a court order: either the court must be approached to vary the order or else the order must be appealed. On this simple ground, the motion should have been struck out immediately, as an abuse of process, since it was a collateral attack on an unappealed court order. However, it was entertained at great length and leave has now been granted for the majority decision to dismiss it to be made the subject of this appeal.

40. The fatal flaw is evident in the Relief sought by the motion: it seeks "in the first place" an order by the Trial Chamber that "the Registrar ensure that Messrs Metzger and Harris are reassigned" and further, that the Principal Defender must enter into a new legal services contract with them. How can such orders possibly stand with the court's order of 12th May, confirmed on 20th May, which approves Harris and Metzger's withdrawal and directs assignment of new lead counsel?

This motion is, in substance if not in form, an appeal from those orders, and is brought by the co-counsel who had sought them in the first place.

41. The grant of leave for this appeal may be a tribute to the assiduous arguments of the parties or a reflection of the unhappy differences which had emerged between the Trial Chamber judges. But the fact remains that the motion itself is fatally and obviously flawed: however interesting the arguments, it amounts to a claim that the Registrar and/ or the Public Defender are required to disobey lawful order of the court. The order was made, moreover, at the request of the lead counsel whose co-counsel now seek to circumvent it. In truth, it was (as the Presiding Judge apprehended in her response to the Registrar) a "backdoor" way of challenging the court's order to assign new lead counsel.

42. Quite apart from that logical difficulty, the motion assumes a jurisdiction in the Trial Chamber to review and indeed to quash an administrative decision made by the Registrar. Criminal courts do not normally have an administrative review jurisdiction and there is nothing in the Special Court's constitutive documents – its Statute and Agreement – to suggest that Trial judges have powers to direct the Registrar on financial or administrative matters. Should his administrative decision impact on the defence in a manner which could imperil defendants' rights, of course, the Chambers may comment and warn: in the unlikely event that its warnings are ignored, the court has a range of protective powers and ultimately the power to stop a trial for abuse of process if administrative decisions prevent it from proceeding fairly.[9] But administrative actions are for the Registrar, subject to appeal to the President of the court, who has a supervisory jurisdiction granted to the Court's Statute. The notion that Trial Chambers also have a review power is said to have been established by the Brima decision in Trial Chamber 1 and the Registrar in his submissions urges this Appeal Chamber to overrule that precedent. This is an important issue, which I will address later in this judgement.

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[9] See *Prosecutor v. Norman*, Case No. SCSL-04-14-AR72, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), 13 March 2004.

43. The fundamental basis for challenging the Registrar's decision – and by implication the court's order – was that it contravened the right of defendants to have their counsel of choice – a right said to be guaranteed by Article 17(4)(d) of the Special Court Statute. That right, as I shall explain, is very qualified and the nature and extent of the qualifications need to be spelled out.

44. The other important issue raised by the motion, and in particular by the responses to it of the Registrar and the Principal Defender, concerns the powers of the Defence Office and the degree of its operational independence from the Registrar. The Principal Defender and his office is an innovatory and much applauded feature of the Special Court and it is appropriate for this Appeal Chamber to indicate how the rules relating to that office should be interpreted.

45. Other subsidiary issues have been variously raised by the parties in the course of the appeal and my views on them are sufficiently reflected in the comments I have already made on the facts. The point is taken that the robust comments of the Presiding Judge on 16th May meant she (and any other colleague who joined in making them) was henceforth disqualified, for bias, from adjudicating this motion. The point is misconceived: judges will in the course of a long case invariably make adverse or even hostile comments, and sometimes will brusquely decide interlocutory motions: were they thereupon to be disqualified for bias, there would be no judges left by the end of most cases. The comment was obviously directed at counsel - it revealed no bias against the defendants themselves.

THE JUDGEMENTS BELOW

46. The Trial Chamber divided, as before, in its disposal of this motion. The majority – Judges Doherty and Lussick – dismissed it in their decision of 9th June. They decided, correctly in my view, that "this application in reality is

simply an application to reverse a majority decision given by the Trial Chamber on 12th May 2005." They also decided, correctly in my view, that they had no power to interfere with contractual arrangements made with counsel by the Principal Defender and the Registrar. The court pointed out that the security concerns "were still in existence". The only evidence before the Court was an email from Mr Metzger which said "We are content (for the security issue) to be investigated and for all necessary action to be taken". According to paragraph 34 of the motion, this elliptical comment meant "these threats could be investigated by the Registry and reasonable steps taken to ensure the safety of counsel if and when necessary". This *volte face* by lead counsel, who a fortnight previously had represented that their lives and the lives of their families were at serious risk, was viewed suspiciously by the Trial Chamber majority. It concluded that the motion was "frivolous and vexatious".

47. It must have been irritating in the extreme for judges to be told that lead counsel, whom they had taken at their word as being in fear for their lives, were now happy to return merely on the basis that the "threats" could be investigated by the Registry. It would also have been strange to be told by the defendants themselves, in sworn statements, that they had not been warned by their counsel that withdrawing instructions "would force my lead to counsel to withdraw". The court conjectured that lead counsel had been insincere in making the original application and that the motive of the defendants throughout had been to disrupt the trial. These inferences did not necessarily follow that might have been drawn. It may well be that the defendants were genuinely confused and that lead counsel took an argument that they thought was available or properly arguable. In an adversary system, defendants suffer for the mistakes of their advocates, but courts should do their best to temper the wind to shorn lambs. It was not necessary for the court to find that the motion lacked *bona fides*: it was sufficient to find that it was misconceived.

48. The court criticised the Deputy Principal Defender for her failure by that stage to appoint new lead counsel. I do not think that criticism would have been

made had the court been shown the evidence submitted to the Appeal Chamber about the very considerable efforts that were in fact made within and by the Defence Office to comply with the court's order, whilst at the same time striving to have it overturned in the interests of the accused. In all the welter of paperwork that has descended on the Appeal Chamber in the course of this case, what does stand out is the devotion to the interests of the defendants displayed by lawyers in the Defence Office. The Principal Defender had resigned and they had no help from lead counsel and they had to deal with defendants who were upset and urging them to do the impossible. They had to deal with an intransigent court and an intransigent Registrar. They made serious attempts to instruct fresh counsel but it is difficult to obtain competent barristers able to fly to Sierra Leone at the drop of a hat for a period that could last twelve months. The Defence Office lawyers were mistaken in the belief that defendants have a "right" to choose counsel, but they did not seek to subvert the court's order: their commitment to the defendants' interest was conscientious and commendable.

49. As a matter of law, the court's decision to reject the motion was correct. There were, however, two statements about the law made in the course of its judgement that must be corrected. Neither was essential to the decision but they may reflect deep-seated errors. They come at the end of paragraph 51. The court, referring to its judgement of 20th May, states "We do not have jurisdiction to revisit that decision..." This Appeal Chamber has emphasised, more than once, that Trial Chambers do have an inherent jurisdiction to revisit and reconsider any decision, if the circumstances have changed and the interests of justice so require. There was nothing at all to stop this chamber from rescinding or varying its orders of 12th/ 20th May if persuaded that lead counsel were now fully capable of defending their former clients. Had the court done so, this whole debilitating case might have been avoided. Of course, the decision might well have been to confirm the court order, but the problem caused by counsel would have been fully and publicly explored and any criticism of those counsel would have emerged after their side had been heard.

50. That Trial Chambers have the jurisdiction to reconsider and vary their interlocutory orders (as distinct from final judgements, after which they are *functus officio*) is well recognised. As a distinguished ICTR Trial Chamber put it, quite recently,

> the Chamber has the authority to reconsider its decisions if satisfied that the underlying factual premise has changed substantially in a way that alters the original outcome.[10]

So too "the Appeals Chamber has an inherent discretionary power to reconsider a previous interlocutory decision, for example, if a clear error of reasoning has been demonstrated or if it is necessary to do so in order to prevent an injustice".[11] The Trial Chamber should have been invited to exercise its authority to reconsider, because the underlying factual premise of its original decision had changed substantially. If counsel were prepared to address the court in person (rather than in elliptical emails sent to the Public Defender) and assure it that they were willing now to appear, they may have been permitted to return. That, I repeat, is what should have happened.

51. The other error, much commented upon by the parties to the Appeal, was made in the concluding sentence of paragraph 51: "In any event 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)." This point was technical to a fault and in any event spurious: the counsel were not eligible for the simple reason that they had withdrawn and the court had ordered that they be replaced. The "list" and their removal from it was a red herring. The "list" is a construct of convenience. It is a form of registration of counsel who are willing to be instructed, because it permits the Principal Defender to examine their

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[10] See ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Maître Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel for Gratien Kabiligi, 24th March 2005, para. 17.
[11] See ICTR, *Prosecutor v. Nahimana et al,* Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19th January 2005, 4th February 2005, page 2.

credentials and experience. They may be removed e.g. for misconduct, but in such cases the Registrar's decision is appealable to the President of the court. The Registrar's act of removing them from the list was not a freestanding "decision" of a kind capable of challenge, but rather a compliance with the Court orders of 12th/ 20th May.

52. The decision of the court was delivered on 9th June, once again without any dissenting judgement appended to it. The dissent was filed on 11th July, in the form of a very long and carefully considered opinion by Judge Sebutinde. Much of it was directed to criticising, paragraph by paragraph, the Trial Chamber majority decision delivered five weeks before. Much as I agree with some of these criticisms, especially of the inferences drawn in the course of that decision, I merely point out that these inferences may not have been drawn at all if Judge Sebutinde's colleagues had had the benefit of her opinion in draft prior to completing their own. One of the benefits of collegiality is that it helps to iron out rough edges and inadvertent errors and over-speculative inferences. The Trial Chamber majority throughout this matter has been creditably concerned to deliver its decisions expeditiously, in order to get on with the trial. It would have been better if Judge Sebutinde had joined the exercise, even from her dissenting perspective, rather than sniping at errors in her colleagues' decision months after it had been rendered.

53. For present purposes, the significant features of Judge Sebutinde's opinion were:

1. in reliance on *Brima*, she imputed wide judicial review jurisdiction to the Trial Chamber;
2. in consequence, she would accept the motion to quash the Registrar's decision as a freestanding judicial review and not a "backdoor" attempt to appeal the decision of 20th May;

3. there was a basic right for defendants to choose their counsel, which these defendants had exercised on 12th May in choosing to be represented by their former lead counsel;

4. their right had been upheld by the Principal Defender, whose wish to reappoint Harris and Metzger had been wrongly overruled by the Registrar;

5. it followed that the Registrar had been in error to make the decision (on 19th May) denying the defendants their choice of counsel and (on 25th May) frustrating the will of the Public Defender by removing both counsel from the list.

54. On these findings, Judge Sebutinde would have ordered the Principal Defender and the Registrar to comply with the defendants' choice of counsel and reappoint Harris and Metzger. Her order, moreover, would have put them in contempt of the order already made by the court on 12th/ 20th May in a different action. Judge Sebutinde's position, therefore, involved a logical and legal impossibility. The relief she would have granted would necessarily involve the breach of an unappealed order of her own court.

The So-Called "right" to have Counsel of Choice

55. The Statute of the Special Court, in common with the constitutions of other international criminal courts, makes provision for defendants to communicate with their chosen counsel and to have legal assistance of their own choosing. That provision is made in Article 17(4)(b) and (d) of the Statute:

> In the determination of any charge against the accused pursuant to the present Statute, he or she

> shall be entitled to the following minimum guarantees, in full equality...
> To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing; ...
> (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance if his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

56. Article 17(4)(b) is not a guarantee of representation by chosen counsel: it requires that defence counsel chosen by defendants must be given reasonable access to them – by adequate facilities to visits and correspondence with them in prison, and so on. Article 17(4)(d) gives defendants the right to defend themselves or pay for legal assistance of their choice. If indigent, they have a right to have free legal assistance assigned, if the interests of justice so require. Importantly, however, this Article does not guarantee any choice of counsel to those who are indigent. They must first qualify for assistance a) by establishing that they cannot pay for lawyers and b) by being involved in legal proceedings where the interests of justice require them to be represented. Whether (a) is established will be a matter for the Registrar to investigate, at various stages of proceedings. Whether (b) is fulfilled depends upon the nature of the proceedings: there may be no need for representation at formal appearances, and in some interlocutory motions, particularly those involving general points of law, there might be no injustice in having one counsel argue the point for all defendants.

57. The important point is that there is not, in terms, any "right" to counsel for indigent defendants guaranteed by Article 17(4)(d). There is an implication that legal assistance assigned will be competent and I would go further and find an implication that legal assistance, or at least the legal assistance given collectively to the defence in a particular trial, should be sufficient to satisfy the "equality of

arms" principle of adversary trial. But there is no right in a defendant to choose his or her assigned counsel. Those involved in assigning counsel must act reasonably and in so doing they must take the wishes of the defendant into account. But they are not bound by his choice.

58. The right of defendants charged with serious crime not merely to have counsel, but to choose what counsel they shall have is never absolute and is often unrealistic. Lawyers are allowed in courts because they are professionals, authorised and obliged to say all that their clients could say for themselves were they both articulate and learned in law. In order to function as the client's *alter ego* the barrister must enjoy, at least to some degree, the respect and confidence of his client and that is more likely to result if the client can pick and choose his own professional mouthpiece. In this sense, a choice of counsel rule assists in the fairness of the trial, at least as a matter of perception – in reality, counsel are sometimes "chosen" by defendants as a result of their flamboyancy or touting or high reputation amongst fellow prisoners, and such counsel are not necessarily good lawyers. The rule certainly conduces to the efficacy of adversarial trials, which go more expeditiously and with fewer hitches if professional advocates represent and contain their clients. It is more likely that defendants will instruct and follow the advice of professionals if they play a part in selecting them. Although justice – and defendants themselves – might be better served by a rule that they could only be defended by experienced and courageous defence counsel selected for them by the court or a defence agency, Anglo-American legal tradition upholds instead the choice of counsel rule, as an individual right for those who can afford it.

59. The rule is not mentioned in the 1948 Universal Declaration of Human Rights, but soon (in 1953) found a qualified place as a "fair trial" right, in the European Convention, Article 6(3)(c).[12] It was placed there to reflect a time-honoured practice in English courts of offering a "dock brief": when an

[12] It was later (1966) reflected in the text of Article 14(3)(d) of the ICCPR

unrepresented defendant was brought to the Bar, the judge would indicate a row of unemployed barristers and invite him to take his pick of counsel prepared to defend him for a guinea. The rule thus served an important human rights purpose of ensuring representation for the poor, although a choice made between professional clones in wigs and gowns, on momentary visual inspection, was hardly an informed choice. When a statutory legal aid system was instituted in Britain, a measure of real choice for poor defendants was provided by the two tier system of solicitor and counsel. The solicitor would help the defendant to choose, by providing him with information about barristers skilled in the kind of work his case required. This system offered a degree of quality control (although some solicitors were prone to recommend barristers who were friends or relatives, or even members of their clubs or political parties). The client could always insist upon his case being sent to a particular barrister – perhaps because he had read about him in a newspaper or had learnt of his prowess from fellow prisoners. The rule was often meaningless in practice, because counsel of choice were unavailable or had clerks who would substitute another barrister from the same chambers at the last moment. (Royal Commissions in 1981 and 1998 found that many defendants on legal aid in England and Wales met their counsel for the first time on the morning of the trial.)

