

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the "Confidential Joint Defence Submissions on the Withdrawal of Counsel in the AFRC Case" by Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara ("Brima and Kamara Defence Motion"), filed on 5 May 2005 and served on the Prosecution in their un-redacted form on 6 May 2005;

FURTHER SEISED of the "Confidential, *ex parte* and under Seal Kanu-Defence Motion to inform the Trial Chamber on the Legal Position of the Defence in View of Contempt of Court Developments" on behalf of Santigie Borbor Kanu ("Kanu Defence Motion"), filed on 4 May 2005;

NOTING

- a) The "Prosecution Submissions in Response to Application by Defence Counsel to Withdraw from the Case" filed on 5 May 2005 ("Response");
- b) The "Principal Defender's Confidential *ex parte* Submission Regarding Issues Pertaining to Withdrawal of Counsel" filed on 5 May 2005 and served on the Prosecution in its un-redacted form on 6 May 2005;
- c) The oral submissions of the parties on 2, 3 and 6 of May 2005;
- d) The "Confidential Prosecution Submissions on Response to Defence Submissions Disclosed to the Prosecution in Their Unredacted Form Pursuant to Order Dated 6 May 2005" filed on 9 May 2005;

RECALLING

- a) The Trial Chamber's oral Order of 3 May 2005 directing the parties to file written applications by 5 May 2005;
- b) The Trial Chamber's written "Order to Show Cause and Scheduling Order" issued on 5 May 2005;
- c) The Trial Chamber's oral Order of 6 May 2005 directing the Defence to disclose certain documents to the Prosecution;

RECALLING FURTHER that the Trial Chamber handed down oral orders on 5 May 2005 due to the urgency and importance of this matter and indicated that a reasoned decision would follow in due course;

HEREBY DECIDES AS FOLLOWS.

I. SUBMISSIONS OF THE PARTIES

Kanu Defence Motion

1. The Defence for Kanu requests the Trial Chamber:
 - (a) To declare that the Defence be allowed to further represent their client under the conditions that the Defence team will continue to be assigned to the case, that the Defence team should not withdraw from the contract as signed with the Principal Defender of the Special Court, that the Defence team is authorized to attend trial, cross-examine Prosecution witnesses insofar as Counsel deems it to be in the interest of the case and position of the

Case No. SCSL-04-16-T

2.

20 May 2005




Accused depending on the contents of the particular witness statements given in court, and that the Defence team is authorized to continue to file motions on behalf of the Accused insofar as these motions are deemed to be in the interest of his case which is to be assessed by Counsel; and

(b) To issue any further declaration the Trial Chamber deems appropriate in view of the legal position of the Defence considering the present circumstances.

Brima and Kamara Defence Motion

2. The Lead Counsel for Brima and Kamara ("Lead Counsel") request the Trial Chamber:

- (a) To approve their withdrawal as Counsel for Brima and Kamara;
- (b) Not to order them to be made 'Court Appointed Counsel'; and
- (c) To make any other order it deems appropriate.

3. Lead Counsel rely on Rule 45 (E) of the Rules of Procedure and Evidence ("Rules") and on the Code of Practice of their Bar Association.

4. They argue that "there has been a significant amount of difficulty between Counsel in the case and the Accused persons"¹ as a result of (a) an unanswered complaint by the Defence for Brima to the Principal Defender and the Registry asking for an inquiry into an alleged assault on its investigator; (b) a complaint by Witness TFI-023 supported by an oral application by the Prosecution concerning alleged threats to the Witness; and (c) the Trial Chamber's and the Registrar's reactions to the latter complaint (whereby a Defence investigator and the wives of the Accused were charged with contempt of court).

5. Lead Counsel submit that they are likely to be called as witnesses in the contempt proceedings currently pending before Trial Chamber I, and that this fact "did not assist in strengthening the relationship between the Accused and their Legal Representatives"².

6. They further submit that a potential Defence Witness and a clerk to Counsel for the co-Accused Kanu have been harassed by Military Police. In addition, they claim "that there is a significant threat of danger to their persons or family in the conduct of the Defence in this case". According to them, "Counsel has been informed 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 thereof they and their families will be called upon to answer for their decision to accept Special Court Appointment"³. Lead Counsel say that these threats were communicated to both Counsel from different sources and that "[d]ue to the nature of these threats Counsel do not wish to reveal the said sources. Accordingly, Counsel are extremely concerned for their personal safety and feel it would be highly imprudent to place them in such a position of vulnerability." Reference is also made to other threats to one of the Counsel, in the form of an overseas telephone

¹ Brima and Kamara Defence Motion, 5 May 2005, para. 9.
² Brima and Kamara Defence Motion, 5 May 2005, para. 10.
³ Brima and Kamara Defence Motion, 5 May 2005, para. 15.

call which implied danger to his family living overseas, and local telephone calls threatening him personally.

7. Lead Counsel, whose national Bar is the Bar of England and Wales, argue, in addition, that the withdrawal of instructions by their clients makes it impossible to carry out their duties under paragraphs 12.1 and 12.2(g) of the Bar Council Guidance on the Responsibilities of Defence Counsel which requires them “[to] endeavour to protect [their] client from conviction except by a competent tribunal and upon legally admissible evidence sufficient to support a conviction for the offence charged”, and “[to] ensure that [Counsel] has sufficient instructions for the purpose of deciding which prosecution witnesses should be cross-examined.”⁴

8. Lead Counsel conclude their argument by stating as follows: “Accordingly, in the light of lack of instructions, harassment and threats articulated herein, the Defence submits that there is sufficient cause for the Trial Chamber to approve the withdrawal of Counsel.”

Prosecution Submissions of 5 May 2005

9. The Prosecution submits that Defence Counsel should not be permitted to withdraw and should be directed to represent the Accused pursuant to Rule 60 (B).

10. The Prosecution further submits that the Accused have instructed their Counsel to absent themselves from Court and to file certain documents and that therefore Defence Counsel is acting upon instructions. These became operational when the Trial Chamber dismissed a Defence application for an adjournment to await the completion of contempt proceedings which are currently pending before Trial Chamber I. According to the Prosecution, the instructions “are designed to effect a boycott on the trial and obstruct the course of justice. The Prosecution concludes that the current situation does not fall within the ambit of “most exceptional circumstances” in the sense of Rule 45 (E), which it deems to be applicable in the present case.

11. The Prosecution further submits that the Code of Conduct of the Bar of England and Wales does not prevent Counsel from representing an Accused if directed by a Court to do so.

