

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

SEIZED OF the oral application made on the 27th of March, 2006 by Professor Andreas O’Shea, Counsel for the Third Accused, to be allowed to withdraw from the case pursuant to Rule 45(E) of the Rules of Procedure and Evidence (“Rules”) (“Application to Withdraw”);¹

NOTING the oral submissions made by the Principal Defender on the 28th of March, 2006;²

MINDFUL of the “Decision on Application to Withdraw Counsel” issued by this Chamber on the 6th of July, 2004;

MINDFUL of the “Decision on Appeal against Decision on Withdrawal of Counsel” issued by the Appeals Chamber on the 23rd of November, 2004;

MINDFUL of this Trial Chamber’s “Decision on Application by Counsel for the Third Accused to Withdraw from the Case” filed on the 5th of April, 2006;

CONSIDERING that, in the said Decision, the Chamber dismissed the Application to Withdraw and indicated that a comprehensive and reasoned Decision will be filed in due course;

PURSUANT TO Article 17 of the Statute of the Special Court (“Statute”) and Rules 26bis, 45, 46 and 54 of the Rules of Procedure and Evidence (“Rules”);

NOW HEREBY ISSUES THE FOLLOWING REASONED DECISION:

I. PROCEDURAL HISTORY

1. The Application to Withdraw by Counsel for the Third Accused was made orally on the 27th of March 2006. On the following day, the Chamber also heard oral submissions from the Principal Defender and the Prosecution and various exhibits were filed.³

¹ Transcripts, 27 March 2006, p. 2-35.

² *Id.*, 28 March 2006, p. 2-60.

2. Previously, on the 6th of July 2004, the second day of the RUF Trial, the Chamber dismissed an oral request by the Third Accused to withdraw his Defence Counsel on the basis that he did not recognize the jurisdiction of the Special Court and that he did not want anyone to represent him before the Court. In its Decision, the Chamber hold that “exceptional circumstances” were not established to justify the withdrawal and emphasized that Defence Counsel has an obligation to conduct the case to finality. In particular, the Chamber ordered that Defence Counsel “must continue to represent the Accused”.⁴ The Accused then decided not to attend the RUF Trial proceedings any longer and declined to provide any instructions to his Defence Team.⁵ The Trial Chamber’s Decision was subsequently upheld by the Appeals Chamber.⁶

3. On the 17th of February 2006, the Accused requested, through letters addressed to the Trial Chamber, that Professor O’Shea be withdrawn from the case and a new Counsel called Mr. Shears Moses, from the Bar of Sierra Leone, be appointed in his place.⁷ The Presiding Judge indicated to the Principal Defender that the Chamber was not prepared to allow such withdrawal, although it consented to the addition of a competent Sierra Leonean lawyer to the Accused’s Defence team due regard being given to the domestic realities of the case.⁸ The Accused then wrote another letter to the Trial Chamber on the 25th of February 2006 stating that he has “totally lost confidence” in his current Defence Counsel and reiterated his request to withdraw him from the case.⁹

4. At a Status Conference held on the 27th of February 2006 prior to the commencement of the 7th Session of the RUF Trial, during which the Accused was present, the Principal Defender made brief oral submissions on the recent developments concerning the representation of the Accused as set out above. In particular, the Principal Defender stated that he did not intend to withdraw the assignment of the Defence Counsel but supported the addition of a Sierra Leonean lawyer to the Defence Team, possibly as Co-lead Counsel. Professor O’Shea expressed his general agreement with

³ Exhibits 89 A and B, 90, 91, 92, 93, 94, 95, 96, 97 and 98.

⁴ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Gbao - Decision on Application to Withdraw Counsel, 6 July 2004.

⁵ *Id.*, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, 12 July 2004.

⁶ *Id.*, Case No. SCSL-04-15-AR73, Gbao - Decision on Appeal against Decision on Withdrawal of Counsel, 23 November 2004.

⁷ Exhibit 89A and B.

⁸ Exhibit 91. See also Exhibit 92.

⁹ Exhibit 93.

view of the Trial Chamber and the Principal Defender.¹⁰ From then on, the Accused regularly resumed attending the trial proceedings.

