

064

SCSL-2003-06-PT

(1206-1240)
SPECIAL COURT FOR SIERRA LEONE
FREETOWN-SIERRA LEONE

SPECIAL COURT FOR SIERRA LEONE

1206

NEIL GIBSON

12.49

THE PROSECUTOR

Against

Alex Tamba Brima also known as (aka) Tamba Alex Brima aka GULLIT - APPLICANT

Case No. SCSL - 2003 - 06 - PT

IN THE APPEALS CHAMBER

Before: Judges of the Appeals Chamber

Registrar: Robin Vincent

Date Filed: 16th September, 2003.

APPLICATION FOR EXTENSION OF TIME FOR LEAVE TO BE GRANTED TO THE APPLICANT HEREIN TAMBA ALEX BRIMA TO FILE THE DEFENCE MOTION TO APPEAL TO THE APPEALS CHAMBER AGAINST THE DECISION AND CONSEQUENTIAL ORDERS OF THE RT. HONOURABLE JUDGE BENJAMIN MUTANGA ITOE OF THE 22ND JULY, 2003 REFUSING AN APPLICATION BY THE APPLICANT HEREIN FOR BAIL OR PROVISIONAL RELEASE.

Office of the Prosecutor
Mr. James Johnson
Mr. Nicolas Brown-Marke
The Prosecutor

Applicant's Counsel
Mr. Terence Michael Terry

The Hon. Attorney-General & Minister of Justice
Guma Valley Building
Lamina Sankoh Street
Freetown
Sierra Leone

Registry
(a) Ms. Mariana Goetz
(b) Mrs. Musu Kamara

**SPECIAL COURT FOR SIERRA LEONE
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INTRODUCTION:-

In the light of Rule 116 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, the Defence respectfully submits a Notice of Motion for Extension of time for leave to be granted to the Applicant herein Tamba Alex Brima to appeal to the Appeals Chamber against the decision and consequential orders of the Rt. Honourable Judge Benjamin Mutanga Itoe dated 22nd July, 2003 refusing an application for Bail or for Provisional Release of the Applicant herein.

The Defence further submits that for the purposes of this Motion:-

- (a) The Defence means and includes the Accused, the Defence Counsel and their respective Legal Assistants and Staff and others specifically assigned by the Special Court for Sierra Leone to the Accused's trial defence team in conformity with Rule 44 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
- (b) The Prosecution means and includes the Prosecutor of the Special Court for Sierra Leone (the Court) and staff members.
- (c) The Accused means Tamba Alex Brima who is currently in detention facing charges before the Special Court for Sierra Leone relating to terrorizing the Civilian Population and collective punishments, unlawful killings, sexual violence, physical violence, use of child soldiers, abductions and forced labour, looting and burning and attacks on UNAMSIL Personnel.

ARGUMENT:**RULES:****Rule 116 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.****FACTUAL BASIS FOR THE EXTENSION OF TIME SOUGHT**

The Accused the Applicant herein Tamba Alex Brima is currently been detained at the Special Detention Centre at Jomo Kenyatta Road, Freetown pursuant to a purported Warrant of Arrest issued by Judge Bankole Thompson on the 7th March, 2003, and his trial is presently pending before the Trial Chamber of the Special Court for Sierra Leone for charges relating to terrorizing the Civilian Population and collective punishments, unlawful killings, sexual violence, physical violence, use of child soldiers, abductions and forced labour, looting and burning and attacks on UNAMSIL Personnel.

Written Briefs were filed by both the Defence and Prosecution and a decision was subsequently delivered by Judge Benjamin Mutanga Itoe in which the application for Bail or for Provisional Release for the applicant was refused on the 22nd July, 2003 – a photocopy of which said decision is hereby attached as Index of Attachment ONE.

The factual basis for the application arose from the present detention of the Accused herein who sought bail OR Provisional Release and include among others the following:-

That the lead Counsel of the defence team for the applicant herein Terence Michael Terry has been unwell for a considerable time now since the ruling was delivered and up to the material time an appeal against the decision and consequential orders of the said Rt. Honourable Judge Benjamin Mutanga Itoe dated the 22nd day of July, 2003 ought to have been prepared and filed. The said medical attestation from Dr. Walter Renner of 8 Pultney Street, Freetown, Sierra Leone is hereby attached as Index of Attachment TWO.

The Defence will rely on the affidavit of Ayo Max-Dixon sworn to on the 16th day of September, 2003 at 9:30 o'clock in the forenoon which is hereby attached as Index of Attachment THREE. The Defence will also rely on paragraphs 2 to 8 inclusive of the said affidavit of Ayo Max-Dixon and the exhibits attached thereto.

LEGAL BASIS FOR THE EXTENSION OF TIME TO APPEAL TO THE APPEALS CHAMBER.

Rule 116 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone is discretionary in its terms as it expressly empowers the Appeals Chamber to judiciously exercise its discretion in granting a Motion for an extension of time limit upon a showing of good cause. In this respect the defence will rely on the cause shown above regarding the illness of the lead Counsel for the Defence Terence Michael Terry which with respect constitute good cause to warrant an extension of the time for leave to be granted to the applicant herein to file the Defence Motion to appeal against the said decision and consequential orders of the Rt. Honourable Judge Benjamin Mutanga Itoe of the 22nd July, 2003 refusing Bail OR Provisional Release of the applicant herein.

