



Case No. SCSL-2004-16-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTI GIE BORBOR KANU

MONDAY, 02 MAY 2005
9.25 A.M
TRIAL

TRIAL CHAMBER II

Before the Judges:

Teresa Doherty, Presiding
Julia Sebutinde
Richard Lussick

For Chambers:

Mr Matthias Reuss

For the Registry:

Mr Geoff Walker

For the Prosecution:

Ms Lesley Taylor
Ms Melissa Pack
Mr Alain Werner
Mr Robert Braun
Ms Maja Dimitrova (Case Manager)

For the Principal Defender:

Mr Elizabeth Nahanya

For the accused Alex Tamba
Brima:

Mr Kevin Metzger
Mr Koyo Graham

For the accused Brima Bazy
Kamara:

Mr Wilbert Harris
Mr Mohamed Pa-Momo Fofanah

For the accused Santigie Borbor
Kanu:

Mr Abibola Manley-Spaine
Ms Karlijn van der Voort

1 [TB020505A- SGH]

2 Monday, 2 May 2005

3 [The accused not present]

4 [Open session]

09:17:45 5 [Upon commencing at 9.25 a.m.]

6 PRESIDING JUDGE: Good morning. Good morning,

7 Mr Manley- Spaine, I note your return. I trust you are feeling
8 better.

09:28:20 9 MR MANLEY- SPAINE: Good morning, Your Honour. I just wish
10 to apologise for my absence for three days last week, it was due
11 to circumstances that I couldn't control.

12 PRESIDING JUDGE: It has been explained to us and we accept
13 the explanation.

14 MR MANLEY- SPAINE: I am obliged.

09:28:39 15 PRESIDING JUDGE: I note the accused are not present in the
16 Court precincts. Do the matters raised on Friday still apply?

17 MR METZGER: It would appear to be the case, Your Honour,
18 that the matters that were raised on Friday still apply. At the
19 moment counsel are finding themselves in very great difficulty
09:29:03 20 indeed. We are currently without instructions and that does make

21 life somewhat difficult in the presentation of a case of this
22 nature. I don't know what it is that the Trial Chamber wishes
23 now to happen and so perhaps it would be prudent, as they always
24 say, to look before you leap. I shall sit and await any
09:29:38 25 instruction from the Trial Chamber before we make any submissions
26 and any observations, of course, by my learned
27 friends opposite.

28 PRESIDING JUDGE: The Trial Chamber has heard counsel for
29 the Defence. The Trial Chamber notes that the accused stated or

1 conveyed certain views on Friday and that they have not appeared
2 having been advised and we note therefore that the provisions of
3 Rule 60 - I think it is 60(B) - that they have waived their
4 rights and the matter can now proceed. Any matters between
09:33:18 5 counsel and their clients are a matter for counsel and their
6 clients and it would not be proper for this Trial Chamber to
7 interfere in any way with that relationship. And similarly, I
8 will not invite comment from any other party. The matter will
9 now proceed and we have before us a revised list of the
09:33:39 10 witnesses.

11 MR METZGER: We are very grateful for the ruling and, as
12 ever, we stand guided by the wisdom of the Trial Chamber.
13 However, we are in a position of difficulty and in our respectful
14 submission, it would be - I try to use my words carefully -
09:34:11 15 significantly imprudent for us to continue at this particular
16 point in time. We, of course, note that our clients' concerns
17 have been exacerbated by a confidential decision that we were
18 notified of, I believe, late on Friday, but in fact became fully
19 aware of on Saturday when we saw the relevant documentation. We,
09:34:47 20 of course, have had the opportunity to look at that decision and
21 the ensuing document that emanated therefrom.

22 There then comes a situation, Your Honours, my learned
23 friends, where counsel applying their collective experience,
24 questioning their own integrity and considering the global
09:35:15 25 matters as a whole, have to say that in our collective experience
26 it would go against, respectfully, the rule of law, the principle
27 of a fair trial and the principle of a public trial for this case
28 to proceed with the calling of witnesses who we, in our role as
29 counsel, for people who have expressed concern about what they

1 consider to be attacks from them from all sides. And for the
2 sake of clarity, the considerations that they have had in their
3 minds are, of course, in most circumstances, considerations that
4 people would say fall upon an accused person or a defendant in
09:36:20 5 any sort of criminal trial. He or she will not always be happy
6 with decisions that are made. He or she will not always be happy
7 with the way in which decisions are made. But we pray that this
8 Honourable Trial Chamber considers in the wider picture the
9 perception, not only of the accused who are not in court, but the
09:36:56 10 public in general, that whatever it is that these men are accused
11 of, however grave the crimes, the presumption of innocence always
12 applies. The doctrine of equality of arms always applies. The
13 principle that the defence must have adequate time and facilities
14 for the preparation of the defence always applies.

