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SPECIAL COURT FOR SIERRA LEONE

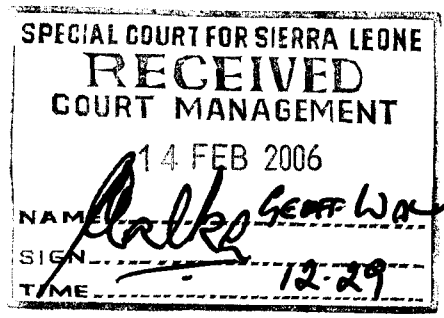
Before: Judge Pierre Boutet, Presiding Judge
Judge Bankole Thompson
Judge Benjamin Mutanga Itoe

Interim Registrar: Lovemore Munlo

Date: 14th February 2006

PROSECUTOR against **Sam Hinga Norman**
Moinina Fofana
Allieu Kondewa

(Case No.SCSL-2004-14-T)



Issa Hassan Sesay
Morris Kallon
Augustine Gbao

(Case No.SCSL-2004-15-T)

PUBLIC DOCUMENT

REPLY TO THE INTERIM REGISTRAR'S RESPONSE TO THE PRINCIPAL DEFENDER'S MOTION FOR A REVIEW OF THE REGISTRAR'S DECISION TO INSTALL SURVEILLANCE CAMERAS IN THE DETENTION FACILITY OF THE SPECIAL COURT FOR SIERRA LEONE.

The Principal Defender

The Registrar

Principal Defender's Reply to Interim Registrar's Response

I. INTRODUCTION

1. This Reply addresses the issues raised by the Interim Registrar's Response to the Principal Defender's Motion for a Review of the Registrar's Decision to Install Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone ("the Motion").

II. PROCEDURAL BACKGROUND

2. On 31st January 2006, the Office of the Principal Defender, acting at the request of the nine accused currently held in the Detention Facility of the Special Court for Sierra Leone ("the Court"), filed the Motion before Trial Chambers 1 and 2 of the Court.
3. On 8th February 2006, the Interim Registrar filed his Response ("the Response")¹ to the said Application which response was also served on the Defence Office.

III. INTERIM REGISTRAR'S ARGUMENTS

a. *Locus Standi* of the Principal Defender

4. The Response argues that the Principal Defender "has no individual authority under the legislation of the Special Court and therefore has no standing to bring this motion seeking review, as that power rests with the Registrar who is the respondent in this motion" (paragraph 5). In his view, only the detainees' counsel, not the Principal Defender, can bring an action seeking protection of the accused's fair trial rights; the motion should, accordingly, be dismissed.

¹ See Interim Registrar's Response to Principal Defenders Motion for a Review of the Registrar's Decision to Install Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone, SCSL-04-14/15-T-466.

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5. It is evident that the Response essentially puts in issue the nature of two relationships: first, the Principal Defender's power relative to that of the Registrar; and second, the Principal Defender's power in respect of counsel that he engages to represent the various accused.
6. The Principal Defender submits that the nature of these relationships, properly understood, do not in any way affect his standing to bring a motion to defend the rights of the accused persons before this Court. Indeed, the *legislation, practice and jurisprudence* of the Court, taken individually and collectively, clearly demonstrate that the Interim Registrar's position is flawed and therefore untenable.

(i) Principal Defender's Standing to Appear Before the Court is Provided for Under Rule 45

7. Under Rule 45 of the *Rules of Procedure and Evidence* of the Court ("the Rules"),² which must be read and interpreted as a whole, the Principal Defender as head of the Defence Office is charged with "ensuring the rights of suspects and accused".³ The Principal Defender, who technically falls within the administrative purview of the Registrar,⁴ has the main responsibility for ensuring those rights by accomplishing the various functions set out in Rule 45, in particular, to "provide advice, assistance and *representation* to"⁵ suspects and accused persons.
8. While the Principal Defender is administratively under the Registrar, the Appeals Chamber has noted that he must act independently from other organs of

² As amended 14 May 2005.

³ Rule 45 *chapeau*. We note that for the purposes of the Motion and this Reply, the Principal Defender and the Defence Office are treated as the same entity; this is consistent with the approach adopted at paragraphs 4-7 by the Response. Where reference is made to the Principal Defender, we consider that coequal to the Defence Office.

⁴ The Registrar is the principal administrative organ of the Court as per Article 16(1) of the *Statute of the Special Court* (16 January 2002).

⁵ Rule 45(A).

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the Court in the interests of justice.⁶ The Principal Defender independently discharges his duties in guaranteeing the rights of the accused persons. At times, he must do so even against the Registrar.⁷ This degree of operational independence is the minimum required to ensure that there is no undue interference with the rights of the accused by the Registrar who may make, as here, decisions adverse to detainee rights enshrined in Article 17 of the *Statute of the Court*.