Principal Defender’s Submissions

12. The Principal Defender notes that she is not yet able to determine whether the possibility of being called as a witness in the contempt proceedings currently pending before Trial Chamber I might lead to exceptional circumstances warranting the withdrawal of Counsel for Brima. However, she does accept that this may be an exceptional circumstance for withdrawal in certain situations, although less drastic measures may be available. In the case of Lead Counsel for Kamara, she asserts that he will not be called as a witness in the contempt proceedings and so there is no basis for his withdrawal.

⁴ Brima and Kamara Defence Motion, 5 May 2005, para. 16.

Handwritten signature and initials, possibly 'JD' or similar, located at the bottom right of the page.

13. The Principal Defender submits that the refusal of an accused person to give counsel instructions does not constitute an exceptional circumstance justifying the withdrawal of counsel. She further submits that the Bar Council provisions cited by the Defence do not disallow Counsel to continue to represent the Accused.

14. The Principal Defender encourages the Trial Chamber to avoid a replacement of Counsel at this advanced stage of the proceedings, but cautions that an appointment of Counsel by the Court against the will of the Accused could irreparably damage the relationship between Counsel and the Accused.

15. On the other hand, she "wholeheartedly accepts" that the security concerns of Counsel for Brima and Counsel for Kamara may constitute exceptional circumstances meriting their withdrawal. However, she avers that both Counsel "believe that their physical safety is less likely to be in jeopardy if they are not appearing in Court as 'Assigned Counsel' or 'Court Appointed Counsel'"⁵, but rather as 'Amicus Counsel'. According to the Principal Defender, this modification in the status of Counsel could be based on Rules 54 and 60, and Art. 10 of the Directive on Assignment of Counsel.

16. The Principal Defender therefore requests the Trial Chamber to allow Counsel for Brima and for Kamara, and all of their team members, if they so choose, to be temporarily re-designated from 'Assigned Counsel' to 'Amicus Counsel', until such time as they believe it is safe and effective to return their designation to Assigned Counsel.

Prosecution Submissions of 9 May 2005

17. The Prosecution concedes that "threats made to any Counsel appearing before the Special Court are a matter to be taken extremely seriously". It suggests that the threats against the two Defence Counsel should be investigated by the Special Court's Security Section with a view to responding to the threats by appropriate means, which could include close protection.

18. However, the Prosecution disputes that the physical security of Counsel depends on the terminology used to describe their appointment. It suggests that the distinction between assigned and Court-appointed Counsel on the one hand and some other designation, such as "Amicus Counsel", on the other, is likely to be of little moment to those who engage in the criminal action of threatening Counsel.

19. The Prosecution submits that the designation and duties of 'Court Appointed Counsel' guarantee the Article 17 rights of the accused and that there is no reason to depart from the established practice of the Special Court to establish a new species of Counsel called "Amicus Counsel".

20. The Prosecution contends that the risk of a breakdown in the lawyer-client relationship following the imposition of 'Court Appointed Counsel' on an accused is merely speculative.

⁵ Principle Defender's Submission of 5 May 2005, para. 11.



21. The Prosecution reiterates its position that nothing in the Written Standards for the Conduct of Professional Work of the Bar of England and Wales prevents a member of that Bar from carrying out the duties of 'Court Appointed Counsel'.

II. DELIBERATIONS

1. Note on Procedure and the Public Nature of this Decision

22. All submissions filed by the Parties and the Principle Defender were marked as confidential, i.e. that they should not be disclosed to the public. We note and put emphasis on Rule 78 providing that "[a]ll proceedings before a Trial Chamber, other than deliberation of the Chamber, shall be held in public, unless otherwise provided." We note that Defence Counsel do not provide reasons for such confidentiality. We agree with Hon. Justice Bouter stating that "[...] all documents filed before the Special Court should be public, as a matter of general principle, unless a cognant reason is offered to the contrary."⁶ Nevertheless, this decision does not reveal any of the specifics we assume should be kept confidential, but only refers to them in a broader sense.

2. Procedural Background

23. All three Accused have chosen not to attend the proceedings. On 10 March 2005, a protected witness told the Trial Chamber that she had been threatened by some women in the Special Court Complex. Other information was given to the Trial Chamber by the Prosecution, whereupon the Trial Chamber made a direction to the Registrar under Rule 77(C)(iii) to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there were sufficient grounds for instigating contempt proceedings. The subjects of the investigation were to be five persons, an investigator with the Brima Defence team and four women, three of whom are the wives of the Accused and one a friend. An interim order was made suspending the investigator and prohibiting the four women from attending the public gallery of the Court. The case was adjourned until 14 March 2005.

24. On 14 March 2005 the Principal Defender's Office informed the Trial Chamber that another investigator was available as a replacement but was not accepted by the Brima Defence Team who stated that their client insisted on the services of the investigator who had been suspended. The Trial Chamber granted another adjournment until 5 April 2005 but ordered that the case must proceed on that date.⁷

25. On 5 April 2005 none of the three Accused came to Court. They wanted to see the independent counsel's report to the Trial Chamber, but this had not been permitted. Defence counsel tendered a letter written to them by the Accused dated 4 April 2005 explaining their absence as follows:

⁶ *The Prosecutor v. Issan H. Sesay et al*, Case No. SCSL04-15-PT, Decision on the Motion by Morris Kallon for Bail, 23 February 2004, para. 19.

⁷ Transcript 14 March 2005, page 6, line 16-19.

"Dear All assigned Counsel

RE: Independent Investigator Report in the Alleged Witness Protection Breach

We the Undermentioned which Comprised all accused person in the SLA/AFRC trial hereby inform you that the abovementioned report is of paramount concern to our families and ourselves, as it is an alleged threat on the liberty of our wives who are presently the respective head of our various household.

Being that we have not heard anything from you or the registry, it leave us with no alternative, but to refuse to go to Court until we are informed about it in order to deside on our next step, because we consider our wives, investigators and ourselves to be one always.

Faithfully always-

Brima

Kamara

Khanu"

26. On 26 April 2005 Counsel for Kamara read to the Court another letter from all three Accused. It was dated 24 April 2005 and was addressed to the AFRC Defence Counsel, with copies to the Judges of Trial Chamber II, the Registrar, the Principal Defender, and reads as follows:

"Dear Sir/Madam.

This letter is not direct to be disrespectful to the Court or the judges. We have being detained unlawfully since 10th. March, 29 May and 17 September, 2003 respectively, and trial start 7th. March 2005.

To help us go through the long trial and being locked-up is the presence of families in jail, and at court. In march 2005, the court made a decision to denied us our basic human rights and our constitutional rights not to see our families, and to have an investigator to help us build our defence.