09:37:33 15 The principles of natural justice which say that justice is
16 a scale, a balance, whereby with the evidence dropping on one
17 side or the other, those who sit in the administration of justice
18 are able thereby to judge the way in which they can properly see
19 events have unfolded - and this is always a weighty task because
09:38:14 20 consideration must apply to all sides. But, of course, as we
21 are, it has been said, in a hybrid jurisdiction, but this is not
22 an inquisitorial court it, in our respectful submission, falls
23 upon all those of us here who are charged in one way or another
24 with the administration of justice to honour that obligation in
09:38:52 25 the best way that we can without leaving anyone, either side,
26 feeling that there is a want of consideration for them. And
27 that, respectfully, is the position we find ourselves in. And
28 whilst we understand that this Trial Chamber urgently wishes this
29 matter to continue, if one were to pause just for a minute and

1 consider, we, of course, of counsel are used to operating in our
2 roles in the most difficult of times sometimes, but we do ask on
3 this occasion for consideration to be given to the accused
4 persons and for a small measure of that consideration to be
09:39:59 5 extended to us that we may walk with justice, that we may walk
6 with right rather than run or fly headlong into an abyss that
7 pretends to be justice, but only pretends. It is therefore in
8 the light of the particular circumstances - and I say it in this
9 way - we are fully aware of the decision of last Friday and that
09:40:40 10 it is a confidential decision and that any, it would appear,
11 emanating matters would not be in the public domain as things
12 stand. In so far as we have instructions, we would ask that any
13 such matters be in the public domain so that posterity, and the
14 world at large, can judge what it is that has occurred in their

09:41:20 15 own way and be a part of a system of open justice that we believe
16 is what this Trial Chamber, these buildings, this Court, the
17 agreement that set up the Special Court, is all about.
18 PRESIDING JUDGE: Mr Metzger, I note too you have asked for
19 two things, it seems, from what you have said. I don't think it
09:41:51 20 is appropriate to start answering issues bit by bit. This is not
21 the forum for that at the moment. You said you ask consideration
22 to the accused and the measure of consideration be extended to
23 yourselves. In what form? That is number one. And you said
24 matters emanating from a decision on Friday be made public.
09:42:21 25 Exactly what are a asking to be made public? If you could
26 clarify those. Unless, of course, there is a third application
27 you have got that I have not noted yet.

28 MR METZGER: My application was going to lead eventually to
29 an adjournment of these proceedings until the end of the matters

1 emanating from the decision, so that we can operate in a spirit
2 of stillness, calmness and without undue difficulties.

3 PRESIDING JUDGE: To the end of what? I am sorry, I didn't
4 quite hear.

09:43:09 5 MR METZGER: The end of any - I choose my words advisedly
6 because I shall come to that matter in just a minute - any
7 matters emanating from the confidential decision issued forth on
8 Friday last.

9 Your Honour has asked me to clarify what it is that I ask
09:43:33 10 for when I mentioned that any matters emanating therefrom ought
11 to be in the public domain. I have chosen my words very
12 carefully because we note that the decision is a confidential
13 one. And if I were in these proceedings to state what it is
14 exactly that that decision addresses and what it is exactly that
09:44:03 15 we are asking for as a result of that, I would not want to be
16 held in breach of that particular order. But what I can say, it
17 seems to me, without breaching that order, I can refer to matters
18 that are in the public domain. In the public domain is knowledge
19 of the fact that Mr Brima Samura who was - and still is - the
09:44:36 20 investigator for the accused, Alex Brima, was suspended on 10th
21 March as a result of allegations that were made on 9th March. On
22 that same date --

23 PRESIDING JUDGE: I am sorry. [Microphone not activated]

24 MR METZGER: On that same date, four people who were
09:45:09 25 related to the accused persons, three of them being their wives
26 who had been in attendance during these proceedings, the fourth
27 being a friend of the second accused, were excluded from the
28 Court. Now, at that particular point in time -- I beg your
29 pardon, immediately prior to that there had been the complaint in

1 open court from witness 023, who had indicated that she felt
2 threatened by an incident that had occurred outside court. At
3 that particular point in time, it seems to me, that we weren't
4 told exactly where it was outside the Court, but in the premises
09:46:06 5 of the Special Court grounds, so to speak, this incident had
6 occurred from the witness box over there, that witness indicated
7 that two women had approached her and that two women had said
8 words to her. And I am sure that Your Honours will recall whilst
9 still in open court the way in which we sought clarification of
09:46:36 10 what it was that was actually said and the translation that was
11 given. Indeed, it was His Honour Judge Lussick who asked
12 pertinent and pointed questions of the witness about how she
13 herself felt and what she understood the words to be and it is my
14 recollection - and if necessary we can be assisted by the
09:46:57 15 transcript of that particular portion of the proceedings - he
16 witness responded by saying, "I didn't know what they meant". Of
17 course it went a little bit longer than that. But what had
18 preceded all of that was on the 9th March --

19 PRESIDING JUDGE: Mr Metzger, without interrupting you, I
09:47:26 20 think I am clear now on what you are referring to.

21 MR METZGER: I was simply going to point out in terms of
22 the perception of unevenness in terms of consideration given
23 between the parties, as seen, of course, by our lay clients, the
24 areas in which there were extreme arguably prejudicial concerns.
09:48:00 25 And one of those is how it is that four people could have been
26 apparently identified as being two people who issued threats, but
27 that is --

28 PRESIDING JUDGE: That is a matter for another court,
29 Mr Metzger. We should not go down the road of evidence or the

1 arguments. I note your two applications before us now. I will
2 invite response on the first from counsel for the Prosecution.
3 Thank you. MS Taylor, as I have indicated, I am inviting reply
4 only on the first of Mr Metzger's applications, which I think I
09:49:01 5 have correctly recorded, to adjourn the proceedings to the end of
6 any others emanating from the confidential decision. Could I
7 have your reply on that one, please?

