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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde

Registrar: Robin Vincent

Date: 11 July 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-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 THE DEPUTY PRINCIPAL DEFENDER TO TRIAL CHAMBER II FOR CLARIFICATION OF ITS ORAL ORDER OF 12 MAY 2005

First Respondent:
The Registrar

Second Respondent:
The Acting Principal Defender

Defence Counsel for Alex Tamba Brima:
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain

SPECIAL COURT FOR SIERRA LEONE
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I- Introduction:

I respectfully dissent from the Majority Ruling of my learned colleagues, Hon. Justice Teresa Doherty and Hon. Justice Richard Lussick on the Extremely Urgent Confidential Joint Motion for the Reappointment 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 (herein referred to as "the present Motion") and the Principal Defender's Cross-Motion Filed Pursuant to Articles 17(4)(c) and 17(4)(d) of the Statute of the Special Court and Rules 45 and 54 of the Rules of Procedure and Evidence and Inherent Jurisdiction of the Court for Clarification on the Decision on the Confidential Joint Defence Application For Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu (herein referred to as "the Cross-Motion").

Firstly, I am not persuaded that the present Motion by the Accused persons Alex Tamba Brima and Brima Bazzy Kamara is either frivolous or vexatious or some kind of a sinister conspiracy between the Accused persons, their former Counsel Kevin Metzger and Wilbert Harris and the Deputy Principal Defender "to go behind" the Trial Chamber's earlier Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu (herein referred to as "the earlier Decision"). I find absolutely no grounds or justification for drawing such an inference or conclusion. Nor do I understand the present Motion to be asking the Trial Chamber indirectly or underhandedly, "to review its said earlier Decision". In my opinion the present Motion filed solely by the Accused persons Alex Tamba Brima and Brima Bazzy Kamara pursuant to Article 17 (4) (c) and (d) of the Statute of the Special Court is fundamentally concerned with the statutory rights of Accused persons to be tried without delay and to choose their Counsel and is clearly distinct and different from an earlier application filed solely by their former Defence Counsel seeking leave to withdraw from the AFRC trial pursuant to Rule 45 (E) of the Rules of Procedure and Evidence (herein referred to as "the Rules"). In my opinion, the interests of justice and a fair trial would best be served if the Trial Chamber perceived, treated and determined the two applications as separate and distinct from each other and if the Trial Chamber examined and determined the present Motion upon its merits rather than treating it with suspicion and summarily dismissing it as frivolous and vexatious or as a backdoor attempt by the Applicants to undermine a court Order.

In my opinion the pursuit of the statutory rights of Accused persons should never be described or treated as "frivolous" or "vexatious". The reasons for my dissent are articulated in the ensuing paragraphs. Before examining the merits of the present Motion and Cross-Motion I wish to highlight a number of statements in the Majority Decision with which I fundamentally disagree. I propose to indicate the statements as they appear in the various paragraphs of the Majority Decision and to briefly indicate alongside each statement the reasons for disagreement. These comments form an integral part of the ensuing dissenting opinion and are without prejudice to the detailed reasoning contained therein. The preliminary comments will be followed by an in-depth consideration of the merits of the Motion and Cross-Motion.

II-Preliminary comments on Majority Decision:

1. I disagree with the statements in paragraph 25 of the Majority Decision in relation to the Defence prayer that the Motion and all subsequent responses and replies thereto be made public and heard in open court, that "*Counsel have made 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*". In my opinion the Defence request for "an open and public hearing" is not a request for "further relief" against the First or Second Respondents as such. The Accused

persons are merely asserting their statutory right to a public hearing as guaranteed by Article 17 (2) of the Statute and asking the Trial Chamber not to apply the exception to the rule provided in Rule 73 (A) of the rules. As I understand it, the right to a public trial is the norm under the Statute, while Rule 73 (A) of the Rules which empowers the Trial Chamber to adjudicate on motions "*based solely on written submissions*" is the exception to the norm. In my view Rule 73 (A) is not intended to override the right to a public trial as such but is merely intended generally to expedite the proceedings of the Trial Chamber. In any event, there is nothing in the Statute of the Special Court or the Rules or the Practice Direction on Filing of Documents before the Special Court[1] that expressly or impliedly prohibits a party from applying for "additional relief" in a reply, if the interests of justice so require. After all, Rules of procedure are merely handmaidens of justice and are not meant to fetter the court's discretion where the interests of justice otherwise require. The proper remedy for a party prejudiced by a belated prayer for such "additional relief" is for that party to apply to the Trial Chamber for leave to respond appropriately to such prayer. Since neither of the Respondents herein has applied for leave to respond to the application for a public trial and neither of them has indicated that a public hearing is likely to be prejudicial to or in conflict with any measures ordered by the Court for the protection of witnesses or victims, the Trial Chamber ought not in my opinion, to assume or infer the existence of such prejudice or to penalise the Accused persons for containing the application in their Reply rather than their Motion. The Trial Chamber ought instead, to consider the merits of that application, as I will endeavour to do later on in this opinion. In this regard I am persuaded by the approach taken by the Honourable Justices of Trial Chamber I in the ***Prosecutor v. Brima, et al,*** SCSL-2004-16-PT-16[2]. In that Decision Trial Chamber I decided that in order to ensure the protection of the rights of the accused persons under Article 17 (4) (b) and (d) of the Statute, their Lordships would hear Counsel orally "*on any new matters which had not already been raised in their submissions or on clarifications relating to the filed submissions*". Their Lordships did not consider it to be in the interests of justice to prevent Counsel from raising additional matters not originally included in their written submissions.

2. More significantly, the Accused persons in the present Motion have clearly indicated in their Response to the Registrar's Reply that their application for a public and open hearing "*was above all necessitated by the disclosure by the Registrar that both Counsel (Kevin Metzger and Wilbert Harris) have been removed from the list of eligible Counsel*"[3] and by "*the Registrar's decision to strike off Counsel from the list of eligible Counsel in the face of a motion and cross motion for their reappointment while claiming to be acting in the best interests of the accused when they have clearly said that they want their Counsel back*"[4]. In my opinion, since the Registrar's removal of Counsel from the eligible list and the disclosure of that removal occurred after the filing of the Defence's initial Motion and while that Motion was *sub judice*, the Trial Chamber cannot reasonably expect the Accused persons to have applied for an open and public hearing any earlier than in their Response to the Registrar's Reply, nor can the Trial Chamber in these circumstances penalise the Accused persons for invoking their Statutory rights in their reply. Their Lordships in

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[1] Document No. SCSL-2004-16-PT-114

[2] *Brima-Decision on Applicant's Motion against Denial by the Acting Principal Defender to enter into a Legal Service Contract for Assignment of Counsel*, 6 May 2004, paragraph 28

[3] Document No. SCSL-2004-16-PT-296, paragraph 6 of the Conclusion, page 9337.

[4] Document No. SCSL-2004-16-PT-296, paragraph 18.

paragraph 25 of the Majority Decision also seem to suggest that the Accused persons are estopped from asserting their right to a public hearing in the present Motion simply because their former Counsel in an earlier application to withdraw raised certain personal security concerns that Counsel requested the Trial Chamber to handle as "*confidential and under seal*". In my opinion the argument is fallacious as it uses the security concerns of former Counsel raised in an application to which neither accused person was party, to deny the Accused persons their rights under the present Motion. Not only must a distinction be drawn between the Accused persons and their Defence Counsel, but a clear distinction ought to be drawn between the earlier withdrawal motion by Counsel and the present Motion by the Accused persons. I will address the merits of the application for a public hearing later on in this opinion.

3. I disagree with the statements in paragraph 26 (in respect of the Defence's failure to include a statement in their Motion that the Court made a ruling on 12 May 2005 granting in full the relief sought by Counsel to withdraw from the case) that "*the Motion implies that the Trial Chamber gave orders to withdraw after and despite a letter from the Accused asking for Counsel to be maintained. Such an implication that the Court acted without giving any consideration to the wishes and statements of the Accused is improper*". It is a fact that the Court's Oral Order of 12 May 2005 together with the reasoned Ruling of 23 May 2005 are both matters of public record that speak for themselves and that need not be recited by either party in their pleadings. Accordingly I see no need for the Trial Chamber or any of the parties to read into the Motion any views or implications that are contrary to the public court record. In any event, even the Registrar who was not a party to the proceedings that led to the Court Order and Reasoned Ruling of 12th and 16th May 2005 is well aware of the Court's "Decision on the Confidential Defence Application for withdrawal by Counsel for Brima and Kamara and on the Request For Further Representation by Counsel for Kanu" and quotes extensively from it in the Registrar's Reply to Extremely Urgent Motion[5] and in the Registrar's Reply to the Principal Defender's Cross-Motion[6], thereby proving that he has suffered no prejudice by the failure of the Accused persons to recite the Decision in their Motion.

4. I disagree with their Lordship's view and statement in paragraph 28 to the effect that "*the Deputy Principal Defender's submissions omitted to cite the Trial Chamber's Ruling of 16 May 2005 and a Memorandum from the Deputy Principal Defender to the Registrar on 17 May 2005 which sought to have Counsel re-assigned. That Memorandum very improperly fails to inform the Registrar of the Court's Ruling of 16 May 2005*". I reiterate my earlier comments above with regard to the Court's Ruling of 16 May 2005 being a matter of public record that speaks for itself. Furthermore, the Deputy Principal Defender's Memorandum to the Registrar of 17 May 2005 although copied to the Honourable Justices of Trial Chamber II on an earlier occasion, is not annexed to the Defence Office's Response to the Motion and therefore does not form part of the Principal Defender's case in these proceedings. I disagree with the view taken by their Lordships that the Deputy Principal Defender was under some kind of legal obligation to include certain facts in her pleadings. In my opinion it is improper for the Trial Chamber to dictate to the parties what they ought or ought not to include in their pleadings. To do so would be tantamount to the Trial Chamber "descending into the

[5] Document No. SCSL-2004-16-PT-290, paragraphs 11, 12,16,17,22 and 25.
[6] Document No. SCSL-2004-16-PT-298, paragraph 3.

arena". In my view, where the Trial Chamber considers certain facts to be relevant in the determination of this Motion, the Trial Chamber has the option to narrate those facts in its decision, even if the parties have not recited them in their pleadings. This in my view is the proper course to take.

5. I disagree with their Lordship's view and statements expressed in paragraph 29. The views expressed in that paragraph are premised upon the presumption that the Trial Chamber has power to dictate to the parties the content of their pleadings, which presumption I have described above as being tantamount to the Trial Chamber "descending into the arena". By imputing or implying "*mala fides*", "untruthfulness" and "vexatious ness" on the part of the Deputy Principal Defender simply because she chose to omit certain facts from her pleadings (which facts are in any event public) or because she omitted to included certain facts that the Trial Chamber would have wanted or expected her to include in her pleadings, their Lordships are once again, "descending into the arena" that is the province of the disputants. Furthermore I cannot see how the Deputy Principal Defender who herself is one of the Respondents obligated to respond to the Motion, can be said to be "vexatious" in her Response, much less "vexatious to the Trial Chamber".

6. I disagree with their Lordship's view and statements expressed in paragraph 30. I shall comment on this in greater detail later.

7. I disagree with their Lordship's view and statements expressed in paragraph 31. There is no indication that in the Accused in their Motion question or challenge the Registrar's powers to consult the Trial Chamber pursuant to Rule 33B of the Rules. Instead the Accused persons indicate in paragraphs 31 to 33 of the Motion that they object to and challenge the manner in which the Trial Chamber responded to the Registrar's consultation pursuant to Rule 33B.

8. I disagree with their Lordship's view and statements expressed in paragraphs 32 and 33. I shall comment on this in greater detail later.

9. I disagree with their Lordship's view and statements expressed in paragraphs 34, 35 and 36 on the grounds that those statements and view are premised upon the perception that the earlier application[7] by Mr. Kevin Metzger and Mr. Wilbert Harris to withdraw from the conduct of the Defence case for Brima and Kamara respectively, and the subsequent withdrawal of Counsel pursuant to the Trial Chamber's Ruling thereon, act as an estoppel or bar to the current application by the Accused persons Brima and Kamara to subsequently apply to have the same Counsel "re-appointed" as their chosen Counsel pursuant to Article 17 (4) (d) of the Statute. With the greatest respect to their Lordships I think that such a perception is mistaken and legally unjustified. In particular I disagree with the statements that "*the accused have decided to frustrate the hearing by withdrawing instructions and then, when it suits them, giving instructions. There is no undertaking or clear indication that this pattern of behaviour will not be repeated to avoid interfering with a fair and expeditious hearing. In our earlier decision permitting Lead Counsel to withdraw, we found that the*

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[7] *The Prosecutor v. Alex Tamba Brima et al*, Case No. SCSL-2004-16-T: Decision on the Confidential Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, 23 May 2005.

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 Counsels. We believe that their real motive is to cause as much disruption to the trial as possible". Apart from prematurely speculating about the future conduct or behaviour of the Accused persons, the statements are premised upon the presumption that the Trial Chamber has power to dictate the relationship between an Accused person and his Counsel and to demand certain "undertakings" of "good behaviour or conduct" from the Accused persons with regard to that relationship. In my opinion the Trial Chamber has no such power under the law. In the same vein, I am of the opinion that the Trial Chamber has no power to question the "genuineness" or otherwise of the Accused persons' choice of Counsel, whether that choice is in favour of Mr. Kevin Metzger and Mr. Wilbert Harris or any other Counsel. Under the Statute and Rules the choice of Defence Counsel is entirely the prerogative of the concerned Accused persons. Lastly I am of the opinion that without having examined the merits of the present application, it is unjust for the Trial Chamber to disparage the motives of the Accused persons purely on the basis of an earlier application by their Counsel, to which application the Accused persons were not party. This is precisely the crux of my departure in opinion from their Lordships in the Majority Decision. In my opinion the two applications are separate and distinct from each other and should be handled as such.

