SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

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

Registrar: Mr Robin Vincent

Date filed: 5 May 2005

THE PROSECUTOR

Against

ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

CASE NO. SCSL – 2004 – 16 – T

PROSECUTION SUBMISSIONS IN RESPONSE TO APPLICATION BY DEFENCE COUNSEL TO WITHDRAW FROM THE CASE

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I. Background

1. On 3 May 2005 each of Mr Metzger[1], Lead Counsel for the First Accused, Mr Harris[2], Lead Counsel for the Second Accused, and Mr Manley-Spaine[3], Co-Counsel for the Third Accused, sought leave of the Trial Chamber pursuant to Rule 45(E) to withdraw from the case[4]. The Chamber ordered Counsel to file written applications by 9.00am on 5 May 2005, such applications to be filed under seal, confidentially and ex parte ("the Order").
2. Pursuant to the Order the Prosecution files these simultaneous submissions based entirely upon matters articulated by Defence Counsel throughout the trial proceedings and, specifically, in the absence of knowledge as to any new particulars filed pursuant to the Order. In doing so, the Prosecution assumes that

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[1] Trial Transcript, 3 May 2005, p. 3 (lines 2-5).
[2] Trial Transcript, 3 May 2005, p. 3 (lines 10-13).
[3] Trial Transcript, 3 May 2005, p. 3 (lines 15-18).
[4] See "List of Assigned Counsel in Prosecutor v Kamara, Kanu and Brima", SCSL-2004-16-PT filed 1 March 2005.

no ground inconsistent with those already articulated will be relied upon by Defence Counsel.

3. The withdrawal of instructions by the Accused on 2 May 2005 is more correctly named a positive instruction to not go to court.[5] In very clear terms this instruction became operational only after the failed application for an adjournment of the trial until the conclusion of contempt proceedings arising from the Decision on the Report of the Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure dated 29 April 2005 ("the Contempt Decision") made earlier the same day failed.[6] The Prosecution submits that this condition precedent to the instruction to Counsel to not attend court, coupled with the history of selective non-attendance and recurrent adjournment applications by the Accused, demonstrate a consistent and underlying pattern of behaviour designed to obstruct the trial process and thereby the course of justice.[7]
4. The Prosecution submits that such behaviour does not amount to "the most exceptional circumstances" within the meaning of Rule 45(E) and, accordingly, Counsel should not be permitted to withdraw from the case. Rather, Counsel should, it is submitted, be directed to represent the Accused pursuant to Rule 60(B).[8]

II. Procedural History

5. The trial commenced on 7 March 2005. Since that date the Defence have made eleven applications for an adjournment of the trial for reasons connected with the various orders made by the Trial Chamber pursuant to Rule 77.[9]

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[5] Mr Harris read a letter written and signed by the three Accused addressed to all AFRC Defence Counsel in the following terms: "We the AFRC detainees refuse going to Court until the contempt matter involving our wives and our investigator (Brima Samura) is resolved. **If the matter is not resolved, we instructed counsel, we are not to go to Court**. We only give our counsel limited instructions to go and file certain motions to the Appeal Chamber. Yours faithfully" (Emphasis added.) The Prosecution notes that a Joint Defence Notice of Appeal Against Decision on Independent Counsel and associated documents were filed with the Appeals Chamber on 3 May 2005.

[6] See Trial Transcript, 3 May 2005, p. 14 (lines 17-25).

[7] In making this submission the Prosecution should not be taken as demurring from the position that it is appropriate, in certain circumstances, for the Court to grant the Defence time in accordance with the rights enunciated in Article 17.

[8] *Prosecutor v Sesay* and others, "Gbao – Decision On Appeal Against Decision on Withdrawal of Counsel", SCSL-2004-15-T, 23 November 2004.