8 MS TAYLOR: Certainly, Your Honour. Thank you. The
9 Prosecution opposes the application for the adjournment. The
09:49:17 10 basis articulated for the application was to allow Defence
11 counsel to operate in a manner of stillness and calmness, I
12 believe. The Prosecution would say that the matters that will
13 flow from the decision on the report of the independent counsel
14 that was issued on 29th April, are entirely separate to the
09:49:41 15 proceedings in this trial to the extent that anyone on the
16 defence side of the courtroom will be involved in those
17 proceedings. It is only as perhaps a witness. If that is to
18 occur, then either there can be a short break in these
19 proceedings while that occurs, or co-counsel can take over if any
09:50:03 20 of the counsel are involved in that.

21 To say that this trial cannot proceed while separate
22 proceedings are going on in a different courtroom, is, in the
23 Prosecution's submission, not correct and that in any event those
24 matters do not concern the accused persons; they are not charged.
09:50:27 25 The Defence counsel are not related, they do not appear on the
26 record as acting for any of the people who are so charged in
27 those proceedings. And that this trial should proceed. As Your
28 Honours please.

29 PRESIDING JUDGE: Thank you. Mr Metzger, points of law.

1 MR METZGER: I had, of course, not concluded my original
2 submissions, but as usual I sat down because I was invited so to
3 do. And perhaps --

4 PRESIDING JUDGE: I thought you had very ably laid down
5 your foundation.

6 MR METZGER: I had a little bit more to go. And perhaps it
7 is that which has caused my learned friend to speak in the way
8 that she has. And respectfully, it never ceases to amaze me when
9 a person comments that if something is happening to the wife or
10 family member of someone else, that that has no bearing on
11 anything that may be happening in that person's life, because, it
12 seems to me, that that is disingenuous in the extreme. But, of
13 course, far be it from me to comment any further than that, what
14 I was going to address this Court on was the fact that any
15 matters which may emanate from the decision, the confidential
16 decision on Friday, may well, judging by the appearance of shall
17 I say named persons in the writing, for want of a better way of
18 putting it, if there is going to be a thorough investigation will
19 require the attendance of those named persons.

20 The issues that will arise in that case, in case the
21 Prosecution had not noticed, may well include privilege and
22 privilege attaches to the relationship between counsel in this
23 case and the accused in this case, which those proceedings
24 apparently have nothing to do with. I fail to understand that.
25 And, therefore, if I am unable to convince this Trial Chamber -
26 and I am pleased I do not have to make the effort to convince my
27 learned friend for the Prosecution - but if I am able to convince
28 this Trial Chamber that there is a significant nexus between not
29 only the proceedings in this case, the welfare of individuals in

1 this case, but also the appearance of justice, well then the only
2 proper way in which we are going to be able to proceed has got to
3 be to pull up stumps, go to tea and wait for what happens in
4 those other proceedings. I cannot understand how it could
09:53:24 5 possibly be that these proceedings can run uninterrupted, because
6 these are accused persons something else is going on. Well one
7 of the other counsel and go to the other court and another
8 co-counsel can take it over. And yet, the Defence does not have
9 anything, anything at all, like the kind of resources that are
09:53:49 10 available to the Prosecution. Where is the fairness? The
11 Prosecution are meant to prosecute, not to persecute. Those are
12 my submissions.

13 PRESIDING JUDGE: Thank you, Mr Metzger.

14 JUDGE SEBUTINDE: Mr Metzger, I am personally trying to
09:57:26 15 articulate in my mind probably the first application you made. I
16 know the second was for us to adjourn pending the completion of
17 the contempt matters. But the first application, I just want you
18 to help me if I have got it right, is it that you want certain
19 aspects of that proceeding to be in public, or is it certain
09:57:54 20 documentation that you want to be in public? If you could help
21 me just on that aspect --

22 MR METZGER: Everything.

23 JUDGE SEBUTINDE: -- before we retire. We must be sure
24 what it is we are retiring to consider. Thank you.

09:58:05 25 MR METZGER: We would like everything to be in public. We
26 would like everything, all of it, to be in the public domain.
27 Except, of course, we do understand that the individuals
28 themselves concerned have a right and it will be a matter for
29 them ultimately in so far as those proceedings are concerned.

1 That is what we ask for.

2 JUDGE SEBUTINDE: In other words, if I get you right, you
3 want the publication of the documentation thus far in the Court's
4 custody, but also from henceforward you want proceedings in that
09:58:38 5 matter to be public?

6 MR METZGER: To be public.

7 JUDGE SEBUTINDE: I think I get you.

8 MR METZGER: We would also like to have disclosure of the
9 investigator's report which we have not seen.

09:58:50 10 JUDGE SEBUTINDE: Are you saying -- because disclosure and
11 public are two slightly different things. So are you saying that
12 the documentation should be public or merely disclosed? It can
13 be confidential, but disclosed.

