SCSL-04-16-AR77
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SPECIAL COURT FOR SIERRA LEONE

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IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding Judge
Justice George Gelaga King
Justice Geoffrey Robertson

Registrar: Robin Vincent

Date: 23 June 2005

PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGIE KANU
(Case No.SCSL-04-16-AR77)

DECISION ON DEFENCE APPEAL MOTION PURSUANT TO RULE 77(J) ON BOTH THE IMPOSITION OF INTERIM MEASURES AND AN ORDER PURSUANT TO RULE 77(C)(iii)

Office of the Prosecutor:
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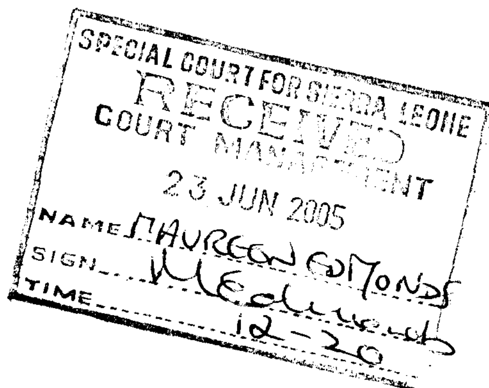

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Introduction

1. This is the first occasion upon which the Special Court has been required to consider contempt proceedings, in this case in respect of allegations by the prosecutor that a protected witness has been identified by a member of a defence team and has in consequence been intimidated by four women related to other defendants in the trial. The Trial Chamber dealt with the allegation by appointing an independent Counsel to investigate and report on whether there were grounds for contempt proceedings. Additionally, it made interim orders which had the effect of removing an investigator from the defence team and excluding the four women – two of them wives of defendents - from the public gallery. This challenge to both decisions is brought, not by the persons under investigation for contempt, but by the three defendants in the trial: Brima (on whose team the investigator was working), Kamara and Kanu (whose wives were excluded from the Court). The prosecution objects that they have no standing to bring an appeal . More fundamentally, since the interlocutory appeal has been brought without leave either of the Trial Chamber or of this court, the prosecution maintains that the Appeals Chamber has no jurisdiction to hear it.

2. All courts must possess the powers necessary to enable them to administer and deliver justice fairly and efficiently. These powers are not vouchsafed to bolster the self-regard of judges, officials or counsel, who must in the discharge of their duties put up with criticisms, however wrong-headed, of their actions. The power to investigate and punish what is generically (and somewhat misleading) described as "contempt of court" can only be used against those whose actions are calculated to obstruct the court's task of getting at the truth – in the terms laid down by rule 77A, "any person who knowingly and wilfully interferes with its administration of justice." That sub-rule gives six, non-exhaustive, ways in which contempt of court may be committed, e.g. by disclosing information relating to proceedings in knowing violation of an order (ii) and by threatening or intimidating a witness (iv). It should be obvious that witnesses must never be put under any pressure in their choice to give evidence for one party or another or as to what evidence they should give, and must be rigorously protected thereafter from any reprisals. Where the court, because there is a real danger of such reprisals, has taken the exceptional step of ordering that the name and any identifying details of a witness should not

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be disclosed to the public, a credible allegation of breach of that order by a person subject to it must be investigated without delay.

3. It goes without saying that a war crimes court, sitting in a country which for ten years was riven by a war which affected all its people, must be astute to protect its witnesses, especially victims of that war who come forward to give evidence against defendants alleged to have occupied command positions in factions that may still have support. The Court must use its powers to safeguard them from any risk of reprisal. At the same time, it must uphold the rights of defendants to a fair trial – not any arguable 'rights', but those basic rights that are enshrined in Article 17 of the Court's Statute. This exercise is mandated by Rule 75 whenever the Court orders that a particular witness be "protected" from having his or her name disclosed to members of the public. Rule 75(A) provides:

   > A Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Section, order appropriate measures to safeguard the privacy and security of victims and witnesses, *provided that the measures are consistent with the rights of the accused.* (my emphasis)

   This principle – and it is not a balancing act, but rather an injunction to ensure that witness protection measures do not breach those fair trial rights in Article 17 – must be kept in mind in all decisions relating to protected witnesses.

The Facts

4. Since the AFRC Trial is ongoing, discussion of the facts is necessarily constrained. The Appeals Chamber has, however, studied the transcript of the *in camera* proceedings in the course of which the impugned decisions were taken, and has been shown the documents and witness statements supplied to the court by the prosecution in order to provide it (in the words of Rule 77(C)), "with reason to believe that a person may be in contempt of the Special Court."

5. Protected witness TF1-023 began her testimony on 9 March 2005, screened off from the public gallery but visible to Judges and counsel and their in-court teams, some of whom knew her real name. An incident occurred as she was being driven out of the court at the end of the day, her evidence part-heard. According to a report submitted immediately to the Registrar by the Chief of the Witness and

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Victims protection section, the car in which the witness was travelling was still within the court precincts when four women, whose identities were said to be well known to the security staff at the gates, assailed its occupants by shouting out the first name of the witness, followed by threats. These were (the report went on) clearly heard by the driver and two protection officers in the car, and by the witness, who was "visibly perturbed and frightened."

6. The prosecution decided to raise this matter the next day, at the close of the witness's testimony. However, as soon as TF1-023 stepped into the box the following morning, she asked to make a statement. "Yesterday here, after here, I was threatened, I had remarks against me... I was in the vehicle and they shouted my name."[1] The Chamber was understandably concerned. It moved into closed session, in which Ms Taylor (for the prosecution) supplied it with the report to the Registrar and urged that there was a *prima facie* case of contempt against the four named women. Obviously, in terms of the Rule 77 test, there was "reason to believe" that a person *may* be in contempt of court, given the sworn testimony of TF1-023 (albeit not cross-examined) and the report from the Chief of the Witness Unit – hearsay, certainly, but on its face describing credibly a real incident that had put the witness in fear. The pre-condition for the Chamber to institute one of the three alternative contempt procedures as set out in Rule 77(C) had been satisfied in respect of the four women.

7. The prosecution went further. It submitted written statements from two court security officers, who claimed to have overheard conversations in the Court precincts on 9 March between Brima Samura, an investigator on the team representing the accused Tamba Brima, and the same women, from which conversations – if honestly and accurately reported – it might be inferred that Samura had supplied the information which identified the protected witnesses. The prosecution sought Samura's committal for contempt. It also sought an "interim order" suspending him from his position as investigator in the Brima Defence team, requiring him to hand back all documents which identified witnesses and to give a solemn undertaking to the court that he would not until further order discuss witness identity. In addition it sought a further interim order to have the four women barred from the public gallery.

[1] Transcript, p3-4

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The Rule 77 Procedure

8. I have every sympathy with trial Judges faced unexpectedly with such an apparently serious turn of events and without precedent in this Court to guide them. What they did have was Rule 77, which sets out the law and procedure for dealing with contempt of the Special Court. Rule 77(C) provides:

> (C) When a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Special Court , it may:
>
> i. deal with the matter summarily itself;
> ii. refer the matter to the appropriate authorities of Sierra Leone; or
> iii. direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter.

9. It is clear from the terms of Rule 77(C) that the situation required the court to take three decisions. In the first place, it had to decide whether, on the material placed before it, there was reason to believe that a contempt may have been committed. If so, it had to decide whether: i) to proceed to summary trial, or ii) to refer the matter to the authorities of Sierra Leone or iii) to direct the Registrar to appoint independent counsel to investigate and report back to the Chamber as to whether there were sufficient grounds to proceed for contempt. Thirdly, it had to decide, under its inherent jurisdiction or pursuant to its Rule 54 power to make orders or its Rule 75 power to protect witnesses, whether any or all of the interim measures urged by the prosecutor should be put in place.

10. In each of these three issues the defence had an interest and Ms Taylor had, very properly, ensured that the Principal Defender was supplied with all documents before they were showed to the court.[2] The allegation against the investigator cast a shadow over the Brima team that had employed him and thereby implicitly vouched for his obedience to the orders of the Court. Any proceedings against its only investigator would be likely to disrupt the preparations for Brima's Defence. The other defendants would be personally affected if their wives, who had regularly attended in the public gallery and visited them in prison, were now to be investigated for a serious offence, or else summarily prosecuted.

[2] Ibid, p6

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11. It follows that the Defence counsel were entitled, if they chose, to present argument that the material submitted by the prosecution did not give any cause for reasonable belief that a contempt might have been committed. Obviously the court could not allow itself at this stage to be drawn into a summary trial, or a trial before a trial. But if the Defence could provide evidence that entirely refuted the allegation – e.g. if it could prove that the investigator was in another country at the material time, or that there had been an obvious misunderstanding or misidentification, then it should be permitted to produce it. It is much better that a demonstrably mistaken allegation should be exposed at once, before unnecessary contempt proceedings or investigations are commenced. That was not this case, however, as will appear.

12. If the Chamber decides that there may have been a contempt, then it must next decide whether to try the matter summarily (with a maximum sentence of six months) or to pass it to the Sierra Leone authorities or to direct the Registrar to appoint an independent Counsel to investigate: a procedure for serious cases which could result eventually in a seven years jail sentence. This is essentially a question for the Trial Chamber, but it might be assisted by submissions from counsel.

13. On the third decision – the interim orders – the right of the defence to be heard is self evident. The court must be told the extent to which the proposed order will impact on the course of the trial or hinder defence preparation or cause distress to a defendant, and it must hear argument as to whether any draconian order sought by the prosecution is really proportionate to deal with the apprehended risk.

The Court's Response

14. It would appear from the transcript that these distinctions were not clearly drawn. After the prosecution's submission, the court conferred and the Presiding Judge indicated that they would deliver a ruling. Mr Metzger, appearing for Brima, jumped to his feet and pointed out, very politely, that he had not been heard on behalf of his client or his team member, the investigator Mr Samura, and that the other counsel had not been heard on behalf of the wives of their clients. "In a court of law, in my humble but limited experience, it is always the case that the defence

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is called upon."[3] The Presiding Judge was properly conscious of the danger of embarking on a mini-trial then and there, and so explained "I think it is premature to invite the defence to lay out their case." But Mr Metzger persisted and persuaded the court to hear him, at least in respect of Mr Samura, and in due course the court heard counsel for the other defendants. Their submissions went on for some time, and ranged over the three questions at issue – whether the nature and quality of the prosecution information gave "reason to believe"; whether a special cousel should be appointed, and whether the interim measures should be imposed. The points the three Defence teams wished to be made were made, albeit without an adjournment and in scatter-gun fashion and to a court that had come to a provisional view before it allowed them to be heard. In the event, there was no breach of the "*audi alterem partem*" (hear the other side) rule, because the other side was heard, and at some length. Indeed, it was heard on various issues relating to the alleged contempt throughout the day. Professor Knoops, for Kanu and Mr Harris, for Kamara, were able to explain their clients' concern that their wives, on whom they relied for emotional support, would be excluded from the public gallery. Mr Metzger explained that there was a background to the allegations against Mr Samura, which were made against him by or on behalf of persons against whom he already had cause for complaint.