10. I disagree with their Lordship's view and statements expressed in paragraphs 36 to the effect that, "*Rule 45 (E) provides that the appointment must be of "another" Counsel. There is no provision for reassignment of former Counsel in the event that they or their clients or both, have changed their mind.*" Again this statement is based upon the presumption or perception that the Accused persons are in their present application asking the Trial Chamber to reverse or review its earlier decision permitting their Counsel to withdraw. The present application is clearly not a Rule 45 (E) application by any stretch of imagination, nor do the Accused persons claim it to be so. Furthermore although there is nothing in the Rules providing expressly for "*re-assignment of former Counsel*" there is nothing in the Rules, the Statute or the Directive on assignment of Counsel that prohibits such re-assignment either, if the interests of justice so require and the Accused persons and concerned Counsel are agreeable to it.

11. I disagree with their Lordship's view and statements expressed in paragraph 37 to the effect that, "*we do not have the power to interfere with the law relating to privity of contract.*" The Trial Chamber's duty is not limited to ensuring that the trial is "*fair and expeditious*". There is ample authority to the effect that the Special Court's inherent jurisdiction does extend to the control and supervision of officers of the Court and to subject questionable administrative acts to Judicial scrutiny and review in order to protect the rights of the Accused persons and to promote a fair and just trial[8].

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[8] *The Prosecutor v. Alex Tamba Brima et al*, Case No.SCSL-2004-16-T, Brima 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; see also *Prosecutor v. Tadic*, Case No. IT-94-1Decision on the Defence Motion for Interlocutory Appeal for Jurisdiction, 2 October 1995; The Prosecutor v. Blaskic, Case No. IT-95-14: Appeals Chamber Judgment on the Request of the Republic of Croatia for Review of the decision of Trial Chamber II, 18 July 1997; The Prosecutor v. Barayagwuriza, Case No. ICTR-97-13, Appeals Chamber Decision on Abuse of Process, 3 November 1999.

12. I disagree with their Lordship's view and statements expressed in paragraph 38 to the effect that, "*In the absence of the Principal defender, certain obligations to carry out duties fall upon the Registrar.*" There is ample authority to the effect that "*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 always 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 recognises the concept of "Acting Officials" in the absence of their substantive holders. 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.*"[9]

13. I disagree with their Lordship's view and statements expressed in paragraphs 39 to 52. The Accused persons Brima and Kamara have in the present Motion not requested the Trial Chamber to review or reverse its earlier decision in the withdrawal motion by Defence Counsel. It appears to me that their Lordship's view and statements expressed in paragraphs 39 to 52 are in tantamount to a review of that earlier motion and decision. The present Motion filed by the Accused persons pursuant to Rule 54 and Article 17 (4) (d) of the Statute is clearly separate and distinct from that earlier motion for withdrawal filed by Defence Counsel pursuant to Rule 45 (E). In my opinion the present Motion is so fundamental to the rights of the Accused persons as envisaged under Article 17 (4) (d) of the Statute that it would not be in the interests of justice or a fair trial for the Trial Chamber to simply and summarily dismiss the Motion as a veiled attempt by the Accused persons "*to reverse an earlier decision of the Trial Chamber*". Furthermore I find no grounds or justification whatsoever for imputing insincerity, ill motive or alacrity on the part of the Accused persons who are simply pursuing their statutory right to choose Counsel. Equally, I find no grounds or justification whatsoever for accusing Mr. Kevin Metzger and Wilbert Harris who are not party to the present Motion, of conniving with the Accused persons to "*go behind an earlier order of the Trial Chamber*" or to "*delay or obstruct*" the conduct of a trial from which they have already withdrawn. Equally, I find no ground or justification whatsoever for imputing insincerity, ill motive, alacrity on the part of the Deputy Principal Defender who herself a Respondent in these proceedings, nor do I find any grounds or justification for accusing her of connivance with the Accused persons or with Mr. Kevin Metzger and Wilbert Harris to "*go behind an earlier order of the Trial Chamber*" or to "*delay or obstruct*" the conduct of the trial. The fact of the matter is that the AFRC trial has never been adjourned or delayed even for a single day on account of the Accused persons or their former Counsel or the Deputy Principal Defender. Therefore I cannot subscribe to the view or statement in paragraph 50 that "*the accused have seriously delayed and obstructed this trial*" nor do I subscribe to the view that there is some kind of backdoor conspiracy between the Accused persons, their former Counsel and the Deputy Principal Defender to delay and obstruct the AFRC trial.

14. I disagree with their Lordship's view and statements expressed in paragraph 51 to the effect that "*Counsel are not eligible to be reappointed since they are no longer on the list of*

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[9] *The Prosecutor v. Alex Tamba Brima et al*, Case No.SCSL-2004-16-T, Brima 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, paragraphs 78 and 79.

qualified counsel required to be kept under Rule 45 (C)." With the greatest respect, the view and statement fails to take into account the fact that the removal of Counsel from the said list was done by the Registrar who is the first Respondent to the present Motion while the Motion was under judicial consideration (i.e. *sub judice)*. In my opinion it would not be in the interests of justice or a fair trial if the Trial Chamber merely turned a blind eye to this pertinent fact and failed to properly evaluate and adjudicate upon the effect of such removal on the rights of the Accused persons, as my colleagues appear to have done. It does not appeal to my sense of justice and fairness to question the motives of the Applicants or of the Second Respondent while being completely oblivious to those of the First Respondent.

15. I disagree with their Lordship's view and statements expressed with regard to the Deputy Principal Defender's Cross Motion. Having concluded in paragraph 62 that "*the Cross Motion sought clarification only and that having made those clarifications no orders are required*" it is contradictory to describe the Cross Motion in paragraph 53 as "*a vehicle that seeks further relief*".

16. Lastly, I disagree with their Lordship's view and statements expressed in paragraph 61. I find no ground or justification whatsoever in accusing the Deputy Principal Defender of "*having gone out of her way to undermine an order of the Trial Chamber*" or of "*being unwilling to do her job or to follow the directions of the Registrar*". In my opinion, the views expressed in paragraph 61 of the Majority decision presuppose that there are certain fixed time frames within which the Trial Chamber expects the Principal Defender to have assigned new Counsel to the Accused persons. In fact this is not the case. In its earlier Decision the Trial Chamber did not stipulate any time frames within which they expected the Principal Defender to assign new Counsel for the Accused Brima and Kamara, even though the Trial Chamber had the option to do so. In the premises it is inconceivable that the same Trial Chamber that did not order time frames now accuses an officer of the court of having "*undermined its order*". It is a fact that under the Statute and Rules it is the Defence Office (headed at the material time by the Deputy Principal Defender in the absence of the Principal), that is vested with the power and responsibility of assigning Counsel to the Accused persons. There is nothing in the Rules or the Directive on Assignment of Counsel to suggest that the Principal Defender when carrying out that duty is obligated to do so "under the direction of the Registrar". On the contrary, the office of the Principal Defender was designed to act autonomously and independently when handling issues related to assignment of Counsel, as I shall endeavour to show later on in this opinion. It is also a fact that many of the lawyers who serve as assigned Counsel at the Special Court are also practitioners in foreign jurisdictions and are not readily available at the drop of a hat to take up their duties when the need arises or when called upon. It may well be that the consultative process between the foreign lawyers and the office of the Principal Defender takes considerable time. It is also a fact that the Defence Office in assigning Counsel or new Counsel to the Accused persons is under statutory obligation to liaise with the Accused persons and to ensure as much as possible that their choice of Counsel is respected. In my assessment, the assignment of new Counsel to the Accused persons is a process that necessarily takes time, careful consideration and consultation of all parties involved. As matters stand, the Trial Chamber is simply not in possession of any or sufficient information as to how the Deputy Principal Defender has been going about the issue of replacing Mr. Kevin Metzger and Mr. Wilbert Harris. As such I do not think that the Trial Chamber is in a position to make a fair assessment of her "*willingness or otherwise to do her job*" or to draw conclusions that the Defence Office "*has made no attempts to appoint new lead Counsel*" or that the Deputy Principal Defender has "*gone out of her way to undermine an order of the Trial Chamber.*" It is also note worthy that the Registrar in his written submissions himself makes no such claims or accusations against the Deputy Principal Defender, even though it

is he that is in disagreement with the Deputy Principal Defender over this issue! In the circumstances, I find absolutely no justification for the statements made about the Deputy Principal Defender in paragraph 61 of the Majority Decision.

After my preliminary comments on the majority Decision I will now go on to discuss the merits of the present Motion in the ensuing paragraphs.

III- The Merits of the Present Motion and Cross-Motion:

17. The present Motion principally challenges the extent of the powers of the Registrar (the First Respondent) and of the Deputy Principal Defender (the Second Respondent) acting as Head of the Defence Office, to assign Counsel on the one hand, and on the other hand, the rights of the Accused persons (Alex Tamba Brima and Brima Bazzy Kamara) to choose their assigned Counsel as guaranteed and enshrined in the provisions of Article 17 (4) (c) and (d) of the Statute.

18. The present Motion also raises issues related to the extent to which the rights of the Accused persons, in particular those pertaining to the right to choose assigned Counsel, should be protected, upheld and ensured by the Deputy Principal Defender (the Second Respondent) as acting Head of the Defence Office established under Rule 45 of the Rules, under the authority and supervision of the Registrar (the First Respondent), in their application of the provisions of the Directive on Assignment of Counsel promulgated by the Second Respondent on 3 October, 2003 pursuant to Article 17 of the Statute.

19. The Motion also raises related questions of conflict of interest in particular whether the Honourable Justices of the Trial Chamber, having advised the Registrar on 19 May 2005 pursuant to Rule 33 (B) not to re-appoint Mr. Kevin Metzger or Mr. Wilbert Harris as assigned Counsel for the Accused persons after their withdrawal, are now in a position to fairly and objectively adjudicate upon the present Motion or should recuse themselves. The present Motion also raises the more fundamental question of whether this Trial Chamber is competent to entertain and adjudicate upon a dispute arising from an administrative decision of the Registrar and Deputy Principal Defender emanating from the application of the legal instruments referred to above. In particular the Motion raises the question whether the Trial Chamber has power to review the decision of the Registrar not to re-appoint Mr. Kevin Metzger or Mr. Wilbert Harris as assigned Counsel for the Accused persons and further his decision of 25 May 2005 to remove them from the list of qualified Counsel.

20. The Principal Defender's Cross-Motion raises questions relating to the rights of the Accused persons (Alex Tamba Brima and Brima Bazzy Kamara) to choose Mr. Kevin Metzger and Mr. Wilbert Harris as their assigned Counsel respectively, even after those Counsel have been permitted by the Trial Chamber to withdraw and have withdrawn from defending the Accused persons pursuant to Rule 45 (E) of the Rules.

21. In my opinion, the present Motion and Cross-Motion raise the following issues for consideration and determination.

(i) Whether or not there are substantial grounds for casting doubt on the impartiality of the Honourable Justices of the Trial Chamber when adjudicating upon the present Motion and Cross-Motion.

(ii) Whether or not the present Motion and Cross-Motion should be heard in open court.

(iii) Whether or not the Trial Chamber has jurisdiction to entertain the present Motion and Cross-Motion.

(iv) Whether or not the Accused persons Alex Tamba Brima and Brima Bazzy Kamara are entitled under Article 17 (4) (c) and (d) of the Statute of the Special Court to choose Mr. Kevin Metzger and Mr. Wilbert Harris respectively, as assigned Counsel, after each of those Counsel withdrew from representing the respective accused persons in the AFRC Trial pursuant to Rule 45 (E) of the Rules. Alternatively, whether or not Mr. Kevin Metzger and Mr. Wilbert Harris are ineligible for reassignment as Defence Counsel for the respective Accused persons, by reason of Counsel having withdrawn from representing the respective accused persons in the AFRC Trial pursuant to Rule 45 (E) of the Rules.

(v) Whether the Registrar acted within his powers in directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of eligible Counsel.

(vi) Whether the Deputy Principal Defender was bound to comply with the directives of the Registrar relating to the non-assignment of Counsel and their removal from the list of qualified Counsel.

(vii) Whether the Trial Chamber has power to review the Registrar's decision not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as assigned Counsel, and his decision to remove their names from the list of qualified Counsel.

22. Before examining the merits of the Motion and Cross-Motion, I consider it necessary therefore, to reproduce here the relevant provisions of these legal instruments: The provisions pertaining to the right of the accused to choose Counsel are contained in Article 17 (4) of the Statute and Article 2(A) of the Directive on Assignment of Counsel.

Article 17 (4) of the Statute provides as follows:-

> *"17 (4) **In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:***
> *(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;*
> *(b) 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;*
> ***(c) To be tried without undue delay;***
> ***(d) 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 such 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..."***

Article 2 (A) of the Directive on Assignment of Counsel provides as follows:-

> *"2 (A) **Any person detained on the authority of the Special Court has the right to Counsel, in terms conclusively defined in Article 17 (4) (d) of the Statute.**"*

23. The provisions pertaining to the assignment and withdrawal of Counsel by the Principal Defender are contained in Rule 45 (A), (C) and (D) as well as Articles13 (A), (B), (E) and (F) and Articles 24 (B), (C) and (F) of the Directive on Assignment of Counsel.