14 MR METZGER: We would like disclosure certainly of all the
09:59:08 15 documentation, but in so far as the proceedings, and all matters
16 relating to that which emanates from the decision, we would ask
17 for it to be made public. And perhaps I can put the matter even
18 more clearly. We have - and I am sure that no-one is surprised
19 by this - experienced, by virtue of that particular matter and by
09:59:36 20 virtue of events which occurred over last weekend, we have

21 experienced a significant reluctance in parties seeking to assist
22 the Defence by way of calling our own witnesses. People just
23 don't want to know. And therefore, we believe that now we should
24 have everything public so that people are able to know this is
09:59:59 25 what is happening. People's rights are being protected and the
26 matters such as they are, when they arise, are being properly
27 investigated. Because if that does not happen, we believe that
28 come the end of the Prosecution case, when the Defence should be
29 looking for witnesses, there will be none. And that would be, in

1 our respectful but humble submission, a travesty of justice.

2 PRESIDING JUDGE: [Microphone not activated]

3 MR MANLEY-SPAINE: Your Honours, just briefly to state that
4 we support the application. Particularly the first application,
10:01:30 5 but particularly the first because we really badly need to
6 reconcile our position with our client.

7 PRESIDING JUDGE: Thank you very much. Mr Harris, I
8 presume you are ad idem with your co-accused?

9 MR HARRIS: Your Honour, yes. I simply ask the question --
10:01:51 10 I am sorry. I simply ask two questions because I have been
11 wrestling with this over the weekend. The documentation which I
12 have seems to suggest that -- well it has named counsel in it -
13 it just seems to suggest that counsel may be called as a witness
14 in the trial in the Chamber. I have no criticism about that.

10:02:21 15 The only matter which concerns me is this, if that be
16 right, we may be entering along the path which you have so
17 rightly indicated before of the communication privilege between
18 counsel and their clients. And I also note that representatives
19 of the Principal Defender's Office is also named and that may
10:02:54 20 necessitate the giving of evidence and therefore may equally
21 necessitate a communication between them and counsel who may be
22 called to give evidence. That concerns me a little bit. I am
23 inviting you to take that on board when you are considering the
24 matters at issue. It may very well be safer to, at the end of
10:03:17 25 the day, completely the one first and then we can do the other
26 using - my words now - protective measures, which enable us to
27 still maintain the confidentiality principle between counsel and
28 his client and counsel and the Defence Office.

29 And there is one other matter which seems to raise another

1 issue. In the document which you have so ably presented, I must
2 confess, is a reference to some documents which came into
3 counsel's possession. I think the word is on pieces of paper.
4 But what would happen to that, is that document a confidential
10:04:19 5 one because it communicates -- it is communication between
6 counsel in the course of a trial, or is it one which the
7 confidentiality rule could be breached so as to present a clear
8 balance in the other trial. This is an issue which raises its
9 head.

10:04:37 10 PRESIDING JUDGE: And that may be more appropriate before
11 another court, Mr Harris.

12 MR HARRIS: Yes.

13 PRESIDING JUDGE: I do not think it is appropriate for this
14 Bench to rule upon it. I will -- Thank you for your submissions.
10:04:49 15 I am sorry there was something else?

16 MR HARRIS: Yes, there was just one other matter I would
17 like to refer you to to just address. You have ruled to Rule 60.

18 PRESIDING JUDGE: Mr Harris, please pause, I was working
19 off the top of my head. Let me ensure that.

10:05:04 20 MR HARRIS: You are right, you are right, it is Rule 60. I
21 am not criticising you at all. You are absolutely right. I am
22 just looking at it because it has been worrying me a little bit
23 during the course of the week. 60(B): "In either case the
24 accused may be represented by counsel of his choice." That is no
10:05:25 25 problem "Or as directed by the Judge or Trial Chamber." That
26 is the difficulty.

27 PRESIDING JUDGE: That particular phrase in the rule I
28 understand arises in a certain situation which is not before us.
29 There has been some indications or implications and if that

1 situation does so arise, of course then we will hear and deal
2 with it.

3 MR HARRIS: Thank you. Then I rest.

4 PRESIDING JUDGE: Thank you, Mr Harris. Ms Taylor, I had
10:06:12 5 inadvertently invited your response prior to certain matters. If
6 there is anything you wish to add in the light of the other
7 submissions.

8 MS TAYLOR: Thank you, Your Honour. There is nothing
9 further that I feel will assist the Chamber.

10 PRESIDING JUDGE: I am grateful for that indication. We
10:06:25 11 will take a few minutes to consider this and I don't think it
12 will take very long. Thank you, counsel. Mr Court Attendant,
13 please adjourn court for a short period.

14 [Break taken at 10.05 a.m.]

10:15:13 15 [TB020504B- JM]

16 [On resuming at 10.24 a.m.]

17 PRESIDING JUDGE: The Trial Chamber has considered the two
18 applications by counsel for the Defence, and we have reached a
19 unanimous decision. On the first application for an adjournment
10:25:18 20 pending proceedings to come to an end, it is the decision of the
21 Trial Chamber that that other matter is a different trial in a
22 different forum with different accused. We see no good reason
23 for an adjournment of this trial. If any person involved in this
24 trial is called on as a witness in any other trial, then an
10:25:41 25 application will be considered at the pertinent time.