[9] The Defence have also made applications for an adjournment of the trial for other reasons. For example, on 26 April 2005 following the non-appearance of Mr Manley-Spaine, Mr Metzger requested that the

6. On 10 March 2005 the Chamber was appraised of certain incidents relating to witness TF1-023. Before any Ruling was delivered in relation thereto, Mr Harris sought an adjournment on the basis that the issue affected the human rights of the Second Accused.[10] That application was refused.[11] On the same day, immediately after the Chamber had delivered its Ruling and made certain interim orders with respect to alleged contemnors, Mr Metzger made an application for an adjournment on the basis that until the investigation into the investigator assigned to the Brima Defence Team was completed "there is a shadow of suspicion over the Defence"[12] and also that conduct of the defence was affected by the lack of an investigator.[13] That application was supported by Mr Knoops.[14] That application was also refused.[15]
7. A third application for an adjournment was made on 10 March 2003 at the completion of the evidence-in-chief of witness TF1-023, when Defence Counsel indicated that they would not be in a position to cross-examine future prosecution witnesses as a result of the suspension of the Brima investigator earlier that morning.[16] The Chamber allowed that application and adjourned the matter to 14 March 2005.[17]
8. On 14 March 2005 Mr Metzger indicated that although a replacement investigator was available, the instructions of the First Accused were "I want my investigator"[18] and that he intended to act on those instructions.[19] The Chamber

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matter be stood down to 28 April 2005 allow the Defence to file a Rule 54 motion. See Transcript, 26 April 2005, p. 14 (line 24) to p. 15. (line 19). **No such motion has yet been filed**. Issues arising from the Contempt Decision were raised as part of that application. Mr Metzger stated that the issues canvassed concerning the alleged actions of the Military Police were compounded by the outstanding issue in relation to the investigators and wives and the perception that a Defence complaint made to the Registry "was in the hands of the Prosecution". See Transcript, 26 April 2005, p. 6 (line 25) to p. 7. (line 8). On the same date Mr Harris read a letter signed by the Accused indicating that they refused to attend Court because their basic human rights/ and or constitutional rights were denied by not being able to see their families or have an investigator to help build their defence. See Transcript, 26 April 2005, p. 9 (line 20) to p. 10. (line 18)

[10] Transcript, 10 March 2005, p. 12 (line 17) to p. 14 (line 29).
[11] Transcript, 10 March 2005, p. 15 (lines 1-5).
[12] Transcript, 10 March 2005, p. 16 (line 22).
[13] Transcript, 10 March 2005, p. 17 (lines 12-25).
[14] Transcript, 10 March 2005, p. 19 (lines 2-24).
[15] Transcript, 10 March 2005, p. 20. (lines 2-18).
[16] Transcript, 10 March 2005, pp. 41-50, especially at p. 48 (lines 22-26).
[17] Transcript, 10 March 2005, p. 54 (line 12) to p. 55 (line 11).
[18] Transcript, 14 March 2005, p. 5 (lines 8-9).
[19] Transcript, 14 March 2005, pp. 3-5.

found that the concerns of Counsel that led to the adjournment had been met and that it was proper to allow further time for briefing and investigations. Accordingly, the trial was adjourned to 5 April 2005.

9. On 4 April 2004 a Joint Defence "Request" was filed which sought, *inter alia*, a stay of proceedings.[20] On 5 April 2005 the Accused were not present in Court because they had not seen the report of the independent investigator.[21] Ms Thompson sought an adjournment until the report of the independent investigator was provided to the Defence[22] after stating that the First Accused "categorically rejected"[23] a replacement investigator. That application was supported by Mr Fofanah.[24] The application for an adjournment was rejected on the basis that the Defence submitted "no convincing reasons"[25] for an adjournment of the trial. Immediately following that Ruling Mr Manley-Spaine made an application for an adjournment to 7 April 2005 to discuss the issue of attendance at court with the Accused.[26] That application was refused.[27]
10. On 8 April 2005 a joint Defence Application for leave to appeal the Ruling of 5 April 2005 was filed which, *inter alia*, requested a stay of proceedings until a final decision had been taken on the issue.[28]
11. On 2 May 2005 the Accused were not present in Court. The Accused had also been voluntarily absent on 29 April 2005. On that occasion several reasons were submitted for that absence,[29] including that the Accused believed that their right to a fair trial was denied by the fact 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.

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[20] "Joint Defence Request for Disclosure of Independent Investigator's Report on Contempt Proceedings and Request for Stay of Proceedings", filed 4 April 2005.
[21] Transcript, 5 April 2005, p. 2 (line 21) to p.3 (line 7) and Exhibit D2.
[22] Transcript, 5 April 2005, p. 11 (lines 22-25).
[23] Transcript, 5 April 2005, p. 7 (line 1).
[24] Transcript, 5 April 2005, p. 16 (lines 18-20).
[25] Transcript, 5 April 2005, p. 27 (lines 8-11).
[26] Transcript, 5 April 2005, p. 28 (line 26) to p. 30 (line 15).
[27] Transcript, 5 April 2005, p. 31 (lines 23-27).
[28] Joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005, filed 8 April 2005.
[29] Transcript 29 April 2005, p. 2 (line 10) to p. 3. (line 27).

