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SCSL-2004-15-T  
(7803-7526)

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SPECIAL COURT FOR SIERRA LEONE  
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 4 August 2004

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

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

Office of the Prosecutor:

Luc Côté  
Lesley Taylor

Defence Counsel for Issa Hassan Sesay:

Timothy Clayson  
Wayne Jordash

Defence Counsel for Morris Kallon:

Shekou Touray  
Raymond M. Brown

Defence Counsel for Augustine Gbao:

Girish Thanki  
Andreas O'Shea



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

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

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

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

CONSIDERING THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES:

I. THE MOTION

A. The Defence Submissions:

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

<sup>1</sup> *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, Gbao - Decision on Application to Withdraw Counsel, 6 July 2004 (“Gbao Decision”).

2. The Defence application is based on the assertion that there exist exceptional circumstances and that leave to appeal should be granted in order to avoid irreparable prejudice to a party.
3. The Defence submits that exceptional circumstances that justify the desirability of an appeal include:
- a) The right to legal representation and the right to defend oneself are fundamental aspects of the right to a fair trial;
  - b) The novelty of the issue in question, since the Accused wishes to defend himself after having employed the services of counsel throughout the Pre-Trial period and he now wants to dispense with Counsel;
  - c) The possibility of creating new jurisprudence in international criminal procedure since no Appeal Chamber has been directly seized with the issue of the right to self-representation, and there have only been three cases before international tribunals dealing with the right to self-representation, each providing a different result and solution to the problem;
  - d) The Trial Chamber's decision entails implications not only for the Accused but for his Counsel, since it requires counsel to remain until the end of the case and does so in circumstances where they would normally be professionally embarrassed by the Accused's refusal to provide instructions and entitle them to withdraw, thus placing Counsel in a difficult position; and
  - e) The Defence's view that the Decision impacts on all aspects of the Trial.<sup>2</sup>
4. The Defence avers that if leave to appeal is not granted, it may suffer the following irreparable damage:
- a) A conviction could be based on a trial where explanations, denials and assertions of the Accused were never proffered because of the absence of the Accused, in combination with the refusal to provide instructions. It is the contention of the Defence that the fact that the Accused has brought this situation upon himself does not divert from the fact that irreparable prejudice may be caused for the purposes of Rule 73(B);
  - b) The Defence submits that cross-examination in the absence of proper instructions from the Accused would render the process ineffective and could potentially lead to the wrong

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<sup>2</sup> Motion, para. 6.



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

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

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

**B. The Prosecution Response:**

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

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

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

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

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

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<sup>3</sup> *Id.*, para. 7.

<sup>4</sup> *Id.*, para. 8.

<sup>5</sup> Response, para. 15.

<sup>6</sup> *Id.*, para. 9.

<sup>7</sup> *Id.*, para. 10.

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

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

## II. FACTUAL BACKGROUND

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

12. The Accused Gbao was transferred into the custody of the Special Court pursuant to the granting of a request from the Prosecution for an order under Rule 40bis of the Rules on 20 March 2003.<sup>11</sup>

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

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

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<sup>8</sup> *Id.*, para. 11.

<sup>9</sup> *Id.*, para. 12.

<sup>10</sup> *Id.*, paras 13 and 14.

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

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

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

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

16. On 23 April 2003 the Registrar issued his Decision provisionally appointing Mr. O'Shea as Defence Counsel for the Accused. Mr. O'Shea represented the Accused during his Initial Appearance. The provisional appointment of Mr. O'Shea was subsequently made permanent by a Decision of the Acting Principal Defender on 17 December 2003.<sup>14</sup>

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

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

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

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

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

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

<sup>14</sup> Decision, 27 January 2004.

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

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

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

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

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

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

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

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

THE ACCUSED GBAO:

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

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

MR. PRESIDENT:

Will you ~

THE ACCUSED GBAO:

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

MR. PRESIDENT:

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

THE ACCUSED GBAO:

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

MR. PRESIDENT:

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

THE ACCUSED GBAO:

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

MR. PRESIDENT:

Yes.

THE ACCUSED GBAO:

I stand to defend myself, I wish to fight my - to fight this case anyhow I see proper I will bring total justice.<sup>17</sup>

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

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

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

<sup>17</sup> *Id.*, at 35.