26 On the application -- the second application, the Trial
27 Chamber is of the view that that matter has been assigned to
28 Trial Chamber I pursuant to Rule 77(D) of the Rules of Evidence
29 and Procedure. Hence, this Trial Chamber no longer has a matter

1 before us, and any application in relation to it should be made
2 before Trial Chamber I. That is the Court ruling. The matter
3 will now proceed.

4 Ms Taylor, your witness.

10:26:26 5 Please pause.

6 MR METZGER: Your Honour, I have taken the opportunity of
7 discussing matters with my learned friend, and it was last week
8 that we were so ably reminded that in the absence of a code of
9 conduct, we must look to our code of conduct. The code of
10:26:46 10 conduct from my professional body does not permit me to act
11 without the instructions of my lay client. If, therefore, this
12 trial is to continue at this point in time, I do not have his
13 consent. And therefore, Rule 3.4 of my codes says: "If after a
14 barrister has accepted a brief or instructions on behalf of more
10:27:15 15 than one lay client there is or appears to be a conflict of
16 significant risk or conflict between the interests of any one or
17 more of such clients, he must not continue to act for any client
18 unless such clients give their consent to his so acting."

19 That deals in terms of a multiple client situation. But
10:27:35 20 over and above that, there are various other rules which I can
21 bring before the Court. Rule 303(b), for example, indicates that
22 the barrister owes his primary duty to his lay client. If I am
23 without instructions, then Court may continue, but I would have
24 then to ask the Court to consider giving me some opportunity to
10:27:59 25 reconcile my professional position because at that point in time,
26 if my position is untenable, I must withdraw.

27 PRESIDING JUDGE: Yes. Obviously we are conscious of your
28 duty, both to the Court and to the profession and to the client.
29 Has any other counsel any comment to make?

1 MR HARRIS: Your Honour, yes. I just say this, just for
2 the purposes of completion. I was not certain, and this morning
3 I had to go back to the Detention to try and reaffirm the
4 instructions I had on Saturday, having spent some time there.
10:28:53 5 Honesty compels me to say I am not sure whether I have his
6 confidence and his continued instructions. When I left this
7 morning, I am not sure that I did. So it may be that I would
8 just need a moment or two to speak to him again, maybe that. I'm
9 not asking for a lengthy adjournment, but I need -- I think I do,
10:29:26 10 because I am as confused now as I was on Saturday.

11 PRESIDING JUDGE: Very well, Mr Harris.

12 Mr Manley-Spaine, you've already indicated to us.

13 MR MANLEY-SPAINE: Yes, I believe I made that point before,
14 Your Honours.

10:29:43 15 [Trial Chamber confers]

16 PRESIDING JUDGE: Mr Harris, when you say a few short
17 time -- a few moments, what time are you looking at?

18 MR HARRIS: At the outset, an hour, but it could be
19 shorter. But I have wrestled with it.

10:30:49 20 PRESIDING JUDGE: We accept that. We accept that.

21 Counsel for the Prosecution, this is really a matter
22 between Defence counsel and their clients, but if there's
23 anything you consider pertinent, we will hear it.

24 MS TAYLOR: No, Your Honour. We don't wish to be heard.

10:31:09 25 PRESIDING JUDGE: The Bench, of course, is conscious of the
26 duty of counsel and client and the privilege that accords
27 therewith. And in the circumstances, we'll accede to the request
28 for counsel for the Defence for an hour's adjournment in order to
29 fully talk to their clients on this situation.

1 Mr Court Attendant, please adjourn Court for one hour.

2 [Break taken at 10.31 a.m.]

3 [TB020505C-CLR]

4 [On resuming at 2.17 p.m.]

14:20:32 5 PRESIDING JUDGE: Before I invite counsel to inform us of
6 the situation, I wish to make the following -- following
7 Mr Metzger's submissions this morning, referring to the status of
8 a document during the adjournment, I checked the situation and
9 found that the decision on the report of the independent counsel
14:20:52 10 pursuant to Rule 77(C)(iii) and 77(D) of the Rules of Procedure
11 and Evidence was marked "Confidential" but, in fact, this Bench
12 had not made such an order. This was an erroneous directive to
13 the Registry and has been lifted. An appropriate order will be
14 filed in writing. Mr Harris, I noted you had your light on.

14:21:23 15 MR HARRIS: Your Honours, may I be clear and say on behalf
16 of my learned friends who appear for the detainees, we wish to
17 thank you for the understanding and the time you have given us
18 this morning. I fear that it has not brought the fruits that I
19 had indeed expected. I hand you an original document, the
14:21:54 20 contents of which I shall read to you. It's very short.

21 PRESIDING JUDGE: Mr Harris, has this document been shared
22 with the Prosecution prior to being tendered to the Court?

23 MR HARRIS: No, it's instructions from our client.

24 PRESIDING JUDGE: I see, it's something between client --

14:22:19 25 MR HARRIS: Yes.