60. Against this background, it might be thought that human rights would be better advanced by a rule requiring counsel of ability rather than counsel of choice. But where the concept of "choice" does have real resonance is against the practice, in many repressive regimes, of foisting government-stooge lawyers on defendants in political trials – i.e. lawyers who refuse to defend courageously, or in some cases to defend at all. There are some countries, still, where it is notoriously difficult to find lawyers prepared to act against the government, for men accused of crimes with political or dissident motivation. A right to "counsel of choice" especially if it extends to bringing in counsel from other countries or other Bars, can be a genuine protection. The rule, in short, makes it more likely that defendants will instruct counsel and that counsel will be fully instructed and

that they will have the benefit of advice that is independent of the government or the judiciary.

61. Any right to choose one's counsel is limited not only by practical considerations of a particular lawyer's availability, but by overall considerations of the interest of justice in ensuring that defendants are effectively and fairly tried. To this end they must be adequately represented, irrespective of their wishes. This principle emerges from the recent European Court of Human Rights case of *Mayzit v Russia.*[13] A legally aided defendant facing complex forgery charges refused no less than eight qualified lawyers and insisted that he should be represented by his unqualified elderly mother and his sister, a speech therapist. The court could have granted this request, but given the seriousness and complexity of the case it appointed a specialist counsel to conduct the defence. The European Court approved this course, pointing out that the fair trial promises of the Convention, including the right "to defend himself in person or through legal assistance of his own choosing" (Article 6(3)(c)) had to be interpreted in light of the overall need to ensure equality of arms;

> Article 6(3)(c) guarantees that proceedings against the accused will not take place without adequate representation for the defence, but does not give the accused the right to decide himself in what manner his defence should be assured... Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to choose ones 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.

[13] 6/7/2005, 20th January 2005, Case Number 63378/00, paras 65-66

62. *Mayzit v Russia* demonstrates that the choice of counsel rule that applies to European states can be subordinated to the overall interests of justice. The court held that the objection to the lay persons chosen by the defendant was legitimate since the interests of justice would not have been served by an incompetent defence. This is not an altogether satisfactory approach, since the interests of justice would have been even worse served had the defendant represented himself, as he was fully entitled to do. It has always seemed to me preferable to allow the right of self-defence, aided whenever the defendant wishes by a friend in court or a "Mackenzie lawyer"[14] (or even his mother and his sister) and if the assistance of counsel is required in the interests of justice then to appoint such counsel as *amicus* instructed by the court to take points on behalf of the defendant, rather than to impose counsel on an unwilling defendant. That can be unfair to the defendant and unfair to the advocate. I do not comprehend how an uninstructed barrister can sensibly and professionally represent a "client" with whom he has not conferred and whose trust he does not possess. It would be otherwise, of course, if the barrister had already been chosen and instructed and the client in mid-trial changed his choice or purported to instruct his counsel to boycott the trial: there would be no professional embarrassment for counsel in obeying a directive of the court to remain and do his best according to his existing instructions.

63. That Article 17(4)(a) of the Statute of the Special Court does not grant an indigent defendant the right to counsel of choice has long been recognised by the ICTR, which first interpreted an equivalent provision in 1997 in the case of *Ntakirutimana*.[15] This indigent defendant's claim that 4(d) entitled him to choose a counsel other than the counsel assigned him by the Registrar was rejected: "the formula used for the indigent accused, which is the right "*to have*

[14] An expression deriving from the English case (Mackenzie v Mackenzie) when a litigant was permitted to have the in-court assistance of a lawyer who was not admitted to practice in the jurisdiction.

[15] ICTR, *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-PT and ICTR-96-17-PT Decision on the Motions of the Accused for Replacement of Assigned Counsel, 11 June 1997.

legal assistance assigned to him... and without payment by him in any such case if (he does not have sufficient means to pay for it involves a party other than the accused in the choice of assigned defence counsel". As a matter of interpretation of the plain words of the Statute, this is obviously correct. The Human Rights Committee has also declared that ICCPR Article 14(3)(d) does not entitle the indigent accused to choose counsel, although the assigned counsel must be an effective representative. This is the position taken by the European Court of Human Rights in *Mayzit v Russia*: Article 6(3)(c) does not guarantee the right to choose assigned counsel: the preferences of the accused should be taken into account but cannot override the interests of justice in providing effective representation. In the recent ICTR case of *Bagosora*, the Appeals Chamber pointed out:

> The appeals chamber has repeatedly emphasised that the right to free legal assistance by counsel does not confer the right to choose one's counsel. The present practice of assigning counsel is simply to accord weight to the accused's preference, but that preference may always be overridden if it is in the interests of justice to do so. In addition, the appeals chamber has confirmed that counsel may be assigned to an accused even against his will.[16]

64. Against this weight of jurisdictional authority from the ICTR, it cannot be seriously contended that the appellants had any right to insist that Harris and Metzger be reassigned to them. The lawyers in the Defence Office misunderstood the legal position and treated these defendants as though they had a right of veto on assigned counsel. They may well have been led astray by an early Trial Chamber 1 decision in *Brima*, where the chamber wrongly assumed that the Statute guaranteed a right of choice of counsel to indigent defendants:

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[16] See ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Maître Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel for Gratien Kabiligi, 24 March 2005, para 21. See also ICTY, Prosecutor v. Milosevic, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1st November 2004.

> The chamber observes that Article 17(4)(d) of the Statute guarantees to the applicant, as an indigent, the right to be represented by a counsel "of his or her own choosing". It should be noted that this provision is mandatory... the chamber will not... loose sight of the pre-imminently mandatory and defence protective character of the provisions of Article 17(4)(d) of the Statute.[17]

65. Unfortunately, Trial Chamber 1 lost sight of the actual words of Article 17(4)(d), which confines the right to defend through "legal assistance of his or her own choosing" to those who can pay for it or obtain it *pro bono*; the right to have expensive legal assistance assigned and paid for from the budget of the court carries no right to insist on the identity of the legal assistant provider. It follows that Article 17(4)(d) does not guarantee the right to choose counsel to any indigent defendant, much less does it make such choice mandatory. It seeks to protect indigent defendants by giving a responsible official the task of ensuring that they have effective representation. Their wishes, of course, are taken into account but are not the overriding factor in the counsel selection. This position, when advanced in argument in Brima, was characterised by Trial Chamber 1 as "superficial, cosmetic, unimpressive and unconvincing" (para 47). On the contrary, it was the law, from the plain words of the statute and repeated decisions of the ICTR. In this respect (and in others – see below) the *Brima* decision should not be followed in future.

66. As I understand the position, all defendants at present before the court claim to qualify as indigent, and have been provided with lead counsel and a team of co-counsel. (The only defendant to "appear" by privately paid counsel has been Charles Taylor, unsuccessfully contesting the court's jurisdiction to try him).[18] It has been the task of the Principal Defender to compile a roster of counsel willing to act and competent to defend in a major criminal trial. The

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[17] See *Prosecutor v. Brima*, Case No. SCSL-04-16-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, paras 40-41.

[18] See *Prosecutor v. Taylor*, Case No. SCSL-03-01-AR72, Decision on Immunity from Jurisdiction, 31 May 2004.

defendants may express views about particular counsel on that roster, or suggest outside counsel who might qualify to be assigned to them, but the final decision belongs to the Principal Defender. In the 1997 *Ntakirutimana* decision the ICTR thought that some measure of choice might be permitted under its "Registrar's List" system:

> The final decision for the assignment of counsel and the choice of such counsel rests with the Registrar... nonetheless, mindful to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial, and convinced of the importance to adopt a progressive practice in this area, an indigent accused should be offered the possibility of designating the counsel of his or her choice from the list drawn up by the Registrar for this purpose, pursuant to Rule 45 of the Rules and Article 13 of the Directive, the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused.

67. This envisaged a choice only from the names of counsel already on the Registrar's list. Although this modified "choice" of counsel appeared as a "progressive policy" in 1997, the amount of litigation that it spawned since suggests that it can be retrogressive. The cases and UN investigations show that defendants bent on disrupting their trials can do so by choosing to sack their counsel or "choosing" the services of unavailable or over-expensive advocates. They show how incompetent defenders, such as "ambulance chasers", can baton onto relatives or tout amongst support groups. In "fee splitting" cases, counsel has been "chosen" because they make a deal to pay the defendant and his relatives a proportion of their fee. The Principal Defender system in this court was designed to avoid these problems, by providing counsel of ability and independence. Of course it is more likely to make for a trusting relationship if the accused had some say in the selection, which is why Public Defenders should always canvass candidates and discuss their merits with defendants whose preferences must be taken into account in the final selection. But it should not be necessary for the Public Defender to justify or show good reason for rejecting a

defendant's choice – that way litigation lies, as the ICTR shows. It is sufficient if the Public Defender consults and takes the defendant's preferences into account in a decision that remains his to take, in the overall interests of justice.

68. My views in this regard are strengthened by the recent ICTR decision in *Bagosora* which demonstrates the problems which arise when the Registrar gives a defendant the repeated opportunity to choose counsel, in that case after his lead defender (a previous choice of his) had been disqualified for corruption half way through a long trial. When the Registrar eventually grasped the nettle and "imposed" an experienced defence counsel who was familiar with the case (he had been co-counsel for a co-defendant) the accused refused all cooperation with him and so the newly assigned counsel sought to withdraw. His application was refused: "an accused is not permitted to unilaterally sabotage the preparation of a defence by refusing to cooperate".[19] Neither the code of his home Bar Association (which required withdrawal in the event of lack of client cooperation) or his own difficulties in taking instructions from this truculent accused, were sufficient to override the interests of justice in having the man properly defended.

Withdrawal by Counsel

69. The court must try fairly those who do not want to be tried at all, and that may mean imposing duties on counsel to continue defending men who cease to instruct them. Where counsel has been in place for some time, it makes some sense to speak of him continuing to "represent a client" from whom he has previously taken instructions. However, it is odd to pretend that counsel assigned to a defendant who refuses to instruct him from the outset is "representing" that client, since no professional counsel could accept as a client a person who refuses all communication with him. In such cases, the assigned counsel should be designated as an *amicus* – he is there to serve the interests of

[19] See ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Maître Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel for Gratien Kabiligi, 24 March 2005, para 30.

justice by taking all legal points that might help the accused, but he does not have the accused as a client pursuant to a proper professional relationship of confidence and trust. He may be defence counsel, but he is not counsel for the particular defendant. He is counsel for the court, brought in to ensure that all points are taken that could assist the accused. I accept that Rule 60 provides the defendants who escape or refuse to attend court "may be represented... as directed by a judge or trial chamber" and that under this Rule counsel have been ordered to "represent" men who refuse to recognise the court.[20] But if in this situation they have to operate without ever having had any instructions from the defendant, it would be best to reflect this fact by designating them as *amici*. To say that they are "representing" a client gives a false impression and causes professional concern. If the defendant has chosen to defend himself, and is doing so in a rational manner, trial courts should in general avoid imposing *amici* lawyers: this is an expensive, condescending and time-consuming step.

70. This court has a comprehensive *Directive on the Assignment of Counsel* which was approved by the President and came into force on 3rd October 2003. It implements Article 17(4)(d) of the Statute by placing the duty to assign counsel upon the Principal Defender, after a request for such assignment (which is not a request for assignment of any particular counsel). If the conditions – poverty and the interests of justice – are met, the Principal Defender shall assign a named counsel from his list of those counsel who are qualified for assignment, after consultation with the suspect or accused (Article 9). The direction is careful to avoid any implication that the accused has an right to choose counsel – consultation is all that is required.

[20] See *Prosecutor v. Gbao*, Case No. SCSL-04-15-AR73, Decision on Appeal Against Decision on Withdrawal of Counsel, 23 November 2004, para. 44-45. There are cases at the ICTY where lawyers have represented clients despite lack of adequate instructions: see Milosevic; Blagojevic.

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71. In international courts, in any event, it can be much more difficult to implement preferences for advocates, especially by indigent defendants. There is no "cab rank rule" of international practice which obliges barristers to leave their cities and circuits when offered a brief in a war crimes court in a far-off country. Defendants may know of distinguished local lawyers, but they will be few and far between in a country emerging from war. At Nuremberg, after the English Bar Council refused to allow its members to defend the Nazi leaders, the quality of the German lawyers prepared to accept an unpopular brief was poor. At the ICTR and ICTY, where the Registrar has been responsible for allocating briefs, honouring a counsel of choice rule has in some cases had unattractive consequences and encouraged practices that have damaged international justice. So from the outset the SCSL judges and Registrar were determined that they should not happen here. That is one reason why a "Principal Defender" with a defence office was established, to effectuate the choice of counsel rule in a way which would ensure quality control and eliminate corrupt practices.

72. The lawyers in the Defence Office of this court have the task of recruiting experienced defence counsel from the various Bar Associations of the world as well as from the Sierra Leone Bar and these counsel must be prepared to commit themselves to represent defendants throughout lengthy trials. They are entered on a register (the "list") kept by the Defence Office, which collects relevant information about their professional records. When a defendant needs to choose a lead counsel, or a new lead counsel, the Defence Office lawyers will inform their choice by providing them with details of counsel on the list and discussing which of them might, subject to availability, be appropriate to lead their defence. The Defence Office lawyer in this respect performs the function of an instructing solicitor, informing and advising a defendant about counsel whom they have vetted for independence and ability. Once the defendant has expressed any preference, and the Principal Defender has made a final decision and confirmed availability, he will enter into a contract with the lead counsel. At the relevant

time, these were "block" contracts where the lead counsel was guaranteed a large one off payment but from that sum she or he had to pay co-counsel as well as investigators whom they would contract separately for their defence team. Thus every indigent defendant charged in this court has substantial funds devoted securing a high quality legal assistance, and the defence teams as well are allocated offices in the Court precincts and have access to a well-stocked library, computer terminals and may draw on the resources of the Defence Office. Thus "equality of arms" is meaningfully achieved, by a system that takes account of the defendant's preferences for counsel, but ensures that counsel has ability. It is a system that works, but a system that can be thrown into disarray if lead counsel have to be replaced in mid-trial.

73. That can happen for any number of reasons. The most common example, in this and other courts, is when the defendants purport to sack their counsel – whether as a general protest against the trial or because of some genuine personality conflict. Counsel, too, may wish to withdraw – for family reasons or because the trial is taking too long or the living conditions in Sierra Leone are difficult or because of illness (in the case of Mr Brima's first counsel, sadly, because of death). The consequences of withdrawal are very damaging – disruption of the trial, difficulty for the defendant, great expense for the court which has to find a new counsel who must be paid to begin from scratch. So international criminal courts have devised rules that make it difficult for defendants to sack their counsel and for counsel to sack their clients.

74. Once counsel is assigned to an indigent defendant, the assumption – certainly of the contract which is made with the lead counsel by the principal defender – is that the relationship will continue until the trial concludes. If the defendant wishes to end that relationship and obtain different counsel, the position is governed by Rule 44(D):

> (D) Any request for replacement of an assigned counsel should be made to the Principal Defender. Under exceptional circumstances, the request may be

> made to a Chamber upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.

This sub-rule provides a necessary degree of flexibility in accommodating a defendant's wishes, without endowing him with any "right" to change counsel. If the breach of relationship is sought at an early stage, before the trial starts, it may be relatively easy and inexpensive for the Principal Defender to substitute lead counsel. The Principal Defender will balance the interests at stake: on the one hand, the reasons why the defendant wants fresh counsel and on the other hand the potential for disruption and the expense of granting that wish. If the Principal Defender cannot or will not grant the request, then if the circumstances are "exceptional" it may be renewed in front of the Trial Chamber, which must be satisfied that there is good reason for the change and that it is not motivated by any wish to delay proceedings. Even if these conditions are satisfied, the Chamber is not obliged to order a replacement. Its discretion will be exercised in the overall interests of justice, accepting the desirability of an accused person being represented by counsel in whom he has confidence, if that can be achieved without unnecessary expense or disruption. Since there is no right under Rule 17(4)(c) to choose one's counsel there is, *a fortiori*, no right to choose one's counsel for a second or third time.