<sup>18</sup> *Id.*, at 36.



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

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

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

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

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

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

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

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

#### HAVING DELIBERATED, THE CHAMBER DECIDES AS FOLLOWS:

##### III. THE TEST UNDER RULE 73(B)

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

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

35. In its twin Decisions on the subject of interlocutory appeals in the RUF Case and in the AFRC Case<sup>22</sup> where the Prosecution sought leave of the Trial Chamber to file an interlocutory appeal

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

<sup>21</sup> Annex A.

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

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

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

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

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

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

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

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

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

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

<sup>24</sup> *Id.*, at para. 21.

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

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

#### IV. EVALUATION OF APPLICATION'S MERIT

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

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

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

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

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<sup>25</sup> Motion, para. 4; Response, footnote 1.

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

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

I stand to defend myself, I wish to fight my – to fight this case anyhow I see proper I will bring total justice.<sup>26</sup>

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

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

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

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

To be tried in his or her presence, and to **defend himself or herself in person** or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right, and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him

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<sup>26</sup> Transcripts, *supra* note 16 at 35.

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

51. In this regard, the Chamber refers to its Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court<sup>27</sup> in which the Trial Chamber examined a request by the Accused Norman to represent himself. This Chamber held that the Accused has a right to self-representation, but that such a right is qualified and not absolute and can be derogated from should the interests of justice dictate. The Accused Norman continues to represent himself in the trial proceedings with the assistance of standby counsel. The distinction to be drawn here, however, is that while the Accused Norman made a clear, unambiguous and written application for self-representation in accordance with the prescribed Rule, the Accused Gbao, for his part, has not actually made any such a request with the clarity that is supposed to accompany it.

52. The Accused Gbao's decision not to recognise the Special Court, notwithstanding the Appeals Chamber's Decision on Constitutionality<sup>28</sup> and its Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of Special Court Violates Constitution of Sierra Leone, does not make this issue any clearer. In fact, it renders it more uncertain as to what his intentions really were.

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

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

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

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



from this perspective, the results of the proposed appeal would be “of general importance... in international law”.<sup>29</sup>

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

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

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

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

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

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

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

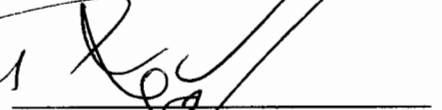
**FOR THESE REASONS:**

**THE TRIAL CHAMBER ALLOWS THIS APPLICATION AND ACCORDINGLY**

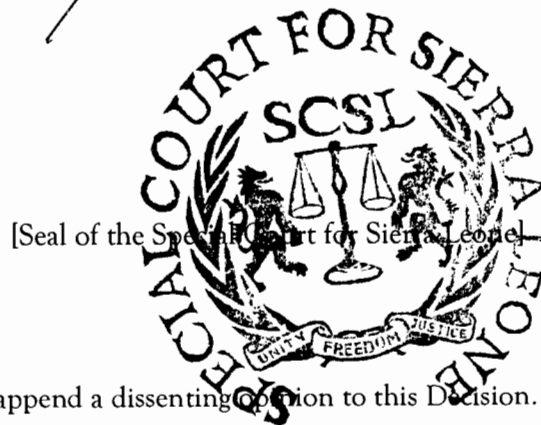
Grants the Defence leave to file an interlocutory appeal against Gbao - Decision on Application to Withdraw Counsel dated 6 July 2004.

Done at Freetown this 4<sup>th</sup> day of August, 2004

  
 Hon. Judge Pierre Boutet

  
 Hon. Judge Benjamin Mutanga Itoe

Presiding Judge,  
 Trial Chamber



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



TO: THE TRIAL CHAMBER JUDGES 7519

FROM: MR AUGUSTINE ATO BAO

THROUGH: THE PRINCIPAL DEFENDER

DATE: 23RD JULY 2004

MY LORDS,

SUBJECT: INSTRUCTIONS TO THE  
DEFENCE OFFICE

REFERENCE THE UNDERLINED,  
I RESPECTFULLY REQUEST AS  
FOLLOWS:

1. THE ONLY PEOPLE TO COMMUNICATE FOR ME TO THE COURT, ADVISE AND ASSIST ME IS THE PRINCIPAL DEFENDER, BUT NOT TO APPEAR FOR ME.
2. I DO NOT WANT ANY LEGAL COUNSEL TO APPEAR FOR ME IN MY ABSENCE WITHOUT MY EXPRESS AUTHORIZATION.