We have tried to deal with the decision of the Court in our own ways. We have reach braking point and cannot continue anymore with all our human rights being taken from us. We do see how we could continue without the love of our families.

We would rather not come and suffer twice over by not seeing our families when we are in Court with the pressure all that bring. We have spoken to our families and told them we cannot go on any longer. It is because of that we are resufing(sic) to attend the court.

Yours without bitterness

Brima

Kamara

Khanu"

27. The Accused again did not come to Court on 29 April 2005. On that occasion, Counsel for Kamara told the Trial Chamber that the Accused had a number of complaints, such as, that they had formed the view that their case was not receiving due consideration, that a decision had already been reached as to their guilt, that there had been a systematic abuse of their rights, including the right to a fair trial, that they had not been able to see their wives in the public gallery, and that they had not had the proper service of an investigator.

28. The Accused were again absent from Court on 2 May 2005. Counsel read to the Trial Chamber the following letter from the three Accused:

"02th.May 2005

ALL AFRC DEFENCE COUNSEL

We the AFRC Detainees refuse going to court until the contempt matter involving our wives and our investigator (Brima Samura) is resolve.

If this matter is not resolved our instructed counsel are not to go to Court, we only give our Counsel limited instructions to and file certain motions to the Appeals Chamber.

Yours faithfully

Brima

Kamara

Khanu"

29. The three Accused did not come to Court on 3 May 2005, and Counsel for Brima, Counsel for Kamara, and Co-counsel for Kanu all sought leave to withdraw from the case. The Trial Chamber ordered the filing of a formal motion by 5 May 2005. Lead Counsel for Brima and Kamara subsequently filed a motion seeking the Trial Chamber's permission to withdraw from the case, but Counsel for Kanu requested, by motion, to be allowed to continue to represent their client.

3. Kanu Defence Motion

30. The Defence for Kanu has clarified its position by confirming that it will continue to represent the Accused. It is not necessary for the Trial Chamber to make any specific orders in this regard.

4. Brima and Kamara Defence Motion

31. The application for the Trial Chamber to approve the withdrawal of Lead Counsel is governed by Rule 45 (E), which states:

45 (E) 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.

32. Rule 45(E) covers a different situation than Rule 44(D). Rule 44(D) provides:

(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.

Rule 44(D) provides for a request by the Accused to withdraw his Counsel if he is not satisfied with Counsel's services. Unlike Rule 45(E) subparagraph (D) requires the accused to demonstrate

“exceptional circumstances” and good cause, compared to the “most exceptional circumstances” required in subparagraph (E). Thus there is a higher threshold where a Defence Counsel applies to withdraw from the case than in a case where an Accused requests a substitution of Counsel.

33. The wording of Rule 45(E) makes it clear that there is an obligation on Lead Counsel to “represent the accused and conduct the case to finality” and that “the most exceptional circumstances” would need to be established in order to allow them to withdraw from the case. Nevertheless, while the Rule aims to limit the instances in which Counsel should be allowed to withdraw, it does recognise the possibility that circumstances may exist - albeit most exceptional - which would warrant the Trial Chamber permitting Counsel to withdraw.

Consideration of “The Most Exceptional Circumstances”

Withdrawal of Instructions

34. Lead Counsel allude to “a significant amount of difficulty between Counsel in the case and the Accused persons”. This difficulty arises from a number of factors, by far the most serious of which is the problem of obtaining instructions from the Accused. Lead Counsel argue that “the withdrawal of instructions from all 3 accused persons makes it impossible to carry out [their] duty”.⁸ We accept that Lead Counsel are no longer receiving instructions from the Accused, other than instructions not to go to Court and to file certain documents. However, in our view, it is well settled in the jurisprudence of the *ad hoc* Tribunals, that lack of instructions does not constitute “most exceptional circumstances” under Rule 45 (E) warranting the withdrawal of Counsel.

35. In the case of *The Prosecutor v. Barayagwiza* the ICTR found as follows:

As the Chamber observed in its decision of 25 October 2000, Mr Barayagwiza does not lack confidence in his two lawyers. Neither does he argue that they are incompetent. The core of his argument is that he will not be given a fair trial. [...] This allegation is without foundation. [...]

The Chamber finds it obvious that Mr Barayagwiza's arguments do not constitute exceptional circumstances as required under Rule 45 (I). Rather, Mr Barayagwiza is merely boycotting the trial and obstructing the course of justice. As such, the Chamber shall not entertain the request of the accused for the withdrawal of his counsel, on this basis.

In 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 Counsel is under an obligation to follow them, and that not do so would constitute grounds for withdrawal.⁹

⁸ Brima and Kamara Defence Motion, 5 May 2005, 5 May 2005, para. 16.

⁹ *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 14 ff.

36. The ICTR, in the case of *The Prosecutor v. Bagosora*, observed that:

*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.*¹⁰

37. We also approve the statement of the ICTY in the case of *The Prosecutor v. Slobodan Milošević* that:

*[...] an accused cannot manufacture a reason for an Article 19(A) withdrawal by refusing to cooperate with his attorney.*¹¹

38. The jurisprudence of the international criminal tribunals is in compliance with international human rights standards as confirmed by *Croissant v. Germany*:

*It is for the Courts to decide whether the interests of justice require that the accused be defended by Counsel appointed by them. When appointing Counsel, the national courts must certainly have regard to the defendant's wishes – However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interest of justice.*¹²

39. In line with *Barayagwiza*, we find in the present case that, by withdrawing instructions from their counsel, the Accused are merely boycotting the trial and obstructing the course of justice. It is well established law 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).

Testimony of Counsel for Brima and Kamara in Proceedings before Trial Chamber I

40. Another factor claimed by Lead Counsel to be creating difficulties in the relationship with their clients is the possibility that they will be called as witnesses in the two contempt proceedings involving a Defence investigator and the wives of the Accused respectively. In this regard, we note the Principal Defender's claim that Counsel for Kamara will not be called as a witness in such proceedings. The first of the contempt proceedings was concluded before Trial Chamber I on 9 May 2005, and neither Counsel was required to give evidence. The second contempt proceedings will resume on 27 June 2005, and whether either Lead Counsel will be called to give evidence in that case remains to be seen. In any event, Lead Counsels' claim is that they are concerned "about the potential difficulties surrounding the position of Counsel who, on any view, are likely to be called as witnesses in the pending Contempt Proceedings. This singular fact did not assist in strengthening the relationship between the Accused and their Legal Representatives."

41. In addition, during the course of the proceedings, Lead Counsel foreshadowed a potential conflict of interest arising should they have to give evidence. However, what this conflict would be

¹⁰ *The Prosecutor v. Théoneste Bagosora et al*, 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.