9. Leaving aside the unequivocal language of the Rules, in the practice of the Court, the Principal Defender has initiated and responded to various motions against the Registrar and other organs of the Court asserting the rights of the accused. This demonstrates that the Interim Registrar's want of standing argument is unsound.⁸

10. Finally, there is nothing in the jurisprudence of the Court to support the Interim Registrar's claim that the Principal Defender does not have standing to file this motion. The only decision⁹ relied on for this striking proposition is not applicable because it only considered the narrow question regarding the powers of the Principal Defender, relative to those of the Registrar, respecting the appointment and reappointment of counsel for two accused. That decision, which did not address the issue of *locus standi* of the Principal Defender, does not have any bearing on this application. If anything, it serves as an example of a situation wherein the Principal Defender took action before this Court to allay

⁶ See *Prosecutor v. Alex Tamba Brima*, SCSL-2004-16-AR-73-441, *Decision on Brima Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead counsel for Alex Tamba Brima and Brima Bazzy Kamara*, separate and concurring opinion of Hon. Justice Gelaga King at para. 49.

⁷ This is not to say that the Registrar does not have any responsibility to protect the accused's rights, in particular, those regarding their rights in detention pursuant to Rule 33(C). By the same token, the three main organs of the Court, especially the Chambers, play a crucial role in assuring that the rights of the accused are adequately protected.

⁸ The Defence Office has, for example, acted as party or respondent to various motions before the Court in respect of, among others, conjugal matters, the question of assignment of counsel for the accused, reappointment of counsel for the accused, etc. We note that the issue of standing of the Defence Office was not raised in those motions, even by the Registrar.

⁹ See *Prosecutor v. Alex Tamba Brima*, *supra* note 4.

various concerns of the accused regarding their right to counsel guaranteed under Article 17.¹⁰

11. Even if that decision were to be found relevant to this motion, the text of Rule 45, the interests of justice and common sense would all dictate that if the fair trial rights of the accused can be compromised by the Registrar's decisions, the Principal Defender, as the main custodian of the rights of the accused, is entitled to invoke any administrative or judicial procedures available to him to shield the accused. That, we submit, would include the right to bring motions before the Trial Chamber on detention issues that may negatively affect sacrosanct Article 17 rights.
12. We reiterate that while not absolute, the fundamental fair trial guarantees that attach to the detainees under Article 17 of the *Statute of the Court* and international human rights law should only defer to security considerations where there is reasonable justification. Reasonable justification simply does not exist here.

(ii) Principal Defender's Standing Before the Court is Not Affected by Delegating to Assigned Counsel his Duty to Represent the Accused

13. To provide an effective defence for the accused, the Principal Defender is also obliged¹¹ under Rule 45 to "*lead* the defence or appeal of an accused"¹² by providing, *inter alia*, initial legal advice and assistance by duty counsel, legal assistance as ordered by the Court, and adequate facilities for counsel -- *who may be from the Defence Office* -- to prepare the defence.

¹⁰ We note that the Principal Defender acted jointly with the Defence teams though not for a lack of standing to file a motion, but rather, because of the importance of the issue to the accused.

¹¹ Notice the use of mandatory language in the Rule: "shall", as opposed to, the discretionary "may".

¹² Rule 45(C).

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14. The plain language of Rule 45 confirms that the Principal Defender can in the exercise of his *representation* functions “lead” the defence of the accused personally. He is also clearly entitled to engage qualified private counsel to do so. Merely delegating part of his power by concluding Legal Services Contracts with qualified counsel to assist him in “ensuring” the rights of the accused does not mean that the Principal Defender divested himself of the power to *represent* the accused solely, or for that matter concurrently, with Assigned Counsel. This is particularly so where, as is the case here, he was invited to so do by the nine detainees currently held by the Court.
15. In any event, the Principal Defender finds problematic the Response that Assigned Counsel, whom he can hire and fire as provided for under the *Directive on the Assignment of Counsel*,¹³ can have standing to represent the accused’s rights in certain situations while he is deprived of the power to bring applications seeking to protect those same rights. The logical implication of this argument is that even Duty Counsel in the Defence Office, who work for the Principal Defender and may step in where Assigned Counsel is not present in Court, can represent the accused’s interest in certain situations but that the Principal Defender cannot.¹⁴ That position is not tenable.
16. Furthermore, while this is an intra-Defence Office issue, there is an informal separation of functions between the Defence Office and Assigned Counsel dictated, in part, by the paucity of resources available to the Principal Defender to ensure the rights of the accused. For example, most matters relating to detainee welfare, including various legal and disciplinary issues, are dealt with by the Defence Office permitting Assigned Counsel to focus on trial preparation and other substantive matters. Thus, Assigned Counsel are not permitted to bill

¹³ As amended on 1 October 2005.