3. I DO NOT WANT THE DEFENCE OFFICE TO DIVURGE ANYTHING TO ANYBODY INCLUDING MY FORMER LEGAL COUNSELS.

4. I INSTRUCT THE DEFENCE OFFICE TO PROVIDE THE SPECIAL COURT TRIAL CHAMBER WITH THE ATTACHED DOCUMENT: "IN RESPONSE TO TRIAL CHAMBER DECISION OF 6<sup>th</sup> JULY; 2004".

FAITHFULLY SUBMITTED)

MR. AUGUSTINE ATOBA

CC: PROF. ANDREAS O'SHEA  
THE REGISTRAR

The Trial Chamber.  
From. Augustine Gbao

Date.

**Subject; Response to Trial Chamber Decision of the 6<sup>th</sup> July 2004.**

The normal legal procedure is for an accused or his counsel to take leave of the trial chamber and appeal to the appeal chamber but I have chosen to respond to your decision rendered on Tuesday the 6<sup>th</sup> of July 2004, imposing counsel on me, as a very abnormal legal procedure adopted by your lordships which clearly shows the abnormal judicial process adopted by this very unusual legal system referred to as the Special Court for Sierra Leone. I have decided to approach the issue by the unusual process of writing to you the judges of the trial Chamber.

I wish to respectfully remind your lordships of your lordships grave judicial error:

A) Referring to my decision as an application, imposing counsel on me even after my clear indication of rejection and to further stress that I still stand by my decision as clearly indicated in the document dated 7<sup>th</sup> of July 2004 forwarded to your lordships.

May I again respectfully bring to your Lordships attention that in any event, the prosecution has not yet presented a charge or charges against me for me to enter a plea, and that the situation still remaining the same as of the date I refused to recognise the authority of the Special Court for Sierra Leone. I am still of the view and continue to strongly hold that your lordship proceeding to try me even in my absence and imposing legal counsel on me in a trial that I have not made or entered a plea is also grave judicial error.

Again your lordships quotation from the Special Court Statute and Rules of Procedure is not only unjust but also show your lordship being bias and partial because ;

- a) The statute and the Rules of Procedure etc, were tailor made and devised solely for persons than the Special Court has in mind to prosecute
- b) That your lordships sitting as a Trial Chamber Judges were select and employed by the Government of Sierra Leone and the United Nations both being the sole signatories to the Agreement that produced the Special Court for Sierra Leone in respect of the conflict that was negotiated and concluded upon no-winner , No-Loser basis.
- c) The government of Sierra Leone that appointed and employed the services of some of the Judges of the Trial and Appeal Chambers is the complainant in the mater in which I am the Accused.

I, Augustine Ato Bao, accuse the Special Court Judges appointed by the Government of Sierra Leone and the United Nations of operating under the perception and actual bias

and partiality, and wish to further state that should any court be set up for the benefit of the Sierra Leonean people resulting from the conflict of the 1991 to the year 2002. That conflict was concluded on the basis of No –Winner No Loser at Lome culminating in the Lome Agreement dated 7th July 1999; The decision to set up such a court as the Special Court must have been an agreement between the parties that signed the Lome Agreement; that is the government of Sierra Leone and the RUF /SL/ Anything less is totally unacceptable I repeat totally unacceptable.

My first and subsequent doubts emanating from the Special Court Judges Ruling that the Lome agreement which bears the signature of among others, Great African leaders as moral guarantors was **LOCAL, INSIGNIFICANT AND IRRELEVANT IN THE INTERNATIONAL ARENA**. But the Special court Agreement which bears the signature of only Solomon Berewa as Attorney General and Minister of Justice and that of Hans Corell, the United Nations under Secretary General for Legal Affairs was taken to be more relevant and authoritative in the International Arena

In analysing the Special Court ruling and Judge Geoffrey Robertson 's statement recorded in page 3 of the Special Court # booklet stating among other things, "our court, as this booklet briefly explains, is the most recent legacy of the Nuremberg ideal'.