The Intended OR Proposed grounds of Appeal in respect of which the applicant herein seeks leave of the Appeals Chamber for an extension of time to Appeal against the said decision and consequential orders of Judge Benjamin Mutanga Itoe of the 22nd July, 2002 are as follows:

1. His Lordship the Rt. Honourable Judge Benjamin Mutanga Itoe erred in Law and on the facts when he held that in an application for bail it is for the applicant to exhibit any asset to show to the satisfaction of the Court his stake and attachment in the society to which he is seeking to be released.
2. His Lordship the Rt. Honourable Judge Benjamin Mutanga Itoe erred in Law and on the facts of the instant case when he proceeded to rely extensively on the respective ratio decidendi of several ECHRR cases quoted by him in his decision when those cases when properly analyzed and construed are clearly distinguishable from the facts of the instant case which was before him at the time, and consequently arrived with respect at the wrong conclusions.
3. His Lordship the Rt. Honourable Judge Benjamin Mutanga Itoe erred in Law and on the facts when he held that the Warrant of Arrest issued by Judge Bankole Thompson on the 7th March, 2003 was valid even though it did not explicitly order the arrest of the applicant herein.
4. His Lordship the Rt. Honourable Judge Benjamin Mutanga Itoe erred in Law when he proceeded to grant an amendment to the date of the Prosecution response to the Defence Motion in circumstances wherein the Defence Counsel was not giving an opportunity to reply to the application for the amendment so sought by the Prosecution Counsel.
5. His Lordship the Rt. Honourable Judge Benjamin Mutanga Itoe wrongfully exercised his discretion and consequently erred in law and on the facts in taking into consideration matters with respect totally irrelevant and extraneous to the determination of the grant OR refusal of Bail OR provisional release to the applicant herein – namely the alleged link between the applicant and one Johnny Paul Koroma, and consequently relied on the latter's flight from the jurisdiction of Sierra Leone with the likelihood of the applicant doing the same - indeed a factor which wrongly constituted an important factor in his determination to tilt the balance towards refusing Bail OR Provisional Release to the Applicant herein.

Counsel for the Defence submits that the jurisdiction to grant leave for an extension of time to Appeal and/OR leave to Appeal both being discretionary remedies a decision to grant one OR the other ultimately depends on the facts and circumstances of the instant case and as dictated by the ends of justice.

The defence further submits that the facts and circumstances of the instant case do warrant the exercise of the discretion by the Appeals Chamber to grant leave for an extension of time to Appeal to the Appeals Chamber against the decision and consequential Orders of Rt. Honourable Judge Benjamin Mutanga Itoe of the 22nd July, 2003 refusing Bail OR Provisional Release to the Applicant herein.

-4-

The defence however reserves its rights to apply to the Appeals Chamber if need be to amend OR add any other grounds to the above Intended Grounds of Appeal for extension of time to appeal to the Appeals Chamber already referred to above.

ORDERS SOUGHT:

In the light of the foregoing reasons, the Defence most respectfully request the Appeals Chamber to issue the following Orders:

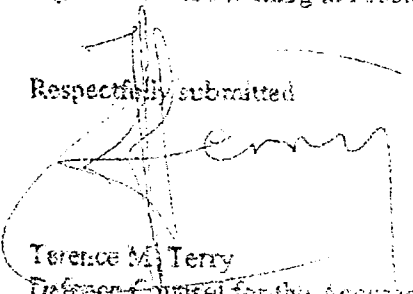
- (1) That leave for an Extension of time be granted to the applicant herein to appeal to the Appeals Chamber on the grounds stated above in the Motion for an extension of time to Appeal to the Appeals Chamber
- (2) That all necessary order OR orders as the Appeals Chamber may deem fit and just

PRAYER:

- (1) In view of the foregoing issues that an Order be granted to the applicant herein for an extension of time to appeal to the Appeals Chamber against the decision and consequential orders of the Rt Honourable Judge Benjamin Mutunga Iloe dated the 22nd July, 2003
- (2) That a further order be granted directing that the application for leave for an extension of time to appeal to the Appeals Chamber against the decision and consequential orders of the Rt. Honourable Judge Benjamin Mutunga Iloe of the 22nd July, 2003 if granted be filed and fixed for hearing and the matter determined accordingly.

Signed in Paris for filing in Freetown on the 16th day of September, 2003.

Respectfully submitted


Terence M. Terry
Defence Counsel for the Accused the
Applicant herein.

**SPECIAL COURT FOR SIERRA LEONE
FREETOWN-SIERRA LEONE**

THE PROSECUTOR

Against

Alex Tamba Brima also known as (aka) Tamba Alex Brima aka GULLIT - APPLICANT

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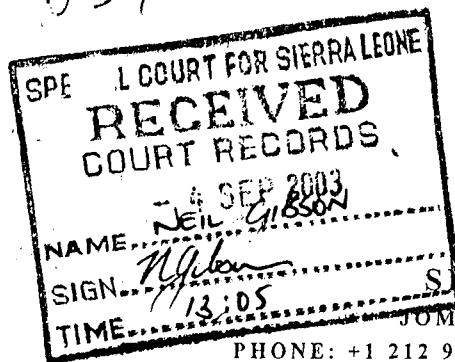
Prosecutor Against TAMBA ALEX BRIMA SCSL-2003-06-PT

DEFENCE INDEX OF ATTACHMENTS

1. Decision of Judge Benjamin Mutanga Itoe of the 22nd July, 2003 inclusive of the consequential Orders.
2. Medical attestation from Dr. Walter Renner of 8 Pultney Street, Freetown, Sierra Leone.
3. Affidavit of Ayo Max-Dixon in support of Defence Motion sworn to at the Law Courts Building, Siaka Stevens Street, Freetown on the 16th day of September 2003 at 9:30 o'clock in the forenoon.