15. After hearing all defence counsel, the Chamber delivered an *ex tempore* ruling. It decided 1) that there *were* reasonable grounds to believe that persons may have committed a contempt; 2) in consequence, to activate Rule 77(C)(iii), which provides (although the court did not put it in those precise terms) that it may "direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chambers as to whether there are sufficient grounds for instigating contempt proceedings." Its third decision was to impose the very interim measures that had been sought by the prosecution. It further indicated that the other trial chamber, or a judge thereof, might be the appropriate forum for any contempt hearing, in view of Mr Metzger's suggestion that defence counsel in the AFRC trial might be required as witnesses.

[3] Ibid, p8

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Discussion

16. The appellants criticise the Trial Chamber's decision on the first issue. But the evidential hurdle is low, and was satisfied by the testimony on oath of Witness TF1-023, the report from the head of the Witness Protection Unit and the witness statements from the two guards. True it is that these two statements included hearsay, were not on oath and cried out for cross-examination, but at this initiating stage the court is not concerned with their veracity - that will be tested by a trial, if the essential material submitted by the Prosecution gives 'reason to believe' that contempt 'may' have been committed.

17. However, the Presiding Judge, in announcing the Court's ruling, said that the material "constitutes *prima facie* grounds for bringing persons named before the court to show cause why they are not in breach of Rule 77(I)(iv)." This language may be confusing, because the procedure in no way reverses the burden of proof for contempt, which remains, as with any other crime, squarely on the prosecution. Moreover, the standard is not that of a *prima facie* case, which is the standard for committal for trial. It is the different and lower standard of "reason to believe" that an offence <u>may</u> have been committed, which is the pre-condition for ordering an independent investigation. In reality, the President was giving an off-the-cuff ruling after a difficult and sometimes heated session: her language may not have been technically correct, but adequately communicated the decision that the material put before the court, on the face of it, gave reason to believe that contempt offences had been committed.

18. The decision to proceed by way of 77(C)(iii), i.e. by appointing an independent counsel, rather than by way of summary trial, was essentially a matter for the Trial Chamber. Summary Trial is preferable if the parties are before the Court and the matter is not overly serious and can be determined speedily and with minimum disruption. It may be inappropriate if the alleged contempt is very serious or will require counsel to give evidence. It will be inappropriate if the Judges of the Chamber feel personally involved: any cases of contempt by the media should for that reason be dealt with by another Chamber. It has been suggested by defence counsel that the Rule 77(C)(iii) route was disproportionate: the matter could instead have been dealt with by a caution.[4] This was a surprising suggestion since

[4] Defence Submission filed 11 March 2005, para 30

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a caution is only possible in relation to a defendant who admits committing the offence, and apologises for his conduct and seeks to extenuate it. Nothing of this sort was offered on 10 May. The option of reference to the Sierra Leone authorities was inappropriate and in any event should only be exceptionally deployed, in cases where the Special Court's powers are insufficient.

19. At another point in her oral ruling the Trial Chamber President used inadvertent language: she directed the appointment of an independent counsel "to investigate and prosecute..." There should be no misunderstanding here: Sub-Rule (C)(iii) does not permit the Court to direct an independent counsel to prosecute at this initiating stage. An independent counsel is appointed in circumstances where it is inappropriate for the Special Court's own prosecutor to act: he serves as an independent officer, reaching his own independent decision as to whether there are sufficient grounds for a prosecution. Only if he comes to that conclusion in his report to the Chamber, and if the Chamber agrees with that conclusion, may it direct him to commence a prosecution.

20. So far as the interim orders were concerned, the position is different. It was arguable that they were disproportionate. The female relatives of the accused were excluded from the public gallery at all times, although the order might have been limited to an exclusion only when protected witnesses were testifying. Before removing the defence investigator entirely from the trial, the Chamber should have considered whether a less draconian measure would suffice, such as a solemn undertaking to protect witness anonymity and an order that, until such time as he was cleared of suspicion, he work only on aspects of the case which did not involve protected prosecution witnesses. The Court, in its understandable concern to deter interference with witnesses, must ensure that its measures do not undermine the defendant's basic right to have adequate facilities to prepare his defence.

21. However, it is not for Appeal judges to determine at this juncture whether the interim measures might have been tuned more finely: it was open to the defence thereafter to seek a variation after the ruling and indeed they did so – for much of that day, persuading the court to order, for example, that another investigator should be accredited immediately to Mr Metzger's team.[5] After hearing further defence argument, the court decided to adjourn for a week so that the position

[5] Ibid, p20

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could be reconsidered. At the end of the day's proceedings, the Chamber halted the trial at the Defendant's request, to ensure that they would suffer no prejudice while the position of the Brima team investigator was clarified.[6]

22. The defence tentatively raised the issue of leave to appeal: one judge questioned whether it was necessary but the President pointed out that at this stage there was no contempt decision to appeal against.[7] The matter does not appear to have been pursued. The defendants apply to this court without leave, and argue (as they must) that they do not need leave to appeal.

JURISDICTION TO HEAR THIS APPEAL

a) The Rule 77 Decisions

23. I have set out the facts together with some comments on the procedure which led up to the impugned ruling. But the threshold question is whether we have power to entertain this appeal at all, which is brought by the defendants and not by the alleged contemnors, and is brought without leave of this court or of the Court below, and which relates to an interlocutory action rather than a final decision.

24. In the full Appeals Chamber Ruling on *Amendment and Consolidation of Indictment* we explained that the Rules of this court must be construed in their context and according to the purpose they serve in the Special Court. This court comprises two full-time Trial Chambers, with an Appeals Chamber the Judges of which are part-time until the conclusion of a trial – a stage that has not yet been reached.[8] The Appeals Chamber's jurisdiction in the meantime is confined to issues which relate to the jurisdiction of the Court (see Rule 72) or else to interlocutory appeals by leave of the Trial Chamber, and such leave can only be given "in exceptional circumstances and to avoid irreparable prejudice to a party." (Rule 73B) That sub-rule appears in the chapter headed Part VI – PROCEEDINGS BEFORE TRIAL CHAMBERS. It appears under the headnote *Section 1 – General Provisions*. In that part of the Rules, under that very section, appears *Rule 77: Contempt of the Special Court*. It follows that unless Rule 77 expressly (and anomalously) provides for an appeal without leave, direct to the Appeals Chamber,

[6] Ibid, p55
[7] Ibid, p21-22
[8] Set out relevant part of Court Statute/ agreement.

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it must be read subject to the Rule 73B requirement for leave. Moreover, if Rule 77, properly construed, excludes by necessary implication any interlocutory appeal, then Rule 73B can have no application. 'Interim measures' which are imposed not by reference to Rule 77 but under the courts inherent power, or under Rule 54 or Rule 75, obviously cannot be appealed without leave.

25. Rule 77 sets out, in careful chronological order, the principles and steps involved in the contempt process. It provides:

Rule 77: Contempt of the Special Court (*amended 29 May 2004*)

(A) The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and willfully interferes with its administration of justice, including any person who:

i. being a witness before a Chamber, subject to Rule 90(E) refuses or fails to answer a question;
ii. discloses information relating to proceedings in knowing violation of an order of a Chamber;
iii. without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
iv. threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness;
v. threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber; or
vi. knowingly assists an accused person to evade the jurisdiction of the Special Court.

(B) Any incitement or attempt to commit any of the acts punishable under Sub-Rule (A) is punishable as contempt of the Special Court with the same penalties.

(C) When a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Special Court , it may:

i.deal with the matter summarily itself;
ii.refer the matter to the appropriate authorities of Sierra Leone; or
iii.direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter.

(D) Proceedings under Sub-Rule (C)(iii) above may be assigned to be heard by a single judge of the Trial Chamber or a Trial Chamber.

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(E) The rules of procedure and evidence in Parts IV to VIII shall apply, as appropriate, to proceedings under this Rule.

(F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be entitled to legal assistance in accordance with Rule 45.

(G) The maximum penalty that may be imposed on a person found to be in contempt of the Special Court pursuant to Sub-Rule (C)(i) shall be a term of imprisonment not exceeding six months, or a fine not exceeding 2 million Leones, or both; and the maximum penalty pursuant to Sub-Rule (C)(iii) shall be a term of imprisonment for seven years or a fine not exceeding 2 million leones, or both.

(H) Payment of a fine shall be made to the Registrar to be held in a separate account.

(I) If a counsel is found guilty of contempt of the Special Court pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to appear before the Special Court or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.

(J) Any decision rendered by a Single Judge or Trial Chamber under this Rule shall be subject to appeal.

(K) Appeals pursuant to this Rule shall be heard by a bench of at least three Judges of the Appeals Chamber. In accordance with Rule 117 such appeals may be determined entirely on the basis of written submissions.

(L) In the event of contempt occurring during proceedings before the Appeals Chamber or a Judge of the Appeals Chamber, the matter may be dealt with summarily from which there shall be no right of appeal or referred to a Trial Chamber for proceedings in accordance with Sub-Rules (C) to (I) above.

26. Rule 77(A) defines the crime – knowing and unlawful interference with the administration of justice – which the court has inherent power to punish, and identifies five ways in which it may be committed (e.g. by disclosing information in violation of an order and intimidating a witness). Sub-rule B extends the power to enable punishment of incitement or attempt. Sub-rule C sets out the test ('reason to believe') which entitles the court to proceed and chose between the three process options – summary trial, reference to Sierra Leone authorities, or appointment of independent counsel. Sub-rule D provides that any prosecution by independent counsel may be heard by a single Judge of that Trial Chamber or another Trial Chamber. Sub-rule E applies the Rules of Procedure and Evidence to those proceedings, i.e. to the trial of the contempt case brought by the independent prosecutor pursuant to a decision to take option 77(C)(iii). Sub-rule F provides legal aid to poor persons facing such a trial. Sub-rule G provides for maximum

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penalties on conviction, both after summary trial or trial prosecuted by the independent counsel. Moving on to the stage after conviction, Sub-rule H provides for payment of any fine to the Registrar, and Sub-rule I gives the Court power to order an additional professional penalty if the convicted defendant is of counsel. Sub-rule J moves us forwards to the Appeal stage. It says: "Any decision rendered by a Single Judge or Trial Chamber under this Rule shall be subject to appeal." Sub-rule K provides that "appeals pursuant to this rule" – i.e. by a convicted defendant, or by a dissatisfied prosecutor – shall be heard by three Judges of the Chamber, and Sub-rule L provides for the unhappy if unlikely circumstance of a contempt committed during appeal proceedings.

27. Rule 77 has only to be read – or set forth as above – to recognise that it is a coherent and chronological code, setting out the procedure at every stage from the time the allegation is made to the final appeal against conviction or acquittal. Sub-rule J comes into play after the final decision of conviction or acquittal (under Sub-rules D, E & F) and after sentencing as provided for by sub-rules G, H & I. By simple and self-evident alphabetical declension, Sub-Rule J is next in time. It opens the door to a direct appeal (without leave) to a three Judge appeal court. It is directly before the constitution of the appeal bench triggered by an appeal (K), and it is before provision is made for dealing with contempts at hearing: Sub-Rule (L). It is, therefore, not a Rule that should come into play (even with leave) before a final decision is made by the Trial Judge. And in its context, it is a Rule that only allows an appeal by the parties involved in the trial – i.e. the alleged contemnor (if convicted) and the prosecutor (if there has been an acquittal). It cannot be activated at any stage by a defendant in another trial who may have a connection with the contemnor, and it cannot be activated at all prior to the result of the contempt trial.