Withdrawal by Counsel: the "most exceptional circumstances" test

75. The Rules make it rather more difficult for chosen counsel to disengage from his client. Rule 45(E) provides:

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

> shall assign another counsel who may be a member of the Defence Office, to the indigent accused.

76. The severity of this sub-rule reflects the gravity of abandoning a client charged with a very serious crime and facing a lengthy prison sentence if convicted. It is not a rule that applies only to war crimes courts – the "most exceptional circumstances" test is found in many codes of conduct for barristers in common law countries.[21] Essentially, it is a core professional duty imposed on all who defend persons accused of serious crime. No matter how inconvenient to their lives or how detestable their client or how sick they are or how threatened they feel, a barrister must stick with a client to the end of the trial. The English Bar is much given to celebrate the courage of its members, often in words used by Lord Brougham to praise himself for defending Queen Caroline:

> An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, that client and none other. To save that client by all expedient means – to protect that client at all hazards and costs to all others, including himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. He must go on, reckless of the consequences... even if his fate it should unhappily be, to involve his country in confusion for his client's protection.

This sounds hyperbolic today, but its sentiments are still reflected in most Bar codes: the advocate has a professional duty "to promote and protect" fearlessly and by all proper and lawful means his lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including his professional client or fellow members of the legal profession).[22]

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[21] See Julian Disney & ors, Lawyers (Law Book 10, 2nd ed, 1986), p609

[22] See Code of Conduct of the Bar of England and Wales (27th January 1990 (paragraph 207)) and David Pannick, Advocates Oxford University Press, 1992.

77. It is against this background that Rule 45(E) imposes the "most exceptional circumstances" test. Exceptional is not used in the sense of "novel" or "unusual": the circumstances which impel counsel to seek permission to withdraw must truly be compelling. Some allowance will be made if the trial has not commenced, hence a number of counsel who were assigned to take jurisdictional points at the outset have been permitted to withdraw before the stage of preparation for the trial proper.[23] "Most exceptional circumstances" might include a serious permanent injury or a major chronic disease; for a foreign counsel it might include a judicial appointment in the home state or the injury of a partner which leaves counsel to care for young children. It would not include the offer of a more lucrative brief elsewhere or even loss of earnings through unexpected length of the trial. What will amount to "most exceptional" circumstances cannot be predicted in advance or stated in some more comprehensive formula. Contrary to Lord Brougham's rhetoric, no advocate can be expected to risk his life to continue defending a client, but that risk must be credible and imminent and incapable of being guarded against other than by leaving the client and the country. It must be such that counsel of reasonable fortitude would see no alternative but to withdraw.

78. In the ordinary course of modern practice at the Bar of England and Wales, the fearless advocacy required may be little more than to stand up to a grumpy judge or endure the whispered instructions of a solicitor with halitosis. But in the wider world, lawyers who defend – and prosecute, and sit as judges – must in some places show real courage: they have an obligation to display bravery, although not bravado. Lawyers who act for unprepossessing people accept many risks in many countries ranging from career discrimination to acid attack (the fate of defence counsel for John Demjanyuk in Tel Aviv).[24] Prosecutors too can suffer assault and there have been a number of judicial fatalities: Marquez reminds us of the low-salaried Columbian jurists who in the

[23] See *Prosecutor v. Norman*, Case No. SCSL-04-14-T, Ruling on request for Withdrawal of Mr. Tim Owen QC, as Court Appointed Counsel for the First Accused, 1 March 2005.
[24] Pannick, op cit, p31

1980s were faced with the impossible choice of granting bail to narco-terrorists or being assassinated - "The most admirable and heart-rending thing is that over 40 of them chose to die."[25] No court can put a lawyer in that impossible position, but equally no lawyer can expect a court to relieve him from his professional duty simply because he has received threats and done nothing about them.

79. This is a war crimes court that sits at the scene of its alleged crimes, very shortly after the end of the war. That location has many advantages, in enabling victims to see justice done and to involve local lawyers in the process and to help engender respect for restoration of the rule of law. It does mean greater provision for security staff and judges and lawyers: there have been threats made, especially at the outset, against SCSL prosecutors and judges and there are still threats against witnesses. But Freetown is not Baghdad. The security that is in place protects all defence counsel in the precincts of the court and can be extended on reasonable request, as both these counsel seem subsequently to have accepted. Mr Metzger says in his email that in any event that "threats" were a "secondary argument": it may have been better if they had not been made the subject of argument at all. It was an argument that did not deserve to succeed although succeed it did – perhaps as an "own goal" for the defence.

80. Serious threats which affect counsel's performance could amount to a "most exceptional circumstance": endogenous or pathological fear is debilitating and no defendant should have to put up with representation by counsel who suffer from it. The Trial Chamber majority found that these counsel were so affected by the threats that they could not adequately concentrate on their client's case and that this state of their minds would continue for the foreseeable future: on this basis it permitted them to withdraw. I can find little evidential support for the court's conclusion, but two very experienced criminal trial judges, having observed the two counsel in question, were entitled to reach it, having been asked to do so by those same counsel. They concluded that these counsel were and

[25] Gabriel Garcia Marquez, *The Future of Colombia* (Granta, 1995)

were likely to remain in no fit state to concentrate on the representation of their clients, and on that basis they made appropriate orders which have not been appealed.

81. It follows that neither the order of the court of 12th/ 20th May nor its implementation by the Registrar involved any infringement of the guaranteed rights of the accused. There is no guaranteed "right" to choice of counsel, although the Defence Office must carefully consult with indigent accused prior to engaging counsel for them. They have no right of veto over what in the end is a Defence Office decision. These particular defendants, by withdrawing their instructions from their chosen counsel, produced a situation in which those counsel sought to withdraw and permission was accorded by the court on the basis that counsel were incapable through fear of acting in their best interests. Its order to assign fresh counsel was properly made under Rule 45(E): the Registrar and the Defence Office were bound to comply. Although the defendants then changed their position and expressed a wish to have their former lead counsel return, that preference could not be accommodated so long as the Trial Chamber order, based on a finding of their incapacity, remained. There is no right to be represented by an incapable counsel, and the Public Defender has a duty not to assign incapable counsel. It follows that these defendants could not have their preferred counsel other than by asking for the orders to be reconsidered or seeking leave for an interlocutory appeal. They did neither.

The Registrar and the Principal Defender

82. The alternate basis of this motion is that the Registrar was acting *ultra vires* in countermanding the decision of the acting Principal Defender that the previous lead counsel should be reassigned. The Registrar responds that the office of Principal Defender is not contained in the court's constitutive documents. Article 16(1) of its Statute provides that "*The Registry shall be responsible for the administration and servicing of the Special Court* and Article 4(1) of the Agreement goes further:

Article 4. Appointment of a Registrar

> The Secretary General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

83. The staff of the Defence Office and its head the Principal Defender, are all "support staff", and have no independent authority to disobey or ignore a direction from the Registrar – in this case, not to reappoint Messrs Harris and Metzger. Judge Sabatindi concluded that the Rules give the Public Defender an extra statutory independence, on the basis of the intention of the Management Committee and the plenary in 2003, at the time the Defence Office was established. In order to examine her argument, it is necessary to explain how that office came into being. It is not an office that existed in any other court at the time it was created.

84. The genesis of the Principal Defender and his office is to be found in the "Public Defender Proposal" submitted to the Management Committee in a note from the President of the court on 7th February 2003, before any indictments had been preferred. This document does not seem to have been available to Judge Sebutinde so I append it to this opinion. It begins:

> International criminal courts have yet to devise a satisfactory means of attracting only experienced, competent and honest defence counsel, so as to comply with the human rights principle that adversary trials should manifest an "equality of arms" (i.e. reasonable equivalents of ability and resources between prosecution and defence).

The paper went on to criticise the "Registrar's List" system adopted by other tribunals, which a UN audit committee had found an unsatisfactory means of excluding incompetent or corrupt defence counsel.[26]

85. The core proposal of this paper was to establish in the SCSL of a Defence Office headed by a "Principal Defender", who would have a status equivalent to the prosecutor or deputy prosecutor. The office would be staffed by trial lawyers who "will have been in unblemished practice, specialising in criminal or international human rights law, for at least seven years: they must have a reputation for fearless and independent representation of defendants charged with serious crimes". The Principal Defender would be

> "an experienced criminal trial lawyer with a reputation for able and fearless defence and some proven administrative ability. His duties will include setting up and staffing a defence support unit; assigning and retaining counsel for indigent defendants; making arrangements for bail applications; conducting (either personally or by assigning other counsel) legal arguments for indigent defendants or as an *amicus* at interlocutory, trial and appeal stages; directing such investigation, research and the like as appears necessary for adequate preparation of assigned cases on behalf of indigent clients; providing assistance as requested to the court, the Registrar, and to counsel retained privately by other defendants."

86. The "Public Defender" proposal was approved in principle by the Management Committee in February 2003 and left to the Registrar and the President to implement through changes to the Rules. Unfortunately, budgetary constraints prevented the offer of a Principal Defender salary sufficient to attract trial counsel of equivalent distinction and trial experience to that of the

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[26] See the Report of the Office of Internal Oversight Services on the investigation into possible fee splitting arrangements between defence counsel and indigent detainees at the ICTR and ICTY, 1st February 2001, A/55/759, especially paras 9-15; follow up investigation into possible fee splitting arrangements between defence counsel and indigent detainees at the ICTR and ICTY, 26th February 2002, A/56/836

Prosecutor and Deputy Prosecutor, but nonetheless, the lawyers who have staffed the office have played a vital part in representing defence interests during the drafting of the Rules of evidence and procedure, and then subsequently functioned in effect as solicitors in obtaining the services of experienced counsel and instructing those counsel to appear for defendants at their trials. The Principal Defender, as envisaged by the Court President, was an independent office that should ideally have been entrenched in the Statute of the court. However, that Statute had been agreed between the UN and the Government of Sierra Leone in 2002, and no amendment was feasible. For that reason, the Office had to be created by way of an amendment by the Plenary of Judges to Rules which were inherited from the ICTR and provided in Rule 45 for the "Registrar's List" system. So a new Rule 45 was devised which retained the reference to a "list" of potential trial counsel, but placed it in the hands of the Principal Defender, who was entitled to add members of his office to this roster. The amended Rule 45 provides as follows:

Defence Office

> The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused. The Defence Office shall be headed by the Special Court Principal Defender.
>
> (A) The Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to:
> (i) suspects being questioned by the Special Court or its agents under Rule 42, including non-custodial questioning;
> (ii) accused persons before the Special Court.
>
> (B) The Defence Office shall fulfil its functions by providing, *inter alia*:
> (i) initial legal advice and assistance by duty counsel who shall be situated within a reasonable proximity to the Detention Facility and the seat of the Special Court and shall be available as far as practicable to attend the Detention Facility in the event of being summoned;

> (ii) legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
> (iii) adequate facilities for counsel in the preparation of the defence.
>
> (C) The Principal Defender shall, in providing an effective defence, maintain a list of highly qualified defence counsel whom he believes are appropriate to act as duty counsel or to lead the defence or appeal of an accused. Such counsel, who may include members of the Defence Office, shall:
> (i) speak fluent English;
> (ii) be admitted to practice law in any state;
> (iii) have at least seven years relevant experience; and
> (iv) have indicated their willingness and full-time availability to be assigned by the Special Court to suspects or accused. [...]

87. This Rule does not fully implement the original proposal, in part for the very practical reason that it was necessary to set up the Defence Office as soon as possible: the first indictments were signed on 8th March, 2003. The Office was established in effect as a public solicitor, with advocacy services at the pre-trial stage and defence support subsequently. This was a model urged at the time by an influential Report from "No Peace Without Justice", which strongly supported the Public Defender proposal but argued that the Defence Office should be confined to solicitor's work.[27] This Report accepted that "there is no requirement in the Statute of the Special Court that an indigent accused should be provided by the Court with a free, or indeed any, choice of legal representation", but argued for a modified and reformed "list" system, under control of the Defence Office, on the ground that "a defendant who has had some degree of choice of counsel is far more likely to have confidence in him or her". Thus the new Rule 45 evolved in an attempt to have the best of both worlds: it was approved unanimously by plenary of all judges in the first week of March 2003.

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[27] Sylvia de Bertodano, Report on Defence provision for the Special Court for Sierra Leone, commissioned by No Peace Without Justice and published on 28th February, 2003.

88. That the Principal Defender and his office fall under the administrative supervision of the Registrar is thus an historical anomaly: in future courts, the office should be an independent "fourth pillar", alongside the judiciary, the Registry and the Prosecutor. But the anomaly remains a reality nonetheless in this Court, and the Principal Defender must make the best of it, although the Registrar should act so far as possible in the spirit of the Rule, by allowing the office an operational independence. The court's second Annual Report notes:

> Whilst the Principal Defender and the Office of the Principal Defender technically fall within the Registry of the Special Court, the Principal Defender acts independently from other organs in the interests of justice. In October 2004, the Principal Defender proposed changes to the Special Court statute and other relevant documents, aimed at formalising the office's contemplated full independence. As of the writing of this Annual Report, the government of Sierra Leone along with the Special Court's President, council of judges, Registrar and Management Committee have endorsed that proposal. The proposal is currently being reviewed by the United Nations and it is hoped that the office of Principal Defender will eventually become as fully independent as the office of Prosecutor.[28]

89. To this I can only say "Amen", and add that the status and salary of the Principal Defender will have to increase to the level of that of the court's prosecutor, so as to attract a QC or an advocate of equivalent ability and "equal arms". The very fact that this constitutional change has not yet been effected emphasises that, for the present, the unamended Statute governs and entitles the Registrar to give directions to the Principal Defender, who is a member of his staff.

90. In this case the Registrar was not only entitled, but in my view bound, to direct the acting Principal Defender to comply with the order of the court and to reassign lead counsel. If the directive on 19th March was somewhat precipitate,

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[28] Second Annual Report of the President of the Special Court for Sierra Leone, 1st January 2004 to 17th January 2005, p19

that of the 25th March – after the decision on the 20th, and after the time for seeking leave to appeal had passed – was inevitable. The Registrar cannot permit any department or member of staff to disobey a court order. When the Principal Defender is given statutory independence, I would expect the office to be filled by a QC or equivalent who would have had the confidence and clout to summon Messrs Harris and Metzger and to insist that the Trial Chamber listen carefully to their case for reassignment to the defendants. If the Chamber declined to revise its order, the Principal Defender might seek leave to appeal it, but would in the meantime be bound to comply with it.

Does the Trial Chamber have jurisdiction to review the Principal Defender and Registrar?

