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SCSL-05-01  
(75-103)



**SPECIAL COURT FOR SIERRA LEONE**  
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**TRIAL CHAMBER I**

**Before:** Hon. Justice Pierre Boutet  
Single Judge of Trial Chamber I

**Interim Registrar:** Mr. Lovemore Green Munlo

**Date:** 26 October 2005

**Independent Counsel**      **Against**      **BRIMA SAMURA**  
(Case No. SCSL-2005-01)

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**JUDGMENT IN CONTEMPT PROCEEDINGS**

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**The Independent Counsel:**

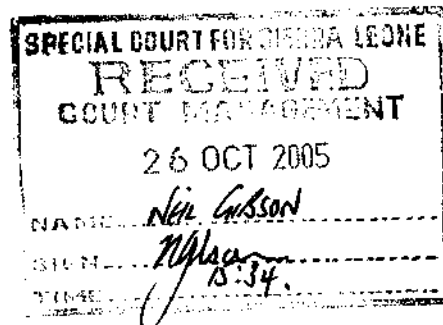
Adelaide Whest  
Bintu Alhadi-Tejan-Jalloh

**Defence Counsel for Brima Samura**

Wilbert Harris  
Kojo Graham

**The Principal Defender:**

Vincent Nmehielle



I, HON. JUSTICE PIERRE BOUTET, acting as Single Judge of Trial Chamber I pursuant to the *Order Designating a Judge for Contempt Proceedings* of the 2<sup>nd</sup> of May, 2005;<sup>1</sup>

MINDFUL of the *Decision on the Report of the Independent Counsel Pursuant to Rules 77(C)(iii) and (D)* filed by Trial Chamber II on the 29<sup>th</sup> of April 2005 and the corrigendum thereto of the 2<sup>nd</sup> of May 2005 ("Trial Chamber II Decision");<sup>2</sup>

MINDFUL, in particular, of the *Order in Lieu of the Indictment* against Brima Samura as contained in Annex A of the aforementioned Trial Chamber II Decision;

MINDFUL OF Article 19(2) of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 54, 77, and 87 of the Rules of Procedure and Evidence ("Rules").

## I. BACKGROUND

1. On the 10<sup>th</sup> of March, 2005, during the trial of the *Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Kanu* ("AFRC Trial"), a Prosecution Witness complained to the Court that, as she was being driven from court on the previous day, she had been subjected to threats from certain persons. In particular, that Witness stated that four women, including the wives of the accused in the AFRC Trial, called her by name and verbally threatened and intimidated her regarding her testimony at trial.<sup>3</sup>

2. Subsequently, on the same date, Trial Chamber II issued an oral ruling by which it directed the Registrar to appoint an independent counsel in order to investigate Brima Samura, Margaret Fomba Brima, Neneh Binta Bah Jallow, Anifa Kamara and Ester Kamara

<sup>1</sup> See also *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01 and *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-2005-02, Order Assigning a Case to a Trial Chamber, 2 May 2005.

<sup>2</sup> *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Decision on the Report of the Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence, 29 April 2005. See also *Id.*, Corrigendum to the Decision on the Report of the Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence, 2 May 2005. For ease of reference, these two documents will be referred to jointly as "Trial Chamber II Decision".

<sup>3</sup> For reference, see Trial Chamber II Decision, *supra* note 2. See also *Prosecutor v. Brima et al.*, Case No. SCSL-04-016-AR77, Decision on Defence Appeal Motion pursuant to Rule 77(I) on Both the Imposition of Interim Measures and an Order pursuant to Rule 77(C)(iii), 23 June 2005, paras 4-7.

("Alleged Contemnors") and to report back to the same Trial Chamber as to whether there are sufficient grounds for instigating contempt proceedings against any of them.<sup>4</sup>

3. On the 11<sup>th</sup> of March, 2005, the Registrar appointed Mr. Louis Tumwesige as Independent Counsel to investigate the matter of alleged contempt and submit a report to Trial Chamber II.<sup>5</sup> On the 16<sup>th</sup> of March, 2005, Mr. Louis Tumwesige submitted to Trial Chamber II his report on the investigations ("Investigation Report").<sup>6</sup>

4. Pursuant to the said Report, Trial Chamber II on the 29<sup>th</sup> of April, 2005 found sufficient grounds to proceed for contempt against the Alleged Contemnors pursuant to Rule 77 and consequently issued its *Decision on the Report of the Independent Counsel pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence* and ordered, *inter alia*, the Independent Counsel to prosecute each of the Alleged Contemnors. In accordance with Rule 77(D) of the Rules, Trial Chamber II assigned the Contempt Proceedings to Trial Chamber I or a Single Judge thereof.<sup>7</sup>

5. On the 2<sup>nd</sup> of May, 2005 Mrs. Adelaide Whest was appointed by the Registrar as Independent Counsel as Mr. Louis Tumwesige was not able to prosecute the matter due to his workload and the short notice given to him.<sup>8</sup> On the same date, I was designated to proceed as a Single Judge of Trial Chamber I with the Contempt Proceedings.<sup>9</sup>

<sup>4</sup> *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Transcripts, 10 March 2005, Trial, p. 15-16 (cited in the Trial Chamber II Decision, *supra* note 2).

<sup>5</sup> Letter of Appointment of Experienced Independent Counsel Under Rule 77 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, 11 March 2005.

<sup>6</sup> Confidential Report to the Trial Chamber by Mr. Louis Tumwesige, 16 March 2005.

<sup>7</sup> Trial Chamber II Decision, *supra* note 2. The contempt proceedings against Brima Samura were marked with Case No. SCSL-2005-01. The proceedings against Margaret Fomba Brima, Neneh Binta Bah Jallow, Anifa Kamara and Ester Kamara were initially marked with Case No. SCSL-2005-02, but, following the severance of Anifa Kamara from this case, the proceedings against her were marked with Case No. SCSL-2005-03. All the alleged contemnors in these two proceedings changed their initial not guilty plea and entered a plea of guilty on the charges against them and were accordingly sentenced. See *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-2005-02 and *Independent Counsel v. Anifa Kamara*, Case No. SCSL-2005-03, Sentencing Judgment in Contempt Proceedings, 21 September 2005. For ease of reference, unless otherwise specified, these three proceedings are herein referred to jointly as "Contempt Proceedings".