¹⁴ At one point, the former Principal Defender appointed Mr. Ibrahim Yilla, Duty Counsel for the CDF Case, to serve on the Norman Defence Team. This arrangement was approved by the Chambers of the Special Court and is a good example of a situation where the Principal Defender’s junior could technically become empowered to “represent” an accused because he was Assigned Counsel while the Principal Defender would not.

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for work done on detention-related issues. So, by denying the Principal Defender *locus standi* to file motions to challenge the Registrar's decisions, we note that the Interim Registrar would effectively rob the accused persons of legal representation in situations where important Article 17 rights are at stake.

b. Reply to Other Interim Registrar's Arguments

17. In addition to his submissions on *locus standi*, the Response also alleges that the Principal Defender has not proffered any evidence that witnesses will be averse to appearing on behalf of the detainees because of the installation of surveillance cameras in the visitation area of the Detention Facility.
18. The Principal Defender submits that there is ample evidence to confirm that witnesses have been harassed. With due respect, the issue is not whether the Principal Defender should catalogue each instance of harassment of witnesses but the perception reasonably held by the witnesses and their families that they are being monitored, and how that perception will impact upon the accused's right to respond to the charges against them using all available evidence, including relevant witnesses. As Sierra Leoneans, the detainees and their potential witnesses have limited experience, if any, with video surveillance equipment. Therefore, the detainees' apprehension that they will be denied a fair trial is understandable, as is witnesses' fear that they will be victimized for testifying on their behalf.
19. In addition, the Principal Defender notes that the Interim Registrar has proposed in the Response, for the first time, to exclude legal visits from surveillance monitoring through the segregation of three separate cubicles in the visitation area (paragraphs 3 and 20).
20. We reiterate that this new proposal, which surprisingly was not addressed directly to the Defence Office through for instance an inter-office

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memorandum,¹⁵ does not allay the detainees' concerns that their Article 17 right to have private visits with their legal counsel will be violated by the installation of surveillance cameras in the visitation area of the Detention Facility. Indeed, it is submitted that full and frank communication between the accused, their counsel and witnesses would be curtailed, if not wholly compromised. And to the extent that the accused and their witnesses cannot freely communicate all information in their possession to their counsel for use in their defence, their right to a fair trial articulated in Article 17 would have been rendered meaningless.

21. Furthermore, the Response argues that the Court, as a tribunal located in the country that was the theatre of conflict, faces unique security challenges vis-à-vis the ICTY. The Principal Defender agrees that, at first blush, the ICTY practice not to install video equipment in visitation areas of their detention facility would not appear to be relevant because that tribunal is located away from the scene of the conflict. To the contrary, we submit that it is the very fact that the Court is located in Sierra Leone, where the conflict took place, which makes the ICTY practice apposite, especially given that the outcome of the trials of the accused will be judged not only on whether they were actually fair, but also whether they were *seen to* be fair by the accused, their witnesses, the people of Sierra Leone and the rest of the world.

22. With due respect, the examples of incidents cited in paragraphs 17 and 18 of the Response are not major security breaches that would threaten the security and good order of the Detention Facility, and that would because of their gravity, justify a severe encroachment on the fundamental fair trial rights of the detainees. This is particularly so considering the amount of time that has elapsed since the accused were detained by the Special Court and the opprobrium associated with the crimes for which they stand charged. As noted

¹⁵ This would have been more reflective of the spirit of mutual cooperation and goodwill that exists between the Principal Defender and the Registrar regarding many other detention-related issues.

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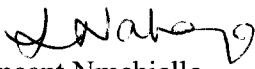
elsewhere,¹⁶ the alleged security breaches can be addressed by the Registrar under the *Rules of Detention* of the Court through less invasive measures on the fundamental human rights of the accused as the *Statute of the Court* and under international law.

IV. CONCLUSION

23. For all the reasons stated in the Motion and this Reply, the Principal Defender respectfully reiterates his request for this Honourable Court to grant relief as stated on page 10 of the Motion; and

24. To issue such other Orders that this Honourable Court may deem just.

Respectfully submitted,


for Vincent Nmehielle

Principal Defender (on behalf of nine detainees presently in detention at the Court).

¹⁶ See Defence Office Reply to Registrar's Response dated 7th November 2005, annexed to the Motion.

LIST OF AUTHORITIES

1. Statute of the Special Court for Sierra Leone (16 January 2002).
2. Rules of Evidence and Procedure of the Special Court for Sierra Leone (as amended on 14 May 2005).
3. Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or otherwise Detained under the Authority of the Special Court for Sierra Leone (as amended on 14 May 2005).
4. Directive on the Assignment of Counsel (adopted 1 October 2003).
5. Prosecutor v. Alex Tamba Brima, SCSL-2004-16-AR-73, Decision on Brima Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead counsel for Alex Tamba Brima and Brima Bazzy Kamara.