26 PRESIDING JUDGE: I understand.

27 MR HARRIS: Your Honour, having a long and detailed
28 discussion with those we represent, they maintain this -- in
29 fact, this has been written by them and signed by each, dated

1 2 May 2005, addressed to all AFRC Defence counsel. "We the AFRC
2 detainees refuse going to Court until the contempt matter
3 involving our wives and our investigator (Brima Samura) is
4 resolved. If the matter is not resolved, we instructed counsel,
14:23:21 5 we are not to go to Court. We only give our counsel limited
6 instructions to and file certain motions to the Appeal Chamber.
7 Yours faithfully," and it is signed by each detainee.

8 Whilst that is the position of the detainees at the time,
9 it's regretted, but we have had considerable discussions without
14:24:01 10 a departure from the contents of the document which I now submit
11 before you. Your Honour, I am uncertain, really, of where we go
12 from here. Because the substance of the document seems to
13 suggest that although I may stand here, I stand here not as
14 counsel for the detainees, but simply as counsel who is here and
14:24:35 15 is not empowered to do anything. The difficulty, as I see it,
16 that I would not be able to present to any witness a positive
17 case. I may, even if I were to take part in this trial, only be
18 able to present a case based upon some suggestions, not a
19 positive case on instructions, because those instructions have
14:25:05 20 been withdrawn. I fear I can not assist any further unless there
21 are any matter or matters which you wish to ask me about
22 specifically.

23 JUDGE LUSSICK: Mr Harris, just one thing I'm not totally
24 understanding of. Do I take it that your clients are saying to
14:26:21 25 you that if this Court orders the trial to proceed, his
26 instructions to you are withdrawn?

27 MR HARRIS: That's the substance. In fact, the answer is
28 yes. That is the substance of the discussion, as I understand
29 it. That is the substance of the document which they have

1 written; it seems -- I think quite clearly in their own hand --
2 to be the case.

3 JUDGE LUSSICK: Was a time constraint a factor, do you
4 think, that did not bring the discussion with your client to a
14:27:03 5 satisfactory ending?

6 MR HARRIS: The time was a factor, so far as we were
7 concerned, in that we were intending to focus as quickly and as
8 decisively as possible on what is required. May I bear this in
9 mind: I have been wrestling with this, together with my learned
14:27:31 10 friend, since last Saturday. We were here and we started again
11 this morning and then we had two hours. It may be that having
12 had a further opportunity, that we may be able to discuss it
13 further and reach a different conclusion. That may be right. I
14 would invite you to give me that time now that it's been raised.

14:28:08 15 PRESIDING JUDGE: Do other counsel have anything to add to
16 the submissions of Mr Harris.

17 MR METZGER: I'm reminded of the introduction to
18 Paradise Lost, in which John Milton invoked the muse and said,
19 "What in me is dark illumine, and what is low raise and support.
14:28:31 20 That to the height of this great argument I may assert Eternal
21 Providence and justify the ways of God to man." I hope that in
22 dredging the depths of my conscious memory I have recalled
23 Milton's words and that I may have the strength to say what it is
24 I'm about to say without causing any offence to anyone. As my
14:29:00 25 learned friend Mr Harris has already indicated, we have been
26 wrestling with this conundrum, for want of a better way of
27 putting it, for some considerable time. It may have escaped the
28 notice of other parties and, if so, we can only congratulate
29 ourselves on a job thus far well done. But the situation has

1 deteriorated over time. We have managed to bring it back and we
2 are now, as it were, at the brink of this gaping canyon from
3 which, it seems, the only way out is to walk back from whence we
4 came, or jump into the chasm

14:29:59 5 I have obviously, certainly today, spent a considerable
6 amount of time speaking with my learned friend Mr Harris. We
7 have contacted Professor Knoops, who I thank in his absence for
8 the time he has given to this matter, and some suggestions that
9 he has put forward. We are, none of us, anxious at this
14:30:21 10 particular point in time to find ourselves in a position that may
11 well be untenable. And that is, I say without making any bones
12 about it, the position that I would regrettably find myself in if
13 it were the decision that we would need to continue. Because it
14 would be for those motor enthusiasts like having a V8 engine in a
14:30:56 15 vehicle that didn't have any wheels. It would be an utterly
16 useless exercise in so far as my time and the time of the Court
17 is concerned. Although it may not be that in relation to other
18 parties.

19 My understanding of the situation would be if, for any
14:31:26 20 reason, I were even allowed to remain on these premises
21 purporting to represent the interests of my lay client, I would
22 simply be a spectator, watching as the Prosecution called its
23 case which would go without challenge and which would ultimately
24 lead to the position which any Prosecutor would want -- a
14:31:58 25 conviction in this case. I, for my part, would have been party,
26 were those the circumstances, to a travesty of justice. I have
27 never lent myself to that sort of circumstance. Indeed, I am
28 proud to say in coming up to some 21 years now at the outer Bar,
29 that there are incidents in which I have found myself in that

1 position and from which I have not been able to persuade my
2 clients to see things differently are few and far between. In
3 any event, they can be counted on one hand without the need to
4 use all fingers. So what I say in this Court, following on from
14:32:53 5 those submissions of my learned friend Mr Harris, I remain, as
6 ever, in the hands of the Court. I hope that my position has
7 been made entirely clear by virtue of the instructions as they
8 currently stand if we are unable to change the situation. It
9 would seem to me that my professional conduct in the absence of
14:33:23 10 any code within the Special Court would leave me with no
11 alternative but to remove myself from these premises,
12 instructions having been withdrawn in my case. Unless there are
13 any matters that I can further assist you with, those are the
14 submissions I put before this Court.