Rule 45 (A), (C) and (D) provide as follows:-

"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)....

(C) The Principal Defender shall, in providing an effective defence, maintain a list of highly qualified criminal 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' experience; and
  iv. Have indicated their willingness and full-time availability to be assigned by the Special Court to suspects or accused.

(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 being satisfied that the request is not designed to delay the proceedings.

(E)......"

Article 13 (A), (B), (E) and (F) of the Directive on Assignment of Counsel provide as follows:-

"(A) Any person may be assigned as Counsel if his name appears on the list maintained by the Principal Defender in accordance with Rule 45 (C) and the Principal Defender has determined that he is and remains available to deal with the case of a particular Accused or Suspect.

(B) To be eligible to be included by the Principal Defender in the list of Qualified Counsel an individual must have the following qualifications:
  i. Speak fluent English;
  ii. Be admitted to the practice of law in any State;
  iii. Have at least seven years of experience as Counsel;
  iv. Possess reasonable experience in criminal law, international law, international humanitarian law or international human rights law;
  v. Having indicated their willingness and availability to be assigned by the Special Court to an Accused or Suspect; and
  vi. Have no record of professional or other misconduct, which may include criminal convictions.

(C) ......

(D) ......

(E) Where the Principal Defender refuses to place the name of an applicant Counsel on the List of Qualified Counsel or removes the name of Counsel from the List of Qualified Counsel, the Principal Defender shall notify the applicant Counsel of his decision in writing and briefly set out his reasons for refusing to include the name of the applicant Counsel on the List, or for removing the name of Counsel from the List.

(F) Where the Principal Defender refuses to place the name of an 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."

Article 24 (B), (C) and (F) of the Directive on Assignment of Counsel provide as follows:-

"(B) The Principal Defender shall withdraw the assignment of Counsel or nomination of other Counsel in the Defence Team:
  i. In the case of a serious violation of the Code of Conduct;
  ii. Upon the decision by a Chamber to refuse audience to Counsel 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.***
>
> ***(C) The Accused, the Counsel concerned and his respective professional or governing body shall be notified of the withdrawal.***
>
> ***(D)......***
>
> ***(E)......***
>
> ***(F) Where the assignment of Counsel or nomination of other Counsel in the Defence Team 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."***

IV-Deliberation and Determination of the issues:

(i) Whether or not there are substantial grounds for casting reasonable doubt on the impartiality of the Honourable Justices of the Trial Chamber when adjudicating upon the present Motion and Cross-Motion:

24. The Accused Alex Tamba Brima and Brima Bazzy Kamara applied that "*the Justices of Trial Chamber II who reconfirmed the order not to re-appoint Counsel as indicated in the letter from the Registrar's Legal Adviser*[10] *should recuse (disqualify) themselves from adjudicating upon the present Motion and Cross-Motion*". The Accused seem to glean the grounds in support of their application for recusal from the Memorandum written by myself on 19 May 2005 in response to the Registrar's consultations, and copied to the Deputy Principal Defender's Office[11]. The Accused persons argue that "*the substantive legal issues of ultra vires, perceived judicial impropriety, potential bias and conflict of interest, and the potential compromise of the fair and impartial conduct of the trial are so palpable in the circumstances as to compel the Defence to respectfully request that the Justices referred to in the letter from the Registrar's Legal Adviser recuse themselves from hearing this present Motion.*" The Accused persons maintain that the Honourable Justices having previously ordered that Mr. Kevin Metzger and Wilbert Harris are not to be re-appointed as Defence Counsel, would not be in a position to fairly or impartially adjudicate upon the present Motion and Cross-Motion. The Accused persons further argue that in the absence of duly proven misconduct or incompetence on the part of Mr. Kevin Metzger or Mr. Wilbert Harris, the Trial Chamber has no power or authority to stipulate who should or should not represent an Accused person or to express a preference of one assigned Counsel over the other. The applicants further argue that for the Trial Chamber to do so would amount to or give the impression of bias and interference with the statutory rights of the Accused persons to choose assigned Counsel under Article 17 (4) (d) of the Statute.

25. The Registrar (First Respondent) submitted that the Defence application for voluntary withdrawal (recusal) is unfounded and should be denied. He argued that under Rule 33 (B) of the Rules he was entitled to consult or liaise with the Trial Chamber on the implementation of its earlier Decision. He argued further that the Trial Chamber was entitled to and acted within its powers when it expressed the view that Counsel who had

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[10] Annex C to the Extremely Urgent Confidential Joint Motion for the Reappointment 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.

[11] Annex D to the present Motion.

withdrawn from the case should not be reappointed or re-assigned, and that to re-assign them would not be in the interests of a fair trial. The Registrar further argued that in expressing their opinion the Trial Chamber was merely giving the Registrar advice pursuant to Rule 33 (B) and was not "directing him" as to what he should do. Their Lordships in their Majority Decision appear to agree with the Registrar's arguments and reasoning. I however, beg to disagree for the following reasons.

26. There is no doubt that the Accused persons on trial before the Special Court are entitled to be heard by an impartial tribunal. The charges that they face as well as the consequences of conviction are of an extremely serious nature that they warrant the highest standards of fairness, transparency and impartiality on the part of the Tribunal at every step of the trial. Although the Statute of the Special Court does not define the term "impartiality" the principle of impartiality lies at the heart of the concept of a fair trial and demands that each of the judges of the Trial Chamber before whom the Accused persons appear be unbiased, has no interest or stake in the matter under consideration and does not have pre-formed opinions about it. Actual impartiality as well as the appearance of impartiality are both fundamental for maintaining the integrity and fairness of the trial and respect for the administration of justice by the Court. (Justice must not only be done but must be seen to be done.) Impartiality implies that judges must not harbour pre-conceived views about the merits of the matter before them, and that they must not act in ways that promote the interests of one of the parties[12]. While the appearance of partiality is considered as important as actual partiality, there is a general presumption that a judge is personally impartial unless one of the parties raises proof to the contrary. Under Rule 15 of the Rules of Procedure and Evidence of the Special Court, it is sufficient for a party to show that *"substantial grounds exist for reasonably doubting the impartiality of a judge"*. Once that has been established the impugned judge is disqualified from sitting on the panel considering the matter and is obligated to withdraw.

27. While the Statute of the Special Court is silent as to the issue of recusal or disqualification of a judge from sitting at a trial on grounds of bias, under Article 13 thereof "impartiality" is one of the hallmarks or qualifications for appointment as a Judge of the Special Court. It is the Rules of Procedure and Evidence that deal with the issue or judicial disqualification. Under Rule 14 every Judge of the Special Court is required before taking up his or her judicial duties to undertake a solemn declaration to serve *"with out fear or favour, affection or ill-will, honestly, faithfully, impartially and conscientiously."* It follows logically from that solemn undertaking that where a matter arises in which a judge's impartiality might reasonably be doubted upon any substantial ground, that Judge is expected under Rule 15 (A) and (C) of the Rules to voluntarily withdraw from adjudicating upon such matter in the interests of justice and a fair trial. In my view, the voluntary withdrawal of a judge from a proceeding in the circumstances envisaged under Rule 15 (A), is often a matter of judicial conscience and should not in any way reflect negatively on the integrity of the judge concerned. However, as earlier indicated Rule 15 also envisages situations where a judge will not voluntarily withdraw from a proceeding on grounds of impartiality. In such a case, Rule 15 (B) empowers an aggrieved party to apply to the Chamber of which the judge is a member, to have the said judge disqualified on grounds that *"substantial grounds exist for reasonably doubting the impartiality of a judge"*. Clearly this Rule does not envisage that

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[12] Report of the Human Rights Committee, HRC, vol. II (A/48/40), 1993, at 120, para.7.2

the impugned judge will sit on the panel that will hear and determine the disqualification motion against him or herself, for that would have absurd consequences! Rule 15 (B) envisages that the disqualification motion should be heard by the remaining judges of the Trial Chamber, excluding the impugned judge. Furthermore Rule 15 (F) requires that "*at each stage, the challenged judge shall be entitled to present his comments on the matter* ***but shall not take part in the deliberations and in the decision thereof***" (emphasis added). The Rule also envisages that the issue of disqualification should be resolved apart from and prior to the issues in the main Motion, otherwise the whole purpose of recusal may be defeated! I note however, that in the present Motion, the applicants not only shied away from naming the Justices that they wanted to see disqualified but also filed the application for disqualification as an integral part of the present Motion. This has put their Lordships of the Trial Chamber in the awkward position firstly, of having to deduce from the facts who is impugned and secondly, of having to go against the well-known principle embodied in the maxim "*Nemo Judex in sua Causa*" (You cannot be a judge in your own cause!) in determining the issue of bias, thereby clearly violating the provisions of Rule 15 (F). Be that as it may I will endeavour at this stage, to examine this issue as best as I can.

28. I must admit that upon the initial reading of Rule 15, it would appear by implication that disqualification or recusal of a judge is envisaged only with respect to either the main trial or the main appeal and does not apply with respect to interlocutory applications or motions such as the present one. However, such a narrow interpretation of Rule 15 would in my view, lead to undesirable and unjust results consequences especially where issues affecting the rights of Accused persons or the conduct of a fair trial arise in the course of an interlocutory application or motion such as the present one. Accordingly I would adopt a more liberal interpretation of Rule 15 which permits the recusal or disqualification of a judge at any stage of the trial (including Motions), whenever it appears that "*his or her impartiality might upon any substantial ground, be reasonably doubted.*" That interpretation is in my view, compatible with the solemn undertaking of a judge to serve honestly, faithfully, impartially and conscientiously, not only during the main trial, but at all times. It is also compatible with the practice pertaining in other international Tribunals such as the ICTR and ICTY. If I understand the applicants correctly, they assert that the Honourable Justices of the Trial Chamber having openly declared to the Defence Office and Registrar on 16th and 18th May 2005 that the Trial Chamber would not countenance the reassignment of Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel respectively for the Accused persons Alex Tamba Brima and Brima Bazzy Kamara, the same judges cannot bring a fair and impartial mind be seen to adjudicate upon the present Motion and Cross-Motion fairly or impartially because they would have already set their minds against such reassignment. A proper determination of this issue requires a full disclosure and examination of the facts surrounding the allegation that there are substantial grounds for doubting the impartiality of the Honourable Justices of the Trial Chamber.

29. The following facts are in my view, relevant. The Trial Chamber orally delivered its earlier Decision granting Mr. Metzger and Mr. Harris leave to withdraw as Defence Counsel on 12 May 2005 and published its reasoned Ruling in respect thereof on 23 May 2005. On 16 May 2005 Ms. Carlton-Hanciles of the Defence Office orally submitted in open court that "*she had received a communication from two of the detainees with regards to a decision which was rendered by this honourable court with instructions that a copy be served on*

Chambers". Before Ms. Carlton-Hanciles had an opportunity to disclose the contents of the document[13] or the identity of its authors, the Presiding Judge interjected and pronounced that "*before she (Ms. Carlton-Hanciles) goes any further, this Court read an Order on 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*."[14] On 17 May 2005 Ms. Elizabeth Nahamya the Deputy Principal Defender wrote a Memorandum to the Registrar which she copied to the Honourable Justices of Trial Chamber II to the effect that although the Trial Chamber had granted Mr. Kevin Metzger and Mr. Wilbert Harris leave to withdraw from the AFRC Case as assigned Counsel and had ordered that new Lead Counsel be assigned to represent the Accused persons Alex Tamba Brima and Brima Bazzy Kamara, the two accused persons wished to retain the two gentlemen as their chosen Counsel in the interests of continuity and a speedy and fair trial. The Deputy Principal Defender indicated in her Memo that she agreed with the views and concerns of the accused persons and that since both Mr. Kevin Metzger and Mr. Wilbert Harris had expressed willingness to be reassigned, she was inclined to re-appoint them as Lead Counsel for the accused persons instead of assigning the accused persons new Counsel. Given the provisions of Rule 45 giving the Principal Defender power to assign Counsel, it is not clear from the wording of this Memorandum whether the Deputy Principal Defender was merely notifying the Registrar and the Trial Chamber of her decision to reassign Counsel or whether in fact she was seeking the approval of the Registrar before doing so. It is also not clear why she copied her Memorandum to the Trial Chamber, given the argument that the Trial Chamber should not at this early stage be involved in issues of assignment of counsel. On 18 May 2005 the Registrar sent a copy of the Deputy Principal Defender's Memorandum to the Presiding Judge of Trial Chamber II with a note that read,

> "*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 demeanour, my view is that it would be counter-productive to reassign them. 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.*"

The Registrar maintains that in addressing the above comments to Justice Doherty he was acting in exercise of his powers under Rule 33 (B) of the Rules seeking the views of the Trial Chamber pursuant to that Rule.

30. On the same day the Presiding Judge circulated the Registrar's Memo and note referred to above to the Justices of Trial Chamber II and orally sought their comments there on. I immediately indicated to the Presiding Judge that I had a number of reservations on the idea of the Trial Chamber expressing an "administrative" or extra-judicial opinion (*i.e.* outside of court) on an application by the Accused persons to the Principal Defender which application was not officially before us as a court and wrote a detailed Memorandum to the Presiding Judge articulating my reservations. That Memorandum appears as Annex D to the present

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[13] This letter is now annexed to Clare Carlton-Hancile's Submissions in Support of the present Motion, which forms part of the defence Office's Reply to the present Motion.
[14] AFRC Trial, Transcript of 16 May 2005, p.48, lines 14-24.