¹¹ *The Prosecutor v. Slobodan Milošević*, Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, 7 February 2005, para. 10.

¹² *Croissant v. Germany*, European Court of Human Rights, Case No. 62/1001/314/385, Judgment, 25 September 1992.

and why it would arise has not been made clear to us, particularly when it is considered that the present trial and the contempt proceedings before Trial Chamber I are two separate, independent proceedings. It may even prove the case that Counsel will not be required to give evidence at all, and, in any event, there is certainly no indication that they would be required to give evidence for the Prosecution.

42. We can understand Lead Counsels' concerns that the anticipated testimony has affected their relationship with their clients. However, they have not established any reason why the anticipated testimony would affect their capacity to act as Counsel in the present trial. In the circumstances, we find that the anticipated testimony of Lead Counsel in contempt proceedings before Trial Chamber I do not constitute "the most exceptional circumstances" under Rule 45(E).

Code of Conduct of the Bar of England and Wales

43. Lead Counsels' submissions regarding the conflict with their Bar Rules should they be ordered to continue to act for the Accused are set out in paragraph 7 above.

44. Under Rule 44(B), Counsel is subject, amongst other things, to the Statute, the Rules, and the codes of practice and ethics governing their profession. Rules 44(B) states:

In the performance of their duties counsel shall be subject to the relevant provisions of the Agreement, the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Special Court, the Headquarters Agreement, the Code of Professional Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel.

45. Under Article 17(4)(d) of the Statute, an accused is entitled to have legal assistance assigned to him in any case where the interests of justice so require. Article 17(4)(d) is in the following terms:

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;

46. Rule 26bis imposes on the Trial Chamber an obligation 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 of the accused and due regard for the protection of victims and witnesses." The rights of the accused which the Trial Chamber must have regard to include the right to legal assistance. To ensure that this right is preserved, the Trial Chamber may, under Rule 60(B) appoint Counsel to represent an accused who refuses to come to court or, under Rule 45(E), the Trial Chamber can refuse permission for Counsel to withdraw from a case.

47. In our opinion, a counsel could not possibly be in breach of his Bar Code by continuing to act for a client where the Trial Chamber, in the interests of justice and to protect the rights of the accused, makes an order under laws to which the counsel is subject in the performance of his duties, compelling him to remain assigned to the accused, or directing him to represent the accused.

48. We find that Lead Counsels' subjective concerns that they may be in breach of their Bar Code are not such exceptional circumstances as to allow them to withdraw from the case.

49. It follows from what has been said that there can be no doubt that Lead Counsel have experienced some serious difficulties in their relationship with their clients. In such circumstances, we approve the statement by the ICTY's President in *Milosevic*, that:

*"Representing criminal defendants is not an easy task. Assigned Counsel would do well to recognize that fact, to realize the breadth of activities that they can carry out even in the absence of [their client's] cooperation, and to continue making the best professional efforts on [their client's] behalf that are possible under the circumstances."*¹³

50. Although the lawyer/client relationship is far from satisfactory, it has not completely broken down, since there are still some communications between them, and Lead Counsel pass on information to the Court on behalf of the Accused. Given the complex nature of the relationship between Lead Counsel and their clients, we find that the difficulties discussed above, although serious, are not, by themselves, so exceptional as to warrant the withdrawal of Counsel.

51. If such difficulties were Lead Counsels' only arguments, then the Motion must fail. However, there is an additional element to this prayer for relief which causes us grave concern, and that is the threats made to Lead Counsel and their families.

Threats to Lead Counsel and their Families

52. The threats referred to are detailed in Lead Counsels' submissions in paragraph 6 above. We are not aware of any guidelines from other international courts on the appropriate measures a Trial Chamber ought to adopt in such a situation.

53. One of the consequences of the Report on Intimidation of Defense Lawyers in Northern Ireland by the U.N. Special Rapporteur Param Cumaraswamy, which recommended an independent judicial inquiry into the 1989 murder of a prominent defence lawyer, was that Human Rights Organisations stressed the need for lawyers to be able to practice "unhindered in their duties by abusive treatment."¹⁴

54. The United Nations Basic Principles on the Role of Lawyers recommends measures that Governments can take to protect lawyers.¹⁵ Article 16 provides that "Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance,

¹³ *The Prosecutor v. Slobodan Milošević*, The President's Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, 7 February 2005, para. 13.

¹⁴ Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, submitted pursuant to Commission on Human Rights resolution 1997/23, E/CN.4/1998/39/Add.4, 5 March 1998. The Report was endorsed by five of the world's leading international human rights organizations: Amnesty International, the International Commission of Jurists, Human Rights Watch, the International Federation of Human Rights, and the Lawyers Committee for Human Rights, see E/CN.4/Sub.2/1998/NGO/2.

¹⁵ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

harassment or improper interference." Article 17 states: "Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities".

55. In the present case we do not think that close protection - as suggested by the Prosecution - will allay the fears of Lead Counsel and we do not think it is the answer. We presume that since Lead Counsel did not want to reveal their said sources, they therefore did not apply for investigations into these allegations by the Security Section of the Special Court or other possible measures to ensure their safety in Sierra Leone.

56. We are not alone in our grave concerns for the safety of Lead Counsel and their families. The Defence submitted that there is "a significant threat of danger to their persons or family"¹⁶; the Principal Defender accepted "wholeheartedly [...] that [security concerns] may be an exceptional circumstance for withdrawal"¹⁷; and the Prosecution conceded that "[t]hreats made to any Counsel appearing before the Special Court are a matter to be taken extremely seriously"¹⁸

57. As can be seen from their submissions, Lead Counsel are sufficiently worried by the threats to move the Trial Chamber for orders allowing them to withdraw from the case. We do not think that they have made that application lightly. They are experienced barristers fully aware of their professional obligations to their clients and to the Court. They perceive a danger to their families or themselves if they continue to act for the Accused. We are unable to say that their perception is wrong.

58. We must bear in mind that, unlike the ICTY, ICTR and ICC, this trial is taking place in the country where the alleged offences are said to have occurred, and this gives rise to substantial security concerns. We are therefore of the view that the fears of Lead Counsel are justified.

59. Taken individually, we find that the arguments put forward by Lead Counsel regarding their difficulties, i.e. that their clients won't come to court, that their clients will not give them instructions, that there is a deteriorating relationship, not helped by the possibility that they may be called to give evidence in contempt proceedings against the clients' wives, that they see themselves acting, in the circumstances, against the principles of their own Bar Code, do not constitute "the most exceptional circumstances" warranting the withdrawal of Counsel. However, when all of these problems are considered together with the threats hanging over their heads, the cumulative result, in our view, creates an intolerable situation which places Lead Counsel under an impossible burden.