28. The defence seek to appeal these decisions taken under Rule 77(C) in reliance upon a literal reading of Rule 77(J) divorced from its context. "Any decision" they argue, whether interlocutory or indeed utterly procedural – a decision to adjourn, for example - can provide the trigger for summoning three international Judges to consider the Appeal. This would cause unjustifiable expense and intolerable delay to a process which demands speedy resolution, especially when it involves members of a defence team or relatives of defendants. A literal interpretation which leads to such absurdity should if possible be avoided. As Judge David Hunt

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pointed out in Prosecutor v Milutinovic and ors, "The Rules of procedure and Evidence were intended to be the servants and not the masters of the Tribunal's Procedures".[9] Older common law decisions use a more dated analogy ("the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress"[10]) but the principle is the same: literal interpretation of Rules of Court which would lead to counter-productive or bizarre results or lack of public confidence should be avoided by purposive interpretation.

29. There is no need in this case to rely on the argument from absurdity: the chronological coherence of Rule 77's alphabetical order produces an obvious and purposeful meaning. 'Any decision' means in context 'any final decision' and not "any decision taken by the Court at any time in the course of investigating or processing a contempt allegation." So this appeal is incompetent in so far as it relates to the two decisions taken by the trial chamber under sub-rule C.

30. The prosecution has argued that Sub-Rule E may permit interlocutory appeals on contempt-related decisions if leave has been granted by the trial chamber under 73B. Sub-Rule E applies Rules of Procedure in Parts IV-VIII, within which Rule 73B falls, "as appropriate". In view of my interpretation of Rule 77(J), application of 73B to a decision taken under 77(C)(iii) would be inappropriate. That is a decision to appoint an independent counsel to collect and consider evidence: such decisions, routinely made by law enforcement agencies, are not normally susceptible to appeal or to judicial review. Moreover, as this case in particular demonstrates, contempt proceedings are apt to disrupt trials and it is of great importance that they should be concluded as quickly as possible – and that means, without interlocutory appeal.

b) The "Interim Measures" Appeal

31. The appeal relating to 'interim measures' is a different matter. Such measures are not specifically provided for under Rule 77. The prosecution suggested that the measures could be imposed under Rule 54, and the court apparently agreed, although did not say so in terms. The Appeals Chamber considers they were in

[9] Prosecutor v Milutinovic and ors, ICTY, 8 November 2002, IT-99-37-1, Decision on disclosure of *ex parte* submissions, para 29.
[10] In the matter of an Arbitration 1907 1KB1, at p4 (per Henn-Collins MR)

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reality Rule 75 "measures for the protection of Victims and Witnesses." As such, they were ancillary to the protective orders designed to preserve the anonymity of Witness TF1-023 and of prosecution witnesses yet to come. They were an 'augmentation' of existing measures, as provided by Rule 75(I). That sub-rule specifically allows applications to "rescind, vary or augment protective measures" to be made to the Trial Chamber. It should not normally be necessary, therefore, to seek alteration by way of appeal. But if the defence – or the prosecution – wishes to appeal a decision made under Rule 75, or Rule 54, then it must seek leave from the Trial Chamber pursuant to Rule 73B.

32. The Trial Chamber, although it made no explicit reference to Rule 75 as such, stated that it was imposing the interim measures because "the duty of the court is to ensure that its orders for protected witnesses are upheld and to ensure that allegations against persons associated with the reference are properly heard and ruled on."[11] The protective measures had already been ordered in relation to Witness TFI-023 and Rule 75 I provides for orders which re-inforce existing protections. It is apt for use to prevent further violations, and was so used by the ICTY Trial Chamber in Simic.[12] There is no basis, therefore, for disputing the Trial Chamber's jurisdiction to make the "interim measures" order. But since that interlocutory order was not made pursuant to the Rule 77 contempt jurisdiction, but in a case to which the appellants were parties, it follows that they have a right to appeal subject to the Rule 73(B) leave requirement.

c. Standing to Appeal

33. This appeal is brought without leave by the three defendants in the AFRC trial. None are subject to the contempt investigation ordered by the Trial Chamber. Their counsel have not been assigned to represent any of the five alleged contemnors nor do they purport to have been instructed to represent them. It follows that they have no standing, in any event, to prosecute an appeal against the two decisions taken by the Trial Chamber in relation 1) to its reason to believe that a contempt had been committed by others or 2) to its direction for an independent investigation of that alleged contempt.

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[11] Ibid, p15, lines 16-19
[12] ICTY, Prosecutor v Simic et al, IT-95-9-T, 30 September 1999

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34. The only decision in relation to which these appellants have standing is the decision to impose interim orders which affected them in the way already described. That decision was effectively taken under Rule 75, but might also be supported by the inherent power, or by the power under Rule 54. In relation to all such decisions, leave to appeal must first be obtained under Rule 73B. Although this matter was inconclusively raised on 10 March, leave to appeal was not granted. For that reason alone, this appeal against the "interim measures" is incompetent.

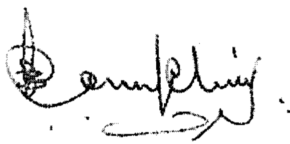
Conclusion

35. This purported appeal must be struck out. There can be no appeal, either by prosecutor or defendant, under Rule 77(J) against decisions taken under Rule 77(C)(iii) unless or until a conviction or acquittal has been entered in relation to a contempt proceeding. The only defendant who has standing to bring such an appeal is the defendant convicted of contempt. A defendant in a war crimes trial may appeal ancillary and/or interim orders made to augment an existing witness protection order, even if arising from an alleged contempt, but only by leave of the trial chamber granted under Rule 73B.

Honourable Justice Ayoola appends a Separate and Concurring Opinion to the present Decision.

Honourable Justice King appends a Separate and Partially Dissenting Opinion to the Present Decision.

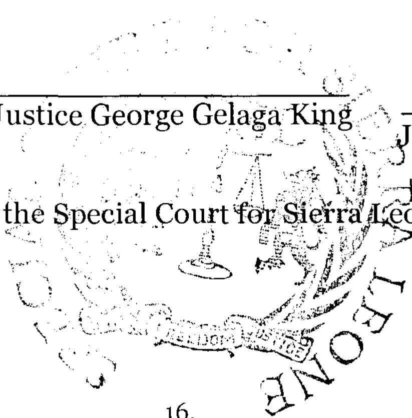
Done at Freetown this day 23rd of June 2005



Justice Emmanuel Ayoola, Presiding

Justice George Gelaga King

Justice Geoffrey Robertson



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IN THE APPEALS CHAMBER

Before:	Justice Emmanuel Ayoola, Presiding Judge Justice George Gelaga King Justice Geoffrey Robertson
Registrar:	Robin Vincent
Date:	23 June, 2005

PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGIE KANU
(Case No.SCSL-04-16-AR77)

SEPARATE AND CONCURRING OPINION OF
HON. JUSTICE EMMANUEL AYOOLA
ON THE DECISION ON APPEAL AGAINST THE 10 MARCH 2005 ORAL RULING ON THE ALLEGATIONS OF CONTEMPT

Office of the Prosecutor:
Luc Côté
Lesley Taylor
Boi-Tia Stevens

Defence Counsel for Alex Tamba Brima:
Kevin Metzger
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Wilbert Harris
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry J. Knoops
Abibola E. Manley-Spaine

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Introduction

1. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu ("the appellants") are, respectively, standing trial before Trial Chamber II ("the Trial Chamber") of the Special Court for Sierra Leone ("the Special Court").

2. During trial proceedings on 10 March, 2005, a protected witness, TFI – 023, informed the Trial Chamber that on 9 March, 2005, when she was on her way home in a vehicle, two women whom she saw but had not known before made remarks that they had seen her, called her name and threatened her that they (she and them) had come together at "daggers drawn".[1]

3. Counsel for the Prosecutor, Ms. Taylor, informed the Trial Chamber that the Office of the Prosecutor had that morning received two written reports relating to two separate incidents, of which the incident mentioned by the protected witness was one, and that those reports indicated that there was a *prima facie* case of contempt against five persons, namely: Brima Samura (the investigator of the Defence team for the Accused Brima), pursuant to rule 77 (A) (ii) and Margaret Fomba, Nene Binta Bah, Anita Kamara and Ester Kamara, pursuant to Rule 77 (A)(iv). She submitted that, in the circumstances, it was appropriate for the Trial Chamber to make certain interim orders.[2]

4. In the event, the Trial Chamber, after some preliminary statements, ruled and made orders in the following terms:[3]

> *"I consider that the report before the Court constitutes prima facie grounds for bringing persons named before the Court to show cause why they are not in breach of Rule 77(i)(iv).*
>
> *Notwithstanding Mr. Metzger's submissions, I am of the view that there are issues which go to the hearing that he raised and they cannot be ruled upon or determined at this time today. The duty of the Court is to ensure its orders for protected witnesses are upheld and to ensure that allegations against the persons associated with the defence with the accused are properly heard and ruled upon. We are also*

[1] Transcript, 10 March 2005, p. 4.
[2] Transcript, 10 March 2005, pp. 7-8.
[3] Transcript, 10 March, 2005, pp. 15-16.

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concerned that in the light of Mr. Metzger's submission, there is possibility that some counsel may have to give evidence in this Court and, accordingly, this Court may not be the appropriate forum.

I refer counsel to Rule 77 and the powers of the Court. I consider that there is prima facie grounds that the following persons should be brought before the Court to show cause why they are not in breach of Rule 77(1)(a)(iv) and (ii). Accordingly, this Court directs an order that the Registrar appoint an independent counsel to investigate and to prosecute the following persons: Margaret Fomba, Neneh Binta Bah, Anifa Kamara, Ester Kamara, Brima Samura pursuant to Rule 77(C)(iii) of the Rules of Procedure. The Court directs that the investigation and appropriate appointment be done expeditiously.

The Court further directs that they be brought before this Court or an alternate Court that may have to be appointed if counsel are involved to be dealt with in accordance with Rules 77(C)(i). The Court further orders that Brima Samura be suspended from this Court and return all Court documents and information pending investigation and hearing.

I accept prima facie it is an interim measure. Further, the Court orders and directs that Margaret Fomba, Neneh Binta Bah, Anifa Kamara and Ester Kamara may not enter the public gallery pending the investigation and hearing of this matter.

We direct that the independent counsel prosecute this matter pursuant to Rule 77(C)(iii). That is the ruling of the Court."

5. It is to be noted that before the ruling and orders were made Mr. Metzger who was counsel for Brima Bazzy Kamara (the 2nd accused) had intervened to say that "it appears that an allegation has been made concerning a member of my team and member of other or certainly relatives of other teams, (sic) and the defence have not been called upon to either meet the allegation that has been made or deal with anything".[4]

6. The Presiding Judge of the Trial Chamber had responded that:[5]

"*. . . . we are going to direct a full investigation and then a hearing, in which all the Defence will, of course be fully heard and as in any hearing, the defence is entitled to*

[4] Transcript, 10 March 2005, p. 8
[5] Transcript, 10 March 2005, p. 8

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be heard, but until there is an investigation, I think it is premature to invite the defence to lay out their case."