5. Subsequently, on the 24th of March 2006 the Accused sought leave to address the Chamber during the RUF trial proceedings. With leave of the Chamber, he stated that he did not want, did not trust and did not have confidence in Professor O'Shea. In response, the Chamber firmly reiterated its opposition to any suggestion of a withdrawal of the said Defence Counsel on the basis, *inter alia*, that it is in the interest of justice and that of the Accused to maintain the current Defence team, and that the Chamber so far has full confidence in the team considering their satisfactory professional input and the advanced stage of the trial proceedings.¹¹

II. THE SUBMISSIONS

A. *Submissions by Professor O'Shea*

6. Counsel for the Third Accused submitted that the Application to Withdraw is premised on the Third Accused's continuous unwillingness to provide instruction to him, his Defence Counsel as well as various public statements made by the Third Accused that he had no trust or confidence in him as Defence Counsel. He stated that these public statements have caused him a great degree of personal and professional embarrassment and contended that this constitutes exceptional circumstances for him to withdraw from the case pursuant to Rule 45(E) of the Rules.¹² In particular, Professor O'Shea indicated that the Accused feels that he did not abide by his professional obligations in dealing with the issue of the Lomé Amnesty and the re-arraignment on the whole of the amended consolidated indictment.¹³

7. During his submissions in support of the Application, Professor O'Shea also stated by way of a "collateral issue", that it appeared that there had been visits from a Sierra Leonean lawyer to the Accused in the Detention Facility while he was not in the Country and without him being informed and consenting to such visits. He stated that the Defence Office facilitated such visits and that the

¹⁰ Transcripts, Status Conference, 27 February 2006, p. 5-8.

¹¹ Transcripts, 24 March 2006, p. 2-8.

¹² *Id.*, 27 March 2006, p. 2-35. See, in particular, p. 25, l. 17-22: "So my application to withdraw from this case is based on my ethical position that I have a client who has indicated in no uncertain terms that he wants absolutely nothing to do with me. He will not co-operate with me, he will not provide me with instructions, he will not communicate with me. He wants to have absolutely nothing to do with me."

visitor was indeed Mr. Shears Moses. In addition, Professor O'Shea also asserted that it appeared that the Defence Office reported to the Accused information of a confidential nature arising from conversations between Counsel and the said Office and in so doing it misreported to the Accused about Counsel's understanding of the reasons for the Accused's request to withdraw his assignment. Professor O'Shea submits that these actions by the Defence Office contributed to a total breakdown in communication with the Accused.¹⁴ According to Learned Counsel Professor O'Shea, in his own jurisdiction, under the present circumstances, he would be under an ethical obligation to withdraw from the case.¹⁵

B. Submissions by the Principal Defender

8. With leave of the Trial Chamber, the Principal Defender made some submissions in open court in response to the issues raised by Professor O'Shea's Application to Withdraw and concerning the alleged involvement of the Defence Office in this matter. The Principal Defender stressed that given the present circumstances, he and the Defence Office acted professionally and as mandated by Rule 45 of the Rules.¹⁶ As to the specific issue of the Accused's request for withdrawal of his Defence Counsel, the Principal Defender stated that in all communications with the Accused he maintained that he could not endorse or recommend such withdrawal and that his view was that, given the domestic dimension of the trial, a competent Sierra Leonean lawyer should be added to the Defence Team, possibly as a Co-lead Counsel, as is the case, as he alleged, with Mr. Touray and Mr. Taku in the Defence Team for the Second Accused, Morris Kallon, but that at no time did he suggest any particular Sierra Leonean lawyer or Mr. Shears Moses, in particular.¹⁷ In addition, the Principal Defender indicated that Defence Counsel, Professor O'Shea was copied in all correspondence relevant to this issue,¹⁸ with exception of certain direct communications between him and the Presiding Judge.¹⁹

9. On the issue of the visit to the Accused by Mr. Shears Moses, the Principal Defender indicated that, when the Accused requested his Office to facilitate a meeting between him and Mr. Shears Moses, the Defence Office granted the request in the absence of assigned counsel and in the

¹³ *Id.*, p. 22-23.

¹⁴ *Id.*, p. 6, 17, 19-21. See also Exhibit 94.

¹⁵ *Id.*, p. 21.

¹⁶ Transcripts, 28 March 2006, p. 2-60.

¹⁷ *Id.*, p. 5. See also p. 32-34.

¹⁸ See Exhibit 89A and B, 91.

¹⁹ See Exhibit 92, 96.

interest of the rights of the Accused, although without knowledge of the scope of such meeting. The Principal Defender disclosed that a representative of the Defence Office, Mrs. Haddijatou Kah-Jallow, was present during the said meeting, held on 16 February 2006, and, although Mr. Shears Moses introduced himself as member of the Bar, only when the Accused requested Mr. Shears Moses to be part of this Defence Team, did she finally learn about the Accused's intention. The Principal Defender said he then told the Accused to put such intentions in writing and address them to the Trial Chamber for its input on this issue.²⁰ Mrs. Kah-Jallow added that a second meeting between the Accused and Mr. Shears Moses, this time also to be attended by Professor O'Shea and Mr. John Cammegh, was subsequently organized but was not held due to the refusal of both Counsel to meet with Mr. Shears Moses under these circumstances.²¹