That ruling and Judges Robertson's statement made my feeble mind to ought rightly conclude that the special Court is erroneously seeing itself a victors court set up to administer nothing but victor's judgement in favour of the government of Sierra Leone and United Nations who are the complaints that selected and employed the services of all the judges and the prosecutors. Judge Robertson recommended **DEVISING A HYBRID COURT** which has now become the Special Court for Sierra Leone long before the Lome Agreement came into being. Even though the conflict ended with No-Winner No –Loser yet they devised a court to try people for an issue that had long been negotiated and signed by all parties to the conflict including the Government of Sierra Leone.

a) The Nuremberg court, Rwanda and Yugoslavia Tribunal are victor's tribunals. The Nuremberg court was set up by Allied Forces that defeated and subdued the Nazis. The allied forces then set up their court, selected their Judges and Prosecutors and conveniently created a Statue to try the Nazis. The Allied forces refused to negotiate with the Nazis simply because they had not wanted to go back on any undertaking made on the negotiating table so, they used all the available military might to defeat and subdue the Nazis. Even though the Nuremberg court was a victors' court, yet they never used money to influence the minds of witnesses nor used agents of the Nazi's as witnesses against them. But in the case of the Special Court, thousands of United States dollars has been dished out to the agents of the various factions in the form of inducing them to be prosecution witnesses with another mighty promise of taking them and their families to Canada or any country of their choice for permanent settlement after their testimonies. The Prosecution witnesses are also receiving huge payments in exchange for their testimonies. Honest historians referred to the Nuremberg court and trial as the Victor's Court and Victor's JUSTICE.

b) In Rwanda, the Rwanda Patriotic Front and refused to negotiate the Rwanda conflict and pursued the war to the end.

c) The Rwanda Patriotic Front used all its military might to defeat the Hutu Militia's so, the Rwanda Patriotic Front was right to negotiate the setting up of the Rwanda Tribunal without the Hutu's. The Rwanda Patriotic Front fought with all their might to defeat and subdued the Hutu Militias. The United Nations would have set up a commission of enquiry to look into the historical cause of the Rwanda conflict before accepting the setting up of the Tribunal. Only recently the true events that led to the massacre of lives and properties began to unfold and the United Nations apologised for events they could have intercepted and solved instantly-partisanship is highly responsible for the mishaps. Also in Yugoslavia the European Union intervened by sending NATO Forces after all attempts for negotiation failed. The NATO forces defeated and subdued Milosevic and his government forces and requested and obtained the setting up of a Tribunal to TRY Milosevic and his military commanders. This was done with chapter V111 of the United Nation Charter Article 52(2) under regional arrangements.

Unlike Sierra Leone the conflict was negotiated by Economic Community of West African States ECOWAS with Head of State as Moral Guarantors in line with chapter V111 Article 52(2) of the United Nations Charter. Therefore, one party cannot nullify the said agreement without the consent of other party or parties including ECOWAS and the Moral Guarantors.

Disclaimer is not a law and cannot make the Lome Agreement invalid. The so much acclaimed Disclaimer made by the SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL (SRSG) Was not adopted, discussed, debated nor voted on the day of signing the Lome AGREEMENT. The disclaimer was just an individual view expressed after all the parties had signed the Lome Agreement and left. The fact that the Special Court judge boldly interpreted the Lome Agreement as local and insignificant and thereby declaring it absolutely irrelevant and pronouncing The Special Court Agreement as the only recognised International Court clearly shows the perception and actual bias and partiality of all the Special Court Judges.

This manifestation strongly qualifies biasness and partiality in deed and in favour of the government of Sierra Leone and United Nations both being the only ones who appointed and employed the services of all the Judges and Prosecutors.

The above reasons are some of the points and contributing factors that had now made me to reject this Special Court as a farce and travesty of JUSTICE. As a result, since the Special Court has by ruling denounced the Lome Agreement which was and still remains the sole basis on which the conflict in Sierra Leone ended, and to avoid the current misunderstanding from spreading across Sierra Leone again,

I am forwarding copies of this letter and other relevant documents to the below listed organisations for their prompt intervention into this burning issue in the interest of PEACE and JUSTICE which now seems threaten by the so called Special Court for Sierra Leone.

a) The Economic Community of West African States. ECOWAS.