INDEX OF ATTACHMENTS

INDEX OF ATTACHMENT – 1



SCSL-2003-06-PT-057



(1128-1144)

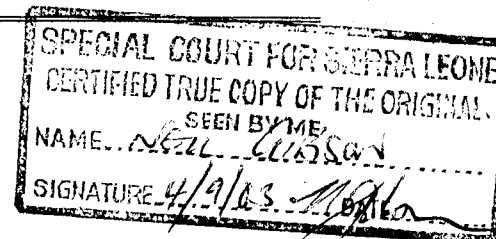
SPECIAL COURT FOR SIERRA LEONE

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IN THE TRIAL CHAMBER



Before: His Lordship, The Rt. Hon. Judge Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 22nd day of July 2003.

The Prosecutor against

Tamba Alex Brima

SCSL-03-06-PT

RULING ON A MOTION APPLYING FOR BAIL OR FOR PROVISIONAL
RELEASE[™]
FILED BY THE APPLICANT

Office of the Prosecutor:
Mr. James Johnson
Mr. Nicolas Browne-Marke

Applicant Counsel:
Mr Terrence Michael Terry

Attorney General:
Mr. Joseph G Kobba

Registry:
Mrs. Musu Kamara
Ms. Mariana Goetz

1 HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE:

2

3 This is my ruling on this Application.

4

5 Mr Tamba Alex Brima, the Applicant in this matter, is in
6 custody and stands indicted before the Special Court of Sierra
7 Leone on a 17 count indictment, preferred against him by the
8 Prosecutor of the Special Court.

9

10 The charges include crimes against humanity and International
11 Humanitarian Law allegedly committed by the Applicant in the
12 territory of Sierra Leone, crimes which come within the context
13 of the Provisions of Article 1 of the Agreement dated the 16th of
14 January, 2002, between the United Nations and the Government
15 of Sierra Leone, creating the Special Court for Sierra Leone on
16 the one hand, and also those of Articles 1, 2, 3,4,5, 6 and 7 of the
17 Statute of the said Court annexed to the Agreement, on the
18 other.

19

20 The Applicant appeared before me as a designated Pre-trial Judge
21 on the 17th of March, 2003, when he was arraigned on each of
22 the counts of the indictment brought against him. He pleaded
23 not guilty to all of them. He was however, at the end of that
24 process, remanded in custody on the same day pending the
25 commencement of his trial.

26

27 On the 28th of May, 2003, the Applicant's Counsel, Mr Terence
28 Michael Terry, filed this motion for bail or for the provisional
29 release of his client and this, pursuant to the provisions of Rule
30 65 of the Rules of Procedure and Evidence of the Special Court
31 for Sierra Leone.

32

1 The arguments on which the Motion is founded and as are
2 highlighted in Counsel's written submissions are as follows:-

3

4 -That the Applicant Tamba Alex Brima is presently suffering from
5 serious medical problems which require daily care namely,
6 diabetes and hypertension:

7

8 -That the Applicant is having frequent nightmares at the Bonthe
9 Detention Facility, and that his general health and sight are fast
10 deteriorating because and I quote:

11

12 "He has not been able to see any eye specialist".

13

14 -That the Applicant is a married man with a son, and the wife is
15 unemployed, and the Accused is the sole breadwinner, so the
16 continued detention of the Accused will cause untold suffering to
17 his wife and child financially and otherwise.

18

19 -That the continued detention of the accused is prejudicial to him
20 and continues to impair his access to his counsel regarding his
21 defence for the ensuing trial.

22

23 -That his trial will be delayed because the finishing of the
24 construction works of the Special Court in Freetown is going to
25 be delayed beyond early 2004.

26

27 -That the Accused will appear for his trial.

28

29 -That the Accused will not pose a danger to any victim, witness or
30 other person.

31

32 In addition to the aforementioned facts, the Applicant swore to

1 an affidavit on the 23rd of May, 2003, in the Special Court
2 Detention Facility in Bonthe. The Applicant relies mainly on the
3 facts deposed to in Paragraphs 2 to 34 of this affidavit. In the
4 affidavit, he states that if released on bail, he will appear for his
5 trial and will not pose a danger to victims or witnesses, or to
6 other persons, conditions which are stipulated under Section 65
7 (B) as a guarantee to secure his release.

8
9 Counsel for the Applicant in making his submissions on the law
10 refers to Rule 65(A). He argues that his client in his affidavit
11 deposes to the fact, in fact, makes the engagement that he will
12 appear for trial and if released will not pose a danger to any
13 victim, witness or other person. He argues that under Rule 65(D)
14 the Court has a discretion to impose such conditions as may be
15 determined or may be deemed appropriate upon granting bail.
16 He urges the court to grant conditional or unconditional release
17 to his client.

18
19 Furthermore, Counsel for the Applicant argues that the
20 purported warrant of arrest did not order the arrest of his client,
21 Tamba Alex Brima; that the warrant of arrest was not served on
22 him and that Judge Bankole Thompson lacked jurisdiction and
23 acted in excess of his jurisdiction when he granted the Order on
24 the 7th of March, 2003; that the Orders made by the Judge were
25 fundamentally flawed and violated the provisions of Rule 47 of
26 the Rules of Procedure and Evidence. He concludes by urging
27 that the Court releases the Applicant on bail conditionally or
28 unconditionally.

29
30 The Respondents on their part argued that the legality of the
31 arrest and the detention of the accused person are not relevant to
32 an application for bail. The Respondents contend that by

1 applying for bail in this case the Accused has conceded to the
2 legality of his arrest and detention.