Motion but is for ease of reference, also appended to this opinion. I further indicated to the Presiding Judge that due to those reservations I would not participate in giving any opinion or advice to the Registrar in that regard, and further requested her to ensure that any communication or opinion emanating from Trial Chamber II in that regard should clearly indicate that it was not an opinion of the Bench but rather that of the individual Justices giving it.

31. On 18 May 2005 and in response to the Registrar's request or query referred to above, the Presiding Judge wrote an inter-office Memo to the Registrar that read 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.*"

The Presiding Judge did not make the distinction that Justice Sebutinde requested to the effect that this was not the view of the full Bench or Trial Chamber. Justice Sebutinde was not privy to this letter nor was she given a copy of this letter until much later when she asked for it. The Registrar argued in paragraph 19 of his submissions that following his representations pursuant to Rule 33 (B) the Trial Chamber was not only acting in the interests of a fair trial but was well within its rights and indeed exercised its responsibilities when it expressed its view quoted above on the reassignment of Counsel. From these submissions it is clear that the Registrar was under the mistaken impression that what he received was the unanimous view of "the Trial Chamber" pursuant to Rule 33 (B) of the Rules rather than a view of individual judges. Their Lordships agree in paragraph 60 of the Majority Decision with the Registrar's submissions. I on the other hand, respectfully disagree with such a view. This is on the grounds that not only are the above-quoted comments *ultra vires* the powers of the Trial Chamber but they did not constitute the opinion of the Trial Chamber as such but rather the opinion of the individual judges who wrote or subscribed to the Presiding Judge's Memorandum to the Registrar. It is one thing for the Trial Chamber to permit Counsel to withdraw from a case pursuant to an application properly brought before the Trial Chamber under Rule 45 (E) of the Rules. It is quite another for individual judges who are not seized with a formal application for reassignment of counsel, to subsequently make an out of court declaration that "*they will not give audience to such counsel or countenance any letters, documents or correspondences, (and applications)*" that seek to have them reassigned and more so to pass off that declaration as a view of the Trial Chamber, with a view to influencing the final decision of the Registrar and Deputy Principal Defender on the issue. Secondly, whilst I recognise the Registrar's powers to consult the Trial Chamber on the implementation of its decisions under Rule 33 (B), I do not agree that that is what transpired between the 17th and 18th May 2005 for the following reasons. That Rule empowers him to make representations to the Trial Chamber as a Bench of three Judges rather than seek the individual opinions of some of the judges. Clearly, this is not what happened. I also note that whilst the Registrar in his submissions refers to the fact that "*the Trial Chamber was entitled to express its views regarding the re-assignment of counsel pursuant to Rule 33 (B)*", he also does not make the distinction that the views he received were not from the Trial Chamber but rather from individual judges even though he too had received a copy of Justice Sebutinde's Memorandum of 19 May 2005. Furthermore he seems to suggest that the Trial Chamber acted properly and legally

pursuant to Rule 33 (B) which empowers the Trial Chamber to consult with the Registrar "*in the implementation of judicial decisions.*" Here I can only point out that the Trial Chamber's Decision permitting Mr. Metzger and Mr. Harris to withdraw did not expressly or impliedly deal with issues of reassignment of counsel pursuant to an application by an accused person, nor did the Trial Chamber order that counsel be removed from the list of qualified counsel. Any additional views, directives or pronouncements by individual judges that tend to modify or go beyond what the Trial Chamber ordered on 12 May 2005 are, in my view *ultra vires*. If I am correct then the Registrar's argument that the Trial Chamber acted within its judicial mandate pursuant to Rule 33 (B) cannot hold water. By the same token it can be argued that while Rule 33 (B) empowers the Registrar to consult the Trial Chamber on "*the implementation of judicial decisions*", in the present case the Trial Chamber had not yet rendered any judicial decision in respect of the Accused persons' application for reassignment of Counsel (*i.e.* the present Motion). It was therefore premature for the Registrar to pre-empt an opinion in that regard from the Trial Chamber. In my humble opinion it was equally fallacious for the Trial Chamber to purport to advise the Registrar on an application that was not yet officially before the Trial Chamber. In that regard, I maintain the views expressed in my Memorandum annexed to this opinion.

32. Furthermore, it is evidently clear from the Transcript of 16 May 2005 that contrary to the Presiding Judge's Memorandum to the Registrar, the matter of the reassignment of Mr. Kevin Metzger and Wilbert Harris as Lead Counsel was never "*orally brought before the court*" on that day nor was there a "*Decision or order made in respect thereof*" that day. There was no oral application before Court made by or on behalf of the accused persons Brima and Kamara on 16 May 2005 to have their former Counsel reappointed. Perhaps that was what Ms. Carlton Hanciles of the Defence Office wanted to do but was not given a chance to finish what she had come to tell the court. The record shows that she wanted to address the Trial Chamber on a letter written by two of the accused persons but was not permitted to either explain the contents of that letter nor its authors and was interrupted by the Presiding Judge before she could do so. Furthermore, as the Transcript clearly shows, the comments of the Presiding Judge addressed to Ms. Carlton Hanciles on 16 May 2005 referred to an earlier application by Counsel seeking leave to withdraw from the AFRC case and to the Trial Chamber's earlier Decision in respect thereof. I do not see any connection or relationship between that application and Ms. Carlton Hanciles' undisclosed letter or the present Motion filed by the accused persons on 24 May 2005. I maintain in this dissenting opinion, that the earlier withdrawal motion should be treated as separate and distinct from the present Motion. It does not appeal to my sense of justice to take the orders in the earlier motion to automatically apply them to the present Motion, and to do so without having heard the merits of the present Motion. Such a stance would in my view, not only be fallacious but would be prejudicial to the statutory rights of the accused persons.

33. Although their Lordships state in paragraphs 32 and 33 of the Majority Decision that "*there was no determination of the issue of reappointment of Counsel*" and further that "*there was no order made in this Trial Chamber refusing reappointment of Counsel per se*" and further that "*the (Registrar's) orders for appointment of other Lead Counsel were based on the mandatory provisions of Rule 45 (E)*", the fact of the matter is that the text of the Transcript quoted above[15] and the Presiding Judge's Memorandum of 18 May 2005 to the Registrar

[15] Ibid.

give the impression (however unintended) that the Trial Chamber had as early as 16th and 18th May 2005 made its mind up "*not to give audience to Mr. Kevin Metzger and Mr. Wilbert Harris if reappointed as Lead Counsel*" and that based on the Trial Chamber's earlier Decision and orders made pursuant thereto, "*the Trial Chamber would not countenance any letters, correspondence or documents contrary to those earlier orders*". It is also clear from the Registrar's note addressed to Judge Doherty that he believed that the Trial Chamber had "the final say" on the issue of reassignment of counsel. Accordingly, his submissions that he was merely "advised" and not "directed" by the Trial Chamber also don't hold water. In the circumstances the Accused persons would appear justified under Rule 15 (A) in reasonably casting doubting the impartiality of the Justices of the Trial Chamber in adjudicating upon the present Motion and Cross-Motion. Be that as it may, the issue remains whether in the circumstances the Honourable Justices of the Trial Chamber could each be trusted to bring an impartial and unprejudiced mind to the issues in the present Motion and Cross-Motion, and not to decide the issues in the same way as they previously exhibited. This is the test to be applied to the judges who are ordinarily presumed to be objective and fair-minded professionals capable of making a reasonable judgement[16]. Perhaps at this stage the question is merely academic as the Majority Decision is already made and published! However, suffice it to say in conclusion that the manner in which the application for recusal or disqualification was made an integral part of the present Motion, coupled with the failure of the applicants to name the impugned Justices, render impossible the resolution of this issue in a fair and impartial manner, and my conclusions on the matter perhaps merely of academic interest.

(ii) Whether or not the present Motion and Cross-Motion should be heard in open court:

34. The accused persons submitted in their Joint Defence Response to the First Respondent's Reply filed on 3 June 2005 that "*In reliance upon the above arguments, the Registrar's indication of security concerns as a ground for non-reappointment of Counsel and, above all, recent disclosure by the Registrar that both Counsel, Mr. Kevin Metzger and Mr. Wilbert Harris, have been removed from the list of eligible Counsel for the Special Court for Sierra Leone, the Defence further prays that its Motion of 24th May 2005 together with all subsequent responses and replies thereto be made public and heard in open court.*" The First and Second Respondents did not respond to this submission.

35. The right to a public trial is one of the statutory rights guaranteed to an accused person on trial before the Special Court[17]. Although the Statute does not define the right to a public hearing there is a wealth of jurisprudence on the subject, which has its roots in the English Common Law. The principle of "publicity" presupposes that a trial is "a public event" and that what transpires in the courtroom is "public property". The principle also embodies the common law notion that "justice must not only be done but must be seen to be done." A public trial is recognised as a safeguard against any attempt to employ the court as an instrument of persecution. The knowledge that the trial is subject to contemporaneous

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[16] This was the test applied in the "*Decision on Application by Momir Talic for the Disqualification and Withdrawal of Judge Mumba, 18 May 2000* " cited in the International Criminal Practice by Jones and Powles, 3rd Edition, page 63 at paragraph 2.1.69

[17] Article 17 (2)

review in the forum of public opinion is an effective restraint on possible abuse of judicial power[18]. The public trial guarantee ensures that not only judges, but all participants in the criminal justice system are subjected to public scrutiny. In the case of international tribunals like the Special Court, that public includes not only the people and press of Sierra Leone where the court is situated but also the international community. The right of the Accused persons to a fair and public trial is guaranteed by Article 17(2) and the only statutory limitation upon that right is "*subject to measures ordered by the Special Court for the protection of victims and witnesses*". In my opinion the right of an Accused to a public hearing is not limited to the conduct of the main trial but also to the interlocutory applications and motions filed under the Rules by the parties, such as the present one. Rule 73 (A) of the Rules of Procedure and Evidence which empowers the Trial Chamber to rule upon motions based solely on written submissions (in order to expedite proceedings) also gives the Trial Chamber the power and discretion to hear motions in open court "*where they otherwise decide*". The Trial Chamber's discretion in deciding to hear a motion in open court under that Rule is unfettered in as far as the Rule does not stipulate any particular circumstances under which the Trial Chamber may or may not hear a motion in open court. I am averse to attaching an interpretation to Rule 73 (A) whose effect is to curtail or deny the Accused persons their rights as guaranteed under Article 17 of the Statute, one of which is "*the right to a public hearing*". Such an interpretation would render Rule 73 *ultra vires* Article 17 (2) of the Statute.

36. The Accused persons submitted that their application for a public and open hearing "*was above all necessitated by the disclosure by the Registrar that both Counsel (Kevin Metzger and Wilbert Harris) have been removed from the list of eligible Counsel*"[19] and by "*the Registrar's decision to strike off Counsel from the list of eligible Counsel in the face of a motion and cross motion for their reappointment while claiming to be acting in the best interests of the accused when they have clearly said that they want their Counsel back*"[20]. It is a fact that Mr. Kevin Metzger and Mr. Wilbert Harris were removed from the list of qualified Counsel by the Acting Registrar on the 25 May 2005[21], after the filing of the present Motion seeking their reassignment and while that Motion was under consideration by the Trial Chamber. According to paragraph 1 of the First Respondent's Response to the present Motion, the Acting Registrar directed that they be removed from the List of Qualified Counsel "*when it became apparent that they were still on the List, despite the fact that they had withdrawn from the trial and that their security concerns, which were a major reason which caused them to seek to withdraw, had not been addressed by Counsel in any manner with the court Registry.*" Since the reassignment of Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the Accused persons is one of the key issues to be resolved in the present Motion, their removal from the list of Counsel qualified to serve as Defence Counsel while the matter is still under judicial consideration, has the effect not only of pre-empting the Trial Chamber's decision on that issue but is also capable of rendering any relief that the Trial Chamber might grant to the Accused persons in that regard, nugatory. While the Rules provide for the withdrawal of Counsel from representing an

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[18] In re Oliver, 333 U.S. 257 at 268 (1948).
[19] Document No. SCSL-2004-16-PT-296, paragraph 6 of the Conclusion, page 9337.
[20] Document No. SCSL-2004-16-PT-296, paragraph 18.
[21] See Acting Registrar's letter to Acting Head of Defence Office dated 25/05/05, Attachment 1 to the Registrar's Reply.

accused person[22], they do not contemplate or provide for the removal of Counsel from the Principal Defender's list of eligible Counsel maintained pursuant to Rule 45 (C) of the Rules, once Counsel has qualified for placement and been included on the said list. The provisions pertaining to the removal of Counsel from the Principal Defender's list are only found in Article 13 (E) and (F) of the Directive on Assignment of Counsel. According to Article 13 the power to remove Counsel from the Principal Defender's list is vested in the Principal Defender, subject to review of the President of the Special Court. However, the Directive does not stipulate the grounds or reasons for removal of Counsel from the Principal Defender's list. There is no provision either in the Rules or in the Directive on Assignment of Counsel that expressly or impliedly empowers the Registrar to remove Counsel from the Principal Defender's list of eligible Counsel maintained pursuant to Rule 45 (C) of the Rules. Considering that in the present case it is the Registrar's office and not the Principal Defender that issued the order for removal of Mr. Kevin Metzger and Mr. Wilbert Harris from the Principal Defender's list of eligible Counsel and considering further that this was done while the present Motion and Cross-Motion for their reassignment were under judicial consideration, the Accused persons are in my view, entitled to question the legality as well as *bona fides* of the Registrar's administrative decision in that regard, including the grounds for Counsel's removal, and to subject that decision to public scrutiny, through an open hearing. In my opinion the application for an open and public hearing of the present Motion and Cross-Motion should in the interests of justice be granted. I will comment later on the Registrar's decision to remove Counsel from the Principal Defender's list in greater detail under the appropriate issue.

