**SPECIAL COURT FOR SIERRA LEONE**

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Ayoola, Presiding Judge
Judge A. Rajan N. Fernando
Judge Winter
Judge Gelaga King

Registrar: Mr. Robin Vincent

Date filed: 22 September 2004

**THE PROSECUTOR**

**Against**

**ISSA HASSAN SESAY**

**MORRIS KALLON**

**AUGUSTINE GBAO**

**Case No. SCSL – 2004 – 15 – T**

---

# PROSECUTION SUBMISSIONS TO GBAO'S "APPEAL FROM DECISION ON WITHDRAWAL OF COUNSEL OF 6 JULY 2004"

---

**Office of the Prosecutor**
Luc Côté
Lesley Taylor
Christopher Dunn
Lorenzo Pugliatti
Marie-Hélène Proulx

**Defence Counsel for Issa Sesay**
Wayne Jordash

**Defence Counsel for Morris Kallon**
Raymond Brown

**Defence Counsel for Augustine Gbao**
Andreas O'Shea
John Cammegh

**SPECIAL COURT FOR SIERRA LEONE**

OFFICE OF THE PROSECUTOR

FREETOWN-SIERRA LEONE

**THE PROSECUTOR**

**Against**

**ISSA HASSAN SESAY**

**MORRIS KALLON**

**AUGUSTINE GBAO**

**Case No. SCSL – 2004 – 15 – T**

# PROSECUTION SUBMISSIONS TO GBAO'S "APPEAL FROM DECISION ON WITHDRAWAL OF COUNSEL OF 6 JULY 2004"

The Prosecution files these submissions in response to the Defence "Appeal from Decision on Withdrawal of Counsel of 6 July 2004". The Prosecution does not oppose the Defence Appeal, but hereby submits a response to some of the arguments of the Accused Gbao, which reach slightly different conclusions, motivated by its concern for the integrity and fairness of the proceedings.

## I. BACKGROUND

1. On 6 July 2004, during the course of the proceedings, Augustine Gbao ('the Accused') was allowed to make a statement before the Trial Chamber, pursuant to Rule 84 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the 'Rules'). As his statement was not considered to conform to the Rules, the Trial Chamber interrupted the Accused. Later, the Accused was once again allowed to make representations to the Court, but this time, under Article 17 of the Statute of the Special Court for Sierra Leone (the 'Statute'). These were to the effect that he did not recognise the Court and "wanted to

withdraw his defence counsel who he did not want to represent him any longer."[1] (the 'Accused's Application')

2. Following that statement, the Court attempted to adjourn, but counsel for the Prosecution stood up and asked for clarification on the nature of the Accused's Application. Learned Judge Itoe replied: "He [the Accused] says he does not recognise this Court, and he is asking – he doesn't want anybody to represent him here any further because he doesn't recognise the Court."[2] No further discussion took place on the Accused's Application, leaving it unclear as whether the Accused's Application was in fact a request for self-representation. Noticeably, Defence counsel for the Accused did not ask to be heard on the matter. The Court then recessed to examine the Application.
3. Upon resumption of the session on 6 July 2004, the Trial Chamber issued its "Decision on Application to Withdraw Counsel" (the 'Decision'), in which it ordered the Accused's counsel to continue representing the Accused and to conduct the case to the finality of the proceedings.
4. On 9 July 2004, the Defence filed an "Application for Leave to Appeal Gbao – Decision on Application to Withdraw Counsel", (the 'Defence Application') in which it requested that the Trial Chamber grant leave to appeal from the Decision pursuant to Rule 73(B) of the Rules.
5. On 19 July 2004, the Prosecution filed a document entitled "Prosecution Response to Defence Application for Leave to Appeal Gbao – Decision on Application to Withdraw Counsel" (the 'Prosecution Response'), submitting that the Defence Application merited careful consideration.
6. On 21 July 2004, the Defence filed a "Note on Pleadings Re Leave to Appeal Gbao – Decision on Application to Withdraw Counsel" to inform the Trial Chamber that they would not file a reply to the Prosecution Response.
7. On 23 July 2004, the Accused Gbao filed, through the Principal Defender, a document in which, inter alia, he requested that the only person to speak on his behalf to the Court be the Principal Defender and that no counsel represent him before the Court (the 'Accused's

[1] *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, "Gbao – Decision on Application to Withdraw Counsel", 6 July 2004, para. 7.
[2] *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, Transcript of 6 July 2004, p. 36, lines 12-13.