3
4 That as far as the validity of the Applicant's arrest or the warrant
5 of arrest and the order of transfer and detention are concerned,
6 the Respondents are adopting their arguments advanced in their
7 application for "Habeas Corpus" which is annexed to their reply.
8 That Rule 65 of the Rules of the Special Court is similar to Rule
9 65 of the Rules of Procedure and Evidence of the International
10 Criminal Tribunal for Yugoslavia (ICTY) as amended on the 12th
11 of December, 2002.

12
13 That following Rule 65 and the jurisprudence of the ICTY,
14 detention is the rule and a release on bail, the exception, and
15 this, notwithstanding the deletion of the phrase 'in exceptional
16 circumstances' from Rule 65 in relation to granting bail to
17 detainees. The Respondent in so submitting, is urging me to
18 arrive at the same conclusion as did the ICTY, because the now
19 amended wording of their rule 65 is virtually the same with the
20 wording of Rule 65 of the Rules of Procedures and Evidence of
21 the Special Court.

22
23 That the Applicant will not appear for trial if released. In so
24 submitting, the Respondents state that the Court has no means
25 to execute its own warrant. That the conflict in this Country put
26 the regular Armed Forces and the Police of Sierra Leone in
27 disarray and that because they are just rebuilding and
28 reconstituting these forces, they will find great difficulty in
29 apprehending the Accused should he seek to evade a recapture
30 and his trial. The cases of Sam Boko, and Johnny Paul
31 Koroma, both of whom are still 'wanted persons' by the
32 Prosecutor of the Special Court tend to highlight the risk in

1 granting bail to the Applicant.

2

3 That if the Applicant is released^{ku} and escapes to embattled
4 Countries like Liberia or Ivory Coast, tracking him down or
5 recapturing him to stand trial would be an up hill if not an
6 impossible task.

7

8 Generally, the Respondents argued that the Applicant, on the
9 submissions of his Counsel and even on the facts contained in
10 his own sworn affidavit, does not fulfil the conditions spelt out in
11 Rule 65 (B) of the Rules for bail to be granted to him.

12

13 In the course of the hearing on the 15th of July, 2003, Counsel for
14 the Applicant urged me to dismiss the submissions of the
15 Respondents on the grounds that they are said to have been filed
16 on the 5th of June, 2000, a date long before the Special Court was
17 even created. The Respondent in reply pleaded a typographical
18 error as being at the origin of what the Applicant's Counsel was
19 contending. He added that we should be concerned with the date
20 on which the application was filed, that is, on the 5th of June,
21 2003. The Respondents explanation appears to me convincing.
22 The correction of 2003 instead of 2000 is accordingly granted
23 and is so ordered.

24

25 In reply to the submissions of the Respondents, Counsel for the
26 Applicant made further submissions to restate what he raised in
27 his earlier submissions including other arguments in reply to
28 assertions and arguments made by Respondents.

29

30 Rule 65 of the Rules of Procedure and Evidence around which
31 this controversy on bail is brewing stipulates as follows, and I
32 would like to reproduce these provisions in extension:

1
2 65 (A) 'Once detained, an Accused shall not be granted bail
3 except upon the order of a Judge or Trial Chamber'.
4

5 65(B) 'Bail may be ordered by a Judge or a Trial Chamber after
6 hearing the State to which the Accused seeks to be released and
7 on only if it is satisfied that the Accused will appear for his trial
8 and if released will not pose a danger to any victim, witness or
9 other person'.
10

11 In applying these provisions and as I earlier indicated, Counsel
12 for the Respondents submits that they must be interpreted to
13 mean that a release on bail or what in other words is referred to
14 as a provisional release, constitutes an exception and continued
15 detention, the rule. This interpretation by the Respondents of
16 Rule 65 is based on case law from the International Criminal
17 Tribunal of Yugoslavia (ICTY) as cited in their submissions.
18

19 It would be recalled however, that the original ICTY version of
20 Rule 65 (B) reads as follows: "Provisional release may be ordered
21 by a Trial Chamber only 'in exceptional circumstances' after
22 hearing the host country and only if it is satisfied that the
23 Accused will appear for trial and if released will not pose a danger
24 to any victim, witness or other persons".
25

26 This ICTY version of Rule 65 was amended on the 17th of
27 November, 1999, and came into force in ICTY on the 6th of
28 December, 1999, in the following form:
29

30 65 (B) 'Release may be ordered by a Trial Chamber only after
31 giving the host country and the state to which the Accused seeks
32 to be released the opportunity to be heard and only if it is

1 satisfied that the Accused will appear for trial and if released will
2 not pose a danger to any victim, witness or other person’.

3

4 The amended version of this Rule, it is observed, no longer
5 contains the very strong component and the element of ‘in
6 exceptional circumstances’ which appeared to have been the
7 justifying factor for the silently developing legal concept
8 consecrating a ‘Release on Bail’ as being the exception and
9 ‘Continued Detention’, the rule.

10

11 It would be recalled that the International Criminal Tribunal for
12 Rwanda, (ICTR) moving towards the direction of ICTY and of
13 the Special Court for Sierra Leone whose Rules were adopted on
14 the 8th of March, 2003, but without the phrase ‘In exceptional
15 circumstances’ also amended this same Rule 65 (B) at their
16 Plenary on the 27th of May, 2003, by striking out, like the ICTY
17 did, and I imagine for the same reasons, the phrase ‘in
18 exceptional circumstances’.

19

20 What is interesting is that the Trial Chamber of the ICTY, even
21 after effectively deleting the phrase ‘in exceptional circumstances’,
22 from Rule 65 (B) on the 6th of December, 1999, still rendered a
23 majority judgement on the 8th of October, 2001, in the case of
24 the *Prosecutor vs Momcilo Krajisnik* and *Biljana Plavsic*, still
25 standing its earlier grounds that granting bail is the exception and
26 detention, the Rule. The Trial Chamber also appeared to have
27 adopted the principal that even where the Accused fulfils the
28 criteria for granting bail, the Court was not bound to grant the
29 bail.