12. On 2 May 2005 Mr Metzger made an application to adjourn the trial until the conclusion of the proceedings arising from the Contempt Decision so that Counsel could "operate in a spirit of stillness, calmness and without undue difficulties"[30] and also because of the "significant nexus" between "the proceedings in this case, the welfare of individuals in this case, but also the appearance of justice".[31] The application was supported by Mr Manley-Spain.[32] That application was refused.[33] Immediately thereafter, Mr Metzger asked for time to reconcile his professional position as the code of conduct of his professional body did not permit him to act without the instructions of his lay client.[34] Mr Harris indicated that he was not sure whether he had the continued instructions of his client.[35] Mr Manley-Spaine concurred.[36] The Court granted an hour's adjournment.[37]

13. Upon resumption of the proceedings on 2 May 2005, Mr Harris indicated that he would read a letter containing "instructions from our client".[38] He did so; then the following exchange occurred between Judge Lussick and Mr Harris.[39]

Judge Lussick:	Mr Harris, just one thing I'm not totally understanding of. Do I take it that your clients are saying to you that if this Court orders the trial to proceed, his instructions to you are to withdraw?
Mr Harris:	That's the substance. In fact, the answer is yes.

An application was made to adjourn the proceedings to allow Defence Counsel time to speak with the Accused.[40] That application was granted.

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[30] Transcript, 2 May 2005, p. 6 (lines 1-2).
[31] Transcript, 2 May 2005, p. 9 (line28) to p. 10 (line 1).
[32] Transcript, 2 May 2005, p. 12 (lines 3-6).
[33] Transcript, 2 May 2005, p. 14 (lines 19-25).
[34] Transcript, 2 May 2005, p. 15 (lines 6-26). The Prosecution notes that Rule 3.4 (sic) quoted by Mr Metzger related to the situation of a conflict arising between multiple clients. Mr Metzger also referred to Rule 303 (b) as indicating "that the barrister owes his primary duty to his lay client". Rule 303 (b) of the 8th Edition of the Code of Conduct of the Bar of England and Wales actually refers to competing duties as between a lay client and a professional client. It reads, "A barrister owes his primary duty as between the lay client and any professional client or other intermediary to the lay client and must not permit the intermediary to limit his discretion as to how the interests of the lay client can best be served".
[35] Transcript, 2 May 2005, p. 16 (lines 1-10).
[36] Transcript, 2 May 2005, p. 15 (lines 12-14).
[37] Transcript, 2 May 2005, p. 16 (lines 25-29).
[38] Transcript, 2 May 2005, p. 17 (line 23). Refer also to paragraph 3 and footnote 4 above.
[39] Transcript, 2 May 2005, p. 18 (lines 23-28). Mr Metzger also referred to the "instructions as they currently stand". See Transcript, 2 May 2005, p. 21 (lines 7-8).

14. On 3 May all Defence Counsel sought leave to withdraw as set out in paragraph 1 above.

III. Argument

15. The Prosecution submits that Defence Counsel appear to have instructions to proceed in a certain way: to absent themselves from Court and to file certain documents. This is plain from the text of the letter read to the Court on 2 May 2005, the exchange between Judge Lussick and Mr Harris of the same day[41] and also the filing of certain documents. Following the Application to withdraw made in the morning of 3 May 2005, Defence Counsel filed joint appeal documents against the Contempt Decision[42] and also a joint application for a stay of the contempt proceedings before Trial Chamber I.[43] It follows that such documents were prepared and filed on instructions.
16. It is therefore incorrect and quite absurd for the situation to be characterized as one in which Defence Counsel are without instructions.
17. The Prosecution submits that Defence Counsel have instructions and, properly characterized, those instructions are designed to effect a boycott on the trial and obstruct the course of justice. The Accused are not only refusing to submit to the authority of the Court but, in reality, are attempting to prevent anyone, including their Counsel, from submitting to that authority on their account.
18. Rule 45(E) establishes that Counsel shall only be permitted to withdraw from the case to which he has been assigned in "the most exceptional circumstances". There is clear authority that obstructionist behaviour by an accused, such as refusing to recognize the legitimacy of the Court and, by analogy, refusing to