<sup>8</sup> *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01 and *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-2005-02, Appointment of Independent Counsel, 2 May 2005. Thereafter, on the 24<sup>th</sup>

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Joint Status Conference on the 4<sup>th</sup> of May, 2005

6. A joint status conference was held on the 4<sup>th</sup> of May, 2005 during which the Principal Defender raised two preliminary objections to the Contempt Proceedings. Firstly, the Principal Defender, appearing as Defence Counsel for Brima Samura,<sup>10</sup> submitted that Mrs. Adelaide Whest had no standing in the Contempt Proceedings and that her appointment as Independent Counsel was in violation of Rule 77(C)(iii) of the Rules, as this Rule provides for the same Independent Counsel to investigate and, if necessary, prosecute any allegation of contempt. Secondly, the Principal Defender submitted that pursuant to Rule 77(E), the provision of Rule 66 of the Rules shall apply, as appropriate, to the contempt proceedings and that, consequently, the Independent Counsel was under an obligation to disclose to the Defence all materials in her possession, and in particular to disclose the Investigation Report.<sup>11</sup>

7. The first objection was dismissed by an oral ruling later followed by written reasons, and the second one was upheld. With specific reference to the preliminary objection as to the standing of the Independent Counsel, recalling the principle of purposive interpretation as stated by our Appeals Chamber<sup>12</sup> I held that Rule 77(C)(iii) must be understood to allow the Registrar to appoint any Independent Counsel in order to investigate and/or prosecute contempt matters and therefore cannot be accorded the limited interpretation submitted by the Principal Defender. I then ruled:

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of October, 2005 the Interim Registrar appointed Bintu Alhadi-Tejan-Jalloh as the new Independent Counsel to prosecute this matter. See *Id.*, Appointment of Independent Counsel, 24 October 2005.

<sup>9</sup> *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01 and *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-2005-02, Order Designating a Judge for Contempt Proceedings, 2 May 2005.

<sup>10</sup> Subsequently, the Principal Defender Assigned Mr. Wilbert Harris as Defence Counsel for Mr. Brima Samura. *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01, Transcripts, Initial Appearance, 4 May 2005, page 3.

<sup>11</sup> *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01 and *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-2005-02, Transcripts, Status Conference, 4 May 2005, pages 14ff.

<sup>12</sup> *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 45. See also *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials pursuant to Rule 68, 8 July 2005, para. 19.

Provided that, on the one hand, the criteria of independence, experience and impartiality of an Independent Counsel are fulfilled and, on the other hand, that the paramount rights of an alleged contemnor to a fair and expeditious trial are ensured at any stage of the proceedings, the Registrar enjoys the latitude to appoint any Independent Counsel that might be required according to the specific circumstances of each contempt case.<sup>13</sup>

8. In addition, during the said status conference, I held that it was in the interest of justice for the Contempt Proceedings to be proceeded with separately. Taking into consideration the different charges contained in the respective orders in lieu of the indictment and based on the indication by the Independent Counsel that she was ready to proceed immediately with the trial of Brima Samura, I consequently directed his trial to be proceeded with separately from that of Margaret Fomba Brima, Neneh Binta Ba Jallow, Anifa Kamara and Ester Kamara.<sup>14</sup>

9. Later that day, Brima Samura appeared before me for his initial appearance and pleaded not guilty to the charge against him as contained in the *Order in Lieu of the Indictment*.<sup>15</sup>

#### The Trial

10. The trial of Brima Samura commenced on the 5<sup>th</sup> of May, 2005 and concluded on the 9<sup>th</sup> of May, 2005. During a total of 3 trial days, held publicly, the Independent Counsel called 3 witnesses in support of her case, namely Samuel Davies, an Audio Visual Technician working as a contractor for the Communication and Information Technology Section of the Special Court and James Kongormanyi and Abigail Sesay, both Security Officers working for the Security Section of the Special Court. Brima Samura appeared as a

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<sup>13</sup> *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01 and *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-2005-02, Written Reasons for the Decision on the Standing of the Independent Counsel and on Disclosure Obligations, 23 June 2005, para. 15.

<sup>14</sup> *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01 and *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-2005-02, Transcripts, Status Conference, 4 May 2005, page 28. See also *supra* note 7.

<sup>15</sup> *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01, Transcripts, Initial Appearance, 4 May 2005, page 13.

witness in his own Defence. No other witnesses were called by the Defence, while one exhibit was tendered by it.<sup>16</sup>

11. Generally, all witnesses testified as to events that had occurred inside and outside the public gallery of Courtroom II at the Special Court Courthouse on the 9<sup>th</sup> of March, 2005, at New England site, Freetown, Sierra Leone during the testimony of a witness in the course of the AFRC Trial. The specific contents of their testimonies will be addressed in detail in Section III of this judgment.

## II. RELEVANT LEGAL PRINCIPLES

12. Albeit neither of the parties put forward any legal submission pertaining to the general legal principles of the offence of contempt of court, I deem it advisable to set out in this section the relevant applicable provisions of the Rules relating to the contempt proceedings against Brima Samura.

### Contempt of Court

13. The specific provisions in the Rules related to contempt of court are contained in Rule 77 which sets out in the following terms the regime to be followed in cases of contempt of court before the Special Court:

(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;

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<sup>16</sup> The Defence tendered Brima Samura's personal spiral notebook as an exhibit. No other exhibits were tendered during trial.

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- (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 any Trial Chamber or a Trial Chamber.
- (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 conviction rendered 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.<sup>17</sup>

<sup>17</sup> Rules of Procedure and Evidence, as amended on the 14<sup>th</sup> of May, 2005.

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14. The basis for this Rule is the inherent power of the Special Court, in the exercise and discharge of its judicial function, to allow the court to deal with cases of contempt before it. As the Appeals Chamber of the Special Court recently held:

All court must possess the powers necessary to enable them to administer and deliver justice fairly and efficiently.<sup>18</sup>

15. It is well-established that courts have an inherent jurisdiction to ensure that its administration of justice is not obstructed, prejudiced or abused.<sup>19</sup> The Appeals Chamber of the International Tribunal for the Former Yugoslavia ("ICTY") in the *Tadic* case had this to say in this respect:

A power in the Tribunal to punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity in order to ensure that its exercise of jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded. Thus the power to deal with contempt is clearly within its inherent jurisdiction.<sup>20</sup>

16. As I previously held in a recent Judgment, this inherent power subsists independently of the specific terms of Rule 77 of the Rules. Therefore, Rule 77 must be read in that context and therefore I am of the opinion that Rule 77 does not, and was not

<sup>18</sup> *Prosecutor v. Brima et al.*, 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), 23 June 2005, para. 2. For a description of the specific provisions of Rule 77, see also *id.*, para. 26.