30

31 In what however appears to be contrary to the *Krajisnik*’s decision
32 and precisely in the case of the *Prosecutor vs Brdanin* on

1 provisional release, the Trial Chamber, still of the ICTY, clearly
 2 states that due to the fact that 'exceptional circumstances' were
 3 removed from the provisions of Rule 65 (B), the presumption is
 4 that release will now be the norm. In the case of *Ilijakov vs*
 5 *Bulgaria* Case No. 33977196 of 26th July, 2001, the European
 6 Court of Human Rights held that the burden of proof to
 7 establish the granting of bail may not rest with the Accused
 8 person, but on the Prosecution .

9
 10
 11 This very important and interesting case which was decided on
 12 the basis of a majority decision of two of the Honourable Learned
 13 Judges with a dissenting opinion by His Lordship the Honourable
 14 Judge Patrick Robinson. Honourable Judge Robinson, to
 15 highlight his reasoning succinctly, is of the opinion that at no
 16 time should detention, as his Colleagues decided, be the rule,
 17 and liberty, the exception. In so holding, he is of the opinion that
 18 the majority decision seriously compromises the right to liberty
 19 and is, to that extent, in contravention of International
 20 Customary Law principles and Conventions, particularly and
 21 amongst others, those of Article 9 Sub-Section 3 of the
 22 International Covenant of Civil and Political Rights, (the
 23 ICCPR). This Article provides as follows:- 'It shall not be a general
 24 rule that persons awaiting trial shall be detained in custody but
 25 release may be subject to guarantees to appear for trial'.

26
 27 To properly apply the provisions of Rule 65 (B), they must be
 28 interpreted by examining the language used and what the natural
 29 meaning is.

30
 31 Under Rule 65, the following conditions for granting bail can be
 32 discerned by just an ordinary reading of the way it is worded.

1

2 -It is the Judge's discretion or that of the Trial Chamber to grant
3 bail.

4

5 -The Judge or the Trial Chamber will grant bail only after hearing
6 the State to which the Accused seeks to be released.

7

8 -The Judge or the Trial Chamber, in the exercise of that
9 discretion in favour of the Accused, only does so if he is satisfied
10 that the Accused will appear for trial.

11

12 -The Judge or the Trial Chamber should also be satisfied before
13 ordering his release that the Accused, if released, will not pose a
14 danger to any victim, or witnesses or other persons.

15

16 On the submission by the Respondent that continued detention
17 is the rule, and release on bail the exception, it is my opinion that
18 in applications of this nature, the onus is on the Applicant, as the
19 eventual beneficiary of the measure solicited, to satisfy the Judge
20 or the Chamber factually and legally, that he fulfils the conditions
21 necessary for the exercise of this discretion in his favour as
22 pleaded in his application. I am further and also of the opinion,
23 that thereafter, the Prosecution equally bears the burden, to
24 convince and satisfy the Judge or the Trial Chamber legally and
25 factually, that the Accused is not likely to fulfil the conditions
26 required to enable him to enjoy the benefit of the exercise by the
27 Judge or the Trial Chamber, of their inherent discretion to
28 release him on bail or not. In effect, just as the accused canvasses
29 for and justifies his release, the Prosecution bears the traditional
30 burden of equally demonstrating to the satisfaction of the Judge
31 or the Trial Chamber, that there are good reasons for continuing
32 to deprive the detainee of his fundamental human right to

1 liberty.

2

3 This position finds its justification in the provisions of Article 17
4 (3) of the Statute of the Special Court which is a restatement of a
5 well known, tested and surviving principle of Customary
6 International Law which is that the Accused shall be presumed
7 innocent until he is proven guilty, and that the burden of proving
8 his guilt lies with the Prosecution.

9

10 It would indeed be remarkable if the contrary were the case as it
11 would represent a major defection from global trends that
12 hitherto have accorded respect and an attachment to very
13 entrenched, tested, respected and universally accepted principles
14 of Customary International Law, particularly where they touch on
15 and affect the liberty of the individual which is one of the most, if
16 not the most sacred and most frequently abused of all
17 fundamental human rights that exist and are internationally
18 recognised.

19

20 Guided by these principles, I will now turn to examine the issue
21 of whether the Applicant, Mr. Tamba Alex Brima, from his sworn
22 affidavit and the submissions of his Counsel, meets the legal
23 criteria for a release on bail.

24

25 In his long affidavit, the Applicant pledges amongst other things,
26 that he will appear for trial if released on bail and that he will not
27 pose a danger to any victim, witness or any other person. He says
28 he is married and has one child.

29

30 However, considering the gravity of the offence for which he is
31 charged, no evidence has been adduced nor has any fact been
32 sworn to, as to the availability of enough guarantees at his

1 disposal in the event of the Court being minded to grant him bail
2 in application of Rule 65 (D) of the Rules of Evidence.

3
4 The Respondent has highlighted the fact that the offences for
5 which he is indicted are of particular gravity and that if granted
6 bail, the Applicant would not appear for trial. They further argue
7 that the Sierra Leonean Police force is in a stage of
8 transformation and that if the accused escapes through the very
9 permeable frontiers, it would be difficult to recapture him as is
10 the case up to date, of other indictees like, Sam Bokarie and
11 Johnny Paul Koroma. The Representative of the Honourable and
12 Learned Attorney General, representing the State of Sierra
13 Leone, has, in accordance with the provisions of Rules 65 (B),
14 made both written and oral submissions which are on the same
15 lines as those of the Respondent and like the latter, he is urging
16 the Court to refuse Mr. Tamba Alex Brima's application for bail.