91. This motion seeks to quash a decision of the Registrar and to order the Principal Defender to enter into fresh contracts with Messrs Harris and Metzger. It seeks, in other words, public law remedies akin to *certiorari* and *mandamus* and assumes that the Trial Chamber has wide supervisory powers of judicial review against court officials. This is a surprising assertion: criminal law courts have an inherent jurisdiction to protect their proceedings and, if justice cannot be done, to halt a trial for abuse of process, but there is nothing in the court statute which suggests that the judiciary have a general power to reverse or interfere with administrative decisions. Quite the contrary: the Registrar is responsible only to the President of the court and to the Court's Management Committee for his administrative decisions (see Special Court agreement 2002 Ratification Act 2002). This is emphasised by Rule 19 and Rule 33(a):

Rule 19 Functions of the President

> *The President shall preside at all plenary meetings of the Special Court, coordinate the work of the chambers and supervise the activities of the Registry as well as exercise all the other functions conferred on him by the agreement, the Statute and the Rules.*

Rule 33 Functions of the Registrar

> *The Registrar shall assist the chambers, the plenary meetings of the Special Court, the council of judges, the judges and prosecutor, the Principal Defender and the defence in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Special Court and shall serve as its channel of communication.*

92. There are a few instances in the Rules and the directives which may specifically bring an administrative act within the oversight of a Trial Chamber: the special jurisdiction to examine any refusal to assign counsel at a preliminary stage is one such (see *Directive* Article 12). Otherwise, the Trial Chamber is a criminal trial court in which administrative law powers have not been vested by statute and nor are they deducible from practices and precedents in other courts. Indeed, as *Ntahobali* shows, ICTR Trial Chambers disavow any supervisory jurisdiction.[29]

93. Any arrogation by trial chambers to themselves of some general right to supervise the Registrar and his officials would conflict with the supervisory powers of the court President under Rules 19 and 33, and so breach the principle that judicial review will not be granted where there is an alternative and established remedy. It would also cut across the overall administrative and financial policy supervision of the Management Committee, to which the Registrar reports. The supervisory jurisdiction of the President has been described at the ICTR by Justice Pillay:

> 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

[29] 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.

> without undue interference by Presidential review. ...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.[30]

94. I endorse these remarks, and note that in the ICTR the President's supervisory jurisdiction in relation to disputes over the Registrar's decisions on assignment of lead counsel is well established.[31] It would be subverted if a parallel and overlapping jurisdiction were to be asserted by trial chambers – both of them – to order the Registrar and his officials to do this or that and to quash their decisions and order them to enter into or not enter into contracts.

95. This question becomes more pointed when the provisions of Article 24 of the *Directive on Assignment of Counsel* are considered. The relevant parts provide:

> **Article 24: Withdrawal of assignment in other situations**
>
> A. The Principal Defender may:
>
> i) in exceptional circumstances, at the request of the suspect or accused, or his assigned counsel, withdraw the assignment of counsel;
>
> E. Where a request for withdrawal, made pursuant to paragraph A, has been denied, the person making the request may seek review of the decision of

[30] See 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.

[31] 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.

> the Principal Defender by the presiding Judge of the appropriate Chambers.

96. This procedure does not appear to have been followed. According to the Directive, Messrs Harris and Metzger should first have applied to the Principal Defender to have their assignment withdrawn, and her reasoned refusal should then have been submitted to the Presiding Judge for review under Article 24(E). Had that procedure been followed, it may well be that the Principal Defender's decision (and she was opposed to their withdrawal) would not have been quashed on judicial review grounds as unreasonable. The point, of course, is that the *Directive* sets out a specific procedure for counsel to follow in seeking withdrawal in a case alleged to have "most exceptional circumstances" and it empowers the Presiding Judge of the Trial Chamber seized with the matter to overrule an initial refusal by the Principal Defender. This is an example of a review power specifically delegated to a member of the Trial Chamber by direction of the President. It would have been unnecessary had the Trial Chamber already possessed a general supervisory power over the public defender and the Registrar, pursuant to its inherent jurisdiction. I should pause to mention that although no argument was addressed to this point, I am not convinced that Directive 24E is compatible with Rule 45E (set out at para 75 above). Although badly expressed ("...absent just cause...") the Rule does seem to give the Trial Chamber, and not its Presiding Judge, the power to approve withdrawal. Since the Rules must govern, and any Directive must be read so as to comply with them, this would legitimise defence counsel's course in bringing the application before the full chamber. The issue does not affect the resolution of the appeal, but the drafting of Rule 45E and its compatibility with 24E of the Directive should engage the attention of the next judicial plenary.

97. The appellants relied on the decision in *Brima,* decided on 6th May 2004, when Trial Chamber 1 carved a wide judicial review power out of its inherent jurisdiction. It struck down as *ultra vires* a decision by the acting Principal Defender to ask a sick lawyer to provide a medical certificate before being assigned to defend Mr Brima. The Registrar argues in this appeal that *Brima* was

wrongly decided and points out that the lawyer died shortly after the court had ordered his officials to enter into a contract, leaving the brief fee no doubt to his estate and leaving Mr Brima unprotected. The argument that a decision is wrong in law because it had absurd results does not necessarily follow, although it does invite closer examination of how Trial Chamber 1 assumed a general supervisory power to interfere with administrative decisions. All the more so since *Brima* on this point conflicts with a decision of the ICTR in *Natahobali* that no such power exists, save for the supervisory role of the President of the Court.

98. The complaint in *Brima* could not be heard as a preliminary motion under Rule 72B(iv) because it was outside the time limits there provided and could not come before the court under Articles 12(A) and 24(E) of the *Directive* because the Principal Defender had not refused to assign counsel but had imposed a condition on that assignment. He had asked a temporarily assigned counsel who had been absent from several court dates through sickness, to provide a medical certificate or else undergo a check-up, paid for by the defence office, before a decision was taken on whether permanently to assign him. The court, as has already been pointed out, misread Article 17(4)(d) and thought that it guaranteed counsel of choice to indigent defendants. It thought that requiring a medical certificate from counsel chosen by Mr Brima was a breach of that guarantee, notwithstanding the terms of Article 4(C) which require the Public Defender to provide an "effective defence" by a counsel who has indicated his "full-time availability" and notwithstanding the *Directive* requirement (Article 13(C)(vi)) that counsel must substantiate their availability for the following eighteen months before they can be assigned. Against that background, I would have thought it irresponsible for the Principal Defender <u>not</u> to insist upon medical evidence of the future health of any counsel previously affected by illness: it would be a breach of Rule 45(C) to assign a chronically ill lawyer to an accused, no matter how much that accused wished for his representation. It would not be "effective" representation nor cost-effective representation. Nonetheless, the Trial Chamber decided that the decision must be struck down and did so on grounds that it was *ultra vires* "not only because he did not have the statutory

empowerment to so act, but also because he acted in excess of and beyond the limits of the statutory empowerment and authorisation of the Principal Defender whose functions he was purportedly exercising".

99. To apply – in my view to misapply – the administrative law doctrine of *ultra vires*, the Trial Chamber invoked its inherent jurisdiction. This jurisdiction exists to enable a court to fulfil its fundamental duty of providing a fair and effective trial, by shaping its procedures to that end. It can go so far as to stop an unfair trial in its tracks by declaring it an abuse of process of the court. This may be a reaction to an unfair decision of the Registrar – e.g. to starve the defence of funds – but it does not involve the exercise of a judicial power over him. The Trial Chamber cited various ICTR decisions which establish the inherent jurisdiction to deal with abuse of process, but these cases are not authority for the proposition the court derived from them, namely "we rule that the court's inherent jurisdiction does extend to the control and supervision of officers of the court in the exercise of their statutory and related functions".[32]

100. This ruling was an error. There was no authority for it, and it conflicted with the ICTR precedents. It usurped the supervisory role allocated by the Statute and Agreement to the President of the court and (as the Registrar's employer) to the Management Committee. The court's Agreement and Statute calls for judges qualified in international and criminal law, not in administrative law. The Trial Chamber embarked on some discussion of the maxim *delegates non potest delegare*, by which it concluded that the Acting Public Defender "could not perform the duties that he purported to be performing nor could he take decisions in relation thereto and that if he did, as indeed he did, it was *ultra vires* his powers and that consequently the said decisions were null and void." The maxim is not a principle of administrative law, but rather a test to ensure that statutory discretions are exercised by the proper authority.[33] In a quite common situation where an Acting official has been appointed to a position

[32] Brima, para 62
[33] Wade and Forsythe, *Administrative Law*, 8th Edition, Oxford, p316.

which had not yet been permanently filled, and has taken a proper decision which had the full support of the Registrar, there can be no basis for a Trial Chamber to declare that decision *ultra vires*.

101. In my judgement, the decision in *Brima* should not be followed. Trial Chambers have specific powers to review certain administrative acts, and Directives issued by the President of the Court may delegate his supervisory power to the Trial Chamber or a member thereof in respect of particular matters – such as reviewing a Principal Defender's decision to reject an application to withdraw counsel. Otherwise, Trial Chambers have no general administrative jurisdiction. They may invoke an inherent jurisdiction, where the rules and directives are silent, to ensure that trial progress is effective and fair and they may complain and warn about any administrative acts which adversely affect their work. Otherwise, they must observe the distinction between the judicial function of the chambers and the administration of the court, which is subject to the supervision of the President in the manner outlined by Justice Pillay and to the policy direction of the Management Committee.

CONCLUSION

102. This motion is itself an abuse of process because it seeks to reverse an order of the court not by appeal or by a request for variation, but by reviewing a decision of the Registrar to implement it. I concur with my other colleagues that the motion must be dismissed. In respect of the arguments addressed to this Appeals Chamber by the parties, I have reached the following conclusions:

(i) Dissenting or concurring opinions must be appended to the judgement of the court and in a timely manner. If such opinions are not prepared so as to be available for appending within a reasonable time, the majority of the trial chamber may, at its discretion, proceed to deliver its judgements without further delay.

(ii) Motions should not be filed as "confidential" unless reasons are given and the classification must be reviewed by the court as soon as practicable and thereafter kept under review.

(iii) Article 17(4)(d) of the Statute does not vouchsafe to an indigent defendant the right to choose counsel. Assignments will be made by the Principal Defender from a roster of counsel qualified according to Rule 45(C), although there is a duty to consult with a defendant and to take his preferences into account before an assignment is made.

(iv) "Exceptional circumstance" requests by defendants or counsel should be made, in conformity with the directive, to the Principal Defender, with Presiding Judge/ Trial Chamber review only in the event of any refusal.

(v) Withdrawal of instructions does not qualify, *per se*, as a "exceptional circumstance" and nor do threats, unless they are proved to be such as render counsel incapable of defending his client or such as to make counsel of reasonable fortitude fear for the safety of themselves or their families.

(vi) Trial Chambers have inherent jurisdiction to rescind or vary orders and to reconsider interlocutory judgements if there has been a change of circumstances which has removed or altered the basis of the original order.

(vii) Trial Chambers do not have jurisdiction to supervise administrative actions of the Registrar or his officials, other than such specific jurisdiction as is bestowed by the Rules or by Directives of the President.

(viii) Until such time as the independence of his office is recognised by an amendment to the statute of the court, the Principal Defender works under the administrative supervision of the Registrar. In the spirit of the Rule change that created the office, the Registrar should allow it to work so far as possible with operational independence.

Done at Freetown this day 8th day of November 2005

Justice Geoffrey Robertson

[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 HON. JUSTICE AYOOLA 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. This appeal is from the majority decision of the Trial Chamber II ("the Trial Chamber") (Doherty and Lussick, JJ; Sebutinde, J. dissenting), on the "extremely urgent confidential motion for the re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara ("the decision"). The decision was rendered by the Trial Chamber (Justice Sebutinde dissenting) on 9th June, 2005.

Background

2. On May 5, 2005 the Defence teams for accused person, Alex Tamba Brima and brima Bazzy Kamara filed a "confidential Joint Defence Submissions on the Withdrawal of Counsel in the AFRC case ("Joint Defence Submissions").

3. By the Joint Defence Submissions the Defence teams prayed the trial Chamber to:

a. approve the withdrawal of Counsel as Counsel for the Accused persons'

b. not order that Counsel hitherto on record be made Court Appointed Counsel,

c. make any order that the Trial Chamber deems appropriate.

4. By the principal Defender's Confidential Ex-parte Submissions Regarding Issues Pertaining to withdraw of Counsel ("Ex-parte Submissions"), the Principal Defender was not apposed to Mr. Harris and Mr. Metzger being temporarily designated from "Assigned Counsel" to "Amicus Counsel" until such time as they believe it is safe and effective to retain their designation as Assigned Counsel".

5. The Prosecution opposed all these requests but submitted that Defence Counsel should not be permitted to withdraw but, rather, should be directed to represent the Accused pursuant to Rule 6(i) (B).

6. The Trial Chamber rendered its decision permitting Mr. Metzger and Mr. Harris to withdraw from the case to which they have been assigned. It is evident from the decision that the ground which weighed most with the Trial Chamber as constituting exceptional circumstances was that of threats to Lead Counsel and their families. There were three other grounds which the Trial Chamber did not regard, by themselves, as constituting exceptional circumstances. The Trial Chamber was unanimous in the view that those three other grounds did not amount to exceptional circumstances.

7. Justice Doherty and Justice Lussick who rendered the majority decision stated as follows:

> Taken individually, we find that the arguments put forward by Lead Counsel regarding their difficulties, i.e. that their clients won't come to court, that their clients will not give them instructions, that there is a deteriorating relationship, not helped by the possibility that they may be called to give evidence in contempt proceedings against the clients' wives, that they see themselves acting, in the circumstances, against the principles of their own Bar Code, do not constitute "the most exceptional circumstances" warranting the withdrawal of Counsel. However, when all of these problems are considered together with the threats hanging over their heads, the cumulative result, in our view, creates an intolerable situation which places Lead Counsel under an impossible burden.
>
> The Accused are charged with crimes of a most serious nature. They are entitled to the best Counsel available, Counsel who can fully dedicate themselves to their demanding task. *We are of the view that Lead Counsel, with their present difficulties, would not be capable of acting in the best interest of their clients. We doubt that they would be able to represent their clients to the best of their ability when, apart from everything else, they are concerned for their own safety and that of their families.* Although we are loath to come to a decision which possibly may adversely affect an expeditious trial, *we are of the view that the rights of the Accused to be represented by counsel would best be served by*

> *appointing counsel able to carry out their duties free of the constraints inhibiting present Lead Counsel. (Italics mine)*

8. In the event, the Trial Chamber granted the motion for the withdrawal of Lead Counsel Kevin Metzger and Wilbert Harris as Counsel for the Accused Brima and Kamara, respectively, and made consequential orders, inter alia, directing the Principal Defender to assign *another Counsel* as Lead Counsel to Alex Tamba Brima and *another Counsel* as Lead Counsel to Brima Bazzy Kamara. They made orders for representation of the two accused pursuant to Rule 60(B).

9. It is pertinent to note that Justice Sebutinde dissented, although that dissent is not of any importance in this appeal. She was unable to find that threat to the accused had been substantiated or that either Mr. Metzger or Mr. Harris had demonstrated the most exceptional circumstances. I pause to note that although the majority decision which is the decision of the Trial Chamber had been rendered on 20 May 2005, the dissenting opinion of Justice Sebutinde which was not appended to the decision of the Court, was not given until 8 August 2005. In my opinion, an opinion, given so late after the decision of the Trial Chamber has been filed and published could hardly be regarded as forming part of the opinions rendered in the case. To hold otherwise will create an indefinite, and unacceptable, uncertainty were a judge who has dissented at liberty to render and publish his or her dissenting opinion at his or her leisure, no matter how long after the Trial Chamber had announced and published its majority decision. If it is permissible to render and publish a dissenting opinion two months after the Trial Chamber has disposed of the matter, what stops it from being rendered one year or two years after!

10. I continue with the narration of the background facts. There was no appeal from the decision on the confidential Joint Defence Application for withdrawal of Counsel. The validity of that decision and the consequential order made is incontestable in the present proceedings.

The Present Proceedings

11. The present proceedings were initiated by a motion whereby the accused Alex Tamba Brima and Brima Bazzy Kamara sought the following orders:

(i) In the first place,....., the Defence herewith respectively prays the Trial Chamber to order the Registrar to ensure that Mr. Metzger and Mr. Harris are re-assigned as Counsel for Accused persons Brima and Kamara.

(ii) In the second place, an order to the Acting Principal Defender to immediately enter into a legal services contract with Mr. Metzger and Mr. Harris.