<sup>19</sup> The subsistence and the nature of this power in International Tribunals have been previously recognized by various decisions of the ICTY and the ICTR. In addition to *Tadic* below, see also, for instance *Prosecutor v. Aleksowski*, IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, May 30, 2001; *Prosecutor v. Blaskic*, IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997; See, more recently, *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005; *Prosecutor v. Beqaj*, Case No. IT-03-66T-R77, Judgment on Contempt Allegations, 27 May 2005. For general reference, see also M. Bohlander, "International Criminal Tribunals and Their Power to Punish Contempt and False Testimony", *Criminal Law Forum*, 2001, p. 91-118. Another author describes contempt as "the most powerful device in the legal conceptual armoury of the courts designed to preserve the dignity and integrity of the judicial process." See B. Thompson, *The Criminal Law of Sierra Leone*, American University Press Inc., 1999, at page 219.

<sup>20</sup> *Prosecutor v. Tadic*, IT-94-I, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 18. See also para. 13.



intended to, limit the Special Court's inherent contempt of court powers.<sup>21</sup> As such, Rule 77(A) identifies and describes certain conducts relating to the offence of contempt of court throughout a defined, though non-exhaustive,<sup>22</sup> list of acts.

17. In addition, Rule 77(E) provides that the rules of procedure and evidence required throughout contempt proceedings are those contained in the Rules and generally applicable to trial proceedings. The purpose of these provisions is indeed to ensure that proceedings involving allegations of contempt before the Special Court are subjected to the same judicial guarantees and procedures, as they might become appropriate due to the ancillary nature of contempt proceeding, set for the crimes falling within the statutory competence of the Special Court.<sup>23</sup>

#### Mens Rea of Contempt

18. Rule 77(A) provides specifically that any person may be punished for contempt for knowingly and wilfully interfering with the administration of justice. I am of the view that the mens rea requirement of "knowingly and wilfully" does apply to those various types of conduct listed under Rule 77 and forms part of the specific intent for the contempt alleged in this case to be a knowing violation of an order of a Chamber.

19. A review and analysis of the jurisprudence of the International *ad hoc* Tribunals provides some guidance as to the specific circumstances related the disclosure of the identity of a protected witness in violation of an order. In the *Brdjanin* Case, the Trial Chamber of the ICTY held that there are differences in the states of mind required for each of the various types of conduct envisaged in Rule 77. That Trial Chamber also stated

<sup>21</sup> See *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-2005-02 and *Independent Counsel v. Anifa Kamara*, Case No. SCSL-2005-03, Sentencing Judgement in Contempt Proceedings, 21 September 2005, para. 12. See also *Tadic*, supra note 20, para. 28.

<sup>22</sup> *Prosecutor v. Brima et al.*, 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), 23 June 2005, supra note 22, para. 26. See also *Prosecutor v. Marjadic and Rebic*, Case No. IT-95-14-R77.2, Decision on Prosecution Motions to Amend the Indictment, 7 October 2005, para. 31.

<sup>23</sup> *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01 and *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-2005-02, Written Reasons for the Decision on the Standing of the Independent Counsel and on Disclosure Obligations, 23 June 2005, supra note 13, para. 18.

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that the *mens rea* had to be established on a case by case basis in relation to the conducts referred to in Rule 77(A). It also held that “for each criminal contempt, it has to be established that an accused acted with a specific intent to interfere with the administration of justice.”<sup>24</sup> I accept the holding of the Trial Chamber in the *Brdjanin* Case as being of application in this case where it is alleged to have been a violation of an order.

20. In the case before me, Trial Chamber II of the Special Court, upon an investigation undergone pursuant to Rule 77(C)(iii), issued an *Order In Lieu of Indictment* against Brima Samura and directed an Independent Counsel to prosecute the matter pursuant to Rule 77(C)(iii). In particular, Brima Samura, the alleged contemnor, is charged with contempt of the Special Court, in violation of Rule 77(A)(ii) for knowingly and wilfully interfering “with the Special Court’s administration of justice by disclosing information relating to proceedings ... in knowing violation of an order of a Trial Chamber.”<sup>25</sup>

21. In particular, in the *Brdjanin* Case it was held that it must be established that:

- a) an accused disclosed the identity of a witness to a member of the public;
- b) the disclosure was in violation of an order of a Chamber; and
- c) the violation was knowingly and wilfully committed.<sup>26</sup>

22. It also ruled that in further determining whether a specific order of a Chamber has been violated, reference must be made to the exact content of the relevant order which is the subject to the allegation of contempt of court.<sup>27</sup>

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<sup>24</sup> *Prosecutor v. Brdjanin*, Case No. IT-99-36-R77, Concerning Allegations against Milka Maglov, Decision on Motion for Acquittal Pursuant to Rule 98bis, 19 March 2004, para. 16. See also *Aleksovski*, supra note 19, para. 40 and 42.

<sup>25</sup> See *Order in Lieu of the Indictment, The Particulars*, contained as Annex A in the Trial Chamber II Decision, supra note 2.

<sup>26</sup> *Prosecutor v. Brdjanin*, Case No. IT-99-36-R77, Concerning Allegations against Milka Maglov, Decision on Motion for Acquittal Pursuant to Rule 98bis, 19 March 2004, supra note 24, paras 36-41.

<sup>27</sup> *Id.*

23. In *Aleksovski*, the Trial Chamber of the ICTY held that a knowing violation “means not only a deliberate violation, but also a deliberate failure to ascertain the circumstances under which a witness testified.”<sup>28</sup> Subsequently, at the appeal stage, having considered whether “knowing” implied that actual knowledge was required before a finding of contempt could be made, the Appeals Chambers then concluded that the knowledge requirement could be met by actual knowledge or wilful blindness (also known as deliberate ignorance), but not by negligence:

Mere negligence in failing to ascertain whether an order had been made granting protective measures to a particular witness could never amount to such conduct. It is unnecessary in this appeal to determine whether any greater degree of negligence could constitute contempt. Negligent conduct could be dealt with sufficiently, and more appropriately, by way of disciplinary action, but it could never justify imprisonment or a substantial fine even though the unintended consequence of such negligence was an interference with the Tribunal’s administration of justice. At the other end of the spectrum, wilful blindness to the existence of the order in the sense defined is, in the opinion of the Appeals Chamber, sufficiently culpable conduct to be more appropriately dealt with as contempt.<sup>29</sup>

24. More specifically on wilful blindness, proof of knowledge of the existence of the relevant fact or, in the circumstances, of a specific order is accepted where it is established that the alleged contemnor suspected that the fact or order existed, or was aware that its existence was highly probable, but refrained from finding out whether it did exist, so as to be able to deny knowledge of it.<sup>30</sup>

25. However, reckless indifference as to whether a specific conduct was in violation of an order as been deemed to be sufficient to warrant punishment for contempt. Indeed, with reference to the specific intent to violate or disregard an order, the Appeals Chamber in *Aleksovski* held as follows:

In most cases where it has been established that the alleged contemnor had knowledge of the existence of the order (either actual knowledge or a wilful blindness of its existence), a finding that he intended to violate it would almost necessarily follow. There may, however, be cases where such an alleged contemnor acted with reckless indifference as to whether

<sup>28</sup> This finding by the Trial Chamber was so reported in the subsequent judgment by the Appeals Chamber. See *Aleksovski*, supra note 19, para. 20.