(iii) Whether or not the Trial Chamber has jurisdiction to entertain the present Motion and Cross-Motion:

37. The Accused persons have on the one hand, called upon the Trial Chamber to entertain the present Motion pursuant to Article 17 (4) (c) and (d) of the Statute, Rule 54 of the Rules and to review the administrative decision of the Registrar pursuant to the inherent powers of the court[23]. The Registrar and First Respondent on the other hand questioned the jurisdiction and competence of the Trial Chamber to entertain the present Motion and ultimately to review his administrative decisions. He argued that while "*the Trial Chamber was entitled pursuant to the provisions of Rule 33 (B) to express the view that Counsel who have withdrawn from the case are not to be reassigned,*"[24] and "*entitled pursuant to its inherent powers to ensure that the accused receive a fair trial,*"[25] the Trial Chamber "*has no power to order anyone to enter into a contract. The process of contract negotiations is a matter for individual parties to reach agreement on the terms of a contract. That is a matter for the parties and should not be constrained by any order to enter into a contract from the Trial Chamber.*"[26] On her part, the Acting Principal Defender and Second Respondent does not question the Trial Chamber's jurisdiction to entertain the Motion and Cross-Motion and in

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[22] Rule 45 (D) and (E)

[23] Paragraph 36 of the present Motion and paragraph 20 (4) and (5) of the Joint Defence response to 1st Respondent's Reply to the present Motion.

[24] Paragraphs 19, 20 and 21 of the First Respondent's Response to the present Motion.

[25] Paragraph 19 and 28, ibid.

[26] Paragraph 27, ibid.

fact "*implores the Trial Chamber to grant the Accused persons' request for reassignment of their former Lead Counsel*".[27]

38. Essentially the issue for determination is whether the Trial Chamber is competent and can draw upon its inherent jurisdiction to review the administrative Decisions of the Registrar, firstly in denying the reassignment of Mr. Kevin Metzger and Mr. Wilbert Harris as Lead Defence Counsel, and secondly in removing their names from the Principal Defender's List of eligible Counsel, and whether the Trial Chamber is competent ultimately to grant the orders sought by the Accused persons Alex Tamba Brima and Brima Bazzy Kamara. I have stated earlier on in this opinion that I do not agree with the views expressed by their Lordships in paragraph 37 to the effect that "*the Trial Chamber does not have the power to interfere with the law relating to privity of contract*" or in paragraph 49 and 50 to the effect that "*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).*" In my opinion Rule 45 (D) of the Rules applies to a situation where an accused person is dissatisfied with the services of his current assigned Counsel and wishes for good cause to have him or her replaced. In such a case, Rule 45 (D) permits the accused person to make his request for the replacement of such Counsel either before the Principal Defender or under exceptional circumstances, before the Trial Chamber. Clearly Rule 45 (D) does not cover the present situation where assigned Counsel (Mr. Metzger and Mr. Wilbert Harris) have already withdrawn from representing an accused person pursuant to a court order under Rule 45 (E) of the Rules and where the accused persons wish to have their former Counsel reassigned to represent them but the Registrar has removed the names of Counsel from the Principal Defender's List of qualified Counsel. For that matter, I am not aware of any other Rule that provides for the present situation. In such situations where the Rules are silent, the Trial Chamber must if called upon, draw upon its inherent powers if it is in the interests of justice to do so.

39. There is a wealth of authorities supporting the principle that an international tribunal such as the ICTY, ICTR and the Special Court can invoke their inherent jurisdiction to entertain a motion alleging a violation or denial of the statutory rights of accused persons, in the overall interests of justice and in order to prevent a violation of those rights. For instance in the ***Prosecutor v. Tadic***[28] the Appeals Chamber held that the Tribunal did have jurisdiction to examine the plea against its own jurisdiction reasoning that such authority "*is inherent in every judicial organ*". In the ***Prosecutor v. Blaskic***[29] where the validity of a subpoena that Judge Macdonald of Trial Chamber II had issued both to the Republic of Croatia and to its Defence Minister personally, was called into question. On the issue of inherent jurisdiction the Appeals Chamber observed,

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[27] See last paragraph of the Second Respondent's Response to the present Motion, the Cross-Motion and Defence Office's reply to Registrar's Response to Cross-Motion.
[28] Decision on the Defence Motion for Interlocutory Appeal for Jurisdiction, Case No. IT-94-1, 2 October 1995, Appeals Chamber (Tadic (Jurisdiction)), referred to in an instructive article on the subject by Louise Symons entitled "The Inherent Power of the ICTY and ICTR" in the *International Criminal Law Review* 3: 369-404, 2003.
[29] Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-914, 29 October 1997, Appeals Chamber.

"The power to make this judicial finding is an inherent power. The International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded."

40. In the ***Barayagwiza (Abuse of Process) Decision*** of the ICTR[30] the central issue was one of alleged abuse of process by the Prosecutor, for which the Appeals Chamber found it necessary to its inherent power to dismiss the Indictment. The Trial Chamber had dismissed the Applicant's motion for orders to review or nullify his arrest and provisional detention. The Applicant appealed against the decision. Allowing the appeal, the Appeals Chamber held that "*an International Tribunal had inherent jurisdiction or supervisory powers to curb an abuse of process or travesty of justice.*" In the ***Prosecutor v. Momcilo Krajisnik***[31] the Registrar who in the ICTY performs the functions of the Principal Defender, arbitrarily and unreasonably assessed the means of Krajisnik an indigent accused, and declared him only partially indigent for legal aid purposes. The Trial Chamber drawing upon its inherent jurisdiction quashed the Registrar's decision. On the Registrar's appeal against the Trial Chamber's decision, the Appeals Chamber observed that "*It should be clear from the analysis in the previous section that the incidence of error and unreasonableness in the Registrar's decision is such as to justify an order quashing that decision. The Registrar should reconsider his position in the light of the Chamber decision.*" I note that our sister Tribunals have not hesitated to invoke their inherent jurisdiction to oversee and supervise Officials of these International Tribunals on the grounds that such oversight and supervision is fundamental to the Court's ability to regulate its own process and to ensure a fair trial. Closer to home, our own Special Court has pronounced itself on the issue. Ironically, less than one year ago, issues similar to the ones now before us arose between the same parties, namely the Accused Alex Tamba Brima versus the Registrar and Acting Principal Defender in the case of the ***Prosecutor v. Alex Tamba Brima et al***, Case No. SCSL-04-16-PT[32]. In that case the Registrar purportedly acting as the Principal Defender refused to enter into a Legal Services Contract with Mr. Terence Michael Terry, then assigned Counsel for the Accused Alex Tamba Brima on two grounds. Firstly the Registrar insisted that before he enters into such contract, Counsel should undergo a medical examination and should be certified medically fit to permanently and at all times be at the disposal of the accused. Secondly the Registrar argued that having represented Ex President Charles Ghankay Taylor Mr. Terry could not under Article 14 (C) of the Directive on assignment of Counsel be permitted to represent the Accused Alex Tamba Brima in the same Trial Chamber. In an application by the Accused Alex Tamba Brima asking the court to review the administrative decision of the Registrar and Acting Principal Defender to deny him assigned Counsel of his choosing, Trial Chamber I said the following:

"We would like to say here that dismissing this Motion either on the merits or on the jurisdictional grounds as the respondents urge us to do, would amount to conceding to the merits of the objections of both the 1st and 2nd Respondents to our jurisdiction and competence to entertain it and in particular, would be approving a judicial endorsement of the 2nd Respondent's submissions, claiming immunity from a judicial review of the 1st Respondent's acts which are palpably arbitrary, ultra vires and offensive to the law. This, in our opinion, would further amount to a total abdication on our part, of our sovereign obligation and judicial responsibility

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30 Case ICTR-97-13, 3 November 1999, Appeals Chamber.

31 ICTY Case No. IT-00-39-PT, 20 January 2004

32 Brima-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.

as a court and as Judges, to subject questionable administrative acts to Judicial scrutiny and review in order to check and curb arbitrary acts, conduct, or decisions taken by our Administrative Officials in particular, and by the Executive organs in general. The Applicant and his Counsel in the situation in which they find themselves, certainly deserve the protection of the court, notwithstanding the jurisdictional objections raised by both the 1st and 2nd Respondents which we dismiss as frivolous, unfounded and bereft of any merits. The stand we have taken in this regard is consonant with the justification the Learned Editors of Halsbury's Laws of England advance to justify the utility of the inherent jurisdiction of the court in terms of a residual source of power to enable the court ... "in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression" such as the Applicant and his Counsel were indeed subjected to by the 1st Respondent in the instant case."

41. In a way it is surprising that less than a year after Trial Chamber I issued the above decision, the Registrar would once again question the competence and jurisdiction of the Special Court to review his administrative decisions over the rights of accused persons and in particular the right of an indigent accused person to choose assigned Counsel. Be that as it may, suffice it to say that I disagree with the views of my colleagues in the Majority Decision which views seem to ignore the established jurisprudential trends in this area. I find that the Trial Chamber is indeed competent to entertain the present Motion and Cross-Motion in the interests of justice and may for the protection of the rights of the Accused persons, draw upon its inherent power to scrutinise, review and nullify the administrative decisions of the Court's Officials whose effect impacts negatively upon those rights.

(iv) Whether or not the Accused persons Alex Tamba Brima and Brima Bazzy Kamara are entitled under Article 17 (4) (c) and (d) of the Statute of the Special Court to choose Mr. Kevin Metzger and Mr. Wilbert Harris respectively, as assigned Counsel, after each of those Counsel withdrew from representing the respective accused persons in the AFRC Trial pursuant to Rule 45 (E) of the Rules. Alternatively, whether or not Mr. Kevin Metzger and Mr. Wilbert Harris are ineligible for reassignment as Defence Counsel for the respective Accused persons, by reason of Counsel having withdrawn from representing the respective accused persons in the AFRC Trial pursuant to Rule 45 (E) of the Rules.

The dispute that has given rise to the present Motion and Cross-Motion essentially centres around the question whether the Applicants can in pursuit of their statutory rights under Article 17 (4) (c) and (d) of the Statute on choose Mr. Kevin Metzger and Wilbert Harris as their assigned Lead Counsel, after the Trial Chamber permitted Counsel on the 12 May 2005 to withdraw from the AFRC trial pursuant to Rule 45 (E) of the Rules. The controversy is heightened by the fact that before the present Motion was officially filed before Trial Chamber II on the 24 May 2005, certain views were expressed from the Trial Chamber on 16 May 2005 to the effect that "*this Court read an Order on 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*"[33] and on 18 May 2005 to the effect that "*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*

[33] ibid.

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[34]." The controversy was further heightened by the fact that while this issue was under judicial consideration the Registrar on 25 May 2005 removed the said Counsel from the list of Counsel qualified to serve as assigned Counsel, thereby effectively rendering them ineligible under the Rules to serve as assigned Counsel.

42. The Applicants Alex Tamba Brima and Brima Bazzy Kamara submitted that notwithstanding the withdrawal of their former assigned Counsel pursuant to Rule 45 (E) of the Rules the Accused persons are entitled under Article 17 (4) (c) and (d) of the Statute to request the Principal Defender to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as their respective Lead Counsel on the following grounds:

(i) That the Accused persons have a right to be consulted regarding their preferred choice and that their choice of Counsel may only be denied upon "reasonable and valid" grounds including proven incompetence, misconduct or serious violations of Counsel's respective Codes of Conduct or instances where Counsel's name has been removed from the Principal Defender's list of qualified Counsel pursuant to Article 13 of the directive on Assignment of Counsel;

(ii) That the Accused persons have indicated their preference of Mr. Kevin Metzger and Mr. Wilbert Harris to other qualified Counsel and have full confidence and trust in their abilities and competence as their respective Lead Counsel;

(iii) That Mr. Kevin Metzger and Mr. Wilbert Harris have each indicated their willingness and full-time availability to be reassigned as Counsel for the Accused;

(iv) That there are no reasonable and valid grounds for not reassigning Mr. Kevin Metzger and Wilbert Harris as Lead Counsel;

(v) That the reassignment of Mr. Metzger and Mr. Harris as Lead Counsel will promote a fair and expeditious trial as Counsel are already familiar with the case and any new appointments would necessarily result in undue delay on the part the newly appointed Counsel who would require adequate time to effectively represent the Accused persons;

(vi) That the Trial Chamber has no power or authority to interfere in the statutory right of an Accused person to choose assigned Counsel, by giving directives that are contrary to that choice.

43. The Deputy Principal Defender in her Response fully agrees with the submissions of Accused persons and "implores the Trial Chamber to grant the present Motion". The Deputy Principal Defender submitted further in her Cross-Motion that the wording of Rule 45 (E) relating to assignment of "*another Counsel*" does not preclude Counsel who has been permitted to withdraw from subsequently being reassigned to defend the same accused person provided that the original reasons for withdrawal no longer exist and both Counsel and the Accused are in agreement about the reassignment. The Deputy Principal Defender

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[34] Ibid.

argued that since both Mr. Metzger and Mr. Harris had indicated to her their willingness and availability for reassignment they should in the interests of justice be reassigned.