60. The Accused are charged with crimes of a most serious nature. They are entitled to the best Counsel available, Counsel who can fully dedicate themselves to their demanding task. We are of the view that Lead Counsel, with their present difficulties, would not be capable of acting in the best interests of their clients. We doubt that they would be able to represent their clients to the best of their ability when, apart from everything else, they are concerned for their own safety and that of their families. Although we are loath to come to a decision which possibly may adversely affect an expeditious trial, we are of the view that the rights of the Accused to be represented by counsel would

¹⁶ Brima and Kamara Defence Motion, 5 May 2005, para. 15.

¹⁷ Principle Defender's Submission, 5 May 2005, para. 9. ii.

¹⁸ Prosecutions Submission, 9 May 2005, para. 12.

best be served by appointing counsel able to carry out their duties free of the constraints inhibiting present Lead Counsel.

61. Accordingly, we find that the cumulative effect of all of these factors constitutes “the most exceptional circumstances” under Rule 45(E), warranting Lead Counsel to withdraw from the case.

62. Because the present case is peculiar in that there are a number of elements that go toward establishing the most exceptional circumstances, there is probably no reasonable likelihood of similar situations arising in the future. In any event, we do not go so far as to say that threats made to counsel would, in every case, satisfy the test of “the most exceptional circumstances” required by Rule 45(E). Each case would need to be decided on its individual merits.

5. Further Considerations

63. We reject the suggestion by the Principal Defender that Lead Counsel be re-designated as “Amicus Counsel”. An “Amicus Counsel” is not recognised by the Rules, although Rule 74 makes provision for Amicus Curiae. Amicus Curiae is not, of course, a party to the case. We therefore find that the suggestion is totally inappropriate and would involve the Trial Chamber’s participation in a sham in which the Amicus Curiae were really the Counsel for the Accused.

64. Pursuant to Rule 45 (E), we grant Lead Counsel permission to withdraw from the case. This does not leave the Accused Brima and Kamara without representation. They would still have Co-Counsel who are part of the Defence team to represent them pending appointment of new Lead Counsel. In fact, in the absence of Lead Counsel, the Accused Brima and Kamara have repeatedly been represented by Co-Counsel.¹⁹ On one of these occasions, Co-Counsel told the Trial Chamber that they were sufficiently able and competent to carry on with the trial in the absence of Lead Counsel.²⁰ Indeed, we have no doubts as to their competence. Furthermore, the Defence has stated in Court that it has a unified Defence strategy, and it has often been the case so far that oral Motions and submissions in court have been made by one counsel on behalf of all Accused. In this regard, we note that Lead Counsel for the Accused Kanu and his Defence team are still in the case.

65. We therefore conclude that the Accused Brima and Kamara would suffer no prejudice if they were to be temporarily represented by their respective co-counsel.

66. Where an accused refuses to come to Court, the Trial Chamber has the power under Rule 60(B) to direct Counsel to represent him. Rule 60 provides:

(A) An accused may not be tried in his absence, unless:

i. the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or

¹⁹ Lead Counsel for Brima and Kamara were absent with the consent of their clients on the following trial days: 7 to 11 March 2005, 5 to 11 April 2005; Additional absence of Lead Counsel for Kamara: 12 to 14 April 2005.

²⁰ Transcripts, 5 April 2005, page 9.

ii. the accused, having made his initial appearance, is at large and refuses to appear in court.

(B) In either case the accused may be represented by counsel of his choice, *or as directed by a Judge or Trial Chamber*. The matter may be permitted to proceed if the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present.

67. We find it appropriate to follow the decision of the Appeals Chamber of this Court in Gbao, in which it approved the following procedure:

Where an accused is present in court but refuses to participate in the proceedings because he does not recognize the court and requests that his counsel do not participate for the same reason, the court should treat the accused as an absent accused and exercise its powers as if Rule 60 applied. Applying that Rule, it would be inconsistent with the position taken by such accused to expect the accused to proffer a choice to be represented, in terms of Rule 60 (B), "by counsel of his choice". The appropriate thing for the court to do in such circumstances is to ensure that the accused is represented, also in terms of Rule 60 (B), as directed by the Trial Chamber. In these circumstances, the Trial Chamber, comprising professional judges, proceeds in the knowledge and awareness that counsel is acting without instructions from the accused when it directs that counsel continue to provide representation whether as "assigned counsel" or "court appointed counsel". While Rule 60 (B) could have been drafted to indicate various options open to the Judge or Trial Chamber in terms of the type of representation, this is left to the Judge or Trial Chamber's discretion.²¹

68. We note that Rule 45(E) provides that "[i]n the event of such withdrawal the Principal Defender shall assign another Counsel ...". This may or may not cause regrettable delays. Nevertheless, we note that this Court has established a Defence Office for exactly these situations. It is the duty of the Defence Office to support new Counsel and to introduce them to the case.

69. We are of the view that the rights of the Accused - in particular their right to be tried without undue delay as enshrined in Article 17 (4) (c) of the Statute - would best be served by directing Co-Counsel pursuant to Rule 60 (B) to represent the Accused on an interim basis until the respective Defence teams are complete again through the assignment of new Lead Counsel.

III. DISPOSITION

For All of These Reasons

The Trial Chamber therefore:

Grants the Motion for the withdrawal of Lead Counsel Kevin Metzger and Wilbert Harris as Counsel for the Accused Brima and Kamara respectively;

Orders as follows:

The Trial Chamber

²¹ The Prosecutor v. Augustine Gbao, Case No. SCSL0415-AR73, Gbao - Decision on Appeal Against Decision on Withdrawal of Counsel, 23 November 2004, para. 52.

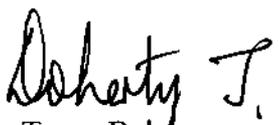
- i. Permits the Lead Counsel for Alex Tamba Brima to withdraw from the case to which he has been assigned;
- ii. Permits the Lead Counsel for Brima Bazzy Kamara to withdraw from the case to which he has been assigned;
- iii. Directs the Principal Defender to assign another counsel as Lead Counsel to Alex Tamba Brima;
- iv. Directs the Principal Defender to assign another counsel as Lead Counsel to Brima Bazzy Kamara;
- v. Being satisfied that the Accused have waived their rights to be present at Court pursuant to Rule 60 (B), directs that the Accused Alex Tamba Brima be represented by Co-Counsel Glenna Thompson and Kojo Graham;
- vi. Further directs that the Accused Brima Bazzy Kamara pursuant to Rule 60 (B) be represented by Co-Counsel Mohamed Pa-Momo Fofanah;
- vii. Refuses the request of the Principal Defender that Lead Counsel and co-counsel for Alex Tamba Brima and Lead Counsel and co-counsel for Brima Bazzy Kamara be temporarily re-designated from assigned counsel to Amicus Curiae;
- viii. Notes that Lead Counsel and Co-Counsel for the Accused Santigie Borbor Kanu will continue to represent their clients.