7. On Mr. Metzger's persistence that he be heard on the interim measures the Trial Chamber proposed to make, the Presiding Judge agreed to hear him, but "only on the question of Brima Samura and that alone".[6] Thereupon Mr. Metzger addressed the Trial Chamber, as it was put, "only on the question of Brima Samura"[7] who was the investigator of the Brima defence team. The Trial Chamber thus had before it Mr. Metzger's submission on which it was obliged to render a ruling as well as the report of an alleged contempt of the Court in respect of which it had to take steps in terms of Rule 77(C).

The Appeal

8. The appellants have now appealed from what has been described as the 'Oral ruling of the Trial Chamber delivered by the Presiding Judge 10 March 2005' which contained the Trial Chamber's ruling on the submission made by counsel on behalf of the investigator of the Brima defence team and the exercise of power pursuant to Rule 77(C)(iii) by the Trial Chamber on the allegation that certain persons may have been in contempt of the Special Court.

9. The appellants' appeal as contained in their "Joint Defence Notice of Appeal" is from "both the interim measures as well as the decision of the Trial Chamber by which it imposed an investigation under Rules 77 (C)(iii)". They appealed on three grounds as follows:

(a) First Ground of Appeal

Error in law and/or fact due to violation of the right to have a fair hearing (principle of *audi alterem partem)* in the context of Rule 77(C)(iii) in conjunction with Rule 54 and Rule 77(E) of the Rules, given the fact that both the decision on the interim measures, as well as the imposition of the inquiry pursuant to Rule 77(C)(iii), were taken on merely information and documents provided by the Prosecution, namely the letter of the Witness and Victims Unit and the attached reports of security services and support staff.

[6] Transcript, 10 March 2005, p. 8
[7] Transcript, 10 March 2005, p. 9

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(b) Second Ground of Appeal

Error in law and/or fact due to a (sic.) erroneously acceptance of a *prima facie* case for contempt of court. Rule 77(C) provides for the criterion that the Trial Chamber must have "reason to believe that a person may be in contempt of the Special Court". The Defence holds the view that this threshold can only be met when both a procedural standard is met (see appeal ground 1 above), as well as a substantive standard in that a certain amount of verifiable facts lie before the Trial Chamber. It is this latter standard that forms part of this appeal ground.

(c) Third Ground of Appeal

Error in law and/or fact due to violation of the principle of proportionality: although Rule 77(C) grants the Trial Chamber consideration discretionary power as to the three options specified under (i) – (iii), those options should nonetheless be assessed based on the principle of proportionality and subsidiarity.

Relief Sought

10. On these grounds the Appellants sought relief that the Appeals Chamber should:

(i) Find the appeal admissible

(ii) Grant the appeal and reverse the impugned decision, both as to the interim measures and the order pursuant to Rule 77(C)(iii), and/or

(iii) Any other decision the Appeals Chamber deems appropriate.

11. The grounds of appeal are vague and in some parts difficult to understand. For instance, ground 1 complained of violation of the right to fair hearing without stating whose right was violated; and, ground 2 is hardly comprehensible. Doing the best one can, it would appear that the complaint of the appellants is that the decision on the interim measures imposed by the Trial Chamber as well as the imposition of enquiry pursuant to Rule 77(C)(iii) should be set aside because (i) they were in violation of the right to fair hearing in that the Trial Chamber had acted on information and documents provided by the Prosecution; (ii) the Trial Chamber proceeded on a wrong criterion in terms of Rule 77(C) and (iii) it did not advert to the principle of proportionality in the steps it took.

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12. As the threshold questions raised in the appeal by the parties may be decisive it is unnecessary to rehearse, at this stage, and consider for the purpose of determination of the appeal, the profuse submissions made on the merits. If the appeal is incompetent, no useful purpose is served by considering and pronouncing on the merits of what is merely a purported appeal. A final appellate tribunal should only pronounce on the merits of an appeal of which it is properly seized. It suffices to re-iterate that the accused in the criminal trial are the appellants, and that their challenge is (i) to the powers exercised by the Trial Chamber pursuant to Rule 77(C) on the report made to it of certain incidents that may have amounted to a contempt of the Special Court, and (ii) to the interim measures imposed by the Trial Chamber.

13. In regard to the power exercised by the Trial Chamber pursuant to Rule 77(c)(iii) the threshold questions are: (i) whether the means of challenging the exercise of those powers is by appellate process; (ii) if it is, whether the appellants are the persons competent to bring the appeal; (iii) if the appellants are competent to bring the appeal, whether they can do so without first obtaining leave of the Trial Chamber. In regard to the interim measures imposed by the Trial Chamber, the threshold questions are whether the appellants are competent to bring the appeal and, if so, whether it is proper for them to do so without, first, obtaining leave of the Trial Chamber.

14. In regard to these issues the appellants put their case thus: (i) the provisions of Rule 77(J) of the Rules of Procedure and Evidence ("the Rules") that "any decision rendered by a single Judge or Trial Chamber under this Rule shall be subject to appeal" specifically embraces the term "any decision" which, it is submitted, includes a decision pursuant to Rule 77(C)(iii); (ii) although Rule 77 does not specifically refer to interim measures in the context of a contempt of Court investigation and the Trial Chamber had founded its interim order on Rule 54, the interim measures were closely connected to the decision under Rule 77(C)(iii) and were appealable in accordance with Rule 77(J) ; (iii) Rule 77(J) having specifically provided that any decision under Rule 77 "shall be subject to appeal" no leave to appeal was necessary.

15. For its part, the Prosecution submitted that the "purported" defence appeal should be rejected on the grounds, first, that there was no legal basis in the Rules for bringing such an appeal and, secondly, that it is lacking in merits.

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16. The Prosecution submitted that: Although Rule 77(J) of the Rules provides that "Any decision rendered by **a** Single Judge or Trial Chamber under this Rule (i.e. Rule 77) shall be subject to appeal", Rule 77(J) referred to a decision under Rule 77(A), (B) or (G) finding a person to be, or not to be, in contempt of the Special Court and imposing a penalty on a person held to be in contempt. An interlocutory or interim decision of a Trial Chamber in contempt proceedings is not a decision made under Rule 77 even if it is a decision made in Rule 77 proceedings. Interlocutory decisions and orders made in contempt proceedings are made under Rule 54 or Rule 73 and not under Rule 77 itself. An interlocutory appeal against a decision of a Trial Chamber in contempt proceedings, as in any other kind of proceeding before a Trial Chamber, requires the leave of the Trial Chamber pursuant to Rule 73 (B). In the absence of leave to appeal pursuant to Rule 73(B) the appeal should be rejected to the extent that it relates to the interim measures ordered by the Trial Chamber.

17. The Prosecution conceded that the decision of the Trial Chamber to order the appointment of an independent counsel pursuant to Rule 77(C)(iii) was a decision under Rule 77. However, it went on to submit that there being no procedure by which a person who is being investigated by the Prosecutor of the Special Court for serious violation of international humanitarian law can challenge the decision to investigate him, there was no basis for suggesting that the accused in this case, who were not being investigated for contempt, could challenge a decision to investigate other person for contempt.

18. On the issue of standing it was submitted that, in regard to challenge of the Trial Chamber's decision on the basis of alleged violation of the rights of the suspected contemnors, the Appellants lacked standing. It was argued that "the Accused in this case and their counsel only have standing to challenge the Trial Chamber's decision to the extent that they allege that the rights of the three Accused in this case have been specifically affected"

Joint Defence Reply

19. In the Joint Defence Reply, the Appellants discussed the *Brdanin*[8] case which was referred to in one of the footnotes[9] of the Prosecution response and argued that the

[8] *Prosecutor v. Brdanin,* ICTY Case No. IT-99-36-T [1 September, 2004]
[9] Prosecution Response, p. 4, footnote 9

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decision in that case was inapplicable. The appellants claimed standing to appeal because, as they argued, the "mere fact that all of the Accused are not allegedly involved in potential contempt of court as such, cannot take away the fact that they have a reasonable interest to a participation in these proceedings as the outcome thereof affects the fairness of their case"[10], even if, indirectly. It was clear from the Appellant's reply (para. 9) that they had proceeded on the footing that they were appealing from a decision made in the case against the Accused.

Discussion

20. Central to a determination of the threshold issues is a proper appreciation of the nature of contempt proceedings under Rule 77 of the Rules generally and, in particular, the true nature and ambit of Rules 77(C) and 77(J).

21. Rule 77 (A) restates the inherent power which inheres in any superior court to punish for contempt any person who knowingly and wilfully interferes with administration of justice. Rule 77(C) sets out the several powers that a Judge or Trial Chamber who has reason to believe that a person may be in contempt of the Special Court may exercise. It is apt to note that whether the Judge or Trial Chamber exercises any of those powers is at the discretion of the Judge or Trial Chamber.

22. The powers that a Judge or a Trial Chamber may exercise pursuant to Rule 77(C) are to:

(1) Deal with the matter summarily himself or itself;

(2) Refer the matter to the appropriate authorities of Sierra Leone;

(3) Direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter.

[10] Joint Defence Reply, para.10

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23. When the summary option is chosen, the Judge or Trial Chamber acts, as it is usually put, "*ex mero motu*". The Judge or Trial Chamber does not need, and is not expected, to give to the alleged contemnor any formal notice of his intention to initiate summary contempt proceedings at that stage and to ask him to address whether or not such should be initiated. Since the summary procedure is reserved for cases of contempt in the face of the court, the Judge or Trial Chamber deals, there and then, with the alleged contempt himself or itself and satisfies the demands of natural justice by stating clearly to the alleged contemnor the specific charge against him, calling upon him and giving him an opportunity to "show cause" why he should not be committed for contempt. Evidently, it will be absurd to ask the alleged contemnor to show cause why he should not be called upon to show cause.

24. Where the Judge or Trial Chamber decides to exercise the power of referral to Sierra Leone authorities, the Judge or Trial Chamber does not at all take any decision as to the innocence or guilt of the alleged contemnor nor does he take any decision that would tie the hands of the appropriate Sierra Leone authorities. The Judge or Trial Chamber merely reports to such authorities that he or it has reason to believe that the alleged contemnor may be in contempt of the Special Court. It would then be for Sierra Leone authorities to investigate the matter and exercise a prosecutorial discretion, whether or not to prosecute the alleged contemnor. The Judge or Trial Chamber in such circumstances assumes a role similar to that of a complainant. The prosecutorial decision lies with Sierra Leone authorities.

25. The third option speaks for itself. It is clear from the provisions of Rule 77(C) (iii) that the Trial Chamber or Judge directs the Registrar to appoint an independent counsel who would investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. At that stage, beyond having reason to believe that a person may be in contempt of the Special Court, the Judge or Trial Chamber has not formed, and is not expected to have formed, any view as to the guilt or innocence of the person suspected to be in contempt, or even whether there would be sufficient evidence to justify a prosecution of such person. The subsequent decision of the Judge or Trial Chamber pursuant to the report of the independent counsel, if it is reported that there are sufficient grounds for instigating contempt proceedings, is a prosecutorial decision which is also at the discretion of the Judge or Trial Chamber.