(iii) In the third place, that the Justice that re-confirmed the order not to re-appoint as indicated in the letter from the Registrar's Legal Advisor recluse (sic) themselves from hearing this present motion.

(iv) In the fourth place, an order to declare as null and void the decision of the Registrar not to re-assign Counsel as the decision was made without legal or just cause and therefore ought to be quashed accordingly and set aside.

(v) In the fifth place, any other relief the Trial Chamber may deem fit and appropriate in the circumstance.

12. By its decision rendered on 9 June 2005 the Trial Chamber (Doherty and Lussick, JJ, Sebutinde, J dissenting) dismissed the motion.

13. Justice Sebutinde, once again, did not append her dissenting opinion to the decision of the Trial Chamber but filed one on 11 July 2005 more than one month after the Trial Chamber had already rendered its decision. She wrote an

opinion which was more like an appellate decision from the opinion of her colleagues.

14. In a decision which is commendable for its succinctness and which was directed to the issues in the Motion, the Trial Chamber having reviewed the submission of Counsel on behalf of the accused, of the Registrar and of the Principal Defender disposed of the motion as follows:

i. In regard to the relief:

> That the Justices that reconfirmed the order not to re-appoint as indicated in the letter from the Registrar's Legal Adviser recluse themselves from hearing this present motion,

the Trial Chamber ruled that:

> There was no order made in the Trial Chamber refusing re-appointment of Counsel per se. The orders sought in the original application made for leave to withdraw from the case. The orders were granted in full as sought and additional orders for, *inter alia*, appointment of Lead Counsel were made.

ii. In regard to the relief:

> That the Trial Chamber order the Registrar to ensure that Mr. Metzger and Mr. Harris are re-assigned as Counsel for Accused persons Brima and Kamara

the Trial Chamber having stated that:

> In our earlier decision permitting Lead Counsel to withdraw, we found that the Accused were merely boycotting the trial and obstructing the course of justice. In our view, that is exactly what they are seeking to do in bringing the present motion. We do not believe that they genuinely wish to be represented by those particular counsel. We believe that their real motive is to cause as much disruption to the Trial as possible.

The Trial Chamber went further to say:

> As the Deputy Principal Defendant has correctly stated, the duty to assign Counsel in the event of a withdrawal rests in the Principal Defender. However, we do not consider this entirely relevant as Rule 45 (E) provides the appointment must be of "another Counsel. There is no provision for re-assignment of former Counsel in the event that they or their client, or both, have changed their mind.

iii. In regard to the relief *that an order be made to the Acting Principal Defender to immediately enter into a Legal contract with Messrs Metzger and Harris,* the Trial Chamber re-iterated its earlier opinion that there is no provision for re-appointment and added the Trial Chamber has no power to interfere with the law relating to priority of contract.

iv. In regard to the prayer that the decision of the Registrar not to re assign Counsel null and void as it was made without legal or just cause, the Trial Chamber disposed of that shortly by pointing out that that the Registrar had sought to uphold the order of the Trial Chamber order allowing Counsel's application to withdraw and ordering another Counsel be assigned in accordance with Rule 45(E). It concluded that to argue that upholding and implementing a Court Order, made on application of the parties concerned is 'without Legal or just cause' is fallacious.

15. It is noteworthy that the Trial Chamber doubted the good faith of the statement by the Defence that the "circumstances where Counsel previously withdraw his services for stated reasons and circumstances have changed" given, as stated in the decision, that the application emanated from a letter from the accused purportedly written on the same day as the Trial Chamber's order.

16. In the event, the Trial Chamber dismissed the motion which it described as not founded on bona fide motives and as one which sought to reverse an order granting relief which the Defence itself sought. It was in the light of these

findings that the Trial Chamber considered the Motion to be frivolous and vexation.

The Appeal

17. The appeal from the decision was on seven grounds as follows:

1. First Ground of Appeal

Error in law and/or fact due to the Trial Chamber's erroneous interpretation, of the statutory rights of the accused persons as provided under Article 17(4) (c) and (d) of the Statute of the Special Court. The Defense submits that the appealed decision wrongfully denied the rights of the Accused persons to have counsel of their own "choosing" as provided for in Article 17 (4) (d) of the Special Court Statute.

2. Second Ground of Appeal

Error in law an/or fact due to the appealed decision's denial of the Defense request for an Order to the Acting Principal Defender to enter into a legal services contract with Messrs. Metzger and Harris on the grounds the Trial Chamber has no power to interfere with the law relating to privity of contract.

3. Third Ground of Appeal

Error in law and/or fact due to the ruling of the Trial Chamber that the Defense request for "an open and public hearing" is an application for further relief in a Reply and that "there has been no submission to support or explain this application for a public hearing".

4. Fourth Ground of Appeal

Error in law and/or fact due to the Trial Chamber's erroneous legal interpretation of Rule 45 (E) of the Rules of Procedures and Evidence of the Special Court for Sierra Leone (Rules) to prohibit re-appointment of

former Lead Counsel. The ruling in this respect is entirely misplaced because the Original Motion was not a Rule 45 (E) application.

5. Fifth Ground of Appeal

Error in law and/or fact due to the Trial Chamber's treatment of the Original Motion as an application for review of its earlier decision on Motion for withdrawal by Messrs. Metzger and Harris.

The Defense is of the opinion that the Trial Chamber erred in law by not considering the original Motion as separate and distinct from the Motion for Withdrawal of Counsel.

6. Sixth Ground of Appeal

Error in law and/or fact due the Trial Chamber's decisions that "Counsel are not eligible to be reappointed since they are no longer on the list of qualified Counsel required to be kept under the Rule 45 (C).

7. Seventh Ground of Appeal

The Trial Chamber erred in law and/or fact due its ruling that since "there was no determination of the issue of re-appointment of Counsel, there are no grounds for submitting that any Judge recuse him/herself.

18. By their notice of appeal the accused sought relief as follows:

> . . . . . the Defense respectfully prays the honourable Appeal Chamber to:
>
> i. Find the Appeal admissible.
>
> ii. Declaration that refusal of the Registrar and the Trial Chamber to re-appoint Messrs. Metzger and Harris as lead Counsel amounted to a violation of the Statutory rights of the Accused as provided in Article 17 (4) (d) of the Special Court Statute.
>
> iii. Declaration that the Registrar's decision against the re-assignment of Messrs Metzger and Harris and also the removal of their names from the list of eligible Counsel is ultra vires and null and void.

iv. An order for the reinstatement of Kevin Metzger and Wilbert Harris on the list of qualified Counsel.

v. A declaration that the Trial Chamber has both the inherent jurisdiction and the power to review the Registrar's decision not to reassign Messrs. Metzger and Harris as assigned Counsel as well as the Registrar's decision to remove their names from the list of qualified Counsel.

vi. A declaration that Justices Doherty and Lussick, having advised the Registrar against the re-appointment of Messrs. Metzger and Harris should properly have recused themselves from hearing the Original Motion on their re-appointment.

19. Grounds of appeal must arise from the decision appealed from if they are to be relevant to the appeal. It is misconceived to complain that a tribunal erred in its decision or is erroneous in its finding on an issue when such finding has not been made. It is a different thing if it is complained that the impugned decision is vitiated by absence of findings on an issue that is relevant and material to the decision. That is not the complaint in any of the grounds of appeal.

20. In this case most of the grounds of appeal do not arise from the decision appealed from. Ground 1 complains of "erroneous interpretation of the statutory rights of the accused person as provided under Article 17 (4) (C) and (d) of the Statute of the Special Court and that the decision wrongfully denied the rights of the Accused to have counsel of their own 'choosing'". However, a careful reading of the decision shows that it was not based on an interpretation of Article 17 (4) (C). There was no controversy about the principle that the right to have legal assistance of assigned counsel does not carry with it an absolute right to any counsel. What was in issue was whether accused was entitled to insist on counsel, as counsel of his choice, when that counsel had -

(i) been permitted to withdraw from the case on grounds stated;

(ii) not applied to vary or discharge the order permitting him to withdraw and the consequential order that another counsel should be substituted for him, and

(iii) not at all shown a change of circumstances from that that had constituted exceptional circumstances for permitting his withdrawal in the first place

The Trial Chamber held that *(i) there was no direct evidence from counsel permitted to withdraw that their circumstances have changed; (ii) that all the other factors the Trial Chamber considered in arriving at its decision were still in existence and (iii) that it was unclear on what legal grounds the application was made as it was not brought pursuant to Rule 45 (D).*

21. Instead of dealing with the grounds of the decision as summarized above, the defence dwelt on the question of the right of an accused to be represented by a counsel of his own choice, which in the circumstances of this case is a purely academic and hypothetical question, whereas the real question was whether the previous subsisting order and the ground on which it was made had not limited that right.

22. It was clear from the reasoning of the Judges who delivered the majority decision hat the accused could not claim a right to the particular counsel who have been permitted to withdraw from the case without first having the order, varied or rescinded. Nothing has been shown on this appeal in the grounds or in the submissions that that reasoning was erroneous.

23. The second ground of appeal suffers from the same misconception as the first in that it ignored the preceding statement that there was no provision for re-appointment of counsel under Rule 45 (E). My understanding of the reasoning of the Trial Chamber is that the power of the Trial Chamber to order a legal services contract with the particular counsel must be predicated on a statutory provision

for their re-appointment, otherwise there would be no legal source of the power which the Defence had requested the Trial Chamber to exercise. The reference to privity of contract may not have been apt, but the idea it sought to convey when read in the context of the preceding statement is clear enough. The Defense should have challenged that preceding statement. They did not.

24. Put under close scrutiny, the remaining grounds may be found to suffer from the same shortcoming, albeit to a lesser degree.

Issues on the Appeal

25. The issues that are decisive of this appeal are really few. They are as follows:

(i) Whether Justice Doherty and Justice Lussick erred in not disqualifying themselves.

(ii) Whether the Trial Chamber made an erroneous interpretation of Rule 45 (E) or erroneously regarded the application as one brought pursuant to Rule 45 (E).

(iii) Whether the Trial Chamber misconceived the nature of the Motion by not considering the "Original Motion as separate and distinct from the Motion for withdrawal of Counsel".

(iv) Whether the statement that "Counsel are not eligible to be re-appointed since they are no longer on the list of qualified counsel required to be kept under the Rule 45 (C)" is correct in the circumstances of the case.

Deliberation

26. The question whether or not the two judges who delivered the majority decision should have disqualified themselves by reason of alleged bias or reasonably doubt as to their impartiality arose from the relief sought in the Trial Chamber that "the Justices of the Trial Chamber who reconfirmed the order not to re-appoint Counsel as indicated in the letter from the Registrar's Legal Adviser should disqualify themselves. The ground for this relief was that the said Judges *having previously ordered* that Mr. Metzger and Mr. Harris were not to be re-appointed as Defence Counsel, would not be in a position to adjudicate upon the Motion by the defence to re-instate them fairly and impartially.

27. The background facts can be briefly stated: The Deputy Principal Defender in a memorandum to the Registrar informed him on 17 May 2005 that although Mr. Metzger and Mr. Harris had been permitted to withdraw from the case, the accused persons had chosen them as their Counsel. She was inclined to re-appoint them as Lead Counsel for the accused persons instead of assigning new Counsel to the accused.

On 18 May 2005 the Registrar wrote a memorandum to the Presiding Judge of the Trial Chamber as follows:

> Justice Doherty, as promised, this is the formal update by the Defence Office as to the present position on Metzger and Harris. As I have mentioned to you, as a matter of expediency, there are reasons which would support their return. But from the long term conduct of the trial, and considering both Counsels' performance and demeanor, my view is that it would be counter-productive to reassign them. <u>One point I would like to put to you for your advice is the issue of who, ultimately, has the final word on this. Whilst it is clear from the Directive on Assignment of Counsel that the Principal Defender and I have a major role, I cannot believe that a Trial Chamber does not have at least a say if not the final say".</u>[underlining mine]

By an inter-office memo of 18 May 2005 the Presiding Judge wrote as follows:

> **Re-Appointment of Mr. Kevin Metzger and Wilbert Harris as Lead Counsel:**
>
> This matter was already brought orally to the Court and the following order made on 16th May 2005:
>
> "This Court read an order on an application. The application was an application to withdraw. That order was made and any letters, correspondence or documents that seek to go behind that decision cannot be countenanced in this Court. The decision has been made."
>
> That ruling stands and the order stands. The Court will not give audience to Counsel who make an application to withdraw on one day on various grounds, particularly security and then come back the day after and basically say they retract. They cannot make fools of the Court like this, nor can they do it in a "back door" way through the Principal Defenders and the Registrar's power to appoint Counsel.

28. In his memorandum of 17 May 2005 to the Presiding Judge earlier referred to the only question on which the Registrar sought assistance from the Presiding Judge was "who ultimately has the final word on this. Whilst it is clear from the Directive on Assignment of Counsel that the Principal Defender and I have a major role, I cannot believe that the Trial Chamber does not have at least a say, if not the final say".

29. The Registrar's enquiry should not be read out of context. The enquiry was made in the context of a subsisting order of the Trial Chamber that another Counsel be appointed. The Registrar, a highly experienced judicial administrator, was perfectly in order in his view that the Trial Chamber has at least a say if not the final say in a matter that affected its order. He would have risked committing a contempt of the Trial Chamber if he had not taken the precaution of enquiring before he acted. He acted appropriately pursuant to Rule 33 (B).

30. The response of the Presiding Judge cannot be faulted. It was merely to restate the existing state of affairs about which there could not have been be any reasonable dispute, namely:

(i) an order has been made permitting Mr. Metzger and Mr. Harris to withdraw from the case

(ii) Counsel who obtained that order cannot turn round to seek re-appointment, without much more.

The opinion which in substance meant that the Counsel could not be allowed to approbate and reprobate cannot be faulted. No self respecting tribunal would allow its process to be trivialized and brought to ridicule.

31. However, in fairness to Mr. Metzger and Mr. Harris, they did not apply to be re-appointed as counsel, and so they had no cause to show that the circumstances had changed and when and how.. They merely gave an indication that they would be prepared to act on condition that their security concerns were taken care of.

32. Mature consideration would show that there was really no question of bias or reasonable apprehension of impartiality by Justice Doherty or Justice Lussick. The two Judges had restated existing and known facts. They made obvious statements, which well interpreted, was in fact a statement of principle regarding a court protecting its order from being treated with contempt. The Registrar's enquiry as to whether the Trial Chamber had a say or final say in the matter was not even directly considered in their response. The issue in the present defence motion which was whether a right of choice of Counsel extended to a right to choose counsel who has been permitted to withdraw from the case with a consequential directive that another counsel be appointed, while the order and the consequential directive subsisted, were not raised by the Registrar's memorandum nor was it addressed by the Presiding Judge's response.

33. There was really no basis, whatsoever, for the charge of bias or likelihood of partiality made against Justice Doherty and Justice Lussick by Justice Sebutinde in her dissenting opinion which was adopted by the defence. It was unfortunate that such an allegation was hastily and without an iota of justification made against the two highly experienced and competent Judges without proper analysis of the memoranda and the circumstances. Had the two judges not been denied the opportunity of discussing Justice Sebutinde's opinion perhaps a lot of misconceptions would have been cleared.

34. I find no substance in the submissions of the defence that Justice Doherty and Justice Lussick should have disqualified themselves.

35. The remaining issues can be dealt with shortly. There is no substance in the submissions that the Trial Chamber made an error in interpretation of Rule 45 (E). Indeed, it had not been shown where that error occurred. The Trial Chamber took the trouble to show the ordinary meaning of "another" as "different from the one already mentioned". It has not been shown that they were wrong.