10. As regards the allegations by Professor O'Shea that the Defence Office misreported certain conversations he had with the said Office about the Accused, Mrs. Kah-Jallow stated that in her ongoing dealings with the Accused, she never acted in an inappropriate or detrimental manner, despite the difficult temper of the Accused and his fragile relationship with his Counsel. She stated, however, that during her conversation with Professor O'Shea, the latter mentioned fears of a possible fee-splitting deal being behind the Accused's intention to withdraw his Counsel, Professor O'Shea in favour of Mr. Shears Moses and that she then subsequently admonished the Accused on the inappropriateness of any such conduct.²²

III. THE APPLICABLE LAW

11. The issue at hand, namely an application for the withdrawal of Counsel from a criminal case pending in the Special Court, is governed by a variety of statutory and related provisions. These are embodied in relevant provisions of the constitutive instruments of the Court. Specifically, Article 17(4)(d) of the Court's Statute provides for one of the most important rights of a person who is accused of a crime under the Statute. The Article provides that:

²⁰ Transcripts, 28 March 2006, p. 26-30, 41-43 and 57. See also Exhibit 95. The Principal Defender subsequently met with Mr. Shears Moses and found that he was a senior member of the Sierra Leone Bar, with substantial criminal law experience and recommended that he met the requirements to be listed as qualified counsel in the list maintained by the Defence Office. See Exhibit 96.

²¹ Transcripts, 28 March 2006, p. 41-49. See also Exhibits 97 and 98.

²² *Id.*, p. 49-52.





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:

...

(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 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;

12. Another relevant statutory provision in this regard is Rule 26bis of the Rules which enjoins the Court to ensure, *inter alia*, that an accused person is afforded a fair and expeditious trial and that the proceedings are conducted with full respect for the rights of the accused.

13. In addition, Rule 45(E) under which Learned Counsel Professor O'Shea made his Application to Withdraw provides as follows:

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

13. Also germane to the issue to be addressed is Rule 45(D) which provides that:

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

14. Furthermore, Rule 46, as statutory authority for the promulgation of a professional Code of Conduct by the Registrar provides as follows:

Misconduct of Counsel

(A) A Chamber may, after a warning, impose sanctions against or refuse audience to a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable to counsel for the prosecution.

(B) A Chamber may determine that counsel is no longer eligible to represent a suspect or accused before the Special Court, pursuant to Rule 45. If declared ineligible, removed counsel shall transmit to replacement counsel all materials relevant to the representation.

(C) Counsel who bring motions, or conduct other activities, that in the opinion of a Chamber are either frivolous or constitute abuse of process may be sanctioned for those actions as the Chamber may direct. Sanctions may include fines upon counsel; non-payment, in whole or in part, of fees associated with the motion or its costs, or such other sanctions as the Chamber may direct.

15. Equally pertinent to the determination of this Application as well are Article 5(iii) of the Code of Conduct²³ and Article 24(A)(i) of the Directive on the Assignment of Counsel,²⁴ a Directive issued by the Registrar. According to Article 5(iii) of the Code of Conduct, Counsel shall act with “integrity to ensure that his actions do not bring the administration of justice into disrepute.”

16. Article 24(A)(i) of the Directive on the Assignment of Counsel empowers the Principal Defender in these terms:

“in exceptional circumstances, at the request of the Suspect or the Accused, or his Assigned Counsel, withdraw the assignment of Counsel;”

Jurisdictional Questions

17. The Chamber wishes to observe that under the Court’s regime of statutory provisions regulating applications for withdrawal of Counsel from a pending case before the Court, whether at the instance of the Accused or his Counsel, such applications do raise issues of a jurisdictional nature requiring a demarcation of the administrative discretion of the Principal Defender to withdraw an Assigned Counsel from a pending case and the judicial discretion of the Chamber to order the withdrawal of Assigned Counsel from a pending case. The clear position is that Rule 45(E) of the Rules and Article 24(A)(i) of the Directive on the Assignment of Counsel cumulatively vest on the Principal Defender the authority (i) to receive requests from an accused person or his counsel for the withdrawal of counsel from the case, and (ii) to withdraw the assignment of counsel, at the request of the suspect or the accused person, or his assigned counsel, in exceptional circumstances.

18. For the sake of clarity and certainty in the law, the Chamber would like to indicate that the administrative discretion conferred on the Principal Defender by virtue of Article 24(A)(i) of the

²³ Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, Adopted on 14 May 2005, Amended on 13 May 2006 (“Code of Conduct”).