Instructions'). In addition, in his document, the Accused vigorously challenged the jurisdiction of the Special Court.

8. On 4 August 2004, the Trial Chamber issued its majority "Decision on Application for Leave to Appeal Gbao – Decision on Application to Withdraw Counsel" (the 'Decision on Leave to Appeal'), granting the Defence leave to file an interlocutory appeal against the Decision.
9. On 7 September 2004, the Trial Chamber issued the "Dissenting Opinion of Judge Thompson on Decision on Application for Leave to Appeal Gbao – Application to Withdraw Counsel".
10. On 1 September 2004, the Defence filed a document entitled "Notice and Grounds of Appeal of Decision on Withdrawal of Counsel of 6 July 2004".
11. On 15 September 2004, the Defence filed its "Appeal from Decision on Withdrawal of Counsel of 6 July 2004" (the 'Defence Appeal'), requesting the Appeals Chamber to grant the Accused the right to represent himself and to order the Trial Chamber to consider alternative measures.

## II. ARGUMENTS FOR WHICH THE APPEAL SHOULD BE CONSIDERED

*General Observations*

12. The Prosecution submits that the Accused's specific request remains unclear despite existing discussions and decisions. Although the Accused's Application is capable of being characterised as one for self-representation and the pleadings for leave to appeal treated it as such, the Accused's statements and submissions to the Chamber are at best ambiguous. For instance, during his first statement to the Trial Chamber on 6 July 2004, the Accused did not assert his right to self-representation at all, instead focusing exclusively on the alleged political nature of the Special Court and his refusal to recognise the Court in light of the Lome Accords.[3] Later during the same session, the Accused did

[3] *Id.*, p. 8, lines 33-34 ("Your Honour, the whole world, even the United Nations, knew that the conflict in Sierra Leone was concluded on the basis of no winner no loser..."); *id.*, p. 10, lines 4-5 (So, I don't think that I can recognise the Special Court. *[Microphone not activated]* let them try me -- let them take me anywhere. . . )

state, "I stand to defend myself . . . ."[4] However, even this relatively clear statement was later confused by the Accused's written submission to the Chamber on 23 July 2004, wherein he once again failed to mention any intention to represent himself or assert his right to self-representation.[5] Instead, the Accused repeatedly challenged both the jurisdiction and legitimacy of the Special Court, and informed the Chamber that "no legal counsel should appear for me in my absence. . . ."[6] This continuing ambiguity motivated the Prosecution's support for the Defence Application.

13. The confusion and disagreement regarding the nature of the Accused's Application is reflected in the Trial Chamber's Decision on Leave to Appeal. In its decision, the majority of the Chamber expressly acknowledged that the Accused did not actually make "a request to represent himself in the trial proceedings before the Court."[7] Nevertheless, the majority held that the Accused's statements might reveal "an implied intention to defend himself"[8], and, given the importance of the right to self-representation, granted the Accused leave to appeal the Chamber's 6 July 2004 Decision. In dissent, Judge Thompson vigorously disagreed with this characterisation, noting that "[a]t no time did learned Counsel for the Third Accused, on behalf of his client, or the Third Accused himself in person, expressly or impliedly, seek leave of this Chamber to be granted the right to self-representation."[9]

14. For the foregoing reasons, the Prosecution submits that the best course of action is to send the matter back to the Trial Chamber for further inquiry as to the nature of the Accused's Application and appropriate disposition.