17
18 In considering applications for bail under Rule 65 (B), the
19 greatest apprehension that surfaces immediately and at all times is
20 the possibility of the accused, if released, to appear or not to
21 appear for his trial. In this regard, it is important to consider a
22 number of other factors which are not incompatible with the
23 spirit of the elements in Rule 65 (B) and which are linked to the
24 element of a possible flight of the accused, namely, the gravity of
25 the offences for which he is indicted, the character, antecedents
26 and association of the accused, and community ties which he has,
27 and which the accused enjoys in society, including a possible
28 interference with the course of justice like posing a danger to
29 victims or witnesses and other persons. Another factor to be
30 addressed and considered in granting or refusing bail in a case of
31 this nature is the need and imperatives to preserve public order.

32

1 In the circumstances and the facts of the case before me, coupled
2 with the flight of indictees, actual and potential, as have already
3 been referred to, I would like to refer to the decision of
4 *Stogmuller vs Austria* 1 EHRR 155, where it was decided that
5 'on the risk that the Accused would fail to appear for trial, bail
6 should be refused where it is certain that the hazards of flight
7 would seem to be a lesser evil than continued imprisonment'. In
8 yet another case of *Neumeister vs Austria* 1 EHRR 91, it was
9 observed that in granting bail, it is relevant to consider the
10 character of the person, his morals, his home, his occupation and
11 his assets.

12
13 In the present case, the Applicant does not exhibit any assets to
14 show to the satisfaction of the Court, his stakes and attachment
15 in the society to which he is seeking to be released. Besides, there
16 is a lot of scepticism in the engagements he has made in his own
17 personal affidavit. In the case of *Momcilo Krajisnik* the majority
18 judgement of the ICTY had this to say, and I quote;

19
20 "As to the undertakings given by the accused himself, the Trial
21 Chamber cannot but note that it is given by a person who faces a
22 substantial sentence if convicted and therefore has a considerable
23 incentive to abscond". These comments indeed hold good for the
24 contents of the Applicant's affidavit.

25
26 One other important factor to be considered in adjudicating on
27 applications for bail is the preservation of public peace. In the
28 case of *Letellier vs France* 14 EHRR 83, it was decided that where
29 the nature of the crime alleged and the likely public reaction is
30 such that a release of the Accused may give rise to public
31 disorder, then, a temporary detention or remand may be justified.
32 In the *Letellier* case, Mrs. Letellier, twice a divorcee, was running a

1 restaurant and living with a third husband. She hired killers who
2 assassinated her ex-husband. Arrested and detained, she applied
3 for bail which was refused on the grounds that the social
4 repulsion and resentment to her crime was such as would disturb
5 the public peace if she were released on bail.

6
7 Counsel for the Applicant has, in canvassing for bail, again raised
8 the argument of the illegality of the detention and of the warrant
9 of arrest and of detention, just as he did in his application for
10 Habeas Corpus for this same Applicant. He has also raised the
11 mistaken identity of his client, and the fact that the warrant of
12 arrest did not contain a specific mention ordering the arrest of
13 his client who he says is called 'Tamba Alex Brima' and not '
14 Alex Tamba Brima'.

15
16 After a thorough examination of all the arguments so advanced, I
17 disagree with the contention of the Respondent that the legality
18 of the arrest and detention of an Accused person is not relevant
19 in an application for bail. I do not agree either with the further
20 submission by the Respondent that by applying for bail in this
21 case, the Accused has conceded to the legality of his arrest and of
22 his detention. These submissions are too dangerous and
23 hazardous to be accepted in criminal law and practice particularly
24 in the light of the doctrine and privilege of the presumption of
25 the innocence which a detained person enjoys and the possibility
26 offered him to contest by all available means and at all times, the
27 legality of his detention, which is just what this Applicant has in
28 fact been doing all along. These two submissions by the
29 Respondent are accordingly dismissed as frivolous, baseless, and
30 contrary to the principles on which criminal law and the
31 fundamental principles of Customary International Law are
32 based and administered.

1

2 This said, I will now turn to the illegalities and arguments raised
3 by the Applicant in support of the application for bail. The
4 following are the main points amongst others raised in support of
5 the illegalities.

6

7 -That the Applicant is called Tamba Alex Brima and not Alex
8 Tamba Brima.

9

10 -That he has never served in the Sierra Leonean Army and could
11 therefore not have risen to the rank of a Staff Sergeant as alleged
12 in the indictment.

13

14 -That the warrant of arrest was defective in that it did not
15 explicitly order the arrest of his client, thereby rendering his
16 arrest and detention, illegal.

17

18 -That Rule 47 was not complied with in signing the indictment,
19 thereby rendering it illegal.

20

21 As far as the first and second points are concerned, these, in my
22 considered opinion, are matters to be examined during the trial
23 because the Applicant was charged both as Alex Tamba Brima
24 and as Tamba Alex Brima, the latter which he claims to be his
25 real name.

26

27 As to the alleged defect on the warrant of arrest and of detention,
28 it is observed that even though there is no express order ordering
29 the arrest of the Applicant, the said warrant of arrest and of
30 detention were issued against him and in names with which he is
31 now identified. As regards the other allegations related to his
32 identity, the Trial Chamber would be the proper venue to

1 resolve all the issues so raised.

2

3 In concluding I observe that the Applicant is indicted for having
4 allegedly committed very serious crimes against humanity and the
5 People of Sierra Leone, the State to which he seeks to be released.