Directive on the Assignment of Counsel is subject to review by the Presiding Judge of the Chamber.²⁵ This discretion, we would like to observe, is separate and distinct from the discretionary authority vested in the Chamber pursuant to Rule 45(D) to replace an assigned Counsel under exceptional circumstances.²⁶

19. In addition, we take the view that the Chamber can, under its inherent jurisdiction, entertain an application of the type under consideration in accordance with the established principle laid down by the Court in its Decision in the case of *Prosecutor v. Brima*. In that case, we explicitly stated that :

“... the Special Court for Sierra Leone, as an independent judicial entity, in addition to its statutory jurisdiction as provided for in the Founding Instruments of the Court, is endowed with an inherent jurisdiction to enable it to act effectively in pursuance of its mandate”.²⁷

20. In taking that position, we drew support from the dictum of Lord Morris in the English case of *Connelly v. D.P.P* that:

“A Court must enjoy some power in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.”²⁸

21. Hence, notwithstanding the administrative discretion of the Principal Defender to order the withdrawal of an Assigned Counsel from a case pending before the Court, this Chamber by virtue of and pursuant to both its statutory jurisdiction under Rule 45(D) and its inherent jurisdiction, can properly hear and determine the merits of the instant Application by Counsel for the Third Accused provided and because, as we did indicate in the *Brima* Decision, it impacts on the rights of the Accused person under Article 17(4)(d) of the Statute. In effect, we opine that the issue of the withdrawal of Counsel for the Third Accused from the case at this advanced stage of the trial proceedings is likely to impact negatively or adversely to the fair and expeditious character of the said proceedings, thereby justifying the exercise of our inherent jurisdiction as a Chamber, to hear and determine the merits of the present application from this perspective and this consistent with our reasoning in the *Brima* Decision. In the same vein, we hold that the Chamber can properly entertain

²⁴ Directive on the Assignment of Counsel, Adopted on 1 October 2003.

²⁵ See *id.*, Article 24(E).

²⁶ See *Prosecutor v. Blagojevic, Obrenovic, Jokic and Nikolic*, Case No. IT-02-60-PT, Decision on Oral Motion to Replace Co-Counsel, 9 December 2002, where this distinction or demarcation of jurisdiction was recognized implicitly by the Chamber in its observation that it is not obliged to intervene in every complaint regarding the assignment of counsel, conceding the Registrar’s primary responsibility in these matters.

²⁷ *Prosecutor v. Brima*, SCSL-04-16-PT, Decision on Applicant’s Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004 (“*Brima* Decision”), para. 62.

²⁸ *Connelly v. D.P.P*, A. C. 1301.

the application pursuant to its statutory jurisdiction conferred on it by Rule 45(D) on a showing of “exceptional circumstances” by the applicant.

22. Having determined that the Chamber can properly entertain the present application, we would now proceed to examine its merits.

IV. EVALUATION OF MERITS OF THE APPLICATION

23. The statutory provisions and rules set out above as forming the regime of applicable law on the issue of withdrawal or replacement of Defence Counsel have been the subject of extensive judicial interpretations in the Special Court system and those of the ICTY and ICTR.

24. By what principles, then, is the Chamber to be guided in determining the merits of an application by an accused person for the withdrawal of his Counsel or by Counsel himself?

25. In the *Brima* Decision, we established some general principles. First, we enunciated that the Trial Chamber, apart from its statutory jurisdiction, enjoys an inherent jurisdiction by virtue of its being a Court of Law. We then laid down the principle that in pursuance of its inherent jurisdiction the Chamber has power to review an administrative decision of the Registrar, whether directly taken or by way of delegated authority, only where such a decision impacts adversely on the rights of an accused person to a fair trial.²⁹ The Chamber, however, wishes to emphasize that the said principle is not directly relevant to a determination of the merits of the instant application in that no administrative decision that is susceptible to judicial review by virtue of the inherent jurisdiction of the Chamber is in question here.

²⁹ *Brima* Decision, para. 39. See also *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-PT, Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, paras 78 and 135. This principle is consistent with the view taken by the Appeals Chamber of the ICTY that “The only inherent power that a Trial Chamber has is to ensure that the trial of an accused is fair; it cannot appropriate for itself a power which is confined elsewhere.” See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, 7 February 2005, para. 6. See also *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 27; *Prosecutor v. Blagojevic, Obrenovic, Jokic and Nikolic*, Case No. IT-02-60-PT, Decision on Oral Motion to Replace Co-Counsel, 9 December 2002. See also *Prosecutor v. Hadzihasanovic, Alagic and Kubura*, Case No. IT-01-47-PT, Decision on Prosecution Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002, paras 18-23.

26. We further posited that in order to safeguard the rights of an accused, the integrity and the expeditiousness of the proceedings, Defence Counsel “must continue to represent the Accused and shall, in accordance with the provision of Rule 45(E), conduct the case to the finality of the proceedings.”³⁰

27. We also reasoned that based on the clear and unambiguous language of Rule 26bis this Trial Chamber has a statutory duty to “ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights and due regard for the protection of victims and witnesses”.