---

[4] *Id.*, p. 35, line 24.
[5] See, the Accused's Instructions. It is worth noting the Trial Chamber made the same observation in its Decision on Leave to Appeal, stating that the Accused "does not, at any point in the letter, state that he wishes to represent himself in the trial proceedings before the Court." *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, "Decision on Application for Leave to Appeal Gbao – Decision on Application to Withdraw Counsel", 4 August 2004, para. 33.
[6] The Accused's Instructions.
[7] *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, "Decision on Application for Leave to Appeal Gbao – Decision on Application to Withdraw Counsel", 4 August 2004, para. 49.
[8] *Id.*, para. 56.
[9] *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, "Dissenting Opinion of Judge Thomspon on Decision on Application for Leave to Appeal Gbao – Application to Withdraw Counsel", 7 September 2004, para. 3.

*Ground 1: Application of the incorrect rule and test*

15. The Prosecution agrees with the Defence that the Trial Chamber erred in applying Rule 45(E) and addressing the issue before it as one of withdrawal of counsel. In its Decision, the Trial Chamber held that "the ground that Mr. Gbao has advanced, that is, the non-recognition of the legitimacy of the Special Court, cannot constitute 'exceptional circumstances' under Rule 45(E) that are required for allowing Counsel to withdraw."[10] However, a literal reading of Rule 45(E) suggests that it only applies when *counsel* for the Accused makes an application to withdraw from the proceedings, further stipulating that the Chamber shall only approve such applications "in the most exceptional circumstances."[11] The Rule does not apply and provides no guidance where the *Accused* makes an application to dispense with his or her legal representation and/or instructs his counsel not to appear on his behalf before the Chamber.

16. Here, Defence counsel made no application to withdraw from representation. On the contrary, it was the Accused who indicated to the Chamber that he did not wish to be represented by counsel and who refused to recognise the Special Court. In light of these facts, Rule 45(E), and the "most exceptional circumstances" test that it annunciates, is inapplicable to the Accused's Application, the precise nature of which remains unclear.

17. Furthermore, the Prosecution submits, in agreement with the Defence, that the Trial Chamber erred in relying on and applying the holding of *Prosecutor v. Barayagwiza*.[12] Although the factual circumstances of the *Barayagwiza* case provide potential parallels to the situation at hand, it is important to note that *Defence* counsel in that case made a formal application to withdraw from the proceedings, not the Accused, thereby

---

[10] *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, "Decision on Application to Withdraw Counsel", 6 July 2004, para. 13.

[11] Rule 45(E) reads, in full:

> 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. (emphasis added)

[12] *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T "Decision on Defence Counsel motion to Withdraw", 2 November 2000 (hereinafter 'Barayagwiza').

implicating the ICTR's analogous rule regarding withdrawal of counsel, Rule 45(I).[13] The fact the Defence counsel in that case made this application pursuant to instructions from the Accused not to appear on his behalf is irrelevant, since it is Defence counsel's application that distinguishes *Barayagwiza* and bars the application of Rule 45(E) in the instant case.

18. The Prosecution also agrees with the Defence that the standard applied to the situation where an Accused attempts to dispense with legal representation must be different than the test applied to the situation where counsel petitions to withdraw from the proceedings. In the latter case, counsel's ability to withdraw must be strictly supervised by the Chamber because of the counsel's professional obligation to represent the Accused as well as the harm such withdrawal might cause to the Accused's right to a fair and expeditious trial. In contrast, the Accused owes no congruent obligation to his or her counsel, and even possesses a qualified right to self-representation. While the precise nature of the Accused's application remains confused, it is clear that the application of the "most exceptional circumstances" test is inapplicable by virtue of the very source of the application.

*Ground 2: Failure to take into account right not to have counsel and/or the right to defend oneself*

19. The Prosecution is in agreement with the Defence in its submission that the Trial Chamber erred in not taking into account the right not to have counsel and/or the right to defend oneself. Submitting that Rule 45(E) was not the applicable Rule, the Prosecution concurs that the actual issue before the Court is not a matter of withdrawal of counsel, but rather is one of the status and nature of the right to legal representation.
20. However, the Prosecution cannot support the argument posited by the Defence in paragraph 15 of its Appeal that the right to self-representation equates to a right not to have counsel, and thus self-representation can include non-appearance and non-

[13] Rule 45(I) states in relevant part that "[c]ounsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances."

participation. The Prosecution firmly submits that the latter is not a natural consequence of the former.