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26. The decision of the Judge or Trial Chamber to exercise any of the powers under Rule 77(c) (ii) or (iii) may or may not, eventually, lead to initiation of contempt proceedings. If contempt proceedings are initiated, the parties to such proceedings would be the prosecutor, which is the independent counsel, and the alleged contemnor. The parties to the criminal proceedings in the course of which the alleged contempt occurred do not by virtue of their being such parties become parties to the contempt proceedings.

27. It is expedient to observe at this point that the prerequisite to the exercise of the powers set out in Rule 77(C) is that the Judge or Trial Chamber must have reason to believe that a person may be in contempt of the Special Court. A Judge who or a Trial Chamber that has reason to believe that a person may be in contempt of the Special Court does not by that fact hold himself or itself out as having concluded that there is even prima facie evidence that the person is in contempt. There is a distinction between reasonable suspicion and prima facie case.[11] 'Reason to believe' that contempt has been committed is another way of putting the prerequisite of 'reasonable suspicion'. Reasonable suspicion that a person may be in contempt are words that could have expressed the same prerequisite as 'reason to believe'. It is difficult to fathom what useful purpose would have served at that stage by hearing the suspected contemnor, or the accused in the pending criminal trial, when, at that stage, all that the Judge or Trial Chamber is expected to act on are facts, which may not even be admissible in evidence, but sufficient to give him reason to believe that a person may be in contempt.

28. In view of Rule 77(J) which provides that: "Any decision rendered by a single Judge or Trial Chamber under this Rule shall be subject to appeal", it is expedient to consider the nature of the power exercised by a Judge or Trial Chamber under

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[11] See, *Dunmbell v. Roberts* [1944] 1 All ER 326 where Scott L.J. emphasising that reasonable suspicion is not to be equated with prima facie proof said (at p. 329):

> "The protection of the public is safeguarded by the requirement, alike, of the common law and, . . . of all statutes, that, the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction."

See, also, the Privy Council Case of *Inspector Shaeban – bin Hussein v. Chong Fook Kan and another* {Privy Council Appeal No. 29 of 1968: Judgment delivered on 7 October 1969}, where their Lordships of the Privy Council said:

> "There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. Suspicion can take into account also matters which though admissible could not form part of prima facie case."

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Rule77(C). In so far as the powers exercised by a Judge or trial Chamber can be said to be a result of a decision to exercise such powers, it can be said that the exercise of such powers implies a 'decision'. However, it cannot be said that such decisions are judicial decisions. They are decisions of an executive nature and are not decisions, at that stage, that depend on any dispute or on the resolution of any conflicting facts or issues. The choice between options available under 77(c) (ii) or (iii) is determined not by law but by administrative convenience and expediency. Rule 77(J) deals with judicial decisions. Hence the use of the words 'decision rendered'. At the stage, when a Judge acts under Rule 77(C) (ii) there are, as yet, no investigation, no contempt proceedings and no parties. All there would have been were mere possibilities of cause to initiate contempt proceedings. Also, at the time when the Registrar is directed by a Judge or Trial Chamber to appoint an independent counsel to investigate under Rule 77(C) (iii) there are as yet no contempt proceedings and no parties. But mere possibilities.

29. Before I part with this aspect of the matter a passage in the opinion of Lord Radcliffe in the Privy Council case of *Nakkuda Ali v. Jayaratne*[12] is apt in support of the view here expressed that the decision of a judge or Trial Chamber to act pursuant to Rule 77(C) is not a judicial decision subject to appellate review by the Appeals Chamber. In that case it was provided in the relevant statute that "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" the Controller could exercise power to cancel the dealer's licence given to him by the relevant Regulations in force in Ceylon. It was held that the words must be construed to mean that there must in fact exist reasonable grounds, known to the Controller, before he could validly exercise the power. Lord Radcliffe in that case observed:[13]

> It is not difficult to think of circumstances in which the Controller might in the ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. **It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process.** [Emphasis mine]

[12] [1951] A.C. 66 at p. 76
[13] Ibid., p. 76

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Also, in that case, Lord Radcliffe went on to say:[14]

> In truth when he cancels a licence he is not determining a question; he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe that the holder is unfit to retain it.

30. Although the Prosecution may be right in the submission that "an interlocutory appeal against a decision of a Trial Chamber in contempt proceedings, as in any other kind of proceedings before the Special Court, requires the leave of the Trial Chamber pursuant to Rule 73(B)"[15] the exercise of power by the Judge or Trial Chamber pursuant to Rule 77(C) (iii) cannot logically be said to be in 'contempt proceedings', because, at that stage, there would have been no contempt proceedings but a decision to launch an inquiry whether there would be sufficient evidence to initiate such proceedings.

31. By way of recapitulation, the following propositions applicable to this case are made:

(i) Contempt proceedings pursuant to Rule 77 are proceedings separate from the proceedings in the course of which the alleged contempt was occasioned or to which the conduct of the contemnor was directed.

(ii) The parties to the proceedings in the course of which the alleged contempt may have arisen do not by virtue of that fact become parties to the contempt proceedings, when initiated, unless they are the alleged contemnors.

(iii) In regard to the description of the powers exercised by a Judge or Trial Chamber under Rule 77 (C) as a "decision", such decision is not a judicial decision but decision in the nature of executive decision, whereas words 'decisions rendered' in Rule 77(J) imply judicial decisions. An appeal, as contemplated in our Rules of Procedure and Evidence, is the mechanism by which an Appeals Chamber reviews the decision of a Trial Chamber rendered in initiated proceedings of which the Trial Chamber is or has been seized.

(iv) Choice of power that a Judge or Trial Chamber decides to exercise pursuant to Rule 77(C) does not amount to a prosecutorial decision, but may lead, eventually, to that. Even in regard to prosecutorial decisions, there may be several ways of

[14] Ibid., p. 78

[15] Prosecution Response, para. 7

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challenging such decisions, but an appellate process is not one of them. The Appeals Chamber is not set up to exercise a general and roving supervisory jurisdiction over the Trial Chamber so as to review such exercise of power conferred upon it by Rule 77(C.).

(v) When, in terms of Rule 77 (C), a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Special Court, such person does not thereby become party to the pending proceedings or, at that stage, even to any proceedings.

(vi) When Rule 77(C) provides that "Any decision rendered by a single Judge or Trial Chamber under this Rule shall as subject to appeal", "decision rendered" must sensibly be interpreted as "decision rendered" in contempt proceedings that had already been initiated and not to steps taken by a Judge or Trial Chamber pursuant to Rule 77(C) which may or may not result in initiation of contempt proceedings and are merely steps in contemplation of a mere possibility of initiation of contempt proceedings. A decision cannot be "rendered" in proceedings that have not been initiated.

These propositions applied to the powers exercised under Rule 77(C) in the present case.

32. Applying these propositions to the present proceedings the conclusion is inescapable that the appeal is incompetent because the provisions of Rule 77(J) do not apply to decision to exercise power under Rule 77(C). Even if there could be an appeal from the exercise of such powers the appellants who are not the suspected contemnors likely to be affected by the order made pursuant to Rule 77(C)(iii) are not the proper parties to bring such appeal. It is far-fetched, misconceived and purely speculative to argue that the order directing the Registrar to appoint a special counsel to investigate whether there are sufficient grounds to initiate contempt proceedings would impair a fair hearing of the pending criminal proceedings or that contempt proceedings which have not been initiated would have such effect. Such argument could only be a try on designed to fashion a platform for an appeal by the appellants who will be strangers to contempt proceedings, if any, that may eventually emerge from the exercise of powers pursuant to Rule 77(C)(iii).

Concerning the Interim Measures.

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33. However, in regard to the interim measures imposed by the Trial Chamber a different consideration applies. Those measures can only, and do, derive their existence from the pending criminal proceedings in which the appellants were the parties as accused. The interim measures were imposed in a case in which the Appellants were parties.

34. The Rules confer appellate jurisdiction on the Appeals Chamber in clearly defined terms. Rule 73(B) empowers the Appeals Chamber to entertain interlocutory appeal from decisions rendered on motions, where the Trial Chamber has given leave to appeal. Rule 77(J) gives a right of appeal from a decision rendered by a Single Judge or Trial Chamber under Rule 77. Rule 106(A) confers jurisdiction on the Appeals Chamber to hear appeals from persons convicted by the Trial Chamber or from the prosecutor.

35. Where a Judge or a Trial Chamber acts pursuant to Rule 54 or Rule 75, an appeal by leave of the Trial Chamber is admissible.

36. The interim measures imposed by the Trial Chamber are not made pursuant to Rule 77 but pursuant to Rule 75. Any appeal from the decision imposing such measures without leave of the Trial Chamber is incompetent. It is unnecessary to consider whether the appellants have standing to appeal from such decision which does not directly affect them. This is one of the considerations that the Trial Chamber would have had to advert to were leave sought from it. It is of interest that the persons directly affected by the interim orders have not appealed from the orders. Be that as it may, for the purpose of this appeal it suffices to find that the appeal having been brought without the leave of the Trial Chamber, is incompetent.

Disposition

37. For the reasons which have been given, it is my opinion that the appeal is incompetent and should, therefore, be struck out.

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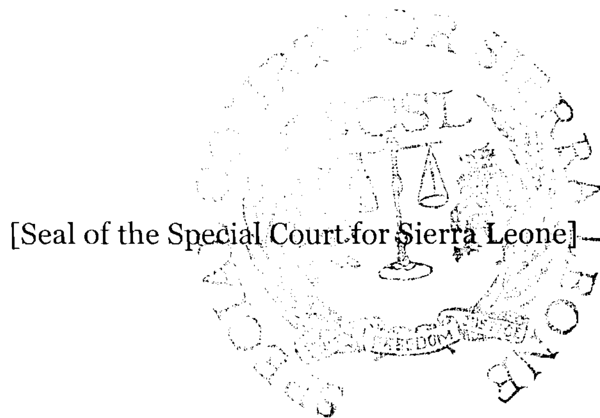
Done at Freetown this day 23rd of June, 2005

Justice Emmanuel Ayoola



[Seal of the Special Court for Sierra Leone]

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SEPARATE AND PARTIAL DISSENTING OPINION OF JUSTICE GEORGE GELAGA KING

A. Introduction

1. I append a separate and partial dissenting opinion because I am unable to agree with the reasoning and part of the outcome of the majority decision that the appeal brought by counsel Kevin Metzger, the legally constituted representative of Brima Samura a defence investigator, be struck out on the ground, inter alia, that he has no locus standi to prosecute the appeal. I agree, for reasons of my own that will follow, that the appeals brought on behalf of the three accused, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu be struck out on the ground that they have no locus standi.