44. The Registrar opposes the Accused persons' application for reassignment of Mr. Kevin Metzger and Wilbert Harris as Lead Counsel and defends his decision not to reassign them, on the following grounds:

(i) That Mr. Kevin Metzger and Wilbert Harris are no longer eligible for reassignment as the Acting Registrar removed their names from the Principal Defender's List of qualified Counsel on 25 May 2005;

(ii) That Mr. Kevin Metzger and Wilbert Harris have not unequivocally indicated their willingness and availability to serve as Lead Counsel if reassigned;

(iii) That the Registrar is obligated to give effect to the Trial Chamber's earlier Decision that permitted Mr. Kevin Metzger and Wilbert Harris to withdraw from the AFRC trial and ordered that "other Counsel" be assigned to replace them, as well as their subsequent advice pursuant to Rule 33 (B) of the Rules;

(iv) That the Registrar's decision not to reassign Mr. Kevin Metzger and Wilbert Harris as Lead Counsel is in the interests of the Accused persons because the Trial Chamber in its earlier decision adjudged Counsel no longer fit to represent the Accused persons by reason of their security concerns;

(v) That the appointment of new Counsel would not unduly delay the trial as the Trial Chamber has in its earlier Decision put measures in place to curb delay including the appointment of co-Counsel to represent the Accused persons in the interim.

45. I have throughout this opinion belaboured the point that the previous withdrawal application by Mr. Kevin Metzger and Mr. Wilbert Harris pursuant to Rule 45 (E) of the Rules is separate and distinct from the present Motion by the Accused persons Brima and Kamara seeking their reassignment as Lead Counsel. In the absence of hard evidence that the two motions are related in any way, there is no justification for treating the present Motion with suspicion and perceiving it as some kind of vexatious or underhanded scheme by the Accused persons in connivance with their former Counsel (and perhaps the Deputy Principal Defender) to "go behind the Trial Chamber's earlier Decision" or to abuse court process or to avert the course of justice. To do so would in my humble opinion, be a serious error of judgment and would amount to an abdication of our judicial duty to protect and uphold the statutory rights of the Accused persons as guaranteed by Article 17 (4) (d) of the Statute. In this regard I reiterate the judicial stand that I took in my Memorandum to their Lordships on 19 May 2005 when the Registrar approached the Trial Chamber pursuant to Rule 33 (B) of the Rules for advice on the issue. Article 17 (4) (d) of the Statute guarantees to the Applicants as indigent accused persons, the right to be represented by Counsel of their choosing. I fully agree with the following observations of Trial Chamber I aptly expressed one year ago that, "*It should be noted that this provision is mandatory and even though jurisprudential and interpretational evolutions have significantly whittled down this right which is now more qualified than it is absolute. The Chamber will not, given the allegations of serious breaches of the rule of law and the due process, lose sight of the pre-eminently mandatory and defence protective character of the provisions of this Article.*"[35] The practice

[35] Brima Decision, ibid. paragraph 41.

pertaining in the ICTR from which the Special Court borrows much of its own, is that the Registry vested with the statutory authority to assign Counsel, permits the accused to select any available counsel from the list of compiled for that purpose and is prepared to add counsel to the list if selected by an accused, provided that such counsel meets the necessary criteria[36]. The ICTR provisions relating to assignment of counsel are similar to those of the Special Court. I agree therefore that although generally the right of an indigent accused to counsel of his choosing may not be unlimited, each case should be considered upon its own merits and the choice of the Accused ought to and should be respected unless there are well founded reasons[37] or reasonable and valid grounds[38] not to assign Counsel of their choice. Can it be said in the instant case that there are well founded reasons or reasonable and valid grounds justifying the Registrar's decision to deny the Accused their choice of Counsel?

46. The placement of counsel on the Principal Defender's list presupposes that counsel has fulfilled the eligibility criteria prescribed under Rule 45 (C) of the Rules. I note that Article 13 (B) of the Directive on Assignment of Counsel purports to modify the eligibility criteria by introducing additional criteria[39]. Once counsel has been placed on the Principal Defender's list, the Rules do not contemplate the removal of counsel from that list. At the most, the Rules simply provide for withdrawal or replacement of counsel from a particular case[40] or denial of audience by the Trial Chamber for misconduct[41] but certainly not removal from the Principal Defender's list. Again the provisions for removal of counsel from the Principal Defender's list are introduced by the Directive on Assignment of Counsel[42], which Directive also purport to modify the provisions for withdrawal of assigned counsel[43]. It is of course debatable whether the provisions of an administrative Directive promulgated by the Registrar can operate to amend, modify or replace a Rule or Rules promulgated by the Plenary of Judges pursuant to Article 14 of the Statute[44]. Be that as it may, it has been suggested by the Accused persons and the Deputy Principal Defender that once Counsel have been included on the Principal Defender's list pursuant to Rule 45 (C) of the Rules the only "reasonable and valid" grounds for rejecting an indigent accused person's choice of a particular counsel from that list is where that counsel has been found guilty of misconduct or a serious breach of the Code of Conduct or where the Principal Defender has removed his name from the list of qualified Counsel pursuant to Article 13 of the Directive on Assignment of Counsel. The Accused and the Deputy Principal Defender further argued that the voluntary withdrawal of counsel pursuant to Rule 46 (E) of the Rules does not lead to automatic removal of that counsel from the Principal Defender's list, nor does it act as an estoppel against his reassignment if the Accused person chooses to have Counsel back. They

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[36] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeals Chamber, Judgment, 1 June 2001, paras.50-64

[37] This was the test applied in *The Prosecutor v. Martic*, Case No. IT-95-11-PT, Decision on Appeal against Decision of the Registry, 2 August 2002 and in Gerald Ntakirutimana

[38] This was the test applied in *The Prosecutor v. Knezevic*, Case No. IT-95-4-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002.

[39] Article 13 (B) (iv) and (vi) of the Directive introduces new criteria not prescribed by Rule 45 (C) of the Rules.

[40] Rule 45 (D) and (E)

[41] Rule 46 (A) and (B)

[42] Article 13 (E)

[43] Article 24 of the Directive on Assignment of Counsel substantially modifies the provisions of Rule 45 (D) and (E) by introducing a parallel avenue for withdrawal of assigned counsel.

[44] Trial Chamber I held in its Brima Decision, ibid, para. 35 that The Directive on Assignment of Counsel cannot operate to either replace or to amend the Rules of Procedure, as to do so would be ultra vires the Registrar's delegated powers.

maintain in other words, that the withdrawal of counsel pursuant to Rule 45 (E) of the Rules does not constitute "reasonable and valid grounds" for denying an accused person's choice of counsel. Their Lordships in the Majority Decision disagree with those arguments and perceive the Accused persons' choice of counsel as simply "*an attempt by the accused persons acting in concert with Mr. Metzger, Mr. Harris and the Deputy Principal Defender, to go behind the earlier order of the Trial Chamber, which their Lordships will not countenance*". Their Lordships further perceive the voluntary withdrawal of Mr. Metzger and Mr. Harris as an estoppel to their reassignment and perhaps a justification for their removal by the Registrar from the Principal Defender's list, since they do not challenge that removal in their Decision. As such they perceive the right of each of the Accused persons Brima and Kamara as being limited to choice of "another counsel" (other than Mr. Metzger or Mr. Harris). For this conclusion their Lordships rely on the wording of Rule 45 (E) of the Rules.

47. As earlier stated in this opinion, I respectfully do not share the views of their Lordships on this issue on the grounds that the present Motion is not an application by Mr. Metzger and Mr. Harris for review of the Trial Chamber's earlier Decision. I also do not share the beliefs of my colleagues expressed in paragraph 35 of the Majority Decision to the effect that "*the Accused persons do not genuinely wish to be represented by those particular Counsel and that their real motive is to cause as much disruption to the trial as possible*". I believe that the Trial Chamber simply does not possess sufficient information or grounds suggesting *mala fides* or bad motives on the part of the Accused persons. For me to draw such conclusions would be nothing short of judicial recklessness on my part. While it is true that the Accused persons have on past occasions "*given Counsel limited instructions to represent them during the trial*" it is also true that this was not on account of any alleged misconduct or incompetence on the part of assigned Counsel nor on any alleged loss of confidence by the Accused in their assigned counsel. On the contrary the Accused persons have on every such occasion reiterated the fact that have confidence in and high regard for their Counsel. The reasons for the Accused limiting their instructions to counsel have in the past related to the manner in which the Trial Chamber has dealt with certain issues in the trial such as the contempt proceedings[45], but not to the conduct or competence of assigned counsel. It is therefore not true or fair to accuse the applicants of inconsistent behaviour in this regard. Secondly, although one of the grounds put forward by Mr. Metzger and Mr. Harris in their withdrawal motion was that the withdrawal of instructions by their clients had made Counsel's work impossible, the Trial Chamber quite rightly observed and ruled that "*the inability of Counsel to obtain instructions from his client does not constitute "the most exceptional circumstances" within the meaning of Rule 45 (E).*[46]" In other words the Trial Chamber did not recognise the inability of Counsel to obtain instructions from his client as constituting a valid impediment to Counsel continuing to represent that client. Since that precedent has been set, it should not matter to the Trial Chamber if a similar situation should arise in future between the Accused and their assigned Counsel and it is not necessary n my opinion, to require the Accused persons to make an undertaking or commitment that the situation would not arise again in the future, as suggested in paragraph 35 of the Majority

[45] See the three letters of the Accused persons quoted in the Trial Chamber's Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, 23 May 2005.
[46] Ibid. paragraph 39.

Decision. For now, it is sufficient that the Accused persons have indicated that they would prefer their former counsel to any others that might be chosen for them.

48. Then there is the issue of whether or not the "security concerns" that initially caused Mr. Metzger and Mr. Harris to withdraw from this case, still exist and whether those security concerns now operate either as a bar to their reassignment or a justification for removal of their names from the Principal Defender's list. It will be remembered that in their withdrawal motion Counsel stated then that "*there was a significant threat of danger to their persons or family in the conduct of the Defence case, and that undisclosed sources had informed Counsel that all Court Appointed Lawyers who work for the Special Court are deemed to be party to a conspiracy to subvert the sovereignty of the Laws of Sierra Leone. In consequence whereof they and their families would be called upon to answer for their decision to accept Special Court appointment*"[47]. Counsel also alluded to incidents where a potential Defence witness and clerk to one of the other Defence Counsel were detained and intimidated in separate incidents. Counsel also alluded to a telephone call that one of them received from abroad containing threats. It is also a fact that at the time of the withdrawal motion, Counsel had not taken any formal steps to have their alleged threats investigated by the relevant departments of the Special Court. None the less, the Trial Chamber ruled that these "security concerns" constituted "most exceptional circumstances" under Rule 45 (E) of the Rules warranting the withdrawal of Counsel. The Accused persons have in paragraph 34 of the present Motion indicated that "*their respective Defence teams have met with the Principal Defender's Office and share a common view that these threats could be investigated by the Registry and reasonable steps taken to ensure the safety of Counsel, if and when necessary, and that both Mr. Metzger and Mr. Harris have indicated that they are agreeable to this arrangement and are willing to continue representing the accused persons once reassigned.*" In support of their submissions the Accused persons attached a copy of a letter from Mr. Metzger E-mailed to the Defence Office in which he indicated that both he and Mr. Harris were willing and available to be reassigned as Defence Counsel for the Accused persons, provided that their initial security concerns were duly investigated. Furthermore, the Accused persons submitted that in the interests of continuity of their case and a speedy trial, they would prefer to be represented by their former counsel who are already acquainted with the trial rather than be represented by new counsel who would require time to get acquainted with the case. The Deputy Principal Defender agreed with the submissions of the Accused persons and submitted in addition that in her opinion since both Mr. Metzger and Mr. Harris have indicated their willingness and availability to serve as reassigned Counsel and none of them has hitherto been found guilty of proven misconduct, there is no legal impediment to their reassignment as Lead Counsel, as requested by the Accused persons. For the same reason she maintained that there are no legally justifiable reasons for the Registrar to remove their names from the Principal Defender's list.

49. Although the Registrar did not contradict the above submissions he submitted that in his opinion it is not enough for Mr. Metzger and Mr. Harris to indicate their willingness to be reassigned. They must, in his opinion, directly apply to be reassigned[48]. Clearly the Registrar makes no distinction between the present Motion made solely by the Accused persons in pursuit of their statutory rights, and an application by Counsel for inclusion on

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[47] Ibid. paragraph 6.

[48] Paragraph 3 of the Registrar's Response.

the Principal Defender's list, nor does he indicate under what Rule Counsel may apply for "reassignment". It is clear that the Statute and Rules of Procedure and Evidence primarily guarantee the rights of Accused persons, in particular the right to choose counsel, and further ensure that assigned counsel fulfil the minimum requirements for defending accused persons. The matter of assignment or reassignment of counsel to defend a particular accused person is not one over which counsel is expected "to apply" but rather is the sole prerogative of the Principal Defender in consultation with the accused persons. Accordingly the issue of Counsel "applying for reassignment" does not arise. The Registrar further expresses concerns that "*to date there has been no approach to court to discuss the security concerns of Counsel nor any determination made that the court is even able to meet those security concerns, and if it could, how long it would take to investigate and implement any recommended security measures. There is no evidence that Counsel have reassessed their security concerns so it can be presumed that the conditions upon which they sought to withdraw from the trial still exist.* " Clearly the Registrar's concerns are all purely speculative and are only capable of ascertainment once Counsel are reassigned and are back on board. As regards the Registrar's submissions that Mr. Metzger and Mr. Harris are no longer eligible for reassignment, I am strongly of the view that the Registrar only removed their names from the Principal defender's list precisely in order to render them ineligible for reassignment. I will deal with this issue in greater detail below. Suffice to say here that the removal of Counsel's names from the Principal Defender's list was, in my view, not done in good faith and therefore cannot be used as a ground to thwart the Accused persons' choice of counsel. I would conclude this issue by stating that I agree with the submissions of the Accused persons and the Deputy Principal Defender on this issue. I acknowledge the fact that both Mr. Metzger and Mr. Harris if reassigned would in future have to be more diligent in expeditiously addressing their security concerns to the relevant departments of the Special Court. For now it is sufficient that they have indicated their readiness and willingness to defend the accused persons, notwithstanding their earlier security concerns. I should perhaps add that in my opinion, the feelings of "fear" and "insecurity" are a personal and subjective affair and that the Trial Chamber should not only listen when Counsel express their feelings of fear and insecurity but should also listen when Counsel say that those feelings have subsided or no longer prevent them from efficiently performing their duties. I resolve this issue in the affirmative.