<sup>29</sup> *Id.*, para. 45.

<sup>30</sup> *Brdjanin*, supra note 24, para. 38. *Aleksovski*, supra note 19, para. 43.

his act was in violation of the order. In the opinion of the Appeals Chamber, such conduct is sufficiently culpable to warrant punishment as contempt, even though it does not establish a specific intention to violate the order.<sup>31</sup>

26. On the issue of compliance with an order of the court, in *Milosevic*, the ICTY Trial Chamber held that "it is an obvious consequence of refusing to comply with an order of the Chamber that the administration of justice is interfered with".<sup>32</sup>

27. I find the aforementioned decisions persuasive and therefore consider that, within the meaning of Rule 77, the requirement of *mens rea* includes both actual knowledge or wilful blindness, but not mere negligence. This *mens rea* will apply not only to the general elements of contempt, but also to the specific intent to interfere with the administration of justice required by the particular form of commission provided for by Rule 77(A)(ii).

#### Standards of Proof for Conviction of Contempt of Court

28. The standard of proof required to establish the commission of an offence of contempt of court is that of proof beyond reasonable doubt. Rule 77(E) provides that Part IV to VIII of the Rules are applicable, as appropriate, to contempt proceedings and Rule 87, contained in Part VI of the Rules, provides that a finding of guilty may be reached only when the Court is satisfied that guilty has been proved beyond reasonable doubt.

29. The conduct of the accused must be such in the circumstances that it constituted beyond reasonable doubt a contempt of the court as defined in Rule 77. All subjective and objective essential elements of the allegations contained in the charge as particularized must therefore be proved to that standard.<sup>33</sup>

<sup>31</sup> *Aleksovski*, supra note 19, para.54.

<sup>32</sup> *Prosecutor v. Milosevic*, Case No. IT-02-54-R77.4, Contempt Proceedings against Kosta Bulatovic, Decision on Contempt of the Tribunal, 13 May 2005, para.17.

<sup>33</sup> See, for instance, *Prosecutor v. Simic*, Case No. IT-95-9, Trial Chamber, Judgment in the Matter of Contempt Allegations against the Accused and His Counsel, 30 June 2000, para. 99. See also *Beqaj*, supra note 19, para. 56-57.

### III. DELIBERATIONS

#### Review of the Facts: Summary of the Evidence adduced at Trial

##### *Witnesses for the Independent Counsel*

##### *Witness Samuel Davies*

30. Witness Samuel Davies was the first of the witnesses called by the Independent Counsel. He is a contractor who had been working for the Communication and Information Technology Section of the Special Court for about 8 months. He testified on the 5<sup>th</sup> of May, 2005.<sup>34</sup>

31. According to his testimony, on the 9<sup>th</sup> of March, 2005 Witness Davies was in the public gallery of Courtroom II following the trial proceedings.<sup>35</sup> While in the gallery, he saw a man wearing a coffee colour shirt/polo with a Special Court ID card, sitting at the edge of the third row talking with what he described as a fat woman wearing a blue polo with blue jeans trousers. He observed this woman telling to another woman to go outside as she had something to tell her. Davies decided to follow the two women outside, while the man was already there.<sup>36</sup>

32. Outside the Courtroom, Davies saw the man holding a spiral notebook, opening it and showing to the women something written in it. Davies was not able to see what was written in the notebook, as he was standing at approximately 12 meters of distance. Thereafter, Davies heard the other woman saying that she was surprised about that witness being in court giving evidence against their husbands.<sup>37</sup> Thereafter, the man closed the notebook and as the two women were coming back to enter in the public gallery, walking

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<sup>34</sup> *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01, Transcripts, 5 May 2005, page 4ff.

<sup>35</sup> *Id.*, page 4-6.

<sup>36</sup> *Id.*, page 7-9.

<sup>37</sup> *Id.*, page 9-11.

towards Davies, the same woman said, referring to the witness, that they knew her identity and they were going to wait for her in her house and attack her on the same evening.<sup>38</sup>

33. Davies reported this event to Abigail Sesay, a Special Court security officer in charge of the scanning machine outside the public gallery. According to him, this officer said that she had not seen the persons standing outside.<sup>39</sup> Then, Sesay asked Davies to indicate this man and they went into the public gallery so that Davies could try to identify the man. Davies decided to go and sit in the front row, where he had been before. When there, Davies turned to look at the man, and the fat woman saw him. He noted a Special Court ID card on the neck of the man's polo, with the photograph turned on the outside and visible. The fat woman then told the man about Davies watching him and pointed at him. The man looked at Davies, and then turned his ID card on the blank side in order to hide his picture.<sup>40</sup>

34. Davies decided to go back to Sesay and told her where the man was sitting. From the window of the entrance door, he showed to Sesay where the man and the two women were sitting.<sup>41</sup> Thereafter, while both Davies and Sesay sat outside, James Kongormanyi, a Senior Special Court security officer, arrived. Davies told to Kongormanyi about the event he had observed and Kongormanyi asked him whether he would be able to identify the man with the Special Court ID.<sup>42</sup>

35. When the court recessed and the public left the public gallery, Davies pointed the man with the Special Court ID. Kongormanyi proceeded to meet the man at the location where the telephones and other personal objects of members of the public are kept by the Security Staff before entering the public gallery. He observed that the man was speaking to Kongormanyi with his right arm on the upper part of his chest, trying to hide his Special Court ID card. There was an argument between Kongormanyi and the man and

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<sup>38</sup> *Id.*, page 12-13.

<sup>39</sup> *Id.*, page 13-14.

<sup>40</sup> *Id.*, page 14-18.

<sup>41</sup> *Id.*, page 18.

<sup>42</sup> *Id.*, page 18-20.