14:33:48 15 PRESIDING JUDGE: I notice the use of the words,
16 Mr Metzger, "If I am unable to change the situation". Are you
17 following on from Mr Harris's -- it would appear to be -- request
18 to speak further to your clients. Is that your implication?

19 MR METZGER: Ever faithful, ever hopeful. It is not a good
14:34:08 20 situation, but we have seen difficult situations in our time. We
21 will continue to try, given the opportunity.

22 PRESIDING JUDGE: Mr Manley-Spaine, do you have anything to
23 add?

24 MR MANLEY-SPAINE: There is nothing I can say now in
14:34:32 25 support of what they have said, and I respectfully believe that
26 probably time will heal the wound.

27 JUDGE LUSSICK: Mr Metzger, did I understand you correctly
28 last week? You had some personal travelling plans later in the
29 week.

1 PRESIDING JUDGE: For Wednesday.

2 MR METZGER: I do have some personal travel plans for later
3 on in the week, that is to say Friday, but Wednesday would be a
4 day that I would be, in view of personal circumstances, unable to
14:35:14 5 attend this Court.

6 [Trial Chamber confers]

7 PRESIDING JUDGE: Ms Taylor, you have heard counsel for the
8 Defence. We understand they are seeking more time and that's our
9 understanding.

16:13:02 10 MS TAYLOR: Your Honour, I would like to be heard on this
11 matter. I think the starting point is Rule 45(E) of the rules,
12 which says: "Counsel will represent the accused and conduct the
13 case to finality. Failure to do so absent just cause approved by
14 the Chamber may result in forfeiture of fees either in whole or
16:13:21 15 in part. In some circumstances the Chamber may make an order
16 accordingly. Counsel shall only be permitted to withdraw from
17 the case to which he has been assigned in the most exceptional
18 circumstances. In the event of such withdrawal, the Principal
19 Defender shall assign another counsel who may be a member of the
16:13:38 20 Defence office to the indigent accused."

21 It is that phrase, "exceptional circumstances" that I wish
22 to be heard upon. A very similar situation --

23 PRESIDING JUDGE: If I could ask you to pause. I didn't
24 mean to interrupt. My understanding, and I want to be sure of
16:14:06 25 this at the moment, is that the Defence counsel are seeking more
26 time. I have formed the impression that we have not reached the
27 stage of 45(E).

28 MS TAYLOR: I understand, also. I am coming to an
29 authority that deals with that section and also the

1 situation which --

2 PRESIDING JUDGE: I should not have interrupted. I'm
3 sorry.

4 MS TAYLOR: Having in mind that counsel are only permitted
16:14:39 5 to withdraw from a case in exceptional circumstances, may I refer
6 Your Honours to a decision of the Appeals Chamber of 23 November
7 2004 entitled "Gbao: Decision on appeal against withdrawal of
8 counsel." Mr Gbao is the third accused in the RUF trial. At a
9 very early stage in those proceedings, he indicated that he would
16:15:13 10 not come to Court because he did not recognise the legitimacy of
11 the Special Court, and he instructed his counsel not to appear on
12 his behalf because he didn't recognise the legitimacy of the
13 Special Court.

14 In those circumstances, an issue arose as to whether
16:15:30 15 counsel could be directed to appear on his behalf pursuant to
16 Rule 60(B) or whether counsel might be allowed to withdraw
17 pursuant to Rule 45(E). The Appeals Chamber found that the
18 reference to exceptional circumstances in 45(E) did not encompass
19 a situation where an accused person refused to instruct counsel
16:15:56 20 and the Appeals Chamber relied upon the ICTR decision of *The*
21 *Prosecutor v Barayagwiza* and quoted at paragraph 45 of the
22 Appeals Chamber decision the reasoning of the Chamber in
23 *Barayagwiza*, which said, "The Chamber finds it obvious that
24 Mr Barayagwiza's arguments do not constitute exceptional
16:16:30 25 circumstances as required under rule 45I the relevant ICTR rule.
26 Rather, Mr Barayagwiza is merely boycotting the trial and
27 obstructing the course of justice. As such, the Chamber shall
28 not entertain the request of the accused for a withdrawal of his
29 counsel on this basis."

1 In my respectful submission, the position of Mr Gbao, who
2 refused to instruct his counsel because he did not recognise the
3 legitimacy of the Court, is analogous to the position of the
4 three accused in this trial who are refusing to instruct their
16:17:23 5 counsel, because they say this trial should not proceed until
6 something else happens.

7 Now, Your Honours have already made a ruling that this
8 trial is to proceed. So in those circumstances the accused are
9 attempting to stop their counsel from appearing in this trial in
16:17:42 10 an attempt to obstruct the course of justice.