21. The Defence writes: "[s]elf-representation, it is submitted, in itself refers to nothing more than the opposite of having legal representation. It is effectively a right to choose between two alternatives, representation or no representation."[14]

22. The Prosecution submits that this interpretation of the right to legal representation is too simplistic and that there are in fact three distinct scenarios:

    a) having a lawyer,

    b) representing oneself, and

    c) taking no part.

    The Accused has been thoroughly ambiguous as to which of these three scenarios he seeks – he has not sought to clarify to what extent he would like to be represented, but seeks only to make an ideological point of non-recognition of the legitimacy of the Special Court. Notably, the letter addressed to the Trial Chamber in which the Accused stated his refusal to recognise the authority of the Special Court without also making any statement which could be interpreted as a wish for self-representation was made subsequent to the pleadings concerning the Application for Leave to Appeal had closed.

23. On 6 July 2004 when the Accused informed the Court that he wished to dispense with his lawyers, counsel for the Prosecution sought clarification as to whether the Accused sought to replace his lawyer, have no lawyer or to represent himself. No clarification on this question has been asked of the Accused nor received.

24. In the *Barayagwiza*[15] decision, where Defence counsel sought to withdraw from the case because the Accused was refusing to instruct them, the Trial Chamber has held that: "[i]n the present case, Mr Barayagwiza is actually boycotting the United Nations Tribunal. He has chosen both to be absent in the trial and to give no instructions as to how his legal representation should proceed in the trial or as to the specifics of his strategy. In such a situation, his lawyers cannot simply abide with his 'instruction' not to defend him. Such instructions, in the opinion of the Chamber, should rather be seen as an attempt to obstruct judicial proceedings. In such a situation, it cannot reasonably be argued that

---

[14] *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL 2004-15-T, "Appeal from Decision on Withdrawal of Counsel of 6 July 2004", 15 September 2004, para. 15.

[15] *Barayagwiza*, Case No. ICTR-97-19-T "Decision on Defence Counsel motion to Withdraw", 2 November 2000.

Counsel is under an obligation to follow them, and that not do so would constitute grounds for withdrawal."[16]

25. In a separate and concurring opinion, Judge Gunawardana emphasised how protests by an accused must not be allowed to affect the due administration of justice: "It is apparent that if this motion were to be granted it would affect the due administration of justice. Mr Barayagwiza has instructed his assigned Counsel not to represent him, and has decided not to attend his trial. These steps have been taken by the accused with a view to obstructing the proceedings and as a form of protest. However, it is important to note that he is not dissatisfied with the conduct or the competence of his Counsel and, in fact, has full confidence in them. Further, he has not asserted his right to self-representation. In such a situation, it is imperative that the Tribunal should act to ensure that justice is done. In the US Supreme Court case of *Faretta v. California*, 422 US 806 (1975), Chief Justice Burger has pointed out that, ' . . . the prosecution is more than an ordinary litigant, and the trial judge is not simply an automation who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial.'"

26. It is for the above reasons that the Prosecution respectfully submits that while agreeing that the right not to have counsel and/or the right to defend oneself should have been taken into consideration by the Trial Chamber, in the interests of safeguarding the effective and fair administration of justice, the status and nature of the Accused's representation needs to be fully clarified.

*Ground 3: The Trial Chamber should have considered alternative measures*

27. The Defence argues, in paragraph 18 of the Defence Appeal, that "[m]easures for the protection of a fair trial and the integrity of the proceedings should only interfere with the rights to choose whether to have legal assistance and/or to self-representation to the extent necessary to protect the fairness of the trial and the integrity of the proceedings, but in no case should deny the accused his freedom to dispense with representation." In the

[16] *Id.*, para. 24.