Kongormanyi removed the Special Court ID card from the man.<sup>43</sup> Then, Davies walked towards them, pretending that he did not know what happened, but the fat woman pointed at Davies and indicated that he heard about their discussion. At that point, other staff and colleagues of Davies gathered and told him to leave the place and he eventually left.<sup>44</sup> He also stated that he later came to know that the person he described as the “fat woman” was Margaret Fomba Brima.<sup>45</sup>

*Witness James Kongormanyi*

36. Witness James Kongormanyi is a senior national security officer working for the Security Section of the Special Court since 2003. James Kongormanyi is the second witness called by the Independent Counsel. He testified on the 6<sup>th</sup> of May, 2005.<sup>46</sup>

37. According to his evidence, on 9<sup>th</sup> March, 2005 he was on duty at the Special Court Courthouse, when he saw one man delivering a file in Courtroom II. Later, Kongormanyi came to know that this man was Brima Samura. Kongormanyi knew that he was a defence investigator. After he delivered the file to the Defence Counsel, Samura left and went into the public gallery of Courtroom II.<sup>47</sup>

38. Later that morning, Kongormanyi saw Samura coming out of the public gallery and speaking with the wives of Alex Tamba Brima and Santigie Kanu while he was standing next to the metal detector with Abigail Sesay, one of the security officers that he supervises.<sup>48</sup> He decided to proceed in their direction. When he walked pass next to Samura and the others, pretending that he was not listening to the conversation, he heard Samura saying “that witness is testifying just now” and “her house is” but then Samura noticed Kongormanyi and stopped talking. Kongormanyi was not able to hear the rest of the conversation and stopped walking, hoping to be able to hear more. Kongormanyi heard

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<sup>43</sup> *Id.*, page 20-21.

<sup>44</sup> *Id.*, page 21-22.

<sup>45</sup> *Id.*, page 24.

<sup>46</sup> *Id.*, 6 May 2005, page 3ff.

<sup>47</sup> *Id.*, pages 5-6.

<sup>48</sup> *Id.*, page 6.

Samura whispering to the wives without being able to hear what Samura said but he heard the wife of Alex Tamba Brima clapping her hands and saying that as soon as they leave, she will go and attack her. According to Kongormanyi, she was referring to the witness indicated by Samura.<sup>49</sup> After that, the group returned into the public gallery. Kongormanyi followed them inside to get Samura Special Court ID card and tried to identify him. Then Samura did not accept and covered his ID card, hanging from around his neck, with his hand. In order to avoid turmoil in the public gallery, Kongormanyi left the gallery and decided to wait for Samura to come outside at the end of the hearing.<sup>50</sup>

39. While waiting, Samuel Davies approached Kongormanyi and told him that someone in the public gallery had disclosed the identity of the witness testifying that morning to the accused's wives. Kongormanyi asked Davies to indicate this person to him. When the morning session was over, Davies pointed at Samura as the man that had disclosed the identify of the witness.<sup>51</sup> Kongormanyi subsequently proceeded towards Samura, but he refused to show his ID card and covered it with his right hand. Kongormanyi forcibly removed the ID card and walked to the reception table in order to write down Samura's name.<sup>52</sup> Kongormanyi gave the Special Court ID card back to Samura but he refused it. Samura told Kongormanyi that he was going to tell to his lawyer that he removed his ID card and scattered his files. Kongormanyi stated that Samura only had a small spiral notebook in his hand. Kongormanyi later consigned Samura's ID card to Atiq Shaikh, the international security supervisor.<sup>53</sup>

40. At the beginning of cross-examination, the Defence submitted that Kongormanyi was present in the public gallery of the courtroom during the testimony of Samuel Davies the previous day. In his evidence, Kongormanyi admitted being present in the gallery but only for a few and short moments, and he was then unable to hear anything that we being said. He was there at the time in pursuance of this duties to supervise the security officers

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<sup>49</sup> *Id.*, pages 7-11. See also pages 35-36.

<sup>50</sup> *Id.*, pages 11-12.

<sup>51</sup> *Id.*, pages 12-13.

<sup>52</sup> *Id.*, pages 13-14.

<sup>53</sup> *Id.*, pages 14-16.



that were in the public gallery. In addition, Kongormanyi stated that he did not know then that he was going to be called as a witness in these Contempt Proceedings. He was informed only in the morning of his testimony.<sup>54</sup> The Defence also inquired with Kongormanyi on whether he saw Davies at the time when he witnessed Samura meeting with the two women. Kongormanyi stated that he only saw Davies thereafter, when he spoke with him but clarifies that he was not paying attention on whether Davies was there.<sup>55</sup> The Defence further submitted that Kongormanyi tried to develop a problem with Samura that day in order to report him to his security supervisor, because Samura had previously filed a complaint against another security officer in January 2005. Kongormanyi responded that he was aware of the fact that Samura previously had a problem with a security officer but further explained that matter had been solved and he was only performing his job as security officer.<sup>56</sup>

#### *Witness Abigail Sesay*

41. Abigail Sesay is a national security officer working for the Security Section of the Special Court. Abigail Sesay is the third witness called by the Independent Counsel. She testified on the 6<sup>th</sup> of May, 2005.<sup>57</sup>

42. According to her testimony, on the 9<sup>th</sup> of March, 2005 Abigail Sesay was on duty at the lawyers' entrance of Courtroom II of the Special Court Courthouse, in charge of the scanning machine. At around midday, Samuel Davies approached her and told her that a man bearing a Special Court ID card disclosed to the wives of the Accused in the AFRC Trial the address of the witness testifying in court that morning. Then, both Sesay and Davies went into the public gallery of Courtroom II in order to identify that man.<sup>58</sup>

43. When they entered, Sesay noticed that one fat woman looked both at her and Davies. Later, Sesay got to know that the woman was Margaret Fomba Brima. Davies sat in

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<sup>54</sup> *Id.*, pages 16-20.

<sup>55</sup> *Id.*, pages 22-23 and pages 40-41.

<sup>56</sup> *Id.*, pages 45-50.

<sup>57</sup> *Id.*, page 52ff.

<sup>58</sup> *Id.*, page 52-54.

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the front row of the public gallery, on the right side, in order to better look at the man and identify him from his Special Court ID card. Sesay remained next to the entrance door, but as Margaret Fomba Brima was still looking at her, Sesay and Davies both left the public gallery. From outside, peeping from the door's glass, Davies pointed at the man to Sesay.<sup>59</sup>

44. Then, James Kongormanyi joined Sesay and Davies. Samuel Davies reported to Kongormanyi about the event and told him and that he will point out that man to him. When court adjourned and the public abandoned the public gallery, Davies identified and indicated the man to Kongormanyi. While testifying, Sesay identified that man as Brima Samura.<sup>60</sup>

45. The Defence inquired with Sesay when she saw Kongormanyi that morning. Sesay stated that she does not remember precisely as Kongormanyi was walking around supervising the security staff. According to Sesay, when she later met Kongormanyi with Davies, that was the first time when he appeared to know about the accident involving the identity of the witness on the stand that morning.<sup>61</sup>

*Witnesses for the Defence*

***Brima Samura***

46. Brima Samura, the alleged contemnor and the Accused in this case, is an investigator attached to the Defence Team of Alex Tamba Brima. Previously, he had been a police officer for 14 years. Samura testified in his own defence on the 9<sup>th</sup> of May, 2005.<sup>62</sup> He was the only witness called by the Defence.