The above orders were delivered in an oral majority decision of the Trial Chamber on 12 May 2005.

Hon. Justice Julia Sebutinde will deliver a separate dissenting opinion.

Done at Freetown, Sierra Leone, this 20th day of May 2005.


Justice Richard Lussick


Justice Teresa Doherty
Presiding Judge



Case No. SCSL-04-16-T

20 May 2005



(14506 - 14513)



SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER II

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

Registrar: Robin Vincent

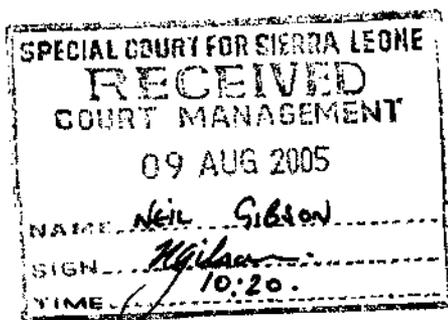
Date: 8 August 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-T)

SEPARATE AND DISSENTING OPINION OF JUSTICE SEBUTINDE IN 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

Office of the Prosecutor:Luc Côté
Lesley TaylorDefence Counsel for Alex Tamba Brima:Glenna Thompson
Kojo GrahamDefence 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

SEPARATE AND DISSENTING OPINION OF JUSTICE SEBUTINDE

1. I have had the benefit of reading and digesting the Majority "*Decision on the Confidential Joint Defence Application for Withdrawal for Withdrawal by Counsel for Brima and Kamara and on the Request for Further representation by Counsel for Kanu*" filed on 23 May 2005 ("the Majority Decision"). Subject to paragraphs 3-5 of this opinion, I agree with the facts leading to the Brima and Kamara Defence Motion and Kanu Defence Motion as summarised in paragraphs 23 to 29 of the Majority Decision. I do not agree with the comments of my colleagues in paragraph 22 of the Majority decision with respect to Defence Counsels' submissions. As I recall, the Trial Chamber in its Order issued *inter partes* on 6 May 2005, required "all documents" filed pursuant to this matter, (including the Defence submissions) "*to remain confidential*"¹. The Trial Chamber issued that Order in order to address the security concerns raised by Defence Counsel at that time. That confidentiality has since not been lifted. As such, I think that in light of the said Order, it would be superfluous to require Defence Counsel or indeed the Prosecution, to provide again the reasons for confidentiality in their written submissions.

2. Furthermore I wish to point out a few more material facts omitted from paragraph 29 of the Majority Decision, which facts are in my view, relevant in putting into perspective the Brima and Kamara Defence Motion; the Kanu Defence Motion and the oral application for withdrawal by Co-Counsel for the accused Santigie Borbor Kanu². The additional facts are narrated in paragraphs 3-5 below.

3. As correctly narrated in paragraph 29 of the Majority Decision, when all three accused persons did not turn up in court on 3 May 2005, Lead Counsel for the accused Alex Tamba Brima³ and Brima Bazy Kamara⁴ as well as Co-Counsel for the accused Santigie Borbor Kanu⁵ each indicated a desire to withdraw from the conduct of their respective client's case. At that time, Counsel orally indicated the reasons for the intended withdrawal as including "the partial withdrawal of instructions by each of their respective clients" as indicated in the Letters quoted in paragraphs 25, 26 and 27 of the Majority Decision. In addition Counsel orally indicated to the Trial Chamber that their respective Defence teams had experienced "certain security threats" which Counsel were not willing to disclose in open court, which threats had caused each of the concerned Counsel to seriously contemplate withdrawal from representing his client. At that stage the Trial Chamber requested Defence Counsel if they so wished, to file a formal Motion for withdrawal, *ex-parte*, indicating amongst others, the alleged "security threats". The Trial Chamber similarly requested the Principal Defender to file submissions *ex-parte* in relation to Defence Counsel's Motion for withdrawal. Thus far Counsel had given the Trial Chamber the impression that they had taken a common stand as far as their intended withdrawal was concerned. It is also note worthy that on the 3 May 2005 when

¹ AFRC Transcript of 6 May 2005, page 15, lines 14-23

² See oral submissions by Manly-Spain, Transcript of 3 May 2005, page 3, line 15-18.

³ Mr. Kevin Metzger

⁴ Mr. Wilbert Harris

⁵ Mr. Abibola Manly-Spain

Co-Counsel for the Accused Santigie Borbor Kanu⁶ made his oral submissions to Court, Lead Counsel for Santigie Borbor Kanu⁷ was not in court due to other commitments abroad. Subsequently, in compliance with the Trial Chamber's order, Lead Counsel for the Accused Alex Tamba Brima and Brima Bazzy Kamara filed their "Confidential Joint Defence Submissions on the Withdrawal of Counsel in the AFRC Case" ("the Brima and Kamara Defence Motion"). Co-Counsel for the Accused Santigie Borbor Kanu⁸ did not join in this motion nor file his own written submissions as ordered by the Trial Chamber.

4. Instead, on 4 May 2005 Lead Counsel for Santigie Borbor Kanu⁹ filed the "Confidential, Ex-parte and Under Seal Kanu-Defence Motion to Inform the Trial Chamber on the Legal Position of the Defence in View of the Contempt of Court Developments"¹⁰ ("the Kanu Defence Motion"). In that Motion, Lead Counsel indicated to the Trial Chamber that certain developments outlined in paragraph 15 thereof had caused "the Kanu Defence team" to take a stand separate from that of the Brima and Kamara Defence teams and to reconsider the team's earlier position with regard to the intended withdrawal by Counsel. Lead Counsel then made the requests set out in paragraph 1 of the Majority Decision.

5. In light of the above facts, I take the view in my dissenting opinion, that Co-Counsel for the Accused Santigie Borbor Kanu¹¹ having chosen not to file a written Motion or submissions for his own withdrawal as earlier ordered by the Trial Chamber, has chosen not to pursue his earlier position or grounds with regard to his intended withdrawal. I further take the view that Co-Counsel's earlier position regarding his intended withdrawal is in fact superseded by the position expressed by Lead Counsel in the Kanu Defence Motion on behalf of the entire Kanu Defence team. This view on my part also has a bearing on my assessment of the submissions contained in paragraphs 12 and 13 of the Brima and Kamara Defence Motion as I shall illustrate later.