6

7 Having regard to the foregoing analysis of the facts and
8 arguments raised in the examination of his Application and
9 considering;

10 Firstly, the likely possibility of his escaping or the probable
11 impossibility of locating or recapturing him if released, or

12 Secondly, the likelihood of a public disorder, and

13 Thirdly, the possibility of likely recriminations, as was raised in
14 the Letellier Case,

15 all of which are possible consequences that his release may
16 provoke in this society where very deep wounds caused by the
17 civil war are still healing, it is my considered opinion that this
18 Application, notwithstanding the contents of the written
19 submissions and arguments advanced by Learned Counsel on the
20 Applicant's behalf, lacks any credible merit and therefore fails to
21 satisfy the conditions laid down in Rule 65 of the Rules of
22 Procedure and Evidence, to warrant the exercise in his favour, of
23 the discretion to grant bail or a provisional release.

24

25 The Application is accordingly dismissed.

26

27 The Applicant will remain in custody pending his trial.

28

29

30

1231
1141

Done at Freetown, this 22nd day of July 2003

HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE:



INDEX OF ATTACHMENT - 2

DR. WALTER A. RENNER

M.A., M.SC., M.D., M.P.H., D.T.M & H., FWACP
PHYSICIAN

8 PULTNEY STREET
P. O. BOX 1304
FREETOWN
SIERRA LEONE

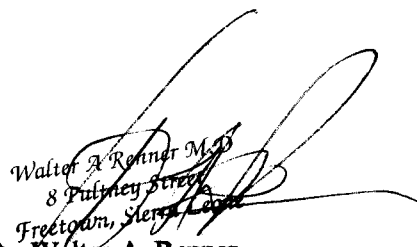
TEL :
OFFICE 224555
RESIDENCE 230730

15th September, 2003.

TO WHOM IT MAY CONCERN

RE: MR. TERENCE MICHAEL TERRY – BARRISTER-AT-LAW

I have been informed by the doctor, to whom Mr. Terence Terry was referred, that his treatment will be prolonged to cover a few more weeks. He will therefore not be able to return until such time as treatment is completed.


Walter A. Renner M.D.
8 Pultney Street
Freetown, Sierra Leone
Dr. Walter A. Renner.

INDEX OF ATTACHMENT - 3

**SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE**

**THE PROSECUTOR
Against**

**ALEX TAMBA BRIMA also known as (aka) TAMBA ALEX BRIMA
Aka GULLIT - APPLICANT**

CASE NO. SCSL-2003-06-PT

IN THE APPEALS CHAMBER

Before: Judges of the Appeals Chamber

Registrar: Robin Vincent

Date Filed: 16th September 2003

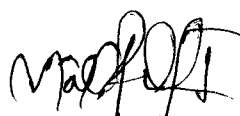
AFFIDAVIT IN SUPPORT

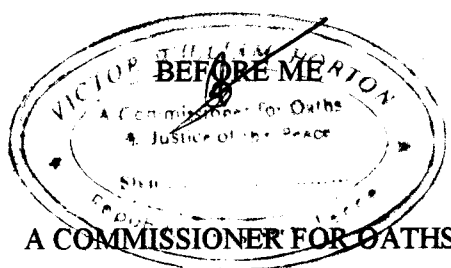
I, AYO MAX-DIXON of 25 Pownall Street, Freetown in the Western Area of the Republic of Sierra Leone Managing Clerk in the office of Terence Michael Terry Counsel for the Applicant herein make oath and say as follows:-

1. That I am the Managing Clerk in the office of Terence Michael Terry Counsel for the Applicant herein and I am duly authorized to make this affidavit for and on behalf of the Applicant herein.
2. That I am shown a letter dated 2nd July, 2003 written by Mariana Goetz – Quintana and addressed to Lahai Momoh Farmah Senior State Counsel which was copied to Mr. Terence Terry the Applicant's Counsel. A photocopy of the said letter of the 2nd July, 2003 is exhibited hereto by me and marked Exhibit "AMD 1".
3. That I am informed by Mr. Terence Michael Terry Counsel for the Applicant herein and I verily believe that since the 21st day of July 2003 he had requested from the Court Management of the Special Court for Sierra Leone the official tape recordings and transcripts of proceedings in both the Bail and Habeas Corpus applications which said proceedings were held in Bonthe on Tuesday the 15th of July 2003 before the Honourable Judge Benjamin Mutanga Itoe, but till date he is yet to receive the said tape recordings and transcripts.

4. That I am also informed by Mr. Terence Michael Terry Counsel for the Applicant herein and I verily believe that on the 24th day of July 2003 he also requested from the Court Management of the Special Court for Sierra Leone Certified True Copies of the Rulings delivered on the Bail and Habeas Corpus applications by the Honourable Judge Benjamin Mutanga Itoe at the Special Court in Freetown on the 22nd July 2003 but his office was only served with the aforesaid Rulings on the 4th of September 2003 at which said time he was abroad undergoing medical treatment.
5. That I exhibit herewith the medical attestation from Dr. Roland DOUMITH of the American Hospital in Paris as Exhibit "AMD 2".
6. That I am further informed by Mr. Terence Michael Terry Counsel for the Applicant herein and I verily believe that the Intended or Proposed grounds of appeal in respect of which the Applicant herein seeks leave of the Appeals Chamber for an extension of time to appeal against the decision and consequential Orders of the Rt. Honourable Judge Benjamin Mutanga Itoe dated 22nd July, 2003 constitute good and substantial grounds of appeal.
7. That I am further informed by Mr. Terence Michael Terry Counsel for the Applicant herein and I verily believe that it is in the interest of justice that the orders prayed for in this application be granted.
8. That I make this affidavit in support of the Orders prayed for in the application herein.
9. That the contents of this affidavit are true to the best of my knowledge, information and belief.