47. Samura testified that, on the 9<sup>th</sup> of March, 2005 sometime after 9am, he arrived at the Special Court. The court was already in session for the AFRC Trial. Samura went first

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<sup>59</sup> *Id.*, pages 55-56.  
<sup>60</sup> *Id.*, pages 57-58.  
<sup>61</sup> *Id.*, pages 60-61.  
<sup>62</sup> *Id.*, 9 May 2005, page 2ff.

to the Defence Office and then to the public gallery of the courthouse.<sup>63</sup> Thereafter, upon request by one of the lawyer from his team, Samura went out of the public gallery and spoke with him. Samura then returned to the public gallery, spoke to a woman from there and proceeded outside with her. Together with the lawyer, Samura went to the Defence Office and interviewed the woman as a potential defence witness, taking notes on a notebook. Samura removed his notes from the notebook and gave them to counsel. Thereafter, Samura returned into the public gallery of the courtroom while the woman left the Special Court premises and the Defence Counsel returned in the well of Courtroom II.<sup>64</sup>

48. Back in the public gallery, Samura was taking notes in his notebook regarding the witness giving evidence that day in court. Samura stated that his notebook does not carry either the name or the identification pseudonym of any witness, but only refers to that witness as "witness 3". Samura stated that he does not know whether this witness was either a male or a female as the voice was distorted. Samura further stated that the notes he took did not help him to identify where that witness was living.<sup>65</sup>

49. Samura stated that he cannot remember leaving the public gallery during the hearing after he returned from interviewing the potential defence witness in the Defence Office. Samura further stated that the wife of Alex Tamba Brima, Margaret Fomba Brima, was in the public gallery that morning but he does not remember where she was sitting. He also stated that he spoke with her and as a result of that discussion he was able to identify the woman that he later interviewed as potential defence witness. Thereafter, Samura does not remember speaking again with her that day. Samura also remembered the wife of Santigie Kanu, Neneh Binta Ba Jallow, being present in the public gallery that morning, but he does not remember speaking with her at any time that day.<sup>66</sup>

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<sup>63</sup> *Id.*, pages 3-4.

<sup>64</sup> *Id.*, pages 4-6.

<sup>65</sup> *Id.*, pages 7-8.

<sup>66</sup> *Id.*, pages 8-10.

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50. Samura also does not remember whether he left the public gallery after he returned from interviewing the potential defence witness.<sup>67</sup> After the court adjourned, Samura stated that a security personnel “snatched” his Special Court ID card. The Security officer did not identify himself, did not ask him to show his ID card and removed it forcibly.<sup>68</sup> He later explained what happened to the Defence Counsel he was working for. The Defence Counsel eventually returned to Samura his Special Court ID card. According to Samura, the Defence Counsel retained the notebook and he only saw it again during his testimony in the contempt proceedings when it was shown to him by his Counsel.<sup>69</sup> Samura reiterated that he never disclosed the names and identity of any witness testifying in the AFRC case that day.<sup>70</sup>

51. When questioned by the Independent Counsel, Samura stated that for his investigations he was never in a position to know the names of any of the protected witnesses appearing at trial, nor does he have access to their written statements. Samura further indicated that normally Defence Counsel assigns him certain specific investigative task. In addition, he said that he does not have access to the transcripts of the hearings and the only way he can follow the proceedings is therefore by being present in court.<sup>71</sup>

#### Submissions of the Parties

52. During her closing arguments, the Independent Counsel submitted that, although none of the witnesses she called to testify knew what was written in Brima Samura’s notebook, there is nevertheless sufficient evidence to prove that Brima Samura disclosed the identity of a protected witness to the wives of the Accused in the AFRC Trial. In response to a question by the Court, the Independent Counsel further submitted that Brima Samura, as a member of a Defence Team, was bound by the protective measures

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<sup>67</sup> *Id.*, page 10.

<sup>68</sup> *Id.*, pages 10-11.

<sup>69</sup> *Id.*, pages 11-12. At this point in time, the Defence for Brima Samura rendered into exhibit his personal spiral notebook.

<sup>70</sup> *Id.*, page 12.

<sup>71</sup> *Id.*, pages 13-14.

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orders not to disclose the identity of the protected witness regardless of the means by which he might have obtained her identity.<sup>72</sup>

53. Defence Counsel for Brima Samura submitted that the Court should firstly disregard the testimony of Witness James Kongormanyi as being present when the alleged disclosure of the identity of a witness took place.<sup>73</sup> Defence Counsel also submitted that Kongormanyi was trying to create an issue with Samura in order to report him to his supervisor, following a previous complaint filed by Samura against another Security Officer. Having disregarded the evidence of Kongormanyi, continued the Defence, the evidence adduced by the other witnesses is not by itself sufficient to satisfy beyond any reasonable doubt that Brima Samura disclosed the identity of a protected witness. Furthermore, the Defence made a reference to the specific absence of evidence that there was a "direct intent to create a source of danger" by Brima Samura to knowingly interfere with the administration of justice.<sup>74</sup>

#### Findings

54. Brima Samura is charged with contempt of the Special Court, in violation of Rule 77(A)(ii) of the Rules for disclosing information relating to proceedings in knowing violation of an order of Chamber. More specifically, the Particulars of this case as contained in the *Order in Lieu of the Indictment* issued against Brima Samura provide that:

On 09 March 2005 at the premises of the Special Court for Sierra Leone, Brima Samura knowingly and wilfully interfered with the Special Court's administration of justice by disclosing information relating to proceedings, viz. the name and identity of protected witness TF1-023, to Margaret Fomba Brima and Neneh Binta Bah Jallow in knowing violation of an order of a Trial Chamber.

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<sup>72</sup> *Id.*, pages 20-23.

<sup>73</sup> See also *Id.*, page 19.

<sup>74</sup> *Id.*, pages 23-33.

55. Considering these specific allegations made in the case against the Accused and the required *mens rea* for such a violation, for the Accused to be found guilty of this charge, the evidence must establish beyond reasonable doubt that:

- a) Brima Samura did disclose the identity of a protected witness to members of the public, more specifically the identity of Witness TF1-023;
- b) the said disclosure by Brima Samura was in knowing violation of an order of the *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses* dated the 5<sup>th</sup> of July 2004; and
- c) the violation of the order was knowingly and wilfully committed.