Defence view, it would have been more acceptable to appoint a counsel to act on behalf of the Court, than to prevent the Accused from withdrawing his counsel.

28. The Defence Appeal then lists a number of 'unnecessary and potentially damaging consequences' of the imposition of counsel on an Accused, which, according to the Defence, can be avoided by appointing a lawyer to act on behalf of the Court.

29. The Prosecution submits that had the Trial Chamber ruled that the Accused's Application was one of self-representation, it should have considered three possible alternative measures to the withdrawal of counsel, namely self-representation, the appointment of a stand-by counsel and the appointment of *amicus curiae*.

30. The Trial Chamber only briefly analysed the possibility of permitting the Accused to appear without legal representation. In paragraph 15 of the Decision, it was found that "the interests of justice would not be served by allowing Mr. Gbao to be unrepresented before this Court." Therefore, the Trial Chamber concluded that the Accused's counsel should continue to represent him until the end of the proceedings. The Prosecution submits that the Trial Chamber erred by drawing this conclusion without looking at the second and third possibilities.

31. The Trial Chamber, it is submitted, should have considered the possibility of appointing a stand-by counsel, as in the case of Samuel Hinga Norman. In its "Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court", the Trial Chamber stated that the "Accused has a right to self-representation, but that such a right, being qualified and not absolute, could, in the light of certain circumstances, be derogated should the interests of justice so dictate."[17] As a result, the Trial Chamber ruled that "the right of self-representation [...] can only be exercised with the assistance of Counsel".[18] In consequence, some of the former counsel of Hinga Norman were appointed as stand-by counsel, meaning that they are assisting the Accused in the conduct of his defence, thereby preserving both the integrity of the proceedings and the Accused's right to self-representation.

---

[17] *The Prosecutor* v. *Norman, Fofana, Kondewa*, Case No. SCSL-04-14-T, "Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court", 8 June 2004, para. 30.

[18] *Id.*, para. 32.

32. The Prosecution submits that the Trial Chamber should also have considered the appointment of *amicus curiae*, as the ICTY did in the Milosevic case. In its Order of 30 August 2001, Trial Chamber III of the ICTY, noting that the Accused was entitled to represent himself and had not appointed a counsel, decided that it was "desirable and in the interests of securing a fair trial that *amicus curiae* be appointed as permitted by the Rules of Procedure and Evidence, not to represent the accused but to assist in the proper determination of the case".[19] In the Milosevic case, the *amici curiae* do not coordinate their work with the Accused, due to Milosevic's refusal to collaborate, yet they help the Court to balance the competing interests and therefore to protect the fairness and integrity of the proceedings.
33. The Prosecution thus submits, in accordance with the Defence Appeal, that the failure of the Trial Chamber to consider alternative measures constituted an error. Should the Accused's Application be considered an application for self-representation, the alternative measures of appointing stand-by counsel or *amicus curiae* should be carefully taken into consideration.

*Ground 4: Failure to hear counsel for the Accused before ruling on the issue*

34. While Defence counsel failed to discharge his duty to ask to be heard on the matter, the Prosecution agrees with the Defence that the Trial Chamber would have benefited from the input of counsel for the Accused, as well as counsel for the co-Accused, prior to issuing its ruling. Not only did the Chamber's ruling personally affect Defence counsel but, until otherwise ordered, the Defence must also continue to represent the best interests of the Accused. As such, any ruling regarding the Accused's right to dispense with legal representation would have been greatly assisted by the input of his current legal representatives.
35. The Prosecution submits that the co-Accused also have a significant interest in the outcome of the Accused's application, as it has the potential to negatively impact their right to a fair and expeditious trial. As noted in the Trial Chamber's 8 June 2004 decision regarding the application of Mr. Norman for self-representation, the joint nature of the

[19] *The Prosecutor v. Milosevic*, Case No. IT-02-54, "Order inviting designation of amicus curiae", 30 August 2001.

trials and their inherent complexity demand that the Chamber consider the tension between granting an Accused's right to self-representation and the co-Accused's right to a fair trial.[20] In considering this tension, it would necessarily assist the Chamber to hear the opinion of counsel for the co-Accused.