28. Does the Application have merit? In the Chamber’s opinion, the question can be resolved by reference to either its inherent jurisdiction or its statutory jurisdiction pursuant to Rule 45(D) or both. In effect, the question is whether Counsel has advanced sufficient grounds on which the Chamber can properly exercise its discretion, inherent or statutory, to grant this Application. The principal thrust of Professor O’Shea’s complaint can be deduced from four submissions: (i) the continuous unwillingness of the Third Accused to provide instructions to him; (ii) public statements by the Third Accused that he no longer wants Counsel to represent him, because he no longer has any trust or confidence in him, and the resulting personal and professional embarrassment; (iii) the feeling of the Third Accused that Counsel did not live up to his professional obligations in dealing with the issue of the Lomé Amnesty and the issue of re-arraignment on the Amended Consolidated Indictment, and iv) the role of the Defence Office when interacting with an Accused who is already represented by Assigned Counsel, more particularly with the Third Accused.

29. In our view, the first question that arises for determination as to the merits of the Application is whether, in the context of the Chamber’s inherent jurisdiction and statutory jurisdiction, unwillingness, on the part of the Accused, to provide instructions to his Counsel does constitute a sufficient and valid ground or “exceptional circumstances” for granting the Application. We have reviewed the facts and circumstances relevant to the present Application as gathered from the oral hearing and the state of the records. We are satisfied, mindful of the established jurisprudence on the

³⁰ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, 12 July 2004, para .12. See also *id.*, Gbao - Decision on Appeal against Decision on Withdrawal of Counsel, 23 November 2004, para. 59: “The representation of the Accused from the date of that Ruling is now pursuant to the directive of the Ruling, that is to say, that “Mr. Andreas O’Shea and other Members of his team will continue to represent the Third Accused”.”

subject,³¹ that this is not a valid or sufficient basis for granting the Application nor do we take the view that it amounts to “exceptional circumstances”.

30. The second question is whether, in the context of its inherent jurisdiction or statutory jurisdiction, lack of trust or confidence on the part of the Accused in his Counsel does constitute a sufficient or valid ground upon which to grant the Application. In effect, more so in the context of its statutory jurisdiction whether lack of trust or confidence amounts to “exceptional circumstances”. On this issue, we have reviewed the facts and circumstances relevant to the said Application, and guided by the established jurisprudence,³² we are satisfied that no valid or sufficient legal basis exists for granting the Application on this ground.

31. The third question is whether the alleged ground that Counsel did not live up to his professional obligations vis-à-vis the Third Accused in respect of some expectations in the context of the Lomé Amnesty Accord and the Amended Consolidated Indictment does constitute a valid and sufficient ground for granting the Application. Again, based on a review of the facts and circumstances relevant to the Application and guided by the established jurisprudence on the subject,³³ we are satisfied that this ground is untenable as a valid basis for the exercise by the Chamber of its discretion to grant the Application.

³¹ See, for instance, *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 100: “An accused does not have the right to claim a break down in communication through unilateral actions, including refusals to meet with or receive documents from his counsel, in the hope that such action will result in the withdrawal of his counsel”. *v. Blagojevic and Jokic*, See also *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, 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, 20 May 2005, para. 34-39; *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 14 ff.; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, 7 February 2005, para. 10.

³² See *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Maitre Paul Skolnik’s Application for Reconsideration of the Chamber’s Decision to Instruct the Registrar to Assign him as Lead Counsel for Gratien Kabiligi, 24 March 2005, para. 21: “Appeals Chamber case law has emphasised that an accused does not have the right to unilaterally destroy the trust between himself and his counsel in the hope that such actions will result in the withdrawal of his counsel.” See also *Prosecutor v. Blagojevic*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 51; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, 7 February 2005, para. 9. See also *id.*, Decision on Assigned Counsel’s Motion for Withdrawal, 7 December 2004, para. 18.

³³ For instance, as stated in the *Milosevic* Case with regard to the duty of diligence and professionalism of a Defence Counsel: “the refusal of one Accused to instruct or cooperate, let alone his criticism of counsel in the conduct of his defence, ..., cannot be the basis for deeming whether counsel are acting in the best interest of the Accused”. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel’s Motion for Withdrawal, 7 December 2004, para. 22. See also *id.*, para 23: “... assigning counsel to an unwilling and uncooperative accused - including an accused who attacks the professional conduct of counsel - cannot be said to impose pressure on counsel such that their integrity is compromised”.

32. As far as the fourth question is concerned, the Chamber finds it necessary to address it separately and specifically in the following section of this Decision, given its overall relevance and implications concerning the statutory role of the Defence Office of the Special Court.