56. However, before discussing further the specific factual and legal findings in this case, I shall firstly outline below the facts that I consider as not being in dispute by the parties, as the evidence is abundantly clear and uncontradicted in respect of these facts and accordingly I find them to have been clearly established beyond reasonable doubt:

- A Prosecution witness was testifying behind a protective screen with her voice distorted in the AFRC Trial on the morning of the 9<sup>th</sup> of March, 2005 at the Special Court Courthouse, in Freetown, Sierra Leone;
- The events referred to in the *Order in Lieu of the Indictment* against Brima Samura took place on the 9<sup>th</sup> of March, 2005 at the Special Court Courthouse during the morning session of the AFRC Trial, before Trial Chamber II;
- Brima Samura is an investigator attached to the Defence Team of Alex Tamba Brima, an Accused in the AFRC Trial;
- Brima Samura was present at the Special Court Courthouse on the 9<sup>th</sup> of March, 2005, during the morning session of the AFRC Trial;
- The identity of Brima Samura is also not in issue;



A) *Was the Identity of a Protected Witness Disclosed?*

57. After a careful review of the evidence before me, I am also satisfied beyond reasonable doubt that the identity of a protected witness was disclosed to members of the public, more particularly to Margaret Fomba Brima and Neneh Binta Ba Jallow and that such disclosure was done by Brima Samura on the morning of the 9<sup>th</sup> of March, 2005, while Brima Samura was in attendance in the public gallery of Courtroom II at the Special Court Courthouse and later on outside the said Courtroom II.

58. According to the evidence, later in the morning, Brima Samura met Margaret Fomba Brima and Neneh Binta Ba Jallow, wives of the accused in the AFRC Trial, outside the public gallery, where he disclosed to them the identity of the protected witness who was then giving evidence in Courtroom II. Witness Samuel Davies was that same morning in attendance in the public gallery of courtroom II. He witnessed Brima Samura having a conversation with Margaret Fomba Brima in the public gallery and briefly thereafter meeting her and Neneh Binta Ba Jallow outside the public gallery and showing them something written in his spiral notebook. Also, Witness James Kongormanyi was outside the public gallery and witnessed the same meeting, testifying quite clearly as to what he observed and what he heard at that time. Samuel Davies had not heard Brima Samura speaking but James Kongormanyi heard Brima Samura saying "that witness is testifying just now" and "her house is ...", before Samura noticed his presence and stopped talking.

59. Samuel Davies then heard one of the women saying that she was surprised that that particular witness was in court that morning testifying against their husbands and that they were going to wait for her at her house and attack her. After the court adjourned for the day, James Kongormanyi, the senior security officer, asked Brima Samura to identify himself, but he refused and Kongormanyi forcibly removed his Special Court ID card.

60. I accept the evidence of these two witnesses, Davies and Kongormanyi, as being highly credible. My observation of their behaviour and demeanour as witnesses, the reasonableness and consistencies of the content and nature of their evidence, the consistency of their evidence with the other evidence adduced and their capacity of

observation, have satisfied me about the truthfulness of their testimonies. I have concluded that they were credible witnesses intending to truly inform the court as to what has happened and what they observed and had no intent to mislead the court. I say so even though there might have been some differences on some matters that were collateral rather than essential issues. I should add that when there were differences or even contradictions with the evidence adduced by the Defence I have accepted the evidence of witnesses Davies and Kongormanyi in preference to the evidence of the Accused when testifying as to fact or matter in issue. In particular, I have accepted the evidence of both Davies and Kongormanyi when they testified as to what they observed and heard about the disclosure of the identity of the witness. I believe their evidence in this respect and I do not accept the denial of the Accused Brima Samura, who was evasive and did not appear truthful when he testified that he did not disclose the name of that Witness. When pressed with specific questions, he would answer that he could either not remember or did not know about it.

61. Furthermore, I do not accept the submissions made by Counsel for the Defence that I should ignore the evidence of Kongormanyi on the one hand because according to that submission he was trying to discredit Brima Samura due to a previous complaint that he had made involving another Security Officer. I find that there is absolutely no foundation in the evidence to support such a proposition. It was also submitted that this witness was in court when evidence was given and therefore his evidence should be disregarded. The evidence shows that this same witness, Kongormanyi, had indeed been present in court but that it was for a very short period of time and that he did not hear what was being said at that time. Such evidence in any event would rarely be excluded for that reason alone. It is more a factor to consider when determining the weight to be attached to such evidence.

62. Furthermore, I do not find that this witness, Kongormanyi, was either biased or had any personal intent or motive in the outcome of this case. As I have stated, I have accepted his evidence as being truthful and I have found him truly trying to assist the court.



63. However, after careful review of all the evidence before me I find that there is no evidence to establish that the particular Prosecution witness testifying in Courtroom II that morning was indeed protected Witness TF1-023, as indicated in the *Order in Lieu of the Indictment* against Brima Samura. In particular, Brima Samura testified that he referred in his notebook to the particular witness testifying that morning as "witness 3" as he arrived late in court, while no submissions on the particular pseudonym eventually assigned by the Prosecution for that specific witness has been put forward by the Independent Counsel.

B) *Was the disclosure in violation of an order of the Decision on Prosecution Motion for Modification of Protective Measures for Witnesses dated the 5<sup>th</sup> of July 2004?*

64. The general thrust of protective measures is, taking into account the rights of the accused, to provide to witnesses appearing before the Special Court with the necessary protection required by the specific circumstances of a case. In particular, the main protective measures referred to above endeavour to preclude the disclosure to the public or the media by members of the Defence of the identity of a Prosecution witness in the proceedings.

65. The relationship between the requirement of witness protection and the administration of justice has been addressed in previous Decisions of the Special Court. Justice Itoe stated in his Decision on Protective Measures in the case of Allieu Kondewa on the 10<sup>th</sup> of October, 2003,<sup>75</sup> that:

One of the goals targeted by the International community is to track down and bring before justice, those who bear the greatest responsibility for a breach of International Humanitarian Law by committing heinous crimes against humanity. In view of the particularly bloody, hostile, and vicious environment in which these gruesome offences were cruelly perpetrated and the necessity to fulfil the procedural imperatives of an adversarial system of justice governing the Courts by providing witnesses to sustain the charges, a mechanism had to be worked out to achieve the targeted objectives.

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<sup>75</sup> *Prosecutor v. Allieu Kondewa*, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and urgent Request for Interim Measures until Appropriate Protective Measures are in Place, 10 October, 2003, para. 25.