- b) The African Union-(AU)
- c) The European Union-EU
- d) The Commonwealth of Nations.

The above named organisations are requested to set up A COMMISSION OF ENQUIRY to investigate the conflict and events that led to the conflict so that impunity can be completely addressed in Sierra Leone once and for all.

The RUF organisation is demanding the commission of enquiry for the benefit of the victims in Sierra Leone who suffered the loss of limbs, blood, life, properties opportunities and dignity. The Geneva Conventions of 12<sup>th</sup> August, 1949 and its protocols additional of 8<sup>th</sup> June 1977 (protocols 1 and 11) should be applied. The Commission should enquire into the activities of all the fighting forces that participated in the conflict (not just RUF, CDF and AFRC).

I mean all the various governments and organisations that participated in the conflict in Sierra Leone who may have either deliberately attacked civilians or used un-necessary fire power or heavy weapons on civilians to be thoroughly investigated so that those who bear the greatest responsibility as parties to the conflict meaning all ( governments and organisation) whose fighting forces operated in the conflict in Sierra Leone pay compensation to the victims and institute and the nation and for all those who bear individual Penal responsibility to be prosecuted and punished according ly. THE ABOVE COMMISSION OF ENQUIRY AND REQUESTED INVESTIGATION. Can only be morally and judiciously and acceptably conducted by the above named organisations.

The decision of the tailor made Special Court Statute and the Rules of Procedure exempting Governments and organisations that participated in the conflict in Sierra Leone from prosecution is not legally accepted under the Geneva Conventions. Any International involvement in wishing to prosecute either members of the RUF organisation or members of the Government of any other party to the conflict in Sierra Leone should and must be a sole request of the International community and not with, or by the connivance nor with request from either the RUF organisation or the Government of Sierra Leone.

Well, If the Special Court Judges hold that the Lome Agreement is not binding on the Special Court as constituted then, I submit THAT, I EQUALLY DO NOT RECOGNISE THE Authority of the Special Court AND Therefore, I will not and cannot in all good conscience submit my self to be tried before the Special Court which I deemed illegal and unlawful.

The United Nations Security Council Resolutions 1260 and 1270 rendered the much acclaimed disclaimer irrelevant and made the Lome agreement more relevant and authentic for the attainment of peace, reconciliation and stability in Sierra Leone.

The whole world is very much aware of the United Nations being involved in the process that eventually led to peace in Sierra Leone and therefore should never have accepted or being a party again to creating a Special Court upon the request of one party to the

conflict alone. (The Government of Sierra Leone) to try ~~the~~ people outside the constitutional court of Sierra Leone or outside the authority of the judicial organ of the United Nations –the International court of Justice endorsed by all member States of the United Nation to impartially adjudicate intricate issues within member States or State. By and large the United Nations could have referred this to ECOWAS in line with chapter V111 ARTICLES 52(2) and (3) RESPECTIVELY OF THE UNITED NATIONS CHARTER –REGIONAL ARRANGEMENTS. We do not want any event that will establish vicious cycles again in our country-Sierra Leone. I mean time and men will pass away but history remains forever, it may be someone else's court today and tomorrow it could be another person's extra Special, Special Court, and what is that ? Vicious cycle all the way to the end of time – Some of you the judges knew the political events in 1965 that eventually affected others in 1978. Nobody should brush the road for another unfortunate event. The ten year war is enough experience to avoid individual decisions and correct those mistakes that spelt mishaps on us

To avoid vicious cycle revolving, the RUF is still demanding that a Commission of enquiry be urgently set up in respect of the conflict in Sierra Leone to look into the activities of all the fighting forces that fully participated in the conflict in Sierra Leone as is now taking place in the Ivory Coast. The facts gathered by the commission will enable the world and the Sierra Leonean people to know the truth.