V. THE INSTITUTIONAL ROLE OF THE DEFENCE OFFICE

33. In the Chamber's view, one disturbing feature emerging from the facts and circumstances relevant to the present Application is the visit of Mr. Shears Moses, a Sierra Leonean lawyer, to the Third Accused that was facilitated by the Defence Office. The facts in respect of this episode may be summarized as follows: A visit by Mr. Shears Moses was requested by the Third Accused. Given the absence from the jurisdiction of Assigned Counsel for the Third Accused, the Principal Defender's Office arranged and facilitated the said visit. The meeting took place in the presence of Mrs. Kah-Jallow. She indicated that prior to the said meeting Mr. Shears Moses introduced himself as a lawyer, and that he was accompanied by a legal assistant.³⁴ The Defence Office averred that it was acting in the best interest of the Third Accused, though it admitted its failure to contact and promptly notify assigned Counsel of such visit.

34. The Defence Office, however, asserted that it did notify Professor O'Shea of the Third Accused's intention to have him withdrawn from the case and replaced by Mr. Shears Moses. The Principal Defender himself asserted that on the issue of withdrawal of Counsel, in all communications with the Third Accused, he did maintain that he could not endorse or recommend such withdrawal and that his view was that, given the domestic dimension of the trial, a competent Sierra Leonean lawyer should be added to the Defence Team, but that at no time did he suggest any particular Sierra Leonean lawyer or Mr. Shears Moses in particular. He also indicated that all communications on this issue were copied to the assigned Defence Counsel except for those with the Presiding Judge of the Trial Chamber.

35. In the light of the preceding analysis, the Chamber does not accept the assertion by the Defence Office that they did not initially know the purpose of the visit to the Third Accused in the Detention Facility, of Mr. Shears Moses who, for this purpose, was accompanied, according to the Defence Office, by a legal assistant and when in fact the Defence Office does admit, that it indeed facilitated this visit.





36. Given the circumstances described above, the Chamber consider that the Defence Office failed to appreciate their role and duties with respect to an Accused they knew was represented by a Counsel assigned to him and finds that they should not have introduced Mr. Shears Moses to the Accused without the knowledge and consent of the Assigned Counsel, Professor O'Shea.

37. Predicated upon this summary of the facts, it is the considered opinion of the Chamber that the dispute between the Third Accused and his Counsel arose, in part, out of a legal misconception on the part of the Defence Office as to its proper institutional role within the Special Court. The Chamber, as the judicial arm of the Court, now takes this opportunity of pronouncing on the institutional role of the Defence Office as part of the Registry of the Special Court.

38. Taking the cue from the Statute, it is significant to note that the Defence Office is not one of the principal organs of the Court.³⁵ The Chamber takes the view that the Defence Office was never intended, if such language is appropriate in the present context, to be one of the "pillars" of the Court. Any such intention would have been embodied and expressly reflected in Article 11 of the Statute. Hence, it is a misconception to postulate such an institutional role for the Defence Office as long as the Agreement creating this Court and the Statute have not been amended to include the entity of the Defence Office as one of the "pillars" of the Special Court.

39. In familiar legal terminology, the Defence Office is a creature of a major *subordinate* legislative instrument of the Court, to wit, the Rules of Procedure and Evidence. Rule 45 which creates the Defence Office provides as follows:

Rule 45: Defence Office

The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused. The Defence Office shall be headed by the Special Court Principal Defender.

(A) The Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to:

- (i) suspects being questioned by the Special Court or its agents under Rule 42, including non-custodial questioning;
- (ii) accused persons before the Special Court.

³⁴ Transcripts, 28 March 2006, p. 57.

- (B) The Defence Office shall fulfil its functions by providing, *inter alia*:
- (i) initial legal advice and assistance by duty counsel who shall be situated within a reasonable proximity to the Detention Facility and the seat of the Special Court and shall be available as far as practicable to attend the Detention Facility in the event of being summoned;
 - (ii) legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
 - (iii) adequate facilities for counsel in the preparation of the defence.
- (C) The Principal Defender shall, in providing an effective defence, maintain a list of highly qualified 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 7 years' relevant 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 having been satisfied that the request is not designed to delay the proceedings.
- (E) Subject to any order of a Chamber, Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances. In the event of such withdrawal the Principal Defender shall assign another Counsel who may be a member of the Defence Office, to the indigent accused.
- (F) Notwithstanding Rules 44(A) and 45(C)(iii), the Principal Defender may, in exceptional circumstances, assign as co-counsel, individuals with less than five years admission to the bar of a State.

