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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER II

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

Registrar: Robin Vincent

Date: 8 August 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazy 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**

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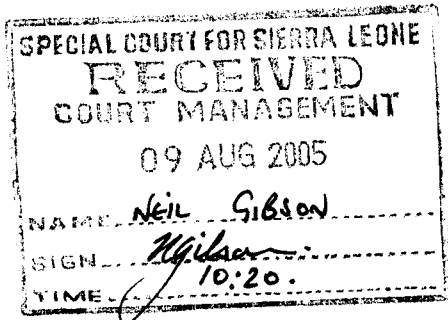
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SEPARATE AND DISSENTING OPINION OF JUSTICE SEBUTINDE

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.