The World should not only take the cheap FABRICATIONS OF JUDGE ROBERTSON'S STORY, FOR WHICH HE RECOMMENDED DEVISING A HYBRID COURT THAT HAS NOW BECOME THE SPECIAL COURT TO TRY THE RUF ORGANISATION ALONE, but should also examine the source of his story without a Commission of Enquiry involving all parties to the conflict in Sierra Leone. All signatories to the Lome Agreement should and must have been involved in any agreement or treaty considered by the two parties (The government of Sierra Leone and the RUF/SL). That could affect changes in the Lome Agreement including the ECOWAS who did so much to bring about the end of the conflict in Sierra Leone, the Moral Guarantors and all other signatories.

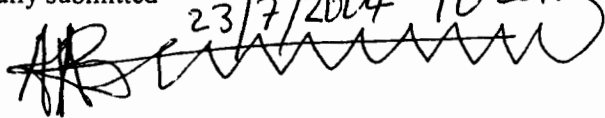
The Special Court Judges ruling that the Lome **AGREEMENT IS LOCAL / INSIGNIFICANT AND IRRELEVANT IN THE INTERNATIONAL CIRCLE** is a **MATTER OF SERIOUS CONCERN**. The ECOWAS leaders, the moral guarantors and all signatories should now confirm to the Sierra Leonean people, the entire Africa, the RUF organisation and the whole world that their signatures on the Lome Agreement is LOCAL, INSIGNIFICANT AND IRRELEVANT and does not carry a pin of weight in the INTERNATIONAL ARENA UNTIL THEN, I WILL NOT RECOGNISE THE SPECIAL COURT AUTHORITY. Imposing legal counsel on me to try me in my absence after clearly saying that I did not recognise the authority of the Special Court because of the way and manner it was established will run into legal and moral problem. I again advise all legal Counsel employed by me for the purposes of my defence to discontinue forthwith as indicated in the document forwarded to your lordships Date <sup>d</sup><sub>7</sub><sup>th</sup> July 2004. Any legal Counsel APPEARING before the Special Court on my behalf

without my CONSENT AND AUTHORITY bears the GREATEST LEGAL AND MORAL RESPONSIBILITY for any NEGATIVE CONSEQUENCES.

With all these reasons it is imperative that the suggested list of neutral organisations urgently put in place a very credible system to replace the now discredited Special Court for Sierra Leone to settle this current issue expeditiously in the interest of transparent justice.

Faithfully submitted

Mr Augustine Ato BAO

23/7/2004 10:20HRS -  


CC ECOWAS Secretariat.  
 AFRICAN UNION Secretariat.  
 EUROPEAN UNION Secretariat.  
 COMMONWEALTH Secretariat.  
 HUMAN RIGHTS WATCH.  
 PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA.  
 PRESIDENT OF THE REPUBLIC OF GAMBIA.  
 PRESIDENT OF THE REPUBLIC OF TOGO.  
 EX PRESIDENT ALPHA KONARE  
 PRESIDENT THABO M'BEKE OF THE REPUBLIC OF SOUTH AFRICA.  
 REVEREND JESSE JACKSON  
 THE LEADER OF THE ALL PEOPLES CONGRESS.  
 THE LEADER OF THE SIRRRA LEONE PEOPLE'S PARTY  
 THE LEADER OF THE PEACE AND LIBERTATION PARTY  
 THE DEFENCE TEAM FOR ISSA SESAY  
 THE DEFENCE TEAM FOR MORRIS KALLON  
 DEFENCE TEAM TAMBA BRIMA.  
 DEFENCE TEAM IBRAHIM KAMARA  
 DEFENCE TEAM FOR MR SANTAGIE KANU  
 CHIEF SAMUEL HINGA NORMAN  
 FORMER DEFENCE TEAM FOR MR AUGUSTINE GBAO  
 REGSTRAR FOR THE SPECIAL COURT FOR SIERRA LEONE  
 SPECIAL COURT PROSECUTOR  
 THE RUF PARTY  
 MY FAMILY  
 THE PRESS.





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DISSENTING OPINION OF JUDGE BANKOLE THOMPSON<sup>1</sup>

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

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

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

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

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

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



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

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

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

Done at Freetown this 7<sup>th</sup> day of September 2004



Judge Bankole Thompson

Trial Chamber