36. Nevertheless, the Prosecution submits that Defence counsel, as well as counsel for the co-Accused, had an opportunity to be heard by the Trial Chamber prior to its adjournment. After the Accused completed his statement to the Chamber, the Chief of Prosecutions attempted to clarify the nature of the Accused's specific request, during which he had a brief exchange with the Bench. Nothing barred the Defence or counsel for the co-Accused from offering similar representations or opinions to the Chamber, and there is nothing in the transcripts indicating that the Defence attempted to present an argument to the Chamber after the Accused gave his statement. It is incumbent upon counsel to direct objections and arguments to the Bench whenever they deem it necessary.

*Ground 5: Imposition or dismissal of counsel not properly primarily within the judicial province*

37. The Prosecution contests the assertion of the Defence that the issue of appointment, assignment or dismissal of counsel of an accused is not in principle a matter within the judicial province, being first a matter within the discretion of the Accused.
38. While the Prosecution acknowledges that the Accused's right to choose his own representation is fundamental; it is not absolute. It is well established at the national, regional and international level that there may be circumstances where, in the interests of justice, a court would consider it necessary to limit this right, in order to safeguard the integrity of the proceedings at hand and ensure justice in its broadest sense is achieved.
39. In *Faretta v. California*[21] the US Supreme Court held that although self-representation by a defendant who is literate, competent and understanding was constitutionally protected, if that Defendant deliberately and purposefully sought to use that self-representation in a serious and obstructionist manner, it may be terminated. Thus, a court may appoint

[20] *The Prosecutor* v. *Norman, Fofana, Kondewa*, Case No. SCSL-04-14-T, "Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court", 8 June 2004, paras. 14, 26.
[21] *Faretta v. California*, 422 U.S. 806 (1975), 834-5.

standby counsel "even over objection by the accused"[22] in order to assist the accused and to be available to represent him in the event of any termination of the self-representation by the court.

40. In *Croissant v. Germany*[23] the European Court of Human Rights held that imposition of an additional defence counsel onto an accused already represented, with the intention of ensuring that the trial proceeded without interruptions or adjournments did correspond to a relevant and sufficient interest of justice, well justifying imposition of the defence counsel.[24]

41. The Court stated that the right to be defended by counsel of one's own choosing was not absolute and it was for the courts to decide whether the interests of justice require counsel being imposed. Acknowledging an accused's right to choose counsel, the Court stated: "Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed to them."[25] The Court accepted the argument of the Respondent that due to the length, size and complexity of the case, it was necessary to ensure such representation.[26]

42. In the *Seselj* case at the ICTY[27], the Trial Chamber discussed how the unique nature of international trials brought particular relevance to this concept: "The phrase 'in the interests of justice' potentially has a broad scope. It includes the right to a fair trial, which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy. In the context of the right to a fair trial, the length of the case, its size and complexity need to be taken into account. The complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence even of a legally qualified accused, especially where that accused is in detention without access to all the facilities he may need. Moreover, the Tribunal has a

---

[22] *Id.*
[23] European Court of Human Rights, No.62/1991/314/385, 25 September 1992.
[24] *Id.*, para. 28.
[25] *Id.*, para. 29.
[26] *Id.*, para. 28.
[27] *The Prosecutor v. Seselj*, Case No. IT-03-67-PT, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence", 9 May 2003.

legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions."[28]

43. In conclusion, the Prosecution submits that given the unique nature and complexity of the trials at the Special Court, and when taking into consideration well-established national, regional and international jurisprudence, that the appointment, assignment or dismissal of defence counsel can be brought firmly *within* the judicial province when the integrity of the judicial process requires protection. There is a balance that needs to be struck between the rights of the Accused and the interests of justice; and it is certainly within the judicial province to sustain a healthy balance. The interests of justice are most threatened when an accused is steadfastly refusing to participate in the judicial process in order to make a protest. As Chief Justice Berger stated in *Faretta*, "The system of criminal justice should not be available as an instrument of self-destruction."[29]