2. I intend to emphasize the fact that it is unjust and wrong for an appellate tribunal (in this instance the majority of the three Appeals Chamber Judges assigned to deal with this appeal) to base its decision on a ground – Rule 75 of the Rules of Procedure and Evidence – not set forth in the Notice of Appeal and where the parties have had no opportunity of contesting the appeal on such ground and particularly where it had been ordered by the Special Court's President under Rule 117(A) that there will be no oral hearing. The basic tenet of natural justice – audi alteram partem (Hear the other side) – ought also to have been adhered to in this instance.

3. Furthermore, there are three substantial issues in relation to which I take a view different from that of the majority. The first relates to the interpretation of rule 77(J): "Any decision rendered by a single Judge or Trial Chamber under this Rule shall be subject to appeal." I am unable to agree with Justice Robertson that "any decision" means "any final decision."

4. The second issue pertains to the *audi alteram partem* rule. One of the majority of the Appeals Chamber, Justice Robertson is of the opinion that in the Contempt of Court proceedings in Trial Chamber II there was no breach of that rule and say that the other side was heard. I disagree. The other side was the defence Investigator Brima Samura and he certainly was not heard or called upon to explain, refute or answer the allegations of contempt made against him.

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5. The third issue arises from the finding of the majority that this Appeal "is brought without leave of this court or of the court below, and which relates to an interlocutory action rather than a final decision." Even if leave to appeal was necessary, it cannot reasonably be said that the appeal is brought without leave as can quite clearly be seen from a perusal of the transcript:

> "Mr Metzger: I am asking for leave to appeal this decision.
>
> Presiding Judge: Rather than.....I see.
>
> Judge Lussick: You don't really need leave, do you, Mr Metzger, it says 'shall be subject to appeal.' You can appeal."[1]

B. Background

6. Messrs Kevin Metzger, Wilbert Harris and Knoops are named in this appeal as Defence Counsel for the First Accused Alex Tamba Brima, Second Accused Brima Bazzy Kamara and Third Accused Santigie Borbor Kanu, respectively.[2] These accused persons are three of those charged on indictment as bearing the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. They are not and have not been charged with Contempt of Court. Their trial on indictment is currently before Trial Chamber II.

7. Contempt of Court proceedings arose in the course of that trial on indictment, against persons other than the three accused, none of whom is alleged or suspected to be a contemnor. The persons alleged and suspected to be contemnors are one Brima Samura a defence investigator and four women, namely, Margaret Fomba, Neneh Binta Bah, Anifa Kamara and Ester Kamara.[3]

8. On 10 March 2005 at the continuation of the trial of the three accused, Ms Taylor for the Prosecution informed Trial Chamber II that the Office of the Prosecutor had that morning received two written reports in relation to two separate security incidents that occurred the day before concerning a protected witness, TF1-023, who had been giving evidence.

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[1] Transcript p.21, lines 20-23.
[2] Notice of Appeal, Front Page.
[3] Transcript p.6, lines 23-25.

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9. After the Presiding Judge had announced that the court will continue in closed session because of the serious nature of the allegations, Ms Taylor went on: "The Prosecution's submission is that the reports of Mr Saleem Vahidy and Mr Jospeh Poraj-Wilcznski indicate that there is a prima facie case of contempt against five people: the defence investigator Brima Samura pursuant to Rule 77(A)(ii) and the women Margaret Fomba, Neneh Binta, Anifa Kamara and Ester Kamara..."[4]

10. Rule 77(A)(ii) states:

 "The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and wilfully interferes with its administration of justice, including any person who:..

 (ii) discloses information relating to proceedings in knowing violation of an order of a Chamber."

11. Ms Taylor referred the Trial Chamber to the Court's powers under rule 77(C), the various options open to the Court "**including dealing with the matter summarily itself**..."[5] She submitted that the matters raised were sufficiently serious and that some action should be taken by the Chamber pursuant to Rule 54 and pointed out that Rule 54 is simply a general provision.[6] Emphasis mine.

12. Rule 54 provides:

 "At the request of either party or of its own motion a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders **as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial**." Emphasis mine.

13. Prosecution Counsel Ms Taylor continued her submissions as follows:

 "In the circumstances, the Prosecution would submit that it is appropriate that pursuant to that section that certain interim orders be issued by this Chamber in relation to the named persons, including that the investigator Brima Samura should be suspended as a Defence Investigator and hand back all documents in his possession concerning the identity of witnesses before this court; that he should be asked to give a solemn undertaking to this Chamber that he will not discuss witness identity with any

[4] Ibid p.6, lines 21-25.
[5] Ibid p.7, lines 13 and 14.
[6] Ibid lines 21-22.

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person; that the four women named should be banned from the public gallery of Trial Chamber II; and that they also be asked to give a solemn undertaking to refrain from contacting any Prosecution witness. Those orders, Your Honours, would be sought as interim orders until appropriate action is taken pursuant to Rule 77, and they are simply to maintain the status quo and to give adequate protection to Prosecution witnesses whose identities have already been disclosed to the Defence and, therefore, to the Defence Investigator in question, if Your Honours please."[7]

14. Immediately thereafter the Trial Chamber conferred. Without calling on any of the Defence Counsel, or Brima Samura the Defence Investigator, or any of the four named women to respond, the Presiding Judge had this to say:

"Thank you, Ms Taylor. **This is the unanimous ruling of the Court.**"[8] My emphasis.

15. At that crucial and decisive juncture, Defence Counsel Mr Kevin Metzger quite rightly I opine, intervened and complained:

"May it please, Your Honour, it appears that an allegation has been made concerning a member of my team and members of other or certainly relatives of other teams, and **the Defence have not been called upon to either meet the allegation that has been made or deal with anything**. Now, in a court of law, in my humble, but limited experience, it is always the case that the Defence is called upon. I was sitting here waiting, and expecting that we would only not be called upon if the Bench decided that it didn't want to do anything about this...."[9] Emphasis mine.

16. What then followed I find instructive and helpful so I shall reproduce for record purposes, and so that there can be no uncertainty as to what actually was said in court, the ensuing relevant dialogue between the Presiding Judge and Mr Metzger:

"Presiding Judge: Mr Metzger, we are going to direct a full investigation and then a hearing, in which case the Defence will, of course, be fully heard and, as in any hearing, the Defence is entitled to be heard, but until there is an investigation, I think it is premature to invite the Defence to lay out their case.

Mr Metzger: Is your Honour going to deal with the interim measures that are sought by the Prosecution?

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[7] Ibid p.7 lines 27-29; p.8 lines 1-13.
[8] Ibid p.8 lines 15 and 16.
[9] Ibid p.8 lines 17-24.

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Presiding Judge: I intend to make interim measures in line with certain submissions by the Prosecution.

Mr Metzger: Then we would respectfully submit that we ought to be heard on any interim measures that the Court decides to rule on.

Presiding Judge: **I will hear you only the question of Brima Samura and that alone.** Emphasis mine.

Mr Metzger: Yes, and I'm content to address you only on the question of Brima Samura. Brima Samura is the investigator for the Brima Defence team...."[10]

17. Defence Counsel Mr Harris pleaded for a moment of reflection and research and Mr Knoops for the 3rd defendant Kanu made submissions in regard to Kanu's right to have his wife (one of the ladies named) to visit him in detention and also asked for an adjournment of the trial. The application for an adjournment was refused.[11]

18. The Presiding Judge duly ruled as follows:

"I consider that there are prima facie grounds that the following persons should be brought before the Court to show cause why they are not in breach of Rule 77(A)(ii) and (iv). Accordingly this Court directs an order that the Registrar appoint an independent counsel to investigate and prosecute the following persons: Margaret Fomba, Neneh Binta Bah, Anifa Kamara, Ester Kamara, Brima Samura **pursuant to Rule 77(C)(iii) of the Rules of Procedure.** The Court directs that the investigation and appropriate appointment be done expeditiously. The Court further directs that they be brought before this Court or an alternate Court that may have to be appointed if counsel are involved **to be dealt with in accordance with Rule 77(C)(i).** The Court further orders that Brima Samura be suspended from this Court and return all Court documents and information pending investigation and hearing. I accept prima facie it is an interim measure. Further, the Court orders and directs that Margaret Fomba, Neneh Binta Bah, Anifa Kamara and Ester Kamara may not enter the public gallery pending the investigation and hearing of this matter. We direct that an independent counsel prosecute this matter pursuant to Rule 77(C)(iii). That is the Ruling of the Court."[12] Emphasis mine.

[10] Ibid p.8 lines 25-29; p.9 lines 1-11.
[11] Ibid p.20 line 18.
[12] Ibid p.15 lines 24-29, p.16 lines 1-13.

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C. NOTICE AND GROUNDS OF APPEAL
SUMMARY OF DEFENCE AND PROSECUTION SUBMISSIONS

19. One day after the Ruling, on the 11 march 2005 Defence Counsel for the three accused filed what they describe as a Joint Notice of Appeal. They also filed on the same date an Appeal Motion "pursuant to Rule 77(J) on both the imposition of Interim Measures and an Order pursuant to Rule 77(C)(iii).[13]

20. The first ground of appeal is in these terms:

> "Error in law and/or fact due to violation of the right to have a fair hearing (principle of audi alteram partem) in the context of Rule 77(C)(iii) in conjunction with Rule 54 and Rule 77(E) of the Rules."

Second ground: "Error in law and/or fact due to an erroneous acceptance of a prima facie case of contempt."

Third ground: "The Trial Chamber erred in law and/or fact due to the principle of proportionality."

The relief sought is that this Appeals Chamber should find the appeal admissible; grant the appeal and reverse the Trial Chamber Decision both as to the interim measures and the order pursuant to Rule 77(C)(iii), and/or any other decision the Appeals Chamber deem appropriate.

21. The main complaint of the Defence is that the Trial Chamber II prior to imposing such severe interim measures, should have maintained the principle of a fair hearing in that both parties should have an equal opportunity to put forward their arguments. Accordingly, they argue, the Trial Chamber "should have heard at least the Defence Investigator, who is now implicated in the current investigation."[14] They complain that the Trial Chamber arrived at its unanimous decision before hearing the Defence and violated the principle of **audi alteram partem**. Further, the Defence claim, the Trial Chamber erroneously accepted the existence of a prima facie case of contempt of court. The Defence submit that having regard to the principle of proportionality and subsidiarity the Trial Chamber, reasonably, should have opted to proceed under Rule 77(C)(i) – i.e. deal with the matter summarily itself.

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[13] Appeal Motion 6944.
[14] Ibid para 13.

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22. The Prosecution submit that there is no legal basis for the interlocutory appeal. That the words "decision rendered...under this Rule" in Rule 77(J) refer to a decision under Rule 77(A), (B) or (G), that is, the final decision of a Chamber finding a person to be or not to be, in contempt of the Special Court, and imposing a penalty on that person.[15] They submit that an interlocutory appeal against a decision of a Trial Chamber in contempt proceedings requires leave of the Trial Chamber pursuant to Rule 73(B). "Accordingly, in the absence of leave to appeal pursuant to Rule 73(B) the appeal must be rejected as lacking any basis in the Rules, to the extent that it relates to the interim measures ordered by the Trial Chamber."[16]

23. The Prosecution further submit that the three Accused lack standing to challenge alleged violation of the rights of other persons. That "the right to be heard of all three Accused (the principle of audi alteram partem) has been respected."[17]

D. THE MAIN ISSUES AND THEIR DETERMINATION

24. In my judgement the main issues to be determined by the Appeals Chamber arising from the grounds of appeal are the following:

(i) Whether the three Defence Counsel for the three Accused have a locus standi in this contempt of court appeal and whether Mr Kevin Metzger has a locus standi to represent Brima Samura the Defence Investigator in this appeal.

ii) Does the Appeal Chamber have jurisdiction to entertain the Appeal?

iii) Are the grounds of appeal meritorious?