³⁵ See Article 11 of the Statute which provides for the principal organs of the Special Court as "a. The Chamber; b. The Prosecution; and c. The Registry"

40. In the Chamber's considered view, the language of Rule 45 is clear, precise, and explicit in providing for the creation of the entire machinery of the Defence Office. Accordingly, giving the Rule and its various sub-rules their plain and ordinary meaning, in terms of its purpose and context, the inference is irresistible, and so we hold, that the Defence Office does not enjoy institutional autonomy and independence as a separate organ of the Court. This Chamber has already expressed this view while hearing submissions from the Principal Defender on this matter.³⁶ The Defence Office, we would like to state, is directly under the Office of the Registrar and subject to the general and specific directions of the Registrar, as the administrative head of the Court, subject only to the supervisory authority of the President of the Special Court. To this effect, the Appeals Chamber recently stated:

As a creation of the Registrar, the Defence Office and at its head, the Principal Defender, remain under the administrative authority of the Registrar. Although the Defence Office is given the main responsibility for ensuring the rights of the accused by accomplishing the functions mentioned [in paras 81-82] above, it is supposed to exercise its duty under the administrative authority of the Registrar who, notably, is in charge of recruiting its staff, including the Principal Defender, in accordance with his general responsibility on administration pursuant to Article 16(1) of the Statute.³⁷

41. It is also the Chamber's view that the institutional role of the Defence Office, once Defence Counsel have been assigned or appointed to an Accused person, is essentially to provide legal research as well as fiscal, logistical and related support services to Counsel assigned to defend the rights of suspects and of persons accused of crimes falling within the jurisdiction of the Court. From the purport and tenor of Rule 45(A) and (B), the Chamber opines that the role of the Defence Office is primarily not to represent and defend suspects and accused persons in collaboration or conjunction with Assigned Counsel.³⁸ In our view, Rule 45 has not created, or did not contemplate the creation of a two-tier parallel mechanism for the effective representation and defence of suspects and accused persons within the Court system.

42. On the contrary, the proper interpretation to be given to Rule 45 in terms of the role of the Office in ensuring and protecting the rights of suspects and accused persons is that of (i) providing

³⁶ Transcripts, 28 March 2006, p. 39-40.

³⁷ *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-AR73, Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, para. 83. See also *id.*: "It results from the Statute and Rules that the Defence Office is not an independent organ of the Special Court, as Chambers, the Office of the Prosecutor and the Registry are pursuant to Articles 11, 12, 15 and 16 of the Statute. See also paras. 80-82."

preliminary or tentative legal advice and assistance to suspects and accused persons with a view to their being afforded their right to effective legal representation and defence through the instrumentality of the Assigned Counsel Regime, and (ii) of continuous administrative supervision, under the direction of the Registrar, of the Assigned Counsel Regime to ensure its effectiveness and efficiency in achieving its objectives, namely, the effective representation and defence of suspects and accused persons.³⁹

43. Once a Defence Team is put in place by the Principal Defender, he can no longer, and should not interfere in the conduct of the Defence of the Accused which henceforth is exclusively under the control of the Defence Team he has put in place.

44. It is, likewise, our view that nothing in Rule 45 empowers the Defence Office to interpose itself between an accused person and his assigned Counsel in terms of ordinarily protecting or defending the latter's rights to a fair trial, which will ordinarily include any matter related to the Accused's detention, this being an integral part of the trial process, except in instances warranted by the invocation of Rule 45(D).

VI. DEFENCE COUNSEL APPOINTED AS COURT APPOINTED COUNSEL

45. The Chamber will now address an issue of some collateral interest which relates to Counsel's ethical obligation under his national system. The Chamber does not dispute the cogency of the position taken by Counsel that in the circumstances that have given rise to the present Application, he would under his own national jurisdiction, have an ethical obligation to withdraw from the case. However, on this issue, the Chamber observes that, as a matter of law, the relevant Code of Conduct of Counsel's national Bar Association is not applicable in this Court, as an international criminal tribunal, and that under Article 3(B) of the Special Court's Code of Conduct, it is stipulated that:

³⁸ See also Transcripts, 28 March 2006, p. 37-38.

³⁹ *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-AR73, Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, para 84. The Appeals Chamber, in discussing the extent of the delegation of power by the Registrar to the Principal Defender, held in particular that: "The delegation given by the Registrar to the Defence Office is therefore limited to certain aspects of the Registrar's responsibility for ensuring the rights of the accused under the Statute, namely the administrative aspect of the task, which includes notably, assignment, payment, withdrawal and replacement of Counsel."