36. In regard to the nature of the defence motion, it is clear that although it was not a motion for withdrawal of counsel, the order permitting withdrawal of counsel and the consequential directive are relevant to the motion. It was in that context that the Trail Chamber discussed the matter of withdrawal of counsel and found that there was no direct evidence that their circumstances have changed. The complaint that they misconceived the nature of the motion is without substance.

37. That statement that "Counsel are not eligible to be re-appointed since they are no longer on the list of qualified Counsel" was one of several reasons for dismissing the motion. The other reasons were valid. Even if the impugned reason were erroneous that would not affect the result.

Conclusion

38. I have confined myself to issues which I find arise from the appeal. I have refrained from discussing the question whether the Trial Chamber could review the decision of the Registrar because I do not see the Defence Motion as a request for a review. If it can be said to be a request for a review, I am content to agree with the decision of the Appeals Chamber that it was rightly rejected.

39. I agree with the decision that the appeal be dismissed and append to it this concurring opinion to express my views on some of the issues.

Done at Freetown this day 8th day of November 2005

Justice Emmanuel Ayoola

[Seal of the Special Court for Sierra Leone]

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IN THE APPEALS CHAMBER

Before: Justice A. Raja N. Fernando, Presiding Judge
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Geoffrey Robertson
Justice Renate Winter

Interim Registrar: Lovemore Munlo, SC

Date: 8th December, 2005

PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGIE KANU
(Case No.SCSL-04-16-AR73)

SEPARATE AND CONCURRING OPINION OF HON. MR JUSTICE GEORGE GELAGA KING 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-Momoh Fofanah

I. INTRODUCTION

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-appointment of Kevin Metzger and Wilbert Harris as their Lead Counsel was dismissed ("former Lead Counsel"). By an oral order of 12 May 2005[1] and a written decision published 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 threats to former Lead Counsel and their families.[2] By a motion filed on 24 May 2005 the Appellants sought the following Orders:

(i) That the Registrar re-assign former Lead Counsel;

(ii) That the Acting Principal Defender do immediately enter a legal services contract with former Lead Counsel;

(iii) That the Justices who re-confirmed the order not to re-appoint be recused from hearing the motion;

(iv) That the decision of the Registrar not to re-assign Counsel be declared null and void and;

(v) Any other relief deemed fit and appropriate.[3]

2. Trial Chamber II dismissed the Motion to Re-Appoint on the ground that it was frivolous and vexatious. On 5 August 2005 the Trial Chamber granted the Appellants leave to file an interlocutory appeal against the Impugned Decision. Notice of Appeal was filed on 2 September 2005.

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[1] Transcript. 2 (12 May 2005), lines 13-16 ("Oral Order Permitting Withdrawal").
[2] Decision on the Confidential Joint Defence Application for the Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, filed on 23 May 2005; and Corrigendum Decision on the Confidential Joint Defence Application for the Wihtdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, filed on 10 June 2005 (both hereinafter referred to as the ("Written Decision Permitting Withdrawal").
[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").

3. This interlocutory appeal which has turned out to be unusually and exceedingly protracted, voluminous and haphazard in its compilation and presentation and seems to be unnecessarily acrimonious, raises certain fundamental and vital issues pertaining to the conduct of a criminal trial that give me cause for concern and alarm. I am accordingly constrained to write this separate and concurring opinion to express my views not only on the substance of the appeal, but more immediately on those discordant matters which, if not nipped in the bud, may end up adversely affecting, if not undermining, the administration of justice in the Special Court.

II. BACKGROUND

4. I shall, therefore, begin by adumbrating and dealing with those discordant and rather disruptive incidents which ought not and cannot be allowed to stand uncorrected, as otherwise the smooth running and proper functioning of the Trial Chamber II will be seriously jeopardised. From the records before this Appeal Chamber, it appears that it is the norm in Trial Chamber II that majority decisions and minority or dissenting opinions are not delivered, simultaneously as is required by law[4] but instead a dissenting opinion is only published several weeks after the majority decision.

Refusal To Publish Dissenting Opinion

5. Incredibly, on at least one occasion, the publication of a dissenting opinion was deliberately blocked. I refer to the Dissenting Opinion of Justice Sebutinde from the Majority Decision on the Application to Reappoint Kevin Metzger and Wilbert Harris as Lead Counsel for 1st and 2nd Appellants. The written Majority Decision,[5] consequent on the oral decision delivered by the Presiding Judge, Teresa Doherty on 12 May 2005, was published on 9 June 2005. Justice Julia Sebutinde issued her Dissenting Opinion on 11 July 2005, but Court Management, acting on instructions from the Registry, refused to publish via the SCSL website.

6. On 28 July 2005, Justice Sebutinde in a memorandum referred the refusal to me in my capacity then as Vice President and asked for redress. On the same day I convened a meeting of Hon. Justice Sebutinde, the then acting Registrar and the

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[4] Art. 18 Special Court Statute.
[5] See note 3 supra.

Legal Advisor to the Registrar, for the purpose of resolving Justice Sebutinde's complaint. The result of the meeting was that I directed and ordered "that the Acting Registrar do instruct Court Management to publish the said Dissenting Opinion of Justice Sebutinde on the SCSL website forthwith." Emphasis mine.

7. I had acted under Rule 21 of the Rules of Procedure and Evidence which provides:

> "The Vice President...shall exercise the functions of the President in case the latter is absent from Sierra Leone or is unable to act."

Despite my instructions that Court Management publish the Dissenting Opinion immediately and without delay, it was not published on the website until one week later on 4 August 2005.

Comment on Dissenting Opinion by Presiding Judge

8. A day after the publication of Justice Sebutinde's Dissenting Opinion on the website, Trial Chamber II on 5 August 2005 published its Decision granting the Defence leave to file an interlocutory appeal against the Impugned Decision. Annexed to that Decision is what is headed "Comment of Justice Doherty." In that so-called Comment, Justice Dohety, the Presiding Judge, refers to the Dissenting Opinion of Justice Sebutinde and then posits that "some facts stated are incorrect or misleading." She then goes on to pronounce: "I am entitled to put the following before the Appeals Chamber", as if she is a party to this Appeal! The "following" consisted of a five paragraph review by Justice Doherty of Justice Sebutinde's Opinion in the course of which she purported to correct and amend portions of the Opinion. I must state that she was ill-advised to have embarked on such course of action.

9. By law, "all judges are equal in the exercise of their judicial functions"[6] and shall be independent in the performance of their functions.[7] No Judge has the mandate or jurisdiction to sit in judgement over the Dissenting Opinion of another Judge of coeval jurisdiction. It is hoped that such practice will not recur. Where

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[6] Rule 17(A)
[7] Art. 13.1 of the Special Court Statute.

there is disagreement, there are channels to pursue, but certainly not by "Comment" annexed to a Decision granting leave to appeal.

Delivery of Majority and Minority Decisions

10. I now revert to the fact that the majority and dissenting judgements were not delivered simultaneously. Article 18 of the Statute provides:

> "The Judgement shall be rendered by a majority of the Judges of the Trial Chamber and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing to which separate or dissenting opinions may be appended."

On a proper construction of that provision, separate or dissenting opinions should be delivered at the same time as the majority decision and not days or weeks later.

11. It is the duty and responsibility of the Presiding Judge of the Trial Chamber after consultation with the other Judges to fix a date when the Judgement of the Court is to be delivered. On that specified date, where a majority Judgement is rendered, it must be accompanied by a reasoned opinion in writing to which separate or dissenting opinion may be appended. The Presiding Judge must ensure that sufficient time is given to his or her colleagues, who may want to deliver separate or dissenting opinion, to enable them to do so at the specified date. That way, time will begin to run from the date all the opinions are delivered. Otherwise it necessarily follows, in my judgement, that time for appealing or seeking leave to appeal will only begin to run after the publication of the dissenting opinion.

12. To say that "a court delivering a majority decision is not even obliged to append a dissenting opinion"[8] is erroneous having regard to Article 18 of the Statute. In my judgement a court delivering a majority decision must append a separate or dissenting opinion where there is one.

13. I opine that on a proper construction of Article 18 of the Statute the Judgement of the Court consists of both the majority (which binds the Court) and

[8] Separate and Concurring Opinion of Judge Lussick in granting leave to appeal.

the separate or dissenting opinions. Where there is a separate concurring or dissenting opinion they should be delivered or published at the same time as the majority decision in accordance with the directions in paragraph 10 supra.

14. Rule 88(C) of the Rules and the provisions of Practice Directions derive their efficacy from the Special Court Statute and they cannot be construed so as to override the clear provisions of the Statute.

III. NOTICE AND GROUNDS OF APPEAL, RESPONSES AND REPLY

15. On 2 September 2005, counsel for Brima and Kamara filed a Notice of Appeal with the following 7 grounds of appeal:

1. Error in law and/or fact due to the Trial Chamber's erroneous interpretation of the rights of the accused persons as provided under Article 17(4)(c) and (d) of the Statute of the Special Court.

2. Error in law and/or fact due to the denial of the Defence request for an Order to the Acting Principal Defender to enter into a legal services contract with Messrs Metzger and Harris.

3. Error in law and/or fact due to the ruling that the Defence request for an "open and public hearing" is an application for further relief in a Reply and that "there has been no submission to support or explain this application for a public hearing."

4. Error in law and/or fact due to the erroneous interpretation of Rule 45(E) of the Rules of Procedure and Evidence to prohibit re-appointment of former Lead Counsel.

5. Error in law and/or fact due to the Trial Chamber's treatment of the original motion as an application for review of its earlier decision on the motion for withdrawal by Messrs Metzger and Harris.

6. Error in law and/or fact due to the decision that "counsel are not eligible to be re-appointed since they are no longer on the list of qualified counsel required to be kept under Rule 45(C).

7. The Trial Chamber erred in law and/or fact due to its ruling that "there was no determination of the issue of re-appointment of Counsel, there are no grounds for submitting that any Judge recuse him or her self."

16. The relief sought is that this Appeals Chamber makes the following declarations:

(i) That refusal of the Registrar and Trial Chamber II to re-appoint Messrs Metzger and Harris as Lead Counsel amounted to a violation of the statutory rights of the accused as provided in Article 17(4)(d) of the Statute.

(ii) That the Registrar's decision not to re-assign Messrs Metzger and Harris and also the removal of their names from the list of eligible counsel is ultra vires and null and void.

(iii) That the Trial Chamber has the inherent jurisdiction and power to review the Registrar's Decision not to reassign Messrs Metzger and Harris and the Registrar's Decision to remove those counsel's names from the List of Qualified Counsel.

(iv) That Justices Doherty and Lussick having advised the Registrar against the re-appointment of the two Counsel should properly have recused themselves from hearing the motion on their reappointment.

17. On 9 September the 2nd Respondent (The Principal Defender) filed a Response to the Appeal in which, inter alia, he supported the Grounds of Appeal. On 12 September 2005 the 1st Respondent (The Registrar) filed his Response to the Appeal which he opposed. A day after, on 13 September 2005, the 1st Respondent filed what is labelled "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)." That document is not in fact an additional motion, but rather additional submissions and a further Response to the submissions of the Second Respondent. On 16 September 2005, the Second Respondent filed a Response to the First Respondent's "Additional Motion". On 16 September 2005 the Appellant's filed their Reply to 1st Respondent's Response.

SUMMARY OF SUBMISSIONS OF THE PARTIES

(a) The Appellants

18. The chief submission of the Appellants is that there is no legal basis for the Registrar, supported by the Majority of Trial Chamber II, not reassigning former Lead Counsel. They contend that in matters relating to the assignment of Defence Counsel the Accused has the right to be consulted as to his wishes and the Registrar may only refuse those wishes on "reasonable and valid grounds" including proven incompetence, misconduct or serious violations of Codes of Conduct or where Counsel's name has been removed from the list of Qualified Counsel pursuant to Article 13 of the Directive on Assignment of Counsel.[9]

19. They further submit that the Trial Chamber has inherent Jurisdiction to allow a motion alleging a violation or denial of the Statutory right of the Accused persons in the overriding interests of justice and having regard to the need for a fair trial. The Appellants stress that the right of the Accused to a public hearing is not limited to the main Trial, but also to interlocutory applications.

20. They complain that the Trial Chamber was wrong in law and fact by erroneously considering the Motion to Reassign as an application to review the application to withdraw under Rule 45(E) and by dismissing the former as "frivolous and vexatious". They submit that the Trial Chamber's decision that "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)" was in the circumstances wrong in law.

(b) The Second Respondent

21. The Second Respondent supports the grounds of Appeal. They submit that the rights of the accused are enshrined in Art. 17 of the Statute and particularly Art. 17(4)(c) and (d) which should be construed having regard to the mandatory manner in which they are couched. That although the jurisprudence indicates that the Accused person's right to counsel of his own choosing is not absolute, the Accused's motion for re-assignment is distinguishable.[10] They refer to the interpretation of Article 6(3)(C) of the European Convention of Human Rights which is identical with

[9] Brima-Kamara Defence Appeal Motion p.4.
[10] Defence Response pp. 6 and 7.

Art. 17(4)(d) of the Statute and the meaning to be given to "legal assistance of his or her own choosing."

22. With regard to the denial of the Accused's right to a public hearing pursuant to Article 17(2) of the Statute on the ground the Accused's outgoing Counsel had sought to have facts under seal and ex parte. The Second Respondent argues that such action by Counsel should not have been considered in matters relating to Accused's right to a public hearing.

23. The right of the Accused to a public hearing should not have been compromised by their Counsel's action. The Second Respondent complains that the Trial Chamber failed to differentiate between the Accused person's Motion for Re-appointment of Counsel and Counsel's Motion for Withdrawal. The Trial Chamber erroneously perceived the Joint motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, filed pursuant to Art. 17(4)(d) of the Statute as a request for review of an earlier motion for withdrawal by the former Counsel.

24. The Second Respondent submits that it is not within the power of the Registrar to remove names of counsel from the list and more so without establishing just cause. The Acting Registrar, Mr Kirkwood, had requested the Deputy Principal Defender to strike the former Lead Counsel's names off the List, but she had declined as the matter was, inter alia, *sub judice.*[11] They complain that when the Acting Registrar finally struck Counsel's names off the List it was done without the consent and despite the legal advice from the Defence Office to the contrary. They stress that as the head of the Defence Office, the Second Respondent should discharge his duties and functions in guaranteeing the rights of the Accused persons independently without any undue interference. That by virtue of Rule 45 of the Rules and Article 13(A),(B),(E) and (F) of the Directive on the Assignment of Defence Counsel the Second respondent in his capacity as Principal Defender is vested with the power to compile, maintain and place counsel on the List of Qualified Counsel and to remove counsel who do not qualify.