1. Locus Standi

25. As far as the three Accused, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu are concerned, as I have already premised, they are not and have not been charged with Contempt of Court. They are neither alleged nor suspected to be contemnors. The Contempt of Court proceedings which arose in the course of their trial on indictment were in respect of the five persons I have already named: Brima Samura (not to be mistaken for 1st Accused Alex Tamba Brima), Margaret

[15] Pros. Response para 6.
[16] Ibid para 9.
[17] Ibid para 18.

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Fomba, Nenh Binta Bah, Anifa Kamara and Ester Kamara. It is obvious, therefore, that the three Accused lack standing in the contempt of court proceedings and I so hold. It is equally obvious that since those Accused persons have no standing in those proceedings it automatically follows that their respective Counsel cannot have a standing on their behalf and I so hold.

26. The next question for determination is the locus standi of the Defence Counsel vis-à-vis the five alleged and suspected contemnors. I take, first, the four women suspected to be contemnors. There is no evidence that any of the three counsel was instructed by those women or anybody else to represent them. Nor is there any evidence that the Trial Chamber had requested them to speak on the women's behalf or represent them. Furthermore, there is no evidence that the three Defence Counsel or any of them has filed any power of attorney with the Registrar to show that they had been engaged by any of the four women suspects as required by the Rules.[18] In the circumstances it is quite clear to me, and I so find, that the three Defence Counsel have no locus standi to represent the four suspected women contemnors in this appeal.

27. I now turn to Defence Counsel Kevin Metzger and the suspected contemnor Brima Samura who is the investigator for the First Accused Alex Tamba Brima. I have already quoted the dialogue between the Presiding Judge and Mr Metzger relating to Brima Samura.[19] The Presiding Judge had ruled that she would hear Mr Kevin Metzger "only on the question of Brima Samura and that alone."

28. Defence Counsel Mr Metzger with some alacrity expressed his contentment to address the Chamber only on the question of Brima Samura. Making full use of the opportunity he proceeded to address the Chamber at some length. He pointed out, inter alia, the following: That Brima Samura was the investigator for the Alex Tamba Brima defence team. That there had been one prior incident in which Brima Samura had been assaulted by security staff as he was entering the court building. That Samura's identity card was removed from him, his file knocked out of his hand and that Samura was ejected from the Special Court. That a witness statement in the possession of Samura had gone missing and that a complaint had been made about these matters using the Registry's internal complaints procedure, etc. etc. Mr Metzger finally asked "that the trial do not proceed until we have had

[18] Rule 44(A).
[19] Supra para. 16.

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the opportunity to have had discussions together about our future roles in this case."[20]

29. From the foregoing, it cannot be denied that Mr Kevin Metzger having acceded to the Trial Chamber's invitation that he address them "only on the question of Brima Samura and that alone" had in the circumstances represented, as Counsel, the suspected contemnor, Brima Samura in the Contempt of Court proceedings before that Chamber and continues to do so before this Appeals Chamber. In my judgement, it is incontestable that Mr Metzger has a locus standi as the legal representative of Brima Samura in the Contempt of Court proceedings. It follows, therefore, that Mr Kevin Metzger brings this appeal also as the legally constituted representative of Brima Samura the Defence Investigator, in whom the right personally inheres.[21] I, therefore, hold that Mr Kevin Metzger in his capacity as the legally constituted representative of Brima Samura has a place of standing in this appeal.

30. The decision of Justice Robertson on this question of locus standi seems to me to be rather ambivalent. He opines, on the one hand, that the three Accused Appellants and their Counsel have no standing to prosecute this appeal in relation to what he refers to as two decisions taken by the Trial Chamber in relation to (1) its reason to believe that a contempt had been committed or to (2) its direction for an independent investigation of the alleged contempt. But, on the other hand, he then goes on to say that those same Appellants have standing in relation to the decision to impose interim orders. I am unable to appreciate or accept this rather strange and novel dichotomy of locus standi which seems to me to be reprobating and approbating at the same time. This idea of the severability of locus standi seemingly for the purpose of fitting the halves into a like severance of the Trial Chamber's Ruling is to my mind palpably anomalous and without legal basis. Either a party has a standing to prosecute the appeal or he has not. One cannot have it both ways. If a party does not have a locus standi in the appeal then that is the end of the matter as far as that party is concerned. The Court ought not then to go further to adjudicate on the substance of the appeal of that party who has no standing.

[20] Transcript pages 8-11.
[21] Vide Locus Satndi and Judicial Review by S.M. Thio 1971, p.1.

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2. Right to Appeal

31. I have already held that the three Accused and their Counsel have no locus standi in this appeal. They, therefore, have no right to appeal and consequently I shall not adjudicate on the substance of their appeal which must necessarily be struck out. The only appeal I will entertain is that of Brima Samura whose appeal has been prosecuted by Mr Kevin Metzger, his legally constituted representative. I shall now deal with the substance of that appeal.

(a) Rule 77(J)

32. Brima Samura's interlocutory appeal is brought under Rule 77(J) of the Rules of Procedure and Evidence. Rule 77(J) provides:

> "Any decision rendered by a Single Judge or Trial Chamber under this Rule shall be subject to appeal."

Mr Kevin Metzger argues that this Rule specifically embraces the term "any decision" and this includes also a decision pursuant to Rule 77(C)(iii). He further submits that such interpretation is also supported by the reference in Rule 77(J) to the phrase "under this Rule" which refers also to a decision as imposed by the Trial Chamber to direct the Registrar to appoint an independent counsel to investigate the matter by virtue of Rule 77(C)(iii).[22] The Prosecution deny this and submit that the words "any decision" in Rule 77(J) refer to a decision of a Chamber finding a person to be, or not to be, in contempt of the Special Court, and imposing a penalty on that person. They further argue that interlocutory decisions and orders made in contempt proceedings are made under Rule 54, or Rule 73, or "under some other relevant provision of the Rule", rather than under Rule 77 itself and submit that the practice of the ICTY is consistent with this interpretation.[23]

33. Justice Robertson is of the opinion that "any decision" means in context "any final decision": He posits that a literal interpretation would cause unjustifiable expense and intolerable delay to a process which demands speedy resolution and a literal

[22] Appeal Motion 6944 para 5.
[23] Prosecution Response, para 7.

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interpretation which leads to such absurdity should if possible be avoided. For reasons that will follow I do not agree with his interpretation.

34. In my judgement the words "any decision" are clear, precise, unequivocal and unambiguous and, therefore, applying the elementary and golden rule of interpretation, those words must be given their ordinary and natural meaning. The words mean simply that any decision given by a Judge or Chamber under Rule 77 – Contempt of the Special Court – shall be subject to appeal. And this includes interlocutory decisions. If Rule 77(J) was restricting appeals to **final** decisions only it could quite easily have been drafted to read: "Any **final** decision...under this Rule shall be subject to appeal." (Emphasis mine).

35. Furthermore, a peculiarity of contempt of court proceedings is that the Judge or Court is invariably judge and prosecutor. For this reason and also the fact that the liberty of a person suspected to be a contemnor is affected, the courts have always regarded such contempt matters as not only *strictissimi juris*, but the Rules have afforded the alleged contemnor the opportunity to test the decision of the judge or court at all stages. Otherwise it might be too late to repair a potential or actual injustice suffered by a party. In the words of the ICTY Appeals Chamber in the case of *Prosecutor v. Aleksovski,* the peculiarity to which I have referred, "underlines the danger of a Chamber being both the Prosecutor and Judge in relation to a charge of contempt, and the possibility in such a case that the ordinary procedures and protections for the parties are overlooked."[24]

36. Quite apart from the literal interpretation of "any decision" even when the purposive or schematic and teleological method of interpretation is applied, the meaning of "any decision" is the same. The intention is to make any decision of the Judge or Court in Contempt of Court proceedings of the Special Court appealable and to that end the mechanism for a speedy adjudication is readily available as can be seen from the following:-

(i) Appeals pursuant to Rule 77 shall be heard by three Judges of the Appeals Chamber,[25] and not the panel of five.

(ii) The appeals may be determined entirely on the basis of written submissions.[26]

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[24] Pros v. Aleksovski IT-95-14/I, Judgement on Appeal by Anto Nobilo against finding of contempt 9AC) 30 May, 2001 para 56.
[25] Rule 77K

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(iii) Rules 109 to 114 which provide for Pre-Hearing Judge, Record on Appeal and relatively long time scale for filing submissions are dispensed with.[27]

(iv) Procedure is expedited just as in the case of interlocutory appeals under Rule 72(E) (serious issue of jurisdiction); Rule 72(F) (issue significantly affecting the fair and expeditious conduct of proceedings, or the outcome of a trial).

All the procedural steps to which I have just referred are steps taken in interlocutory appeals, as in the present case, as distinct from final decisions appeals where the procedure is lengthy, elaborate and time consuming, under Rule 109 to 114.

37. Finally on Rule 77(J) let me point out that to hold, as Justice Robertson does, that 'any decision' means 'any final decision' is not only doing violence to plain language, but he is in fact tacitly saying that the draftsman made a mistake by omitting the word 'final'. In that instance, the mistake (and I do not think it is mistake) can only be cured by amendment and not by judicial interpretation. This Appeals Chamber has no such power. Power of Amendment of the Rules is primarily given to the Plenary of the Special Court comprising the five Judges of the Appeals Chamber and the six Judges of the Trial Chambers.[28] This Appeals Chamber as the highest appellate authority of the Special Court for Sierra Leone ought not to usurp the role of Plenary or put ourselves in a position where it can be said, perhaps with some justification, that we disregard, infringe or circumvent the Rules of the Special Court with impunity.

38. It is most instructive to note that at a meeting of the Plenary of the Special Court on 14th May 2005, that body amended Rule 77(J) as follows:

> Rule 77(J):
> "Any **conviction** rendered under this Rule shall be subject to appeal."[29] (Emphasis mine)

The inference to be drawn from the amendment, and its timing, is too blatantly obvious to any reasonable and right-thinking person and it is unnecessary for me to adumbrate further on Rule 77(J).

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[26] Ibid.
[27] Rule 117(C)
[28] Rules 6 and 24 (i)
[29] The amendment became effective on 14 May 2005

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(b) Rules 54 and 73 and Leave to Appeal

39. The Prosecution have, with some force, contended that interlocutory decisions and orders in contempt proceedings are made under Rule 54, or Rule 73, or under some relevant (but unspecified) provision of the Rules rather than Rule 77 itself. They base their claim on Rule 77(E), which provides:

> Rule 77(E):
> "The rules of procedure and evidence in Parts IV to VIII shall apply, **as appropriate** to proceedings under this Rule." (My emphasis)

It is on that ground that they submit that interlocutory decisions in contempt proceedings are made under Rule 54, or Rule 73, rather than Rule 77 itself, citing practice of the ICTY and referring to the case of *Prosecutor v. Brdanin and Talic*[30] on Motion by Amicus Curiae Prosecutor to Amend Allegations of Contempt of the Tribunal.