“in the event of any inconsistency between this Code and any other codes of practice and ethics governing Counsel, the terms of this Code shall prevail in respect of Counsel’s conduct before the Special Court”.⁴⁰

46. Besides, we are of the opinion that Professor O’Shea has all along not acted unprofessionally and that he has always acted in the supreme interest of his client in the conduct of the proceedings in this case. For this reason, therefore, this Chamber now considers it necessary and in the overall interests of justice to appoint Professor Andreas O’Shea and Mr. John Cammegh, Court Appointed Counsel for the Third Accused. The presence of Court Appointed Counsel is, indeed, a common feature in the trial of *Prosecutor v. Norman, Fofana and Kodewa*, where, it has to be noted, Defence Counsel for all of the Accused were appointed as such after the Accused refused to appear at trial. This status has been maintained after the Accused resumed attending court proceedings, also in consideration of the advanced stage of the proceedings.⁴¹

47. Further to such appointment by the Court, the obligations arising under the normal Counsel-Accused relationship must now be interpreted, *mutatis mutandis*, to give effect to the order appointing Court Appointed Counsel. Accordingly, the specific duties of Court Appointed Counsel will be set forth in the disposition of this Decision.⁴²

⁴⁰ See also *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, 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, 20 May 2005, paras 43-50. See also *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumwa*, Case No. ICTR-98-41-T, Decision on Maitre Paul Skolnik’s Application for Reconsideration of the Chamber’s Decision to Instruct the Registrar to Assign him as Lead Counsel for Gratien Kabiligi, 25 March 2005, para. 29; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel’s Motion for Withdrawal, 7 December 2004, para. 15.

⁴¹ See *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana and the Third Accused Allieu Kondewa at the Trial Proceedings, 1 October 2004; *Id.*, Decision on Fofana Motion for Adjustment of Status of Counsel, 9 December 2005; *id.*, Order on the Appointment of Additional Counsel for the Norman Defence Team, 8 December 2005. Due to the circumstances of the case and the advanced stage of the trial proceeding concerning the Third Accused, representation through Court Appointed Counsel can ensure that his rights to a fair and expeditious hearing are ensured. As found in the *Blagojevic* case: “One aspect of the right to a fair trial is the right to an expeditious trial. Immediately before or at any time after the commencement of trial proceedings, only the most exceptional motions for withdrawal of counsel will be entertained, as any replacement of counsel will have an effect on the accused’s right to be tried expeditiously.” See *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 119. See also, more generally, *Prosecutor v. Ngeze*, Case No. ICTR-97-27-I, Decision on the Accused’s Request for Withdrawal of his Counsel, 29 March 2001.

⁴² See also *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Consequential Order on the Role of Court Appointed Counsel, 1 October 2004.





VII. CONCLUSIONS

48. In totality, therefore, based on our findings in paragraphs 29-44 we hold that the Application by Counsel for the Third Accused is legally unsustainable on the grounds that to accede to Counsel's request at this advanced stage would undermine the integrity and expeditiousness of the trial proceeding in this case.

FOR THE ABOVE REASONS, THE CHAMBER

REITERATES its "Decision on Application by Counsel for the Third Accused to Withdraw from the Case" of the 5th of April, 2006;

HEREBY DISMISSES the Application to Withdraw;

APPOINTS the Defence Counsel for the Third Accused, namely Andreas O'Shea and John Cammegh, to represent and defend him in the capacity of Court Appointed Counsel; and

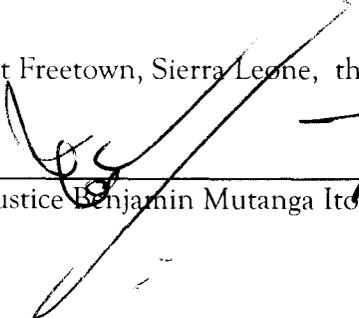
ORDERS that Court Appointed Counsel shall, in doing so, perform these specific duties:

- a. represent the Accused by investigating and preparing for the testimony of Prosecution witnesses and cross-examining them;
- b. prepare for and examine those witnesses Court Assigned Counsel deem it appropriate to call for his defence;
- c. make all submissions on fact and law that they deem it appropriate to make in the form of oral and written motions before the court;
- d. seek from the Trial Chamber such orders as they consider necessary to enable them to present the Accused's case properly, including the issuance of subpoenas;

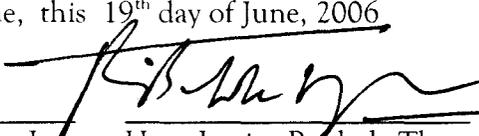
e. discuss with the Accused the conduct of the case, endeavour to obtain his instructions thereon and take account of views expressed by the Accused, while retaining the right to determine what course to follow; and

f. act throughout in the best interests of the Accused;

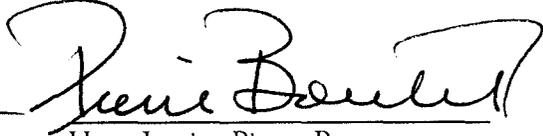
Done at Freetown, Sierra Leone, this 19th day of June, 2006



Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Bankole Thompson
Presiding Judge
Trial Chamber



Hon. Justice Pierre Boutet