25. In support of that submission the second Respondent refers to the dictum of Justice Boutet in *Prosecutor v. Hinga Norman et al,* that the roles of assignment,

[11] Letter of 26 May 2005 to Mr Kirkwood.

withdrawal and replacement of counsel is "essentially a role and function of the Principal Defender".[12] They contend that the First Respondent's reason that "security concerns" constituted "just cause" could not be good reason as the "security concerns" of the withdrawn counsel were not even established nor investigated by the 1st Respondent.[13]

(c) The First Respondent

26. The First Respondent opposes the appeal and submits that there is no absolute right of an Accused to be provided with counsel of their choosing and that this is recognised by the Appellants in their Original Motion.[14]

27. The First Respondent submits that the right to a hearing in open Court is not absolute and reasons must be presented to the Trial Chamber as to why there should be an Open Court hearing.[15]

28. He avers that Messrs Metzger and Harris had both applied to withdraw from the trial on the basis that they were not receiving full instructions from the Accused and that they had received unspecified threats. The Trial Chamber allowed them to withdraw stating that they doubted that Counsel "would be able to represent their clients to the best of their ability."[16] In the circumstances, the 1st Respondent states that "the Principal Defender acted reasonably within his powers under Rule 45(C) of the Rules in refusing the request for the re-appointment of Counsel by the Accused, particularly where there were no new circumstances which would override the observations of the Trial Chamber as to the ability of Counsel to effectively defend the Accused."[17]

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[12] Separate and Concurring Opinion of Justice Boutet on Request for Withdrawal as Court Approved Counsel for 1st Accused, 1 March 2005, page 4 para 4 (SCSL doc 356).
[13] Para 3 of 1st Respondent's Response (SCSL Doc No. 290).
[14] Extremely Urgent Confidential Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara Pursuant to Article 17(4)(C) and 17(4)(D) of the Statute and Rule 54 of the Rules.
[15] Respondent's Response p.3 para 5.
[16] Decision on Motion for Withdrawal, para 60.
[17] 1st Respondent's Response p.6, para 20.

29. The First Respondent maintains that the trial Chamber has power "to review an administrative decision of the Registrar and, in this case, the Principal Defender, as it affects the right to a fair trial of the Accused under Article 17(4)(d) of the Statute."[18] They contend further that "the right to review must also give full authority to the Principal Defender's powers under the legislation and not be used as a means of overruling a decision with which the parties or even the Trial Chamber disagree."[19]

30. The First Respondent in support of the Majority decision of the Trial Chamber reiterates that the "Motion was a 'backdoor' attempt to review the original order of the Trial Chamber in allowing Counsel to withdraw. It never was a separate application from the Original Motion of Withdrawal of Counsel."[20] They submit that "the Appellants filed a Motion for the Re-Assignment of Counsel but this was neither an application to vary the Order of 12 May or to have it rescinded, nor was it an appeal against the Order of 12 May."[21]

31. As for the request that Justices Doherty and Lussick recuse themselves this Respondent states that those Justices acted within their authority and there are no grounds upon which to seek that they recuse themselves.

(d) Appellants Reply to 1st Respondent's Response

32. The Appellants take issue with the 1st Respondent on his Response and repeat their earlier submissions. The Appellants "respectfully question the legal validity of the Honourable Justice Doherty's 'personal comment' appended to a totally unrelated matter. The Defence takes issue with this procedure and submits that it is an irregular procedure engendering a serious violation of the accused persons' rights to a fair trial. It is the view of the Defence that the 'personal comment' was intended to unduly influence the Appeals Chamber. Honourable Justice Doherty should not have proffered a 'personal comment' on a Dissenting Opinion containing pertinent legal arguments, which favour the Accused. The Defence contends that the Honourable Justice Doherty's 'personal comment' makes her a party to the Appeal, which she is not. After having issued a majority decision

[18] Ibid. para 24.
[19] Ibid. para 26.
[20] Ibid. para 47.
[21] Ibid. para 55.

on 9 June 2005, the Honourable Justice Doherty is *functus officio* and cannot, therefore, purport to change that decision or dissenting opinion in such an unconventional manner.[22] The Defence appeals to the Honourable Justices of the Appeals Chamber not to consider that 'personal comment'.[23]

33. The Appellants adopt *mutatis mutandis* the submissions contained in 2nd Respondent's Response and reaffirm their adoption of the Dissenting Opinion in its entirety in support of this Reply.

THE PRINCIPAL ISSUES AND THEIR DETERMINATION

34. In my judgement from the foregoing submissions of the parties, the principal questions which arise for determination in this appeal are:

(a) Was the proper procedure followed when Counsel Kevin Metger and Wilbert Harris applied orally on 3 May 2005 in the middle of the trial to Trial Chamber II to withdraw their respective representation of Alex Tamba Brima and Brima Bazzy Kamara?

(b) Was the Registrar the proper person to remove the names of the two Counsel from the List of Highly Qualified Criminal Defence Counsel ("the List") more so when the matter was *sub judica*?

(c) What are the functions and powers of the Registrar and Principal Defender vis-à-vis the Compilation and Maintenance of the List?

(d) How may Counsel be reappointed following their withdrawal? Must reappointed Counsel be of Accused's own choosing?

Withdrawal of Counsel Kevin Metzger and Wilbert Harris

35. Guidance on this matter can be found in the 'Directive on the Assignment of Counsel', ("the Directive"). It is important to state that the Registrar, in consultation with the President of the Special Court issued the Directive laying down the conditions and arrangements for the Assignment of Counsel to an

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[22] T. 12 May 2005 p. 9-10, lines 25-29 and p.10 lines 1-20, where the same Hon. Justice made another misplaced personal remark on one of the withdrawn Counsel, in his absence.
[23] Reply to 1st Respondent's Response p. 6 p ara 16.

Accused or Suspect.[24] The Directive derives its validity and statutory efficacy from the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court signed in Freetown on 16 January 2002, and the Statute of the Special Court for Sierra Leone annexed to that Agreement and, in particular, the rights guaranteed all individuals appearing before the Special Court under Article 17 of the Statute, including the right to Counsel, and the rights of a suspected or accused person or detainee under international law. The Directive is also issued pursuant to the Rules of Procedure and Evidence ("the Rules") and more particularly, Rule 44, 45 45 bis and 46 of the Rules.

36. Withdrawal of Assignment of Counsel is provided for in Article 24 of the Directive. The relevant portions of Article 24 reads:

> (A) The Principal Defender may:
>
> > (i) in exceptional circumstances, at the request of the Suspect or Accused, or his Assigned Counsel withdraw the assignment of Counsel.
> >
> > (ii) in exceptional circumstances, at the request of the Assigned Counsel withdraw the nomination of other Counsel in the Defence Team;
>
> (B) The Principal Defender shall withdraw the assignment of Counsel or nomination of other Counsel in the Defence Team:
>
> > (i) in the case of serious violation of the Code of Conduct;
> >
> > (ii) upon the decision by a Chamber for misconduct under Rule 46 of the Rules.
> >
> > (iii) where the name of the Assigned Counsel has been removed from the list kept by the Principal Defender under Rule 45(C) and Article 13 of this Directive.

[24] Preamble to the Directive on the Assignment of Counsel.

(D) The Principal Defender shall immediately assign a new Counsel to the Suspect or Accused, and where appropriate, authorise the nomination of other Counsel in the Defence Team...

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

(G) Where the assignment of Counsel...is withdrawn by the Principal Defender pursuant to paragraph (B)(i) and (iii), Counsel affected by withdrawal may seek review of the decision of the Principal Defender by the Presiding Judge of the appropriate Chamber. (Emphasis mine)

Was the procedure laid down in Article 24 followed?

37. The records reveal that during the trial of the Accused persons in Trial Chamber II on 3 May 2005, an oral application was made by both Mr. Kevin Metzger and Mr. Wilbert Harris to withdraw from the case as counsel. The Transcript reveals:

"Mr Metzger:...In those circumstances I would seek, as is courteous and proper, the leave of this Trial Chamber to withdraw from this case as Counsel for Alex Tamba Brima. I will not play a further part in this case unless and until his instructions change."[25]

"Presiding Judge: Mr Metzger, I will not invite you to say anything further until I have heard the stance of other counsel in the case...Mr Harris?"

"Mr Harris: Your Honour, yes. My position regrettably, and I do say very much regrettably is the same as my learned friend Mr. Metzger..."

38. It is of the greatest significance to highlight the fact that crucially and timeously, Ms. Monasebian, who was Principal Defender at that material time, did call the attention of the Judges of Trial Chamber II to Article 24 of the Directive and she did so quite succinctly.'

"Ms. Monasebian: But what I would just like to simply offer your Honours is that pursuant to Article 24 of the Directive of Assignment of Counsel, it is initially within

[25] Transcript of 3 May 2005, p.3 lines 2-5.

my purview for Defence Counsel to make that request to me ex parte. So I think that Mr Metzger's suggestion that this be done on an ex parte basis is in keeping with the spirit of Article 24, that would say that the counsel would come to the Principal Defender or, if the Principal Defender denies the request, the Judges, because there is that remedy as well in Article 24, to hash this matter out..."[26] (Emphasis mine)

39. If the Judges had paused to read Article 24 cited to them by the Principal Defender, it would have been quite clear to them that the application for withdrawal was to be made in the first instance to the Principal Defender and NOT to the Trial Chamber (Art. 24(i)). It is only where the Principal Defender has denied a request for withdrawal that the person making the request may seek review of the Principal Defender's decision by the Presiding Judge of Trial Chamber II and not by all the Judges of that Chamber (Emphasis mine).

40. No such request for withdrawal was made to the Principal Defender and consequently there could have been no request for review by the Presiding Judge of Trial Chamber II. And yet in the face of all these conditions precedent which had not been observed or fulfilled, and in clear breach of the provisions of Article 24, the Presiding Judge thought it fit to order that the Defence Counsel file their submissions to withdraw "by Thursday at the opening of the Registry...Prosecution will file reply by Friday at 2.00pm and, if appropriate, may include a reply pursuant to Rule 24 of the Rules. Sorry, I have corrected myself this on this draft: It is Article 24 on the Assignment of Counsel...and I correct myself yet again. The application from Counsel shall be under seal, confidential and ex parte. The Principal Defender is at liberty to file any submission which the Principal Defender thinks relevant in the light of the situation."[27] The Presiding Judge later amended her Order to the effect that Defence and Prosecution "file by Thursday at the opening of the Registry at 9.00am."

41. In my judgement the Trial Chamber with respect, was rather hurried and precipitate in making the aforesaid orders and ignoring the provisions of Article 24 of the Directive. There is hardly any excuse for this since the Principal Defender had brought Article 24 to their Chamber's attention.

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[26] Ibid. p.5 lines 8-17.
[27] Ibid. p. 7 lines 24-29 p.8 lines 1-7.

Rule 45 of the Rules of Procedure and Evidence

42. In the majority Decision the Trial Chamber purported to act under Rule 45(E) of the Rules. In my judgement the Trial Chamber misinterpreted the Rule. Rule 45 of the Rules must be read and interpreted as a whole. It is headed "Defence Office" and it imposes on the Principal Defender the obligation and responsibility to ensure protection of the rights of suspects and accused. The Defence Office is headed by the Principal Defender whose functions and powers are listed in the various subrules. As I stated earlier,[28] the Preamble to the Directive links the genesis of the Directive, inter alia, to the Rules of Procedure and Evidence and in particular Rules 44, 45, 45 bis and 46.
Rule 45(E) states:

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

In my judgement, on a proper construction of Rule 45(E), taking into consideration Article 24 of the Directive, the proper authority vested with power to permit Assigned Counsel to withdraw in the most exceptional circumstances is the same authority as that stated in Article 24(A)(i) of the Directive, namely, the Principal Defender. Not the Trial Chamber. It is only when the Principal Defender denies Assigned Counsel's request to withdraw that the latter may seek review of the Principal Defender's decision by the Presiding Judge of the Trial Chamber. Not by the Judges of the Trial Chamber. See Article 24(E) of the Directive. I have come to this decision bearing in mind that the Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber, see Article 20(2) of the Statute.

43. It must be noted that on an examination of Rule 45 of the Rules, where an application or request is to be made to a Chamber, it is clearly so stated in the Rule. For example Rule 45(D). Although that Rule states in emphatic terms that request

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[28] Vide para. 35.

for the replacement of assigned counsel shall be made to the Principal Defender, it then goes on to provide that under certain circumstances and for well-defined reasons such request may be made to a Chamber. Let me reproduce the Rule which speaks clearly for itself:

> 45(D) "Any Request for replacement of an assigned counsel shall be made to the Principal Defender. Under exceptional circumstances, the request may be made to a Chamber upon good cause being shown and after having been satisfied that the request is not designed to delay proceedings." (Emphasis mine)

In Rule 45(E) there is no such power given to a Chamber as regards withdrawal. The Trial Chamber in its Majority Decision refers to Rule 44(D).[29] There is no Rule 44(D) of the Rules, so that must be an error. What they meant to refer to must be Rule 45(D) quoted supra.

44. I have not lost sight of the fact that under Rule 45(E) of the Rules, Counsel may only be permitted to withdraw in "the most exceptional circumstances" whilst in Article 24(A)(i) of the Directive it is stated that the Principal Defender may "in exceptional circumstances" withdraw the assignment of Counsel at the latter's request. I opine that as Rule 45(E) now stands, having regard to the fact that an assigned Counsel has the duty, obligation and responsibility to represent the accused and conduct his case to finality and taking into account the rights of the accused as enshrined in Article 17 of the Statute, the Principal Defender may only withdraw assignment in the most exceptional circumstances.

45. From the foregoing it is beyond argument that the procedure laid down in Article 24(A)(i) of the Directive was not followed. There is no provision for a Trial Chamber to permit withdrawal of assigned counsel – that mandate is specifically given to the Principal Defender. In the International Criminal Tribunal for the former Yugoslavia ("ICTY") since they did not have a Defence Office and a Principal Defender that mandate is specifically given to the Registrar. In the case of *Prosecutor v Delalic et al*[30] the Appeals Chamber of that Tribunal stated:

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[29] Majority Decision on the Application for Withdrawal, 20 May 2005, p.8 para 32.
[30] Prosecutor v Delalic et al Order on Escad Land 30's motion for Expedited Consideration 15 September 1999.

> "It is not ordinarily appropriate for a Chamber to consider motions on matters that are within the primary competence of the Registrar"

I accept and adopt that dictum, substituting "Principal Defender" for "Registrar", This prohibition was expanded and reemphasized by the Appeals Chamber in Prosecutor v. Blagojevic (ICTY)[31] when they held as follows:

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

Here again, substituting "Principal Defender" for "Registrar", I accept and adopt the dictum.

Trial Chamber should have stayed the Trial and referred Withdrawal Application to the Principal Defender

46. Applying the ICTY dictum to this appeal, I hold that the only option that was open to Trial Chamber II when Assigned Counsel Kevin Metzger and Wilbert Harris applied to them to withdraw was to stay the Trial and direct that the application be made to the Principal Defender in accordance with Article 24(A)(i) of the Directive. They should have further directed that if the Principal Defender refuses to grant the application to withdraw, then the applicants may seek review by the Presiding Judge of the Trial Chamber as provided in Article 24(E) of the Directive. In the event, Trial Chamber II failed to respect the power specifically conferred upon the Principal Defender and the Presiding Judge. Instead, Trial Chamber II purported to appropriate to itself power that is conferred elsewhere. In my judgement, therefore, Trial Chamber II's Majority Decision permitting the withdrawal of Assigned

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[31] Prosecutor v. Blagojevic, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, 7 November 2003 Case No. IT-02-60-AR73.

Counsel Kevin Metzger and Wilbert Harris was *ultra vires* and wrong in law. I agree with Justice Sebutinde when she says:

> "I perceive the Trial Chamber's legitimate role...as being limited to adjudicating upon ancillary motions, requests and issues properly brought before the Trial Chamber, within the confines of the Rules. That is my understanding of the provisions of the Rules, and of the Directive on the Assignment of Counsel. I am of the considered opinion that any involvement of the Trial Chamber or myself in the manner suggested by the Registrar in his note would clearly be *ultra vires* my powers and certainly the legitimate powers of the Trial Chamber".[32]

It must always be borne in mind in the words of Rule 26bis of the Rules:

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

The Functions and Powers of the Registrar and Principal Defender in the Compilation and Maintenance of the List of Highly Qualified Criminal Defence Counsel

The Principal Defender

47. Having found that Trial Chamber II was wrong in law in permitting the two assigned counsel to withdraw, I only feel called upon, in consequence, to adjudicate on the above-mentioned topic only. The Acting Registrar, Robert Kirkwood, in his Response which incidentally is imprecisely labelled "Reply" To Extremely Urgent and Confidential Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, states: "The position of Principal Defender has no statutory authority..."[33] That is not an accurate statement of the law. The position of Principal Defender has statutory authority. The Office of the Principal Defender has its nascency in Rule 45 of the

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[32] Justice Sebutinde's memo to Justice's Doherty and Lussick, 19 May 2005, p.2 para 4(i).
[33] 1st Respondent's Response para 5 pp. 2 and 3.