40. The application before the Trial Chamber II was not to amend an indictment pursuant to Rule 72, but to impose interim measures for alleged contempt of the Special Court under Rule 77. With regard to the case of *Prosecutor v Brdanin, Judgement*[31] a prosecution for contempt under Rule 77, the alleged contemnors brought a motion for acquittal under Rule 98 bis of the ICTY Rules, which was dismissed. He then chose to seek certification to appeal the decision pursuant to Rule 73(B) of the Rules of that tribunal. In Brima Samura's case there has been no application under Rule73(A) and, therefore, Rule 73(B) is inapplicable.

41. In *Prosecutor v Brdanin*[32], *Corrigendum to Order Instigating Proceedings against Milka Magalov*, an ICTY Trial Chamber found it appropriate to rely on Rule 54 as its authority to make a corrigendum to an interlocutory decision in a contempt case. The Prosecution submitted that they made their application to the Trial Chamber for the imposition of interim measures under Rule 54. That Rule comes under Part V of the Rules – Pre-Trial proceedings under the heading 'General Provision'. It states:

[30] Case No. IT-99-36-R77 6 Feb 2004
[31] Case No. IT-99-36-T Trial Chamber 1 September 2004, ICTY
[32] Case No. IT-99-36-R77 Trial Chamber 14 May 2003 ICTY

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> "At the request of the either party or of its own motion, a Judge or Trial Chamber may issue such orders, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

It seems hardly appropriate for Rule 54 to be called in aid for the type of interim measures ordered by the Trial Chamber. Even if Rule 54 applies it could only have applied if the Trial Chamber was dealing summarily with the matter itself under Rule 77(C)(i) which it ought not to have done as it was purporting to act under Rule 77(C)(iii) – Rule 77(C)(i), (ii) and (iii) is disjunctive.

42. The majority of the Appeals Chamber are of the view that the Trial Chamber did not in fact act under Rule 54 in imposing interim measures but had acted under Rule 75: Measures for the Protection of Victims and Witnesses. I am unable to agree with this finding for several reasons. But let me repeat, as a preliminary matter, what I said *in limine*.[33] It is contrary to accepted practice, it is not justifiable and it is wrong for this Appeals Chamber, the final appellant authority, to ground its decision on interim measures on Rule 75 when the parties to this appeal had not been given an opportunity to contest the appeal on that ground, which was not a ground of appeal.

3. Rule 75: Protective Measures?

43. Witness TF1-023, a protected witness, was giving evidence in Trial Chamber II in the trial, on indictment, of the three Accused persons when allegations of contempt of the Special Court were made against a defence investigator, Brima Samura and others. Witness TF1-023 became a protected witness by virtue of Protective Measures ordered by the first Trial Chamber, Trial Chamber I, comprising Judges Itoe, Bankole Thompson and Boutet. Having regard to the relevant provisions of Rule 75 it cannot be said that the interim measures imposed by Trial Chamber II were ordered pursuant to Rule 75.

44. The relevant sub-rules of Rule 75 are the following:-

> "(F) Once protective measures have been ordered in respect of a witness or victim in any proceedings before the Special Court (the "first proceedings"), such protective measures:

[33] Ibid para 2.

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(i) shall continue to have effect mutatis mutandis in any other proceedings before the Special Court (the "second proceedings") unless and until they are rescinded, varied or augmented **in accordance with the procedure set out in this Rule;** (my emphasis)

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation...

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

i. to any Chamber, however constituted, remaining seized of the first proceedings; or

ii. if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.

(H) **Before determining an application under Sub-Rule (G)(ii) above, the Chambers seized of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings**, if that Judge remains a Judge of the Special Court. (My emphasis)

45. In the instant case the mandatory provisions of Rule 75(H) were not followed. Under that sub-rule it was mandatory for the Trial Chamber II, if indeed it was imposing the interim orders pursuant to Rule 75, (and it never said it was), to obtain all relevant information from the first proceedings **AND consult** with any Judge who ordered the protective measures in the first proceedings **before** determining the application under Sub-Rule (G)(ii). (My emphasis) That was not done. There is, therefore, no legal basis whatsoever, for what in the circumstances is an arbitrary finding by the majority, that the interim measures were imposed pursuant to Rule 75. I, therefore, disagree with the majority on that issue. It is only fair to record here, that neither the Prosecution, nor the Defence, nor the Trial Chamber II, had claimed at anytime that the interim measures were to be or were imposed pursuant to Rule 75.

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46. **Leave to Appeal:** In my interpretation of Rule 77(J) I said that any decision under Rule 77, Contempt of the Special Court is appealable. I have also said, for the reason I gave, that Rule 73(B) is inapplicable.[34] Both of my colleagues are, however, of the opinion that leave to appeal the interim measures had not been obtained. This view most certainly does not accord with the facts as can be seen from the following excerpt from the transcript:

> "Mr Metzger: **I am asking for leave to appeal this decision**
>
> Presiding Judge: Rather than...I see.
>
> Judge Lussick: You don't really need leave do you Mr Metzger, it says **'shall be subject to appeal'. You can appeal**" (My emphasis)

The facts speak for themselves.

4. Audi Alteram Partem (Hear the Other Side)

47. There is no dispute that the allegations against Brima Samura contained in the written reports of James Konormanyi[35] and Samuel Davies[36] were not made in the presence and within the hearing of the Trial Chamber Judges. There can be no doubt that if those reports are true then the Trial Chamber will be in a position, in the words of Rule 77(C) to say it "has reason to believe that a person may be in Contempt of the Special Court."

48. Were the reports true, or shown to be true, or likely to be true? To answer this question it seems to me that the Trial Chamber ought to have confronted Brima Samura with the very serious allegations made against him and given him an opportunity to state his case as it were, or of answering (if he can) the allegations made against him. It is only then, in the circumstances, that the Trial Chamber will be in a position to properly say it had reason to believe those reports. At no time was Brima Samura given that opportunity.

49. I must stress that it is a fundamental principle of natural justice that one ought not to be condemned unheard, which principle is enshrined in the maxim, "audi

[34] Ibid para 40
[35] Exhibit 1 p. 6972
[36] Exhibit 1 p. 6975

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alteram partem", or "hear the other side". As was said rather quaintly in Dr Bentley's case, "Even God himself did not pass sentence upon Adam before he was called upon to make his defence."[37] The allegations against Brima Samura are quite serious. It was, therefore incumbent on the Trial Chamber, in the pursuit of even-handed justice, to fairly listen to both sides, for that is the duty lying upon everyone who decides anything. I reiterate that the Chamber should have given the opportunity to Brima Samura for correcting or contradicting (if he can) the opprobrious allegations of contempt made against him. This they failed to do and it cannot, therefore be said they had reason to believe.

50. It is said that the other side was heard. Which other side? The other side was certainly not the three Accused because no allegations of contempt were made against them. The other side was Brima Samura and the four women against whom the allegations were made and not one of them was called upon, not one of them was heard – that was contrary to natural justice.

51. In my judgement, the Trial Chamber by imposing the interim measures and by the very nature and content of those measures, seems to have been acting summarily pursuant to Rule 77(C)(i) and not, for the reasons I have already given, under Rule 75. In their Ruling the Trial Chamber ordered that the Registrar appoint an independent counsel to investigate and prosecute Brima Samura and the four females, "**pursuant to Rule 77(C)(iii)**" and, at the same time, directed that they be brought before the Court or an alternative court[38] "**to be dealt with in accordance with Rule 77(C)(i)**". This is not permissible. Sub-rules (i), (ii) and (iii) of Rule 77 are disjunctive. If the Chamber decides to act under sub-rule (i) it cannot then purport to act under sub-rules (ii) and (iii) and vice versa.

5. Initiation of Contempt Proceedings

52. Justice Ayoola is of the opinion that the decision of the Judge or Trial Chamber to exercise any of the powers under Rule 77(C)(i), (ii) or (iii) may or may not eventually lead to initiation of contempt proceedings. I find it difficult to accept such proposition. If by 'initiate' is meant 'to cause a process to begin', then it seems to me that proceedings for contempt may be initiated by the Prosecution,

[37] (1723) 1 Stra. 557
[38] See para 18 supra

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the Defence, or by the Chamber suo motu. I agree with the view expressed by the President in the "Celebici Camp" case when he said that "the Prosecutor may investigate and bring to the Chamber's attention such interference of a witness as may come within the terms of Sub-Rule 77(A), but, equally, so may the Defence or the Chamber, proprio motu, and it remains the prerogative of the Chambers whether or not to convict someone of contempt."[39]

53. In the instant case proceedings for contempt of the Special Court were **initiated** from the moment when Ms Taylor for the Prosecution, after investigation, brought to the Chamber's attention reports that Brima Samura had disclosed information relating to proceedings in knowing violation of an order of a Chamber and contrary to Rule 77(A)(ii). The decision of the Trial Chamber to exercise its powers under Rule 77(C)(i),(ii) or (iii) was consequently, a continuation of contempt proceedings **initiated** by the Prosecutor. As soon as contempt proceedings are initiated, that instigates the adjudicatory function of the Chamber. I do not accept, as Justice Ayoola posits, that a decision by the Chamber under Rule 77(C) is not a judicial decision, but a decision in the nature of "executive decision." The Chamber does not, in exercising jurisdiction in contempt proceedings under Rule 77(C), act in an administrative or executive capacity. This would be a negation of the Special Court's Statute and the Rules of Procedure and Evidence.

54. Underscoring the importance of the overriding need for procedural scrupulosity and meticulousness is the universal judicial recognition that contempt is "by far the most powerful device in the legal conceptual armoury of the courts designed to preserve the dignity and integrity of the judicial process."[40]

55. Since the natural justice rule of audi alteram partem was not adhered to and applied by the Trial Chamber, the Appeal of Brima Samura succeeds on that ground. It is consequently unnecessary for me to consider the other grounds.

Disposition

56. For the reasons I have given I would ALLOW the appeal in respect of the Defence Investigator Brima Samura and SET ASIDE the interim measures and orders against Brima Samura whose appeal is competent.

[39] Case No. IT-96-21 "Celebici Camp" Mucic et al. Decision of the President on the Prosecution's Motion for the Production of Notes Exchanged between Zejnul Delalic and Ndravko Mucic, 11 November 1996 at para 34
[40] Bankole Thompson, *The Criminal Law of Sierra Leone*, Maryland: University Press of America Inc. 1999 at p. 219

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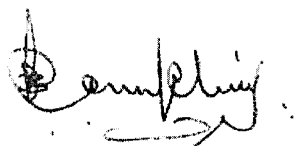
Done at Freetown this 23 day of June 2005



Hon. Justice George Gelaga King

[Seal of the Special Court for Sierra Leone]

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