(v) Whether the Registrar acted within his powers in directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of eligible Counsel.

50. The Registrar submitted that "*Mr. Metzger and Mr. Harris were directed to be removed by the Acting Registrar from the List of Qualified Counsel suitable for assignment on 25 May when it became apparent apparent that they were still on the List. This was despite the fact that they had withdrawn from the trial and that the security concerns, which were a major reason which caused them to seek to withdraw, had not been addressed by Counsel in any manner with the court Registry. In the circumstances the Accused persons have no basis upon which to make their application because the Counsel they request are not on the list*

from which they can choose."[49] The Registrar further maintained that in refusing to reappoint Mr. Metzger and Mr. Harris as Lead Counsel for the Accused persons Brima and Kamara respectively, he was "*upholding the statutory rights of the Accused persons under Article 17 (4) (d) of the Statute and in the interests of justice*".[50] He further submitted that the Trial Chamber in permitting Counsel to withdraw found them unfit to continue representing the Accused persons and ordered that other counsel be assigned to replace them. The Registrar submitted that when he rejected the Accused persons' choice of former Counsel for reassignment he was simply implementing the Trial Chamber's earlier Decision that ordered the assignment of new Counsel, as well as the view expressed by the Hon. Justices pursuant to Rule 33 (B) that they would not accept reassignment of Mr. Metzger and Mr. Harris as Lead Counsel for the Accused persons.[51] The Registrar further argued that "*the Deputy Principal Defender as Acting head of the Defence Office acted contrary to the order of the Trial Chamber in being willing to reappoint Mr. Metzger and Mr. Harris as Lead Counsel for the Accused persons*"[52] and that consequently the Registrar acted legally and within his powers under Article 16 of the Statute in directing the Deputy Principal Defender to assign new counsel for the Accused persons. The Registrar argued that "*the position of Principal Defender is not recognised under the Statute therefore the office of the Principal Defender has no statutory authority and that title comes under the authority of the Registrar and staff are subject to his administrative direction including ensuring that court orders are implemented. It therefore cannot be said that the Registrar is therefore illegally interfering with the role of the Acting head of the Defence Office when he directs her to assign other Counsel to represent the Accused persons. These directions and action to appoint Counsel are administrative matters within the authority of the Registrar.*"[53] Lastly the Registrar argues that "*the Trial Chamber has no power to order anyone to enter into a contract. The process of contract negotiations is a matter for individual parties to reach agreement on the terms of a contract. That is a matter for the parties and should not be constrained by any order to enter a contract from the Trial Chamber.*"[54] Their Lordships in the Majority Decision agree with the Registrar's submissions in their entirety.

51. In reply to the Registrar's submissions the Applicants maintained that the Registrar's direction for the removal of Mr. Metzger and Mr. Harris from the List of Qualified Counsel was arbitrary, *ultra vires* and had no legal justification. They argued further that under Article 13 (E) of the Directive on Assignment of Counsel the power to remove Counsel from that list is vested solely in the Principal Defender and that in any event, at the time the accused filed the present Motion on 24 May 2005 the names of Counsel were still on that list. The Accused argue that the Registrar had a duty to investigate the security concerns of Counsel and in the absence of proven misconduct or breach of the Code of Conduct, Mr. Metzger and Mr. Harris should never have been removed from the List. The Accused further argued that the circumstances that caused them to withdraw instructions from Counsel including the issue of the contempt proceedings, no longer exist. On her part the Deputy Principal Defender argued that under the Rules and Directive on Assignment of Counsel, the

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[49] Paragraphs 1 and 2, ibid.
[50] Paragraph 14, ibid.
[51] Paragraphs 19 and 24, ibid.
[52] Paragraph 25, ibid.
[53] Paragraphs 5 and 23, ibid.
[54] Paragraph 27, ibid.

power to assign and replace counsel and to include and remove from the list of qualified counsel is solely vested in the Principal Defender's Office. She argued further that although the Defence Office is administratively and financially accountable to the Registrar, his role with respect to matters concerning the rights of accused persons is limited to giving support to that office and does not extend to review or usurpation of the Principal Defender's decisions with regard to the rights of accused persons. The Deputy Principal Defender further argued that in the absence of the substantive office holder, she served in an acting capacity as head of the Defence Office and by virtue of that capacity exercised the full powers of the Principal at the material time. She also argues that since both Mr. Metzger and Mr. Harris have no record of misconduct and have indicated their willingness and availability for reassignment, the Accused persons should be permitted to choose them as their reassigned counsel.

52. The resolution of this issue requires a prior understanding of the genesis of the Defence Office of the Special Court as well the inter-relationship between Defence Office and the Principal Defender on the one hand and the office of the Registrar of the Special Court on the other. The traditional practice appertaining in international tribunals like the ICTY, ICTR (and until January 2003 the Special Court for Sierra Leone), has been that there was no independent professional section or department of the international tribunal charged with looking after the rights of accused persons appearing before the Tribunal. For example, while the ICTY and ICTR have administrative offices that handle the affairs of the Defence, neither of the ad hoc international tribunals a permanent institution entrusted with "ensuring the rights of suspects and accused persons" appearing before them. Prior to April 2002 the office of the Registrar handled all aspects of the Defence. This practice has however, been the subject of much international criticism as it does not provide for effective representation of the Defence and has led to significant inequalities between the Defence and Prosecution. In her "***Report on the Estalishment of a Defence for the Special Court for Sierra Leone***"[55] Sylvia de Bertodano observes:

> "*One of the principal guarantees of the right to a fair trial is the provision of adequate facilities for an accused person's defence. Trials can only achieve this legitimacy if there is equality of arms between the defence and prosecution. The prosecution of crimes under international law requires not only an effective prosecution office, but also an effective defence. If this is not provided, trials will not be regarded as having been fair, and their verdicts will not be regarded as legitimate. The forthcoming trials before the SCSL will be subjected to a high degree of national and international scrutiny. The court cannot afford to give the impression that the process is overloaded in favour of the prosecution. Defence is often overlooked in the early stages of planning for international trials. The ICTY in its early stages made no proper provision for the defence, and in the preliminary months of its first case was employing only one defence lawyer. The Special Panels for Serious Crimes in East Timor were planned without any regard to the need for defence, and began their operation with only one junior overseas lawyer acting as a public defender, along with newly qualified national public defenders. The spectacle of nervous newly qualified lawyers facing up to experienced international prosecutors before the Special Panels in East Timor was not an edifying one. Although attempts have been made to improve the situation, there has never been any real recovery from this position. On the other hand, other institutions have given rise to grave concerns at the unmanageable costs of providing defence representation. These have surfaced in relation to both ad hoc tribunals, in particular the ICTR, where over-billing, dishonest practices and lack of proper caps and controls has resulted in a grossly inflated defence budget. The Registry of the SCSL expresses concern that both these extremes should be avoided, and*

[55] The Report was compiled at the request of the Registry of the Special Court and No Peace Without Justice (NPWJ), 28 February 2003.

that a system should be instituted which succeeds in improving a high standard of representation for defendants at a proportionate and manageable cost."

53. In January 2003 the Management Committee reached the conclusion that a Defence Office should be created and headed by a Principal Defender, with a Defence Advisor and three Duty Counsel together with administrative support. Prior to the establishment of the Defence Office the role of the Defence had been essentially ignored through all the early stages of the creation of the court. The "bare bones" of Article 17 of the Statute, which provides for rights and minimum guarantees of an accused person does not stipulate how those rights and guarantees were to be secured. Thus although not originally provided for in the Statute of the Special Court, the Defence Office became an innovation incorporated into Rule 45 of the Rules of Procedure and Evidence, and entrusted with "*ensuring the rights of suspects and accused persons*". Commenting on the newly established Defence Office of the Special Court, Rupert Skilbeck[56] writes:

"*If the Special Court is judged a success, the Defence Office is likely to be a structure that is repeated in other countries. If that is the case, then the unique model of the Defence Office is clearly one that should be adopted. It has to be acknowledged that it is absolutely essential for the defence to be considered on an equal basis to the prosecution from the very start, in terms of legal capacity, administrative support, investigations, public relations, media coverage and outreach. Without this there cannot be a fair trial.*"

54. It is clear from its genesis that the Defence Office was established to "*ensure the statutory rights of suspects and accused persons*", which role the Management Committee and Plenary of Judges reckoned could no longer be adequately performed by the Registrar's Office. With the promulgation of Rule 45 of the Rules, that role was solely vested in the Defence Office and no longer lies with the Registry. The fact that the Defence Office was provided for in the Rules rather than the Statute does not, in my opinion, detract from the important role and mandate of that office. What is of paramount importance is that the establishment of the Defence Office was commissioned by both the Management Committee and the Plenary of Judges, the two legislative arms of the Special Court. Against that background the Registrar's submission that "*the position of Principal Defender is not recognised under the Statute therefore the office of the Principal Defender has no statutory authority*" is inconceivable. Under Rule 45 of the Rules the Registrar is charged with the responsibility of establishing, maintaining and developing the Defence Office. The Registrar is not charged with the running or operations of the Defence Office. That responsibility lies solely with the head of the Defence Office, namely the Principal Defender. In carrying out its mandate under Rule 45 of "*ensuring the rights of suspects and accused persons*" the Defence Office headed by the Principal Defender is expected to carry out the functions stipulated in Rule 45 (A), (B), (C) and (D), including compilation and maintenance of a list of qualified criminal defence counsel, as well as assignment and / or replacement of counsel to indigent suspects and accused persons. Again these important functions are vested solely in the Defence Office and performed by or under the supervision of the Principal Defender. The Directive on Assignment of Counsel sets out further guidelines for the Principal Defender's role of assignment of counsel as well as maintenance of the list of qualified counsel. There is nothing in the Directive remotely suggesting that the Principal Defender

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[56] Defence Advisor, SCSL, February- August 2004. Paper entitled "***Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone***"

should perform those functions in consultation with or subject to the direction of the Registrar. It would appear to me on the reading and interpretation of Rule 45 and the Directive on Assignment of Counsel, that the Defence Office in the performance of its functions, was deliberately envisaged to act with a high degree of autonomy and independence from any other body. It is precisely the autonomous and independent nature of the defence Office that calls for the highest calibre and professionalism of its officials, subject only to judicial review. Thus while the Registrar is expected to exercise administrative and financial oversight over the Defence Office and to give it logistical and other administrative support, he is not expected to take over the functions of the Defence Office or to veto the decisions of its officials made in pursuance of their mandate. That in my opinion, would appear to be an accurate statement of the law on this issue.

55. If I am right, it logically follows that where the Defence Office generally or the Principal Defender in particular has taken a certain stand or decision on matters falling within their mandate (*i.e.* ensuring the rights of suspects and accused persons), any purported interference or veto of that stand or decision (other than by way of judicial review) is clearly *ultra vires* and null and void. Given that in this case the Acting Principal Defender had in exercise of her mandate taken a stand to reappoint Mr. Metzger and Mr. Harris as Lead Counsel for Brima and Kamara respectively, the Registrar's decision directing her not to reappoint them and instead to appoint other counsel, is clearly *ultra vires* and null and void. By the same token the Registrar's unilateral decision to remove the names of Mr. Metzger and Mr. Harris from the Principal Defender's list, against the advice of the Acting Principal Defender was also clearly *ultra vires* and null and void.

56. Regarding the argument that the Deputy Principal Defender acted without proper authority since she had not substantively been appointed "Acting Principal Defender", the law is already settled on this matter. In the ***Brima Decision*** referred to earlier, Trial Chamber dealt with the issue of court officials serving in an acting capacity and said the following:

"*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 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 recognises the concept of "Acting Officials" in the absence of their substantive holders.*"

The Trial Chamber went on to observe 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 trial Chamber would like to observe that to perform such functions which would give rise to far reaching and contentious confrontations as has happened in the instant case, the concerned official should have been regularly, clearly and expressly be appointed or designated as Acting Principal Defender whilst waiting for the recruitment of the substantive holder of the position. We say this because the exercise of administrative duties, functions or discretions, is founded on the notion of empowerment to exercise the duties that go with that office or the discretions that relate to it. This empowerment is conferred on the official purporting to so act, by a legislative, statutory, regulatory or administrative instrument which clearly defines his competence, and on which the substantive holder of the position functions and takes decisions.*"

57. In the instant case it is a fact that at the time of filing of the present Motion there was no substantive holder of the Office of Principal Defender as Ms. Simone Monasebian the former Principal defender had left the Special Court and Mr. Vincent Mnehielle the new Principal Defender had not yet reported for duty. It was during this administrative "vacuum" that the present Motion was filed as "extremely urgent". Consequently Ms. Elizabeth

Nahamya the Deputy Principal Defender found herself in the unenviable position of having to choose between waiting for the new Principal defender to arrive or simply assuming his powers in order to handle an emergency. This was because the registrar had not officially designated anyone to serve in an "acting capacity" pending the arrival of the new Principal Defender. Ideally, such a vacuum should never be allowed to occur as it may compromise the rights of the accused persons. Rather than jeopardise the rights of the Applicants it was expedient that the next most senior official of the Defence Office, namely the deputy Principal Defender should step into the shoes of an "Acting Principal Defender", as Ms. Nahamya did. I find therefore that she acted diligently and lawfully. In concluding this issue I find that the Registrar's decision directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of eligible Counsel were *ultra vires* his powers and are null and void. This brings me to the pen ultimate issue.