6. It is in the context of the above background that I agree with the stand taken by my colleagues in paragraph 30 of the Majority Decision to make no specific orders with regard to the Kanu Defence Motion.

7. I agree with the conclusions of my colleagues in paragraphs 39, 42 and 50 of the Majority Decision. However I take a dissenting view with regard to the approach taken and conclusions drawn by my colleagues with regard to whether the threats to Lead Counsel Kevin Metzger and Wilbert Harris constitute "*the most exceptional circumstances*" required under Rule 45 (E) of the Rules for the grant of leave to Counsel to withdraw. In particular, I am of the considered opinion that although Mr. Kevin Metzger and Mr. Wilbert Harris filed their submissions for withdrawal "jointly", the Trial Chamber ought to examine the case for each applicant separately in order to accurately and effectually assess whether or not each of them has established the most exceptional

⁶ Mr. Abibola E. Manly-Spain

⁷ Mr. Geert-Jan A. Knoops

⁸ Mr. Abibola E. Manly-Spain

⁹ Mr. Geert-Jan A. Knoops

¹⁰ Document No. SCSL-2004-16-T-244

¹¹ Mr. Abibola E. Manly-Spain

circumstances justifying his withdrawal from the conduct of his lay client's defence under Rule 45 (E) of the Rules. In my view, the omnibus approach taken in the Majority Decision whereby all grounds pleaded jointly in the Brima and Kamara Defence Motion are collectively attributed to both Assigned Counsel presupposes that the circumstances and grounds pertaining to the withdrawal of Mr. Kevin Metzger are identical to those pertaining to the withdrawal of Mr. Wilbert Harris, which they clearly are not. The fact that each of the Assigned Counsel in the Brima and Kamara Defence Motion signed his own Legal Services Contact upon engagement¹², lends credence to the view that each application by Assigned Counsel for withdrawal under Rule 45 (E) ought properly to be assessed individually, even where that application or submissions in support thereof happens to be filed "jointly" with another. In this regard I depart from the approach taken by my colleagues throughout the Majority Decision whereby they appear to examine the collective case for Defence Counsel and keep on referring to "Lead Counsel" collectively. I intend in this dissenting opinion to examine and assess where necessary the applications for withdrawal by Mr. Kevin Metzger and Mr. Wilbert Harris separately and individually, notwithstanding that they were filed "jointly".

8. I am of the considered opinion that each of the respective Lead Counsel for the Accused Alex Tamba Brima and Brima Bazzy Kamara has in their joint application fallen far short of the very high standard required under Rule 45 (E) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("the Rules") and has not established "the most exceptional circumstances" justifying his withdrawal from the conduct of his lay client's case. In this regard I wish to emphasise that the standard of proof required under Rule 45 (E) of the Rules is like no other under the Rules, in that it requires the applicant to establish not just "exceptional circumstances" but rather "*the most* exceptional circumstances" justifying his or her withdrawal (emphasis added). This exceptionally high standard of proof is incumbent upon Assigned Counsel by virtue of his statutory duty and undertaking under Rule 45(E) of the Rules to diligently represent the accused and in his best interests to conduct the case to finality. The obligation upon an Assigned Counsel representing a criminal suspect before an International Criminal Tribunal such as the ICTY, ICTR or Special Court is peculiarly distinct from that of his counterpart representing an ordinary criminal suspect in a domestic criminal court. Due to the serious and complex nature of the cases involved, an Assigned Counsel is under a continuing professional duty and obligation to "diligently represent the accused and in his best interests to conduct the case to finality" even where the accused is uncooperative. That duty is aptly described in the words of the President of the ICTY in the case of the *Prosecutor v Slobodan Milosevic*¹³ quoted in paragraph 49 of the Majority Decision.

9. In my view, the Trial Chamber in exercising its discretion under Rule 45 (E) and determining whether or not Assigned Counsel should be permitted to withdraw, stands as guardian (rather than arbiter) to safeguard and uphold the rights and minimum guarantees accorded to the accused under Article 17 of the Statute of the Special Court and to ensure throughout the conduct of the trial, from start to finish, that the withdrawal of Assigned Counsel will not compromise the integrity of the proceedings nor jeopardise the interests of justice and a fair trial. In my view the Trial Chamber's role in determining a withdrawal application under Rule 45 (E) is akin (though not identical) to the role of the Principal Defender's Office under Article 24 (A) (i) of the SCSL Directive on the

¹² See paragraph 1 of the Principal Defender's Confidential *Ex-parte* Submission Regarding Issues Pertaining to Withdrawal of Counsel filed on 5 May 2005, Document No. SCSL-2004-16-T-249.

¹³ The President's Decision affirming the Registrar's Denial of Assigned Counsel's Application to withdraw of 7 February 2005, at paragraph 13.

Assignment of Counsel, when determining a request from the accused or Assigned Counsel for withdrawal. In this regard I find in dealing with the issues at hand, that the submissions contained in paragraphs 8 and 9 (i) to (iii) of the Principal Defender's Confidential *Ex-parte* Submission Regarding Issues Pertaining to Withdrawal of Counsel¹⁴ are quite instructive even though the Brima and Kamara Defence Motion was not filed under Article 24 (A) (i) of the SCSL Directive on the Assignment of Counsel. In her assessment of the situation, the Principal Defender is of the view that the withdrawal of Assigned Counsel is in the circumstances not in the interests of justice and that if it were in her power to so order she would in addressing the concerns of the applicants opt for "*less drastic measures than withdrawal*"¹⁵. Be that as it may, I will comment on the appropriateness or otherwise of the "measures" proposed by the Principal Defender, in the ensuing paragraphs of this dissenting opinion.

10. Before I give my analysis and assessment of the threats to Counsel, I wish to make additional comments on some of the issues at stake. The main grounds for the withdrawal motion were fourfold, namely:

- (i) Lack of cooperation from and withdrawal of instructions by their clients, the accused persons;
- (ii) Potential conflict of interest arising from the likelihood of Counsel appearing as witnesses in contempt proceedings associated with the trial proceedings in the case of *The Prosecutor v. Alex Tamba Brima et al*¹⁶;
- (iii) Potential breach of the Code of Conduct of the Bar of England and Wales to which Counsel belong; and
- (iv) Threats to Lead Counsel and their families.

11. I would like to stress that I agree with the reasoning and conclusion of my colleagues in paragraphs 34 to 50 the Majority Decision, to the effect that none of the first three grounds indicated above constitute "*the most exceptional circumstances*" warranting the withdrawal of Counsel under Rule 45 (E) of the Rules. I do however disagree with the reasoning and conclusions in paragraph 51 and 59 to the effect that "*when all of these problems are considered together with the threats hanging over their heads, the cumulative result creates an intolerable situation which places Lead Counsel under an impossible burden*" warranting their withdrawal.