SWORN TO AT LAW COURTS BUILDING FREETOWN
ON THE 16TH DAY OF SEPTEMBER 2003
AT 9:30 O'CLOCK IN THE FORE NOON


DEPONENT
AYO MAX-DIXON



THIS AFFIDAVIT IS FILED BY TERENCE MICHAEL TERRY OF 4TH FLOOR,
MARONG HOUSE, 11 CHARLOTTE STREET, FREETOWN COUNSEL FOR
AND ON BEHALF OF THE APPLICANT HEREIN.

EXHIBIT 'AMD' 1237
16

**SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE**

**THE PROSECUTOR
Against**

**ALEX TAMBA BRIMA also known as (aka) TAMBA ALEX BRIMA
Aka GULLIT - APPLICANT**

CASE NO. SCSL-2003-06-PT

IN THE APPEALS CHAMBER

Before: Judges of the Appeals Chamber

Registrar: Robin Vincent

Date Filed: 16th September 2003

This is a photocopy of the letter dated 2nd July, 2003 referred to in paragraph (2) of the affidavit of Ayo Max-Dixon sworn to at the Law Courts Building, Siaka Stevens Street, Freetown on the 16th day of September 2003 and marked Exhibit "AMD 1".

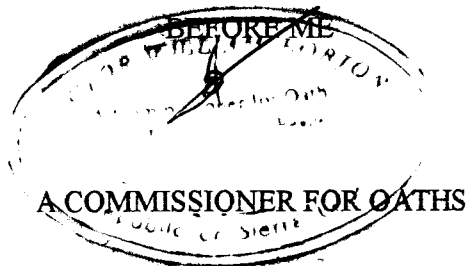




EXHIBIT AND 1238

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

2 July 2003

Ref: REG/204/2003

Lahai Momoh Farmah
Senior State Counsel
Law Officers' Department
Guma Building, Freetown

Dear Mr. Farmah,

Re: Submissions from the Attorney-General and Minister of Justice

I hereby take the opportunity to thank you for your letter dated 30 June 2003 regarding submissions from the Attorney-General and the Minister of Justice in connection with the Defence Motion for Bail or Provisional Release and the Defence Motion for Leave to File a Writ of Habeas Corpus Ad Jubbiciendum for Alex Tamba BRIMA.

In the aforementioned letter you were expressing your concern that such submissions from the Attorney-General and Minister of Justice could not, by reason of logistical difficulties that the Minister of Justice was experiencing, be filed within the seven (7) days period initially granted in accordance with Rule 7 of the Rules of Procedure and Evidence.

In light of the above, Judge Bankole Thompson, Presiding Judge of the Trial Chamber, has decided to grant the Government a three (3) days extension from the receipt of the foregoing for the filing of its submissions with regard to the Defence Motion for Bail or Provisional Release and the Defence Motion for Leave to File a Writ of Habeas Corpus Ad Jubbiciendum.

Yours faithfully,

Mariana Goetz-Quintana
Legal Advisor to the Registrar

CC: Mr. Pascal Turlan, Focal Point for the Special Court, Mr. Terrance Terry, Mr. Luc Coté, Defence Office, Trial Chamber, Registrar.

EXHIBIT AMD 2¹²³⁴

**SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE**

**THE PROSECUTOR
Against**

**ALEX TAMBA BRIMA also known as (aka) TAMBA ALEX BRIMA
Aka GULLIT - APPLICANT**

CASE NO. SCSL-2003-06-PT

IN THE APPEALS CHAMBER

Before: Judges of the Appeals Chamber

Registrar: Robin Vincent

Date Filed: 16th September 2003

This is a photocopy of the Medical attestation from Dr. Roland DOUMITH of the American Hospital referred to in paragraph (5) of the affidavit of Ayo Max-Dixon sworn to at the Law Courts Building, Siaka Stevens Street, Freetown on the 16th day of September 2003 and marked Exhibit "AMD 2".

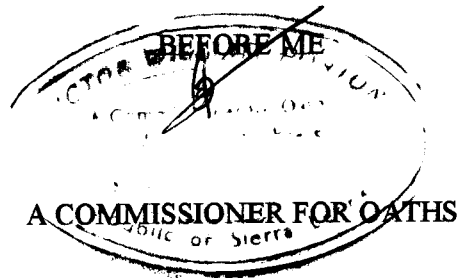


EXHIBIT AND 2

Pr. Roland DOUMITH
Hôpital américain de Paris
105, rue Loufroy d'Abbas

Endocrinologie-Diabétologie-Nutrition
75 1 33 07 1 3

Hôpital Américain
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SECRÉTARIAT N°20

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01 46 41 26 47

Email: roland.doumith@wanadoo.fr

CABINET
105, rue Loufroy d'Abbas
75017 PARIS

01 42 27 86 74

01 42 27 86 64

Email: Roland.Doumith@wanadoo.fr

To Special Court of Sierra Leone

TOMO KENYATTA ROAD
FREETOWN SIERRA LEONE

This is to certify that Mr Terence Michael TERRY, is my patient and was examined by me both in February and the early part of September 2003 and in particular on the 15th September 2003. I have come to the conclusion, that Mr Terence Michael TERRY should return to Paris soonest preferably within the next one month or there a about for detail test to be conducted on him at the American hospital of Paris which will enable me to ascertain the state of his Health and the correct diagnosis.

In the circumstances, Mr Terence Michael TERRY should refrain from attending court until I give him the necessary clearance to resume his professional practice as and when I consider his health to be satisfactory.



Pr Roland DOUMITH