(vi) Whether the Deputy Principal Defender was bound to comply with the directives of the Registrar relating to the non-assignment of Counsel and their removal from the list of qualified Counsel.

58. Having found as I did above that the Registrar's decision directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of eligible Counsel were *ultra vires* his powers and are null and void, I find also that the Deputy Principal Defender was not bound to comply with those directives. I would add here that I find the issues raised in the Deputy Principal defender's Cross-Motion superfluous as they have already largely been addressed in the present Motion.

(vii) Whether the Trial Chamber has power to review the Registrar's decision not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as assigned Counsel, and his decision to remove their names from the list of qualified Counsel.

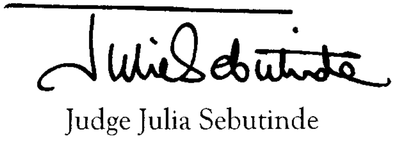
59. I have earlier on in this opinion examined the inherent jurisdiction of the Trial Chamber in reviewing the actions of administrative Officials of the court in order to check and curb their arbitrary acts, conduct or decisions. It logically follows from those earlier findings that the Trial Chamber has not only the inherent jurisdiction but also the power to review the Registrar's decision not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as assigned Counsel, and his decision to remove their names from the list of qualified Counsel. I sum up the role of the First Respondent in this matter as that of an official who acted in excess of his statutory and administrative powers. It is therefore my considered opinion that the Trial Chamber should have allowed the present Motion and that the arguments advanced to support it are founded as against those of the First respondent which are both factually and legally unconvincing.

Conclusion:

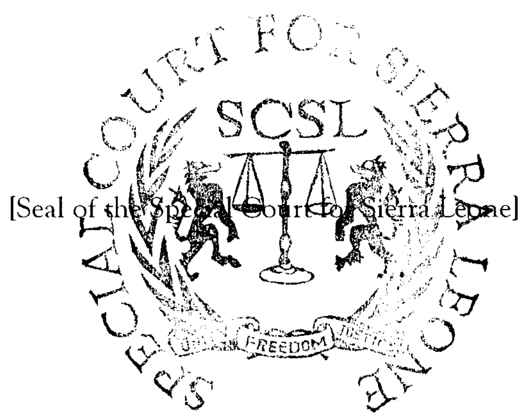
60. Finally, recognising that the Majority Decision unquestionably prevails , I would allow the present Motion and declare the Registrar's decision directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of eligible Counsel, *ultra vires* and are null and void. I would further order

that the Principal defender immediately reinstates the names of M. Kevin Metzger and Wilbert Harris on the list of qualified Counsel. I would further order that the Principal Defender complies with the choice of counsel that the Accused persons Alex Tamba Brima and Brima Bazzy Kamara have made.

Done at Freetown, Sierra Leone, this 11th day of July 2005.



Judge Julia Sebutinde



[Seal of the Special Court for Sierra Leone]

Annex to Dissenting Opinion of Justice Sebutinde

INTEROFFICE MEMORANDUM

To:	Hon. Justice Teresa Doherty, Presiding Judge, Trial Chamber II Hon. Justice Richard Lussick, Judge, Trial Chamber II
From:	Hon. Justice Sebutinde, Judge Trial Chamber II
C.C:	Mr. Robin Vincent, Registrar Ms. Elizabeth Nahamya, Deputy Principal Defender Ms. Leslie Taylor, Senior Legal Officer, OTP
Date:	19 May 2005
Subject:	**Principal Defender's Memorandum on the Re-appointment of Mr. Kevin Metzger and Wilbert Harris and the Registrar's Request to Trial Chamber II for advice thereon.**

Your Lordships,

1. I refer to a photocopy of an Inter-Office Memorandum that Justice Doherty circulated to me entitled "Re-Appointment of Mr. Kevin Metzger and Wilbert Harris as Lead Counsel" dated 17 May 2005 addressed to the Registrar, from the Office of the Principal Defender and copied to "the Honourable Justices of Trial Chamber II". I also refer to the Registrar's hand-written comments on the said Memorandum dated 18 May 2005, which comments appear to be addressed personally to Judge Doherty but were also copied to me as an integral part of the said Memorandum. In his comments the Registrar appears to seek the Trial Chamber's advice or opinion regarding the reappointment of certain Lead Counsel and indicates that he requires that advice urgently, before he travels out of the country. For ease of reference I shall refer to the said document as "the Principal Defender's Memorandum".

2. I also refer to a telephone conversation between Justice Doherty and myself held just before the lunch break on Wednesday 18 March 2005 regarding the Trial Chamber's response to this Memorandum. In our telephone conversation Justice Doherty intimated to me that she had drafted a response to the Registrar on behalf of the Trial Chamber and that she was eager to dispatch it before the day's end. I responded by requesting her not to include me in such a response because I did not wish to express any opinion on the issues raised in the Principal Defender's opinion for reasons I would disclose later. I further requested her to ensure that any communication or opinion emanating from Trial Chamber II in that regard should clearly indicate that it was not an opinion of the Bench but rather of the individual authors. Judge Doherty suggested that I need not feel obligated to be included in the Chamber's opinion since I had given a dissenting opinion in the Joint Defence Application for the Withdrawal of Counsel[1] and that it was sufficient for the two judges who had given the majority decision to express their opinion on those matters. I did respectfully point out that a majority decision is none-the-less the decision of the Court and that any public expression of an extra-judicial opinion on matters concerning the conduct of the Trial or rights of the accused persons could be misinterpreted or misconstrued as an opinion of the Trial Chamber. I did indicate to Justice Doherty that I would have no objection to your Lordships advising the Registrar as requested provided that the distinction was drawn and that it was made absolutely clear that the Trial Chamber as a Bench did not have an opinion to offer on this issue. I do not in fact know whether Justice Doherty went ahead to write to the Registrar as she had earlier indicated. Be that as it may, I feel that it would be a betrayal of my solemn declaration and undertaking if I did not make public my position on and the extent of my involvement in the issue.

3. My Memorandum is intended firstly, to communicate to your Lordships my personal position on matters raised in the Principal Defender's Memorandum and accompanying notes by the Registrar. Secondly, it is intended in the interests of judicial transparency, to disclose my said position and extent of involvement to all concerned parties and for the avoidance of any doubt that may in future arise with regard thereto.

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[1] The Joint Defence Motion for Withdrawal By Counsel for Brima and Kamara and on the Request for Further representation by Counsel for Kanu.

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4. I note that the Registrar in his handwritten notes the Registrar suggests that "*Trial Chamber II ought to have a say or the final word*" on the impending reappointment of certain Lead Counsel mentioned in Principal Defender's Memorandum, on the grounds that Trial Chamber II issued a Ruling granting the said Lead Counsel leave to withdraw from representing the Accused persons. I wish to make it clear beyond a shadow of a doubt that as a Judge of Trial Chamber II which adjudicated and ruled upon the Joint Defence Motion[2] and is currently seized with the conduct of the trial in the case of *The Prosecutor v. Alex Tamba Brima et al*[3], and related judicial proceedings, I decline to advise or express a personal opinion upon the issues raised in the Principal Defender's Memorandum, as requested by the Registrar for the following reasons:-

(i) **Ultra Vires:** As the Registrar correctly observes in his handwritten comments, the assignment of Defence Counsel to represent Accused persons is primarily the administrative prerogative of the Principal Defender's Office in liaison with the Office of the Registrar. I do not perceive the Trial Chamber as having any legitimate administrative role to play in determining or advising upon the assignment of Defence Counsel. I perceive the Trial Chamber's legitimate role in that regard 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[4] 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. I would hasten to add that I do not perceive the Trial Chamber's earlier role in having adjudicated and ruled upon the Joint Defence Application for the Withdrawal of Counsel[5] as automatically conferring a *locus standi* on the Trial Chamber or myself to express an extra-judicial opinion as to the reappointment or otherwise of the concerned Lead Counsel. Any such involvement would in my opinion be premature under the rules and *ultra vires* our judicial powers. Of course I may be wrong in my perception, but would rather err on the side of caution in that regard. For that reason I would as a matter of principle decline from expressing my personal opinion on the assignment of Counsel and from participating in an extra-judicial opinion the Trial Chamber in that regard. Of course I do not in any way purport to influence or to dictate to your Lordships as to how to handle this issue, provided it is understood that such an opinion is expressed in a personal capacity and is not representative of the Trial Chamber's views.

(ii) **Perceived Judicial Impropriety:** As you no doubt are aware, on 12 May 2005 Trial Chamber II delivered its oral decision upon the Joint Defence Motion for Withdrawal of Counsel[6] in which the Court granted the Lead Counsel referred to in the Principal Defender's Memorandum leave to withdraw from representing the respective Accused persons. Although the majority oral decision was made public, the reasons for that decision together with the dissenting opinion are yet to be published. Until the complete decision of the Trial Chamber (i.e. including written majority decision and dissenting opinion) have been made public, I am of the considered view that any involvement on the part of the Trial Chamber at this stage and in the manner suggested by the Registrar may well be perceived by the parties awaiting our full decision as gross impropriety on the part of the Trial Chamber. The impropriety would in my view, arise from any extra-judicial opinions (and / or innuendos) we may publicly or privately express individually or as a Trial Chamber on the issue and that may ultimately taint our full decision when it is eventually published. As a matter of principle I decline to participate in an exercise that has the potential of bringing the integrity of the Trial Chamber or of its decisions into doubt or disrepute.

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[2] Ibid
[3] Case No. SCSL-2004-16-T
[4] In particular Rules 44, 45, 45bis and 46 of the Rules of Procedure and Evidence of the Special Court refer.
[5] Ibid
[6] Ibid

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(iii) **Potential bias and conflict of interest:** Although the assignment of Defence Counsel is the administrative prerogative of the Office of the Principal Defender in liaison with the Registrar, the Trial Chamber could be called upon to adjudicate upon any related issues properly brought before it under the Rules[7]. In that event the Trial Chamber ought to be in a position when so called upon and should be seen, to adjudicate upon such matters independently, fairly and impartially. It is my considered view that any involvement of the Trial Chamber in the manner suggested by the Registrar could well be perceived by the parties concerned as compromising my personal integrity as a judge and the Trial Chamber's independence, impartiality and fairness. As such I am not prepared to participate in an exercise that has the potential of compromising the impartiality or fairness of the trial Chamber's judicial functions or decisions.

(iv) **Potential compromise of the fair and impartial conduct of the Trial:** Most important of all, I am concerned that as the Trial Chamber seized with the conduct of the main trial[8] we ultimately do not compromise or jeopardise the fair and impartial conduct of that trial through the public expression of extra-judicial opinion (individually or corporately) on matters directly affecting the Trial or the rights of the Accused persons. I am of the considered opinion that the issues raised in the Principal Defender's Memorandum directly pertain to the rights and minimum guarantees of the Accused persons as envisaged under Article 17 of The Statute of the Special Court of Sierra Leone. Consequently any extra-judicial opinions we may individually or corporately express on those issues are bound to attract criticism and are fraught with potential to compromise the Trial Chamber's integrity as well as the fair and impartial conduct of the main trial. In this regard I am particularly concerned about the impact that the following opinion expressed by the Registrar in his note to Justice Doherty, would have on the integrity of the Trial Chamber. The Registrar observed regarding the Lead Counsel concerned that-

"*...As a matter of expediency, there are reasons which would support their return. But from the position of the long term conduct of the trial, and considering Counsel's performance and demeanour, my view is that it would be counter-productive to reassign them. 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 the Trial Chamber does not have at least a say, if not the final say.*"

With the greatest respect to the Office of the Registrar, I reiterate my earlier opinion that at this stage the Trial Chamber has no legitimate administrative or extra-judicial 'say' in the matter. Whilst the Registrar may in the performance of his duties be at liberty to express his opinion on "*the performance and demeanour of Defence Counsel as well as the impact their return would have on the long term conduct of the trial*", the Trial Chamber cannot afford to do likewise without the risk of compromising its judicial integrity, fairness and impartiality. It is imperative that any opinion or 'say' of the Trial Chamber on the assignment of Defence Counsel is expressed within the confines of our judicial mandate under the Statute and Rules. It is for that reason too that I do as a matter of principle, decline to express an extra-judicial opinion on the issue.

5. For all the above reasons, I decline to advise upon or otherwise express an opinion to the Registrar, regarding the issues raised in the Principal Defender's Memorandum. In the interest of judicial transparency, and given the potential impact that these issues may have upon our future role and performance as a Trial Chamber and upon our conduct of the main trial[9], I have taken the liberty to copy this Memorandum to the parties named in the Principal Defender's Memorandum.
Regards.

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[7] See for example Rules 45 (D), (E) and 46.
[8] Ibid
[9] Ibid