Rules. Those Rules themselves have their genesis in Article 14 of the Statute. Rule 45 of the Rules provides for a Defence Office which shall be and is headed by the Special Court Principal Defender. The powers of the Principal Defender are to be found in the Directive, as I explained earlier.[34] The Directive itself was promulgated by the Registrar himself in consultation with the President of the Special Court.[35] It was the Registrar himself who armed the Principal Defender, and not himself, with the powers enumerated in the Directive. It is instructive to observe that in the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") the Registrar is given Article 24 powers of the Directive. In these Tribunals, the Registrar is clothed with the primary responsibility and duty of deciding matters relating to the qualification, appointment and assignment of counsel. Significantly, there is no Defence Office in those two Tribunals and in referring to the *Blagojevic* dictum, supra, I had substituted 'Principal Defender' for 'Registrar' in relating the dictum in that case to the Special Court.

The Registrar

48. In order to fully appreciate the Office of the Registrar and his functions in the Registry, it is best to go to source and refer to the relevant empowering instruments. First, the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone ("the Agreement"). The Agreement provides in Article 4:

> "1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court."

In the Statute, however, the Registrar is not stated to be responsible for the servicing of the Office of the Prosecutor who, by Article 15 (i), "shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source." In Article 16

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[34] See paras 35 and 42 supra.
[35] See para 35 and Article 24 of the Directive.

of the Statute, the other provisions of Article 4 of the Agreement are generally reflected in sub-rules (1), (2) and (3).

49. In my judgement, it is reasonable to conclude from the foregoing that the Defence Office, while officially part of the Registry must, in the interests of justice, act as an independent office. Although the Principal Defender and the Defence Office technically fall within the province of the Registry, the Principal Defender must act independently from other organs in the interest of justice. I am reinforced in this conclusion by the opinion of Assistant Secretary-General for Legal Affairs, Mr Ralph Zacklin in this letter to the erstwhile Registrar, Robin Vincent, dated 11 February 2005 in which he states decisively, pointedly and poignantly: "while the Defence Office technically falls within the Registry, they operate independently from other organs". One can, therefore, see, appreciate and understand why it has been authoritatively stated that "It is the Registrar's intention that the Office will, in future, become as fully independent as the Office of the Prosecutor".[36]

Authority of Principal Defender

50. I opine, in conclusion and in all circumstances that the Principal Defender, as Head of the Defence Office, is vested with the mandate to discharge his duties and functions in guaranteeing the rights of accused persons independently and without any undue interference from the Registrar. The Principal Defender is in full legal possession of the authority and power to compile, maintain and place counsel on the List of Highly Qualified Criminal Defence Counsel by virtue of Rule 45(C) of the Rules and Article 13(A), (B), (E) and (F) of the Directive.

DISPOSITION

51. For all the reasons I have given, I find that the Majority Decision of the Trial Chamber II in permitting the withdrawal of Assigned Counsel Kevin Metzger and Wilbert Harris was *ultra vires* and wrong in law.

52. This being said, I agree with the Majority Decision on the other aspects.

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[36] See Special Court Annual Report 2002 – 2003 p. 16.

Done at Freetown this day 8th day of November 2005

Justice George Gelaga King

[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: 14th December 2005

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

APPENDIX TO THE 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

SUSAN GUNSTONG
09:00

1. In my Separate and Concurring Opinion 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 of 8th December 2005, I refer, in paragraph 84, to a document entitled "Public Defender Proposal" and I announce that I will append it to my opinion.

2. The above mentioned document is attached to the present Appendix and shall be read together with my Separate and Concurring Opinion.

Done at Freetown this day 14th day of December 2005

Justice Geoffrey Robertson

[Seal of the Special Court for Sierra Leone]

NOTE FOR MANAGEMENT COMMITTEE

Public Defender Proposal

International Criminal Courts have yet to devise a satisfactory means of attracting only experienced, competent and honest defence counsel, so as to comply with the human rights principle that adversary trials should manifest an "equality of arms" (i.e. reasonable equivalence in ability and resources of prosecution and defence).

At Nuremberg, the inequality was especially pronounced. Allied judges and prosecutors and senior Registry staff lived in the same hotel and socialized to the exclusion of the German defence lawyers. The British Bar had refused to permit members to take defence briefs and provincial German bar associations took reprisals against members who defended Nazis "too vigourously". The defence lawyers, floundering in the alien environment of an anglo-american adversary trial, were given limited facilities to prepare their cases and little notice of prosecution evidence.

At the ICTY and ICTR, defence lawyers complain that the court is a 'prosecution entity' because of the closeness of the Registry and the Prosecutor's office. The prosecutor, of course, is the first to be appointed, and works closely with the Registrar in the start-up phase. The 'Registrar's list' system adopted by these tribunals for indigent defendants means that the Registrar keeps a list of counsel from all over the world who are prepared to defend at The Hague or Arusha. After a particular defendant is indicted, he can chose a counsel from the list or a counsel who qualifies to be added to the list. This counsel is then instructed by the Registrar, at a fee of US$100-200 per hour, far beyond any fee obtainable in Africa for criminal work, and will normally bring in other lawyers (up to 5 per defendant) and obtain permission from the Registrar or the court to spend more money on experts, investigators etc.

The "Registrars List" system derives from the old English 'dock brief' where a poor man in the dock could select from amongst the idle barristers sitting in court an advocate to defend him, who would be paid a guinea from public funds. This developed into "the soup list" ('soup kitchens' fed the poor) at Crown Courts, where young or unsuccessful barristers would put their names on a list which the court clerk would give to indigent defendants to select a trial counsel. The 'dock brief' and 'the soup list' were unattractive expedients before a proper legal aid system developed: The "Registrars List" has caused many problems at the ICTR and ICTY, inter alia

1. Many mediocre, and a few dishonest, lawyers volunteer and qualify for the list because they have practiced for more than 10 (or 7) years;
2. The defendant will have no knowledge of them in any event, and no criteria for informed choice;
3. Often the chosen lawyer turns out not to be available, or when chosen turns out to have many home commitments, thus causing delays in ICT trials;
4. The chosen lawyer comes to the case with no local background, and with no solicitor or defence counsel to assist. He is up against a prosecution which

has been working on the case for years. He asks (justifiably) for more legal assistance, and applies to the court for a delay of a year or so in order to investigate and prepare the defence.

5. Defendants who wish to delay trials sack their counsel and chose another on the list. Then they sack him and ask for another!
6. The corrupt practice of "fee-splitting" occurs when ambulance-chasing lawyers on the list approach defendants' families and offers to share the defence counsel fee (massive, by African standards) if they are selected. The result: men against whom there is a prima facie case of genocide own Armani suits and their families enjoy satellite television!
7. According to the Ackerman report, some listed counsel have become notorious for "excessive lawyering" – making more motions than necessary in order to rack up fees.

These and other aspects of the 'Registrar's List' are giving international criminal justice a bad name. The cost of these "counsel of choice" from around the world is extortionate – up to US$1m per defendant at the ICTR. The UN audit committee in 1999 (chaired by Jerome Ackerman) identified some of these problems, and suggested that legal fees should be certified to the court by counsel and might be reduced if delays had been caused by defence tactics, but this is hardly a satisfactory solution.

Mariana Goetz, our principal legal officer, previously co-ordinated one of the busiest Chambers at the ICTR, she recalls leaving to deal with international counsel from the Registrar's List who were utterly bewildered (some had never been to Africa before). She has explained to me in some detail the damaging consequence of giving indigent defendants a "counsel of choice" power over their defence teams, in effect controlling the receipt of public money, by their lawyers and the choice of investigators (who also receive lavish payment from the Tribunal, and may be relatives or political operatives).

I believe that the 'Registrar's List' is an obsolete and inappropriate system, and should be replaced by employment of full-time defence counsel with considerable experience and demonstrable ability.

The 'Registrar's List' arrangements in any event reflects a confusion between the 'counsel of choice' principle and the right of indigent defendants to legal aid. These two rights are quite separate. Article 17 of the Special Court statute promises that each defendant shall be entitled "to communicate with counsel of his or her own choosing" (17(4)(b)) – but subject to that counsel's availability and willingness to accept such communications, a contingency almost invariably depending on payment of his fees! Then Article 17 (4)(d) promises the right

"to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so

require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it."

Thus it is clear that a defendant has the right under our statute, when put on trial,

a) to defend himself, or
b) to be assisted in his defence by counsel of his choice (in practice, if he can pay for this legal assistance) or
c) if indigent, and the interests of justice require, to have legal assistance provided free of charge.

The statute places an obligation on the court to assign legal assistance to the poor defendant if this is in the interests of justice. It says nothing about giving him the right to choose a lawyer for whom the court will pay. The court's only duty is to assign him a competent lawyer, which he can accept or not.

The interests of justice usually will require such assignment for trial and appeal and for a bail application, if the defendant is too poor to hire private counsel or where he decides to defend himself and the court (as in Milosevic) thinks that in the interests of justice it should appoint an amicus to take any legal points on his behalf. There is nothing in Article 17 or in the court's statute that requires a "Registrar's List".

So how best do we discharge our duty of assigning legal assistance to the poor? The most cost-effective and competence-effective way must be to establish and build up a defence unit that can take on the prosecutors and so ensure "equality of arms". The prosecutor has a number of trial counsel, and some lawyers and investigators preparing cases, as well as support staff. For indigent defendants (who may comprise over half the indictees) we should supply a smaller but nonetheless competitive unit. We need a principal defender (D2 level) installed as soon as possible, with four trial counsel (P4) and two local lawyers (already hired) and several investigators and some support staff. Once the PD is appointed, he or she can build up the staff necessary to deal with the prosecutor's indictments, at levels which can be subject to management committee approval.

The system would work like this:

Soon, the prosecutor will bring down his indictments. Imagine 25 of them, with 15 indictees arrested and in custody, 10 of whom claim to be indigent. Two of the latter group insist on defending themselves, one manages to obtain a lawyer "pro bono" and another refuses to have any part in the trial. The five wealthy defendants all hire counsel. The prosecutor seeks three consecutive trials, with 5 defendants in each.

The PD's role will be to take general charge of defence arrangements. He or his counsel will, if instructed, make bail applications for any defendant. His office will research legal issues and background material, and give such assistance in these respects to the privately hired counsel and the pro bono counsel, if they welcome it (they almost certainly will).

But his main function will be to implement Article 17 (4)(d) by assigning counsel to indigent defendants. He will have, say, 4 experienced and independent defence counsel employed in his office, who can each be assigned two defendants. The PD himself may argue interlocutory legal issues, together with some of the private counsel. The PD may also be requested by the Court to arrange an amicus for the defendants who are representing themselves or who refuse to acknowledge the court, so that at least legal points may be taken expertly on their behalf, whether they like it or not.

By these means the duty to assign counsel to the indigent will be amply satisfied. Each poor defendant will have one competent and independent trial counsel, who is not overworked (having to represent only one or at most two defendants in other trials) and who is present in Sierra Leone full-time to work on his case. That counsel will have a defence unit support structure - researchers, investigators, casework lawyers – to draw upon as necessary. There will be an "equality of arms" with the prosecution by time of trial and no question of fee-splitting cannot arise because there will be no incentive.

This does not mean an exclusion of 'outside' lawyers. The PD, if he considers there is a serious conflict, may arrange for a particular defendant to be represented by an 'outside' lawyer. He may bring in an outside lawyer with special experience to argue a different question of law, or to act as an amicus in a particular trial. An indigent defendant can, of course, sack the lawyer assigned by the PD, who may offer to assign another to him, but if this is refused then (subject to any application to the court) he will have to defend himself or obtain pro bono assistance.

Proper provision for defence costs may not have been made in the original budgetary estimates. Certainly if the "Registrar's List" approach is adopted, then the costs will greatly exceed those of the PD model and the delays caused by waiting upon counsel from abroad will be severe. "Fee-splitting" will become an issue, as it has in other international courts.

The need to make proper provision for the defence is being urged rather late in the day. The PD should be in place by the time the indictments come down, to make bail applications and begin work on collecting defence evidence and on interlocutory challenges. Regrettably, this may not be possible, and I fear that NGOs will criticise the management committee over this failure.

The Special Court has already been subjected to published criticism over its failure to make proper provision for the defence. In the December 2002 Criminal Bar Association newsletter (UK) a barrister from "No peace without Justice" wrote of the court:

"There appears to be no proper provision for defence. This is a feature which emerges again and again in fledgling court systems. There is a popular belief that the prosecution of international crimes requires paying large sums of money to international prosecutors, and leaving defendants with the cold comfort of the right to be represented by counsel without any consideration as to how this will be funded, ... each new court system

appears to be taken entirely by surprise by the need to pay for defence counsel of equal skill and experience to prosecutors in order to ensure equality of arms and fair trials."

I think this criticism is merited and the position needs to be addressed so that it cannot be repeated, at least in relation to our court.

It will be bad publicity for the court if we are perceived to be locking up penniless people before putting in place a system that provides some form of legal aid for bail applications. We must advertise immediately (February 2003) for a PD and some supporting trial counsel at P4 level, but quite frankly most advocates who are any good will be booked up months ahead. Of the few who are more-or-less immediately available, some will be reluctant to sign up for three years. So the Registrar should be given some discretion - perhaps to appoint the PD on a part-time basis at first, or to offer one or two year contracts, subject to an agreement to be available for any appeal proceedings. I trust the management committee will approve an immediate search for a principal defender and for lawyers etc., to staff the defence unit. I append a draft advertisement.

Geoffrey Robertson QC
7th February 2003

17122

TRIAL COUNSEL
SIERRA LEONE SPECIAL COURT

The Registrar, pursuant to the "equality of arms" principle, seeks four experienced trial counsel to work under the supervision of the Principal Defender. Successful applicants will have been in unblemished practice, specializing in criminal or international human rights law, for at least seven years: they must have a reputation for fearless and independent representation of defendants charged with serious crimes.

Counsel will be assigned by the Principal Defender to represent indigent defendants before the Special Court in respect of bail applications, interlocutory motions, and at trials and on appeal.

17123

PRINCIPAL DEFENDER
SIERRA LEONE SPECIAL COURT

The Special Court for war crimes in Sierra Leone has been established by agreement between the United Nations and the Sierra Leone Government to try persons accused of bearing the greatest responsibility for war crimes and crimes against humanity committed in that country since November 1996. The prosecutors will shortly file indictments against those they accuse of bearing such responsibility.

The Registrar, pursuant to the "equality of arms" principle, now seeks an experienced criminal trial lawyer with a reputation for able and fearless defence, and some proven administrative ability, for appointment to the office of Principal Defender. The duties will include setting up and staffing a defence support unit; assigning and retaining counsel for indigent defendants; making arrangements for bail applications; conducting (either personally or by assigning other counsel) legal arguments for indigent defendants or as an amicus) at interlocutory, trial and appeal stages; directing such investigation, research, witness searches and the like as appears necessary for adequate preparation of assigned cases on behalf of indigent clients; liaison with and assistance to the court, the Registrar and (if requested) to counsel retained privately by other defendants.