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[40] Transcript, 2 May 2005, p. 19 (lines 6-14);p. 21 (lines 19-21); p. 21 (lines 24-26); and p. 26 (lines 20-28).
[41] On 3 May 2005 Defence Counsel did not refer to a situation of having no instructions. Mr Metzger at p. 3 (lines 4-5) stated "I will not play a further part in his case unless and until **his instructions change**." (Emphasis added.) Mr Manley-Spaine stated at p. 3 (lines 15-28) "My position is that I cannot go on **in the light of the instructions** yesterday. I wish to add that my position changes in case the indictee's position changes." (Emphasis added.)
[42] Joint Notice of Appeal Against Decision on Independent Counsel, Joint Defence Appeal Against Decision on Report of Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence of 29 April 2005 by Trial Chamber II; and Joint Defence Index of Record on Appeal Concerning Decision on Independent Counsel, all filed 3 May 2005 at 15.35.
[43] Urgent Joint Defence Motion on Stay of the Contempt Proceedings filed 3 May 2005 at 15.50.

accept the authority of the Court to proceed with the trial, cannot amount to exceptional circumstances.[44] To hold otherwise would render trial proceedings captive to the caprice of Accused persons dissatisfied with decisions made in those proceedings or, indeed, the proceedings themselves.

19. As previously outlined, the instructions of the Accused to Counsel in this case to not attend court became operational only after the application for an adjournment until the contempt proceedings arising from the Contempt Decision was refused, and against the background of constant applications for an adjournment of the trial for reasons connected with orders made pursuant to Rule 77.[45]

20. Rule 60(B) gives the Court power to direct that an Accused be represented by Counsel. This power is a natural corollary to Rule 45(E). As has been said by the Appeals Chamber of this Court:

> "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."[46]

21. In oral argument reference has been made to the Code of Conduct of the Bar of England and Wales.[47] The Prosecution submits that there is nothing in that Code which would ethically compromise a barrister of the English Bar in being directed

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[44] *Prosecutor v Sesay* and others, "Gbao-Decision on Appeal Against Decision on Withdrawal of Counsel", SCSL-04-15-AR73, 23 November 2004; *Prosecutor v Barayagwiza*, "Decision on Defence Counsel Motion to Withdraw", Case No.ICTR-99-52-T, 2 November 2000.

[45] The Prosecution has not made reference to the many authorities upon the limited right of an Accused in international criminal law to self-representation as no such issue arises in the instant case.

[46] *Prosecutor v Sesay* and others, "Gbao-Decision on Appeal Against Decision on Withdrawal of Counsel", SCSL-04-15-AR73, 23 November 2004, para. 52. It is to be noted that it was the same Counsel who had previously appeared for Mr Gbao with his instructions who were directed to appear without them.

[47] Transcript, 2 May 2005, p.15 (lines 6-26). See also footnote 34 above.

to appear pursuant to Rule 60(B). Rule 609 states that a barrister may withdraw from a case where he is satisfied that his instructions have been withdrawn. As argued above, the Prosecution submits that in the instant case the instructions have not been withdrawn. The Prosecution further submits that even if they had, the Code of Conduct is silent as to the situation where a court directs Counsel to represent an Accused.

22. In a decision in the *Milosevic* case concerning an application by court assigned counsel to withdraw, court assigned counsel was in fact a member of the English Bar. Reference was made to Rule 609 of the Code of Conduct. It was held to be "plainly in the interests of justice that counsel should remain assigned to the Accused and should not be permitted to withdraw."[48] The Court noted that the assignment of Counsel against the wishes of an Accused is a developing area of law in both national and international jurisdictions. As such,

"it is plain that any code relating to the conduct of counsel, drafted at a time when such appointments were not specifically considered must be construed in light of developments in the law."[49]

23. The Court further noted that what is required of assigned counsel is that they act in what they perceive to be the best interests of the Accused. It is therefore not critical that they are able to obtain his instructions.[50] The Court made reference to the *Blagojevic* Decision, which held