66. It is generally accepted that defence investigators, due to the specific nature of their work, could be considered as an integral part of a Defence Team and, therefore, bound as such by any order of a Chamber directed to a particular Defence Team. In particular, as recently held in the *Karemera et al.* trial at the ICTR:

Defence Investigators are not members of the public but part of the Defence team. They are responsible for obtaining the factual information relevant for the Defence to defend the accusations against them. They spend a considerable amount of time in the field and therefore usually possess first-hand-experience of the locations in question and of the facts adduced at trial. They have interviewed witnesses who will appear during the proceedings. The contribution of the Investigators is therefore an integral part of the work of the Defence.<sup>76</sup>

67. Trial Chamber I recognized this in allowing certain Defence investigators who, by the very nature of their work, provide immediate and invaluable information to assist in the preparation and conduct of the defence of the Accused to be present in the well of the Courtroom during closed session hearings.<sup>77</sup> In particular, the Trial Chamber held that Defence Counsel will be held accountable “for ensuring the Defence Investigators that comprise members of the Defence Team and who may be present during closed session hearings, do not disclose the identity of protected witnesses or the evidence given during those closed sessions to anybody outside the Defence Team”.<sup>78</sup>

68. Brima Samura is a Defence Investigator attached to the Defence Team for Alex Tamba Brima. Among his responsibilities, according to the evidence, is the taking of statements from potential defence witnesses and taking notes during court hearings. In particular, he testified that, in the morning of the 9<sup>th</sup> of March, 2005 he identified and interviewed a potential defence witnesses and later, he was in the public gallery of Courtroom II taking notes about the testimonies of various witnesses giving evidence in pursuance of his investigative tasks.

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<sup>76</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on the Defence Motion to Permit Investigators to Attend Closed Sessions, 18 August 2005, para. 8.

<sup>77</sup> *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Decision on Joint Motion by Sam Hinga Norman, Moinina Fofana and Allieu Kondewa Seeking Permission for Defence Investigators to Sit in Court During Closed Sessions, 28 February 2005, paras 11ff.

<sup>78</sup> *Id.*, para. 18.

69. However, during the course of his testimony, Brima Samura stated that by practice of his Defence Counsel he did not have access to the unredacted versions of the witness statements disclosed by the Prosecution before the testimony of a witness at trial nor does he have access to the transcripts of any such testimony. Therefore, as an investigator and due to his work with that Defence Team he asserted that he was not provided with nor was he in possession of any identifying information of any witness. In particular, he was not in possession of any material or identifying information concerning the protected Witness testifying that morning through his participation or association with that Defence Team.

70. It is worth noting that this particular evidence was not challenged during the cross-examination by the Independent Counsel nor was there any attempt made to contradict any such statement.

71. The specific charge proffered against Brima Samura requires the Independent Counsel to show that the disclosure of the identity of the protected Witness was knowingly done in violation of an order, presumably, I have to say, the *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses*, as this is what appears to be suggested by the Independent Counsel although the evidence does not support such submission. Therefore, in reaching a decision, with respect to the specific charge against this accused, I have to be satisfied that this *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses* was applicable to Brima Samura and that the disclosure of the identity of the protected witness by Brima Samura was done in specific violation of an order of a Trial Chamber.

72. No evidence has been adduced at trial by the Independent Counsel to prove that Brima Samura, due to his association and the specific nature of his work within the Defence Team for the Accused Alex Tamba Brima, knew of the *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses* or of any other such decision nor that any specific provision of protective measures ordered by the Court has been knowingly violated by his conduct.

73. The Independent Counsel, in her closing arguments, did not address the issue of actual knowledge of an order nor did she refer to any evidence to support the intent by the Accused of knowingly and wilfully violate an order. Instead, she submitted that it is not necessary to prove this actual knowledge in order to establish the guilt of the alleged contemnor as Brima Samura is automatically bound by the protective measures solely by that fact that he is a member of the Defence Team and that he might have well obtained the identifying information of that witness elsewhere. However, pursuant to Rule 77(A)(ii), one element of the specific offence contained in the charge is that the alleged disclosure must be in knowing violation of an order. Indeed, although it is widely accepted that the different forms of commission of the offence of contempt articulated in Rule 77(A)(i) to (iv) do not constitute an exclusive list, for the specific circumstances of the case the Independent Counsel is called by the *Order in Lieu of the Indictment*, in its current formulation, to prove that there is evidence of a specific conduct under Rule 77(A)(ii), namely the knowing violation of an order of the Court by the Accused.

74. Although I have found and concluded that Brima Samura disclosed the identity of a protected witness to members of the public, namely Margaret Fomba Brima and Neneh Binta Bah Jallow, I am not satisfied that there is evidence beyond reasonable doubt that such disclosure was willingly done and was in violation of any of the orders contained in the *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses* dated the 5<sup>th</sup> of July 2004 issued by Trial Chamber I or any other decision about protective measures.

75. I have concluded that there is absolutely no evidence in this trial to establish which order, if any, was violated by the Accused person.

C) *Was the violation knowingly and wilfully committed?*

76. Considering that the Independent Counsel failed to prove that Brima Samura acted in violation of an order, it will not be necessary to further debate whether he acted with the specific *mens rea* required pursuant to Rule 77(A)(ii).

#### IV. CONCLUSIONS

77. When considering the whole of the evidence adduced at trial, I am not satisfied that the Independent Counsel has proven beyond any reasonable doubt all essential elements of the charge against Brima Samura and more specifically that Brima Samura knowingly and wilfully interfered with the administration of justice in disclosing the identity of protected prosecution Witness TF1-023 to members of the public in knowing violation of an order of the Court.

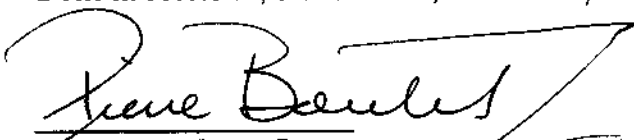
#### V. DISPOSITION

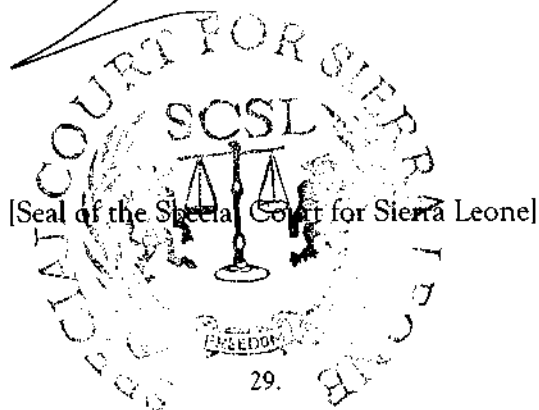
Having considered the arguments and the evidence presented by the parties, considering the presumption of innocence that applies to you or to any accused person in front of this court, I find you, Brima Samura, **NOT GUILTY** of the charge of contempt of court as contained in the *Order in Lieu of the Indictment* against you.

Having so concluded and having found you not guilty of this charge of contempt of court does not mean however that your conduct in the said circumstances was acceptable. I recall here that I have found that you had disclosed the identity of a protected witness.

This concludes the proceedings in this case of contempt of court against the said Brima Samura

Done in Freetown, Sierra Leone, this 26<sup>th</sup> day of October, 2005

  
 Hon. Justice Pierre Boutet



Case No. SCSL-05-01

29.

26<sup>th</sup> of October, 2005