11 In those circumstances, which I say are analogous to the
12 present circumstances, the Appeals Chamber said at paragraph 52
13 of their decision, "Where an accused is present in Court but
14 refuses to participate in the proceedings because he does not
16:18:14 15 recognise the Court and requests that his counsel do not
16 participate for the same reason, the Court should treat the
17 accused as an absent accused and exercise its power as if Rule 60
18 applied. Applying that rule, it would be inconsistent with the
19 position taken by such accused to expect the accused to proffer a
16:18:45 20 choice to be represented in terms of rule 60B by counsel of his
21 choice. The appropriate thing for the Court to do in such
22 circumstances is to ensure that the accused is represented also
23 in terms of Rule 60(B) as directed by the Trial Chamber. In
24 these circumstances, the Trial Chamber, comprising professional
16:19:20 25 judges, proceeds in the knowledge and awareness that counsel is
26 acting without instructions from the accused when it directs that
27 counsel continue to provide representation, either as assigned
28 counsel or Court-appointed counsel. While Rule 60(B) could have
29 been drafted to indicate various options open to the judge or

1 Trial Chamber in terms of the type of representation, that is
2 left to the judge or the Trial Chamber's discretion. "

3 So, in my respectful submission, it is appropriate that
4 this Trial Chamber direct the current Defence counsel to continue
16:20:12 5 to represent their clients. I understand that my learned friends
6 have asked for time. I have also heard them say, "we have spoken
7 on the weekend". Court was stood down again this morning to see
8 whether any further resolution was had. The applications made
9 are not time-specific in terms of whether there is any chance of
16:20:41 10 success in the negotiations or how long it is said that those
11 negotiations might take. In circumstances where Your Honours
12 have ruled that this trial should proceed, it's my submission
13 that if any time is to be given to the Defence, it should be
14 very, very limited. Secondly, that it is appropriate that this
16:21:10 15 Court directs that counsel continue to represent the accused in
16 an application of Rule 60(B), and that if any application arises,
17 and I know that I'm being premature in this submission, pursuant
18 to Rule 45(E), that that application is going to have to be made
19 for some reason other than "I am no longer instructed" or "My
16:21:47 20 client no longer wishes me to appear in this Chamber on his
21 behalf." Your Honours, those are my submissions.

22 [Trial Chamber confers]

23 PRESIDING JUDGE: Rather than wheel about on top here we'll
24 discuss it upstairs.

14:56:42 25 MR METZGER: Might I just respond very briefly to the
26 matter of law that my learned friend raised - precipitate though
27 it may have been - shortly and succinctly, I hope. Whilst we
28 note Rule 45, it may be that my learned friend hasn't seen the
29 contract I signed and my obligations under paragraph 6. It seems

1 to me that as things stand, the rules in relation to my
2 professional --

3 PRESIDING JUDGE: I don't intend to pre-empt what you're
4 going to say, but at the present moment we, as a Bench, are
14:56:42 5 deciding on Mr Harris's request for time. Until we make that
6 decision, it may be premature to invite you to reply and we will,
7 of course, invite you to reply when the appropriate time arises.
8 We have not lost sight of your --

9 MR METZGER: I'm very much obliged.

14:56:43 10 PRESIDING JUDGE: Incidentally, this is addressed to
11 counsel and it's more properly in the hands of counsel for their
12 personal records.

13 JUDGE SEBUTINDE: Except, Mr Metzger, I personally am not
14 sure. Do you support the application for adjournment; a brief
14:56:43 15 adjournment in the terms that Mr Harris has done, or have you
16 yourself, as we speak, come to an understanding with your client
17 that you no longer have instructions from him, as we speak?

18 MR METZGER: Again, it's my fault for not making myself
19 absolutely clear. I have come to an understanding with my lay
14:56:44 20 client and that is the position. I do support Mr Harris's
21 application on the basis that it seems to be that the result of
22 that, if it were to remain the same, would be very stark indeed,
23 so far as my position is concerned and my lay client's position.
24 It's in the hope that one can, through further discourse,
14:56:45 25 encourage one lay's client to consider this matter in a
26 completely different perspective, which is really an about-face,
27 as far as they're concerned, but it is not impossible, and,
28 therefore, I do support the application.

29 JUDGE SEBUTINDE: Mr Manley-Spaine, likewise, we're talking

1 about the application for adjournment, for further consultation.
2 You see, we are looking at the letter that has just been read and
3 in our understanding of it, it is virtually withdrawing
4 instructions as of today. So when you three make applications
14:56:46 5 for further consultations, we have to weigh those applications in
6 light of what your lay clients have brought to our attention. So
7 we need to be absolutely clear: Are you actually saying to us
8 though you've got a letter from our lay clients, give us some
9 more time to try to see if we can change their mind? Is that in
14:56:46 10 fact what you're doing?

11 MR MANLEY- SPAINE: Yes, Your Honour.

12 [Upon adj ourning at 2. 50 p. m]

13 [Upon resumi ng at 2. 52 p. m]

14 PRESIDING JUDGE: We will allow counsel some more time to
14:56:46 15 talk to their clients and allow their clients to mull it over
16 overnight. Therefore, we will resume tomorrow at 10 o'clock.

17 Mr Manley- Spaine.

18 MR MANLEY- SPAINE: I just wanted to say thank you.

19 [Whereupon the hearing adj ourned at 2. 52 p. m

14:56:51 20 to be reconvened on Tuesday, the 3rd day of May
21 2005 at 10. 00 a. m]

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