"The Appeals Chamber rejects the argument of the Appellant that his "subjective" views about how his trial should proceed may override the professional obligation of Counsel to act in the best interests of the Appellant. Counsel has an obligation to consult with the Appellant but he is not bound by the Appellant's views as to what are the best means to achieve the objects of the Appellant's defence."[51]

24. In this context the Prosecution refers to Rules 301, 302 and 701 of the Code of the Code of Conduct of the Bar of England and Wales.[52]

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[48] *Prosecutor v Milosevic*, "Decision on Assigned Counsel's Motion for Withdrawal", Case No. IT-02-54-T, 7 December 2004, para. 26.
[49] Ibid, para. 22.
[50] Ibid, para. 19.
[51] *Prosecutor v Blagojevic*, "Public and Redacted Reason for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, Case No. IT-02-60-AR73.4, 7 November 2003, para. 27.
[52] Rule 301 provides: "A barrister must have regard to paragraph 104 and must not: (a) engage in conduct whether in pursuit of his profession or otherwise which is: (ii) prejudicial to the administration of justice; or

25. Reference has been made in oral argument to Article 24 of the Directive on the Assignment of Counsel. Under that Article the Principal Defender may, in exceptional circumstances, at the request of either the Accused or his Assigned Counsel withdraw the assignment of Counsel.[53]
26. The Prosecution submits that this Article has no bearing on the current applications for leave to withdraw. First, it is clear from the Applications made on 3 May 2005 that they were made directly to the Trial Chamber. Secondly, no application to withdraw has been made to the Principal Defender.[54] Therefore the current applications are not made by way of review by the Presiding Judge of the Trial Chamber following a refusal by the Principal Defender, pursuant to Article 24(E). Rather the applications must be determined pursuant to Rule 45(E).
27. The Prosecution notes that there is a difference in the tests to be applied in any application to withdraw as between Article 24(A) and Rule 45(E). The former requires "exceptional circumstances", the later "the most exceptional circumstances". The Prosecution does not comment further upon this discrepancy except to note that for the reasons outlined above, it is submitted that neither test is satisfied by the present applications.

IV. Conclusion

28. For the reasons outline above, the Prosecution submits as follows:
    (a) The proper characterisation of the current factual situation vis-à-vis Defence Counsel and the Accused is that Counsel hold certain instructions. These are to abstain from attending Court and to file certain documents.
    (b) This is a situation in marked contradistinction to Defence Counsel being without instructions.

(iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute". Rule 302 provides: "A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court." Rule 701 provides: "A barrister: (a) must ... take all reasonable and practicable steps to avoid unnecessary expense or waste of the Court's time and to ensure that professional engagements are fulfilled."

[53] Article 24(A)(i).

[54] See comments of the Principal Defender, Transcript 3 May 2005, p. 5 (lines 7-25).

(c) These instructions, when viewed against the condition precedent to their operation and the history of adjournment applications relating to Orders made by the Trial Chamber pursuant to Rule 77, are calculated to disrupt the administration of justice.

(d) The applications for leave to withdraw fall to be determined by applying Rule 45(E) and, to be successful, Defence Counsel must demonstrate "the most exceptional circumstances". As no application has been made to the Principal Defender pursuant to Article 24(A)(i), consideration of its provisions is otiose.

(e) The most exceptional circumstances do not, in fact or law, encompass behaviour of an Accused designed to prevent Counsel submitting to the authority of the Court.

(f) There is nothing in the Code of the Code of Conduct of the Bar of England and Wales which ethically compromises a member of that Bar appearing for an Accused after being directed by the Court to do so.

(g) It is in the interests of justice that Defence Counsel should remain assigned to the Accused and should not be permitted to withdraw.

(h) Defence Counsel should be directed to represent the Accused pursuant to Rule 60(B).

Filed this 5th day of May 2005,
In Freetown,

Luc Côté
Chief of Prosecutions

Lesley Taylor
Senior Trial Counsel

PROSECUTION INDEX OF AUTHORITIES

Prosecutor v Sesay and others, "Gbao – Decision On Appeal Against Decision on Withdrawal of Counsel", SCSL-2004-15-T, 23 November 2004.

Prosecutor v Barayagwiza, "Decision on Defence Counsel Motion to Withdraw", Case No.ICTR-99-52-T, 2 November 2000.
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