¹⁴ Ibid

¹⁵ Ibid, paragraph 9 (i) and (ii)

¹⁶ Case No. SCSL-2004-16-T

12. I wish to distinguish the several incidents referred to by Counsel as comprising "threats to themselves and their families". These three incidents can be summarized as follows:

- (i) A "potential Defence Witness" was allegedly arrested by the Military Police and his premises searched;
- (ii) A Clerk to a Defence Counsel on the Kanu Defence Team was allegedly apprehended by Military Police who conducted a search of his premises;
- (iii) Lead Council for the accused Brima and Kamara received threats from undisclosed sources allegedly directed against all Court-appointed Counsel working at the Special Court; and
- (iv) Lead Counsel Harris received three anonymous telephone calls allegedly threatening his own safety and that of his family.

13. As far as the first two incidents are concerned, Counsel have not substantiated these allegations nor have they shown the nexus or connection between the alleged incidents and the conduct of this trial. More importantly, neither Mr. Metzger nor Mr. Harris have shown to the satisfaction of the Trial Chamber how these two incidents relate to them as Counsel nor how they affect their ability to perform their duties towards their clients. As such, the Trial Chamber remains in doubt as to exactly who was involved in these incidents; why the incidents took place; how the incidents are related to the conduct of this trial or how they affect the ability of Counsel to perform their statutory duties towards their clients. It is difficult to see how threats to persons other than the concerned Counsel can affect the conduct of his defence. In view of all these unanswered questions I am of the considered opinion that the incidents complained of cannot constitute "*most exceptional circumstances*" under Rule 45(E).

14. With regard to the third incident, namely "threats from undisclosed sources allegedly directed against all Court-appointed Counsel working at the Special Court", again these have not been substantiated before the Trial Chamber. In their submission Counsel state that: "Due to the nature of these threats Counsel do not wish to reveal the said sources."¹⁷ More importantly since these threats are allegedly directed at "Court-Appointed Counsel" only, it is not clear how the threats are supposed to affect or apply to Mr. Metzger or Mr. Harris, none of whom is a Court-appointed Counsel. Again Counsel failed to show how this particular threat is directed at them or how the threat prevents them carrying out their statutory duties as assigned counsel. On the contrary Counsel submitted that "*none of the threats emanated from the accused persons.*" My own view is that where Counsel receives a threat specifically directed at him or her by virtue of his or her duties at the Special court, rather than "throwing in the towel," concerned Counsel should immediately bring such matters to the attention of the relevant security departments the Special Court with a view to having

¹⁷ Submission of Brima and Kamara, para. 15.

the threats investigated, substantiated and remedied. Counsel did not take this option in this case and have instead chosen to “throw in the towel”. However, in view of the very high standard of proof required by Rule 45 (E) it is my considered opinion that in referring to the third incident quoted above without substantiating the threats or showing how they relate to the applicants, neither Mr. Metzger nor Mr. Harris have proved “*the most exceptional circumstances*” warranting their withdrawal.

15. This brings me to the last incident, namely several anonymous telephone calls to Mr. Harris allegedly threatening his own safety and that of his family. Obviously these threats were directed to Mr. Harris and not Mr. Metzger so the latter cannot rely on them in his application for withdrawal. It should also be remembered that shortly before Mr. Harris received these alleged anonymous calls, he had written a series of articles in some local Sierra Leonean newspapers in which he revealed his status as Defence Counsel for the accused in this case. In so doing Mr. Harris has potentially exposed himself to such threats and it is therefore not inconceivable that a disenchanted person may have targeted him after reading the newspaper articles. Counsel are no doubt, aware of the potentially politicized environment in which the Special Court and they operate without the added influence of newspaper articles. If the alleged threats to Mr. Harris are true, which I cannot assess with the evidence before me, than I see them in context with the articles of Mr. Harris in various Sierra Leone newspapers and not particularly on account of carrying out his statutory duties towards his client. More importantly, even if these threats were purely on account of Mr. Harris’s statutory duty towards his client, he has not demonstrated that they pose an actual and present danger to life and limb of either himself or his family. In my opinion, before a threat can constitute “*the most exceptional circumstance*” under rule 45 (E) the applicant must demonstrate not only “*actual and present danger to life and limb*” but in addition must show that the relevant security organs of the Court have failed to investigate the threats and remedy the situation. Mr. Harris did not report this matter to the relevant security organs of the court and merely states in his submissions that “*Counsel is content that this incident is noted*”! Perhaps this is an indication of how seriously Mr. Harris himself regards the alleged threats. Be that as it may, I find that Mr. Harris cannot rely on the last incident as constituting “*the most exceptional circumstances*” warranting his withdrawal from the trial.

16. As mentioned already, I am not in a position to assess whether the threats against counsel are true or false. My colleagues argue that: “*They are experienced barristers fully aware of their professional obligations to their clients and to the Court*” and that they are unable to say that their perception is wrong. It seems to me that my colleagues have more faith and confidence regarding the facts provided by counsel without a scintilla of independent proof. I do not believe that that is the standard set by Rule 45 (E). Furthermore I have alluded above to less drastic measures than withdrawal, that could be employed to address the alleged threats to Counsel and would recommend so.

17. Lastly I would like to observe especially with regard to Mr. Metzger, Lead Counsel for the Accused Alex Tamba Brima that this particular accused person has had a lot of disruptions with regard to his defence Counsel and should be given a chance to stabilize. Mr. Terence Michael Terry who was originally Mr. Brima’s assigned Counsel, passed away in 2004 soon after taking up assignment. Thereafter, Mr. Metzger took over as Mr. Brima’s assigned Counsel. Hardly a year has passed before Mr. Metzger applies to withdraw. In my opinion it would be contrary to the interests of justice to allow Mr. Metzger to withdraw from the case which is in its advanced stages.

18. For all the above reasons I find that neither Mr. Metzger nor Mr. Harris have demonstrated “*the most exceptional circumstances*” warranting their withdrawal pursuant to Rule 45(E) of the Rules and would dismiss their Motion in its entirety.

19. Before I take leave of this matter I must say that I associate with the comments of my colleagues in paragraph 63 of the Majority decision, with regard to the Principal Defender's proposal.

20. In the interests of expediting proceedings I hereby authorize the Court Management section to publish this Dissenting Opinion during the court recess.

Done at Freetown, Sierra Leone, this 8th day of August 2005.