*Ground 6: The Trial Chamber erred in not considering the decision on self-representation in the Norman case*

44. The Defence submits that the "Trial Chamber erred in making an Order which provides for a solution to Mr Bao's request to represent himself which differs significantly from the Order made in response to Mr Hinga Norman's request to represent himself [...] without setting out its basis for distinguishing between the two situations."[30] The Defence argues that therefore, the Trial Chamber violated the principle of equality of the Accused provided for by Article 17(1) of the Statute.

45. As previously stated, there is some ambiguity as to whether original Application of the Accused was one for self-representation. Nevertheless, the Prosecution submits that the facts in the present case are close enough to those that led to the "Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court", and that in consequence, the Trial Chamber should have considered the said Decision in its analysis of the Accused's Application.

---

[28] *Id.*, para. 21.
[29] *Id.*
[30] Defence Appeal, para. 32.

46. If the Trial Chamber had duly inquired as to the nature of the Accused's Application, and had concluded that the matter was one of self-representation, it then should have applied the principles outlined in the Norman Decision. In consequence, the Prosecution submits that two consecutive errors were made by the Trial Chamber, namely: 1) not inquiring properly as to know if the nature of the Application was the same as in the Norman case; and if so, 2) not applying the principles of the Norman Decision.
47. On the contrary, if the Trial Chamber had concluded that the matter was not of a similar nature to the Norman case, it should then have distinguished between the two cases. The Prosecution submits that failure to do so constitutes an error of the Trial Chamber, as it potentially contradicted its own jurisprudence.

*Ground 7: Irrationality of requiring the impossible*

48. The Prosecution's primary interest in this matter is to ensure that the all of the Accused receive a fair and expeditious trial, and that any potential judgements secured by the Prosecution be insulated from further legal attack. Permitting the trial to proceed without resolving the precise nature of the Accused's Application or elaborating on the relationship between the Defence and the Accused may provide potential grounds of appeal.
49. The Prosecution submits that this ground does not warrant further argument or comment.

*Ground 8: Would be misleading to the public*

50. The Prosecution submits that this ground does not warrant argument or comment.

## III. CONCLUSION

51. The Prosecution submits that for the foregoing reasons, the Appeals Chamber should overturn the Trial Chamber's Decision of 6 July 2004 and send the matter back to the Trial Chamber for further inquiry as to the nature of the Accused's Application and appropriate disposition.

52. Alternatively, the Prosecution submits that should the Appeals Chamber be convinced that the original application was for self-representation, that it orders the Trial Chamber to consider alternative measures, such as the appointment of stand-by counsel, in order to protect the integrity, fairness and speediness of the proceedings.

Freetown, 22 September 2004

For the Prosecution,

Luc Côté

Lesley Taylor

## PROSECUTION INDEX OF AUTHORITIES

1. *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, "Gbao – Decision on Application to Withdraw Counsel", 6 July 2004.
2. *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, Transcript of 6 July 2004.
3. *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T, "Decision on Defence Counsel motion to Withdraw", 2 November 2000.
4. *The Prosecutor* v. *Norman, Fofana, Kondewa*, Case No. SCSL-04-14-T, "Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court", 8 June 2004.
5. *The Prosecutor v. Milosevic*, Case No. IT-02-54, "Order inviting designation of amicus curiae", 30 August 2001.
6. *Faretta v. California,* 422 U.S. 806 (1975). http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=422&invol=806.
7. *Croissant v. Germany*, European Court of Human Rights, No.62/1991/314/385, 25 September 1992. http://www.echr.coe.int/Hudoc.htm.
8. *The Prosecutor v. Seselj*, Case No. IT-03-67-PT, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence", 9 May 2003.
9. *The Prosecutor* v. *Milosevic*, Case No. IT-02-54-T, Transcript of 2 September 2004. http://www.un.org/icty/transe54/040902IT.htm.