



SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

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

Registrar: Robin Vincent

Date: 23rd of June, 2005

Independent Counsel Against BRIMA SAMURA
(Case No. SCSL-05-01)

Independent Counsel Against MARGARET FOMBA BRIMA
NENEH BINTA BAH JALLOH
ANIFA KAMARA
ESTER KAMARA
(Case No. SCSL-05-02)

WRITTEN REASONS FOR THE DECISION ON THE STANDING OF THE
INDEPENDENT COUNSEL AND ON DISCLOSURE OBLIGATIONS

The Independent Counsel:

Adelaide Whest

The Principal Defender:

Simone Monasebian
Vincent Nmehielle

Defence Counsel for Brima Samura:

Wilbert Harris

Defence Counsel for Margaret Fomba Brima:

Haddijatou Kah-Jallow

Defence Counsel for Neneh Binta Bah Jalloh:

Amadu Koroma

Defence Counsel for Anifa Kamara:

C.A. Osho Williams

Defence Counsel for Ester Kamara:

Wilbert Harris

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
 COURT MANAGEMENT
 23 JUN 2005
 NAME GEORGE WALKER
 SIGN [Signature]
 TIME 11:00

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 2nd of May, 2005;¹

SEIZED of a preliminary objection by the Principal Defender on the standing of Mrs. Adelaide Whest as Independent Counsel (“Preliminary Objection”) pursuant to Rule 77 of the Rules of Procedure and Evidence of the Special Court (“Rules”) raised orally during the joint status conference for the cases *Independent Counsel v. Brima Samura*, Case No. SCSL-05-01, and *Independent Counsel v. Margaret Fomba Brima et al.*, Case No. SCSL-05-02 (“Contempt Proceedings”), held on the 4th of May, 2005;

MINDFUL of the oral response to the Preliminary Objection by the Independent Counsel made during the said Status Conference;

SEIZED of the oral applications and submissions also made by the Principal Defender and the Independent Counsel on the applicability of the provisions of Rule 66 of the Rules of Procedure and Evidence of the Special Court (“Rules”) for the disclosure of materials in preparation of the Contempt Proceedings;

RECALLING my Oral Decision of the 4th of May, 2005 dismissing the Preliminary Objection and, *inter alia*, ordering the Independent Counsel to disclose to the Defence all materials in her possession pertaining to the Contempt Proceedings;²

RECALLING that I had indicated at that time that a reasoned written decision on these two matters would be delivered in due course;

PURSUANT to Rules 54, 66 and 77 of the Rules;

HEREBY ISSUE THE FOLLOWING REASONED WRITTEN DECISION:

¹ 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.
² *Id.*, Transcripts, 4 May 2005, Status Conference, p. 26-30.

I. INTRODUCTION

The Appointment of the Independent Counsel

1. On the 10th of March, 2005, Trial Chamber II 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 ("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. The Chamber further ordered that the appointment and the investigation be done expeditiously.³

2. On the 11th 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.⁴ On the 16th of March, 2005, Mr. Louis Tumwesige submitted to Trial Chamber II his report on the investigations ("Report").⁵

3. Pursuant to the said Report, Trial Chamber II on the 29th of April, 2005 found sufficient ground to proceed for contempt against the Alleged Contemnors pursuant to Rule 77 of the Rules and ordered, *inter alia*, the Independent Counsel to prosecute each of the Alleged Contemnors.⁶

4. On the 2nd of May, 2005 the Registrar appointed Mrs. Adelaide Whest as Independent Counsel and contextually indicated that Mr. Louis Tumwesige was not able to prosecute the matter due to the workload he has and the short notice given to him.⁷

³ *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Transcripts, 10 March 2005, Trial, p. 15-16. See also *Id.*, 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 the "Decision of 29 April 2005".

⁴ 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.

⁵ Confidential Report to the Trial Chamber by Mr. Louis Tumwesige, 16 March 2005.

⁶ Decision of 29 April 2005, *supra* note 3.

⁷ *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.

B

II. PARTIES SUBMISSIONS

A) On the Standing of the Independent Counsel

5. The Principal Defender, appearing as Defence Counsel for Brima Samura,⁸ submitted that Mrs. Adelaide Whest has no standing in these contempt proceedings and that her appointment as Independent Counsel is 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. More particularly, according to the Principal Defender Mr. Louis Tumwesige has been appointed as Independent Counsel pursuant to Rule 77 and should now be required to prosecute the Alleged Contemnors or to provide an explanation on his current unavailability to do so before the trial of the Alleged Contemnors could proceed with Mrs. Whest as the Independent Counsel.⁹

6. In response to this Preliminary Objection, Mrs. Adelaide Whest reiterated that Mr. Tumwesige is not available to prosecute the Alleged Contemnor and that, however, the provisions of Rule 77 on the assignment of an Independent Counsel should not be interpreted restrictively, especially when Mr. Tumwesige is no longer available for the Contempt Proceedings. She further submitted that Mr. Tumwesige has been appointed by the Registrar solely in order to investigate the alleged contempt and the fact that she has now be appointed in order to prosecute such matter goes to prove her independence.

B) On the Disclosure Obligations of the Independent Counsel

7. In response to a specific question by the Bench, the Independent Counsel submitted that she did not disclose to the Defence any materials in her possession pertaining to the Contempt Proceedings, namely the Report of the Independent Counsel, nor that she deems it now necessary to apply the relevant provisions of Rule 66 of the Rules or the practice of this Court concerning disclosure of materials in consideration of

⁸ Subsequently, the Principal Defender Assigned Mr. Wilbert Harris as Defence Counsel for Mr. Brima Samura.

⁹ *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, 4 May 2005, Status Conference, p. 14ff.

the non complexity of the evidence pertaining to the Contempt Proceedings. However, continued the Independent Counsel, if disclosure of the said Report should take place, the Court shall order the redaction of the name of a protected witness involved in the Contempt Proceedings and mentioned in the Report.

8. The Principal Defender, on behalf of the Defence, submitted that it is in the interest of justice that the provisions of Rule 66 apply to the Contempt Proceedings in order for the Defence to be properly prepared. In addition, with reference to the order for redaction proposed by the Independent Counsel, she submitted that the Defence must abide by the protection orders already in place for this witness and, therefore, such redaction is not necessary.

II. THE APPLICABLE LAW

A) On the Standing of the Independent Counsel

8. The Rules of Procedure and Evidence about Contempt proceedings before the Special Court are found in Rule 77 of the Rules. These provisions closely mirror those contained in the respective rules of the ICTY and the ICTR concerning contempt proceedings, except with respect to Rule 77(C)(iii).

9. More particularly, Rule 77(C)(iii) of the Rules, upon which the Preliminary Objection is based, provides as follows:

(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.

Sub-Rule 77(C)(iii) above substantially differs from the Rules of the ICTY and the ICTR in that it provides for the appointment of an Independent Counsel by the Registrar whereas the investigation and prosecution of contempt matters before the ICTY and the ICTR is usually assigned directly to the Office of the Prosecutor.¹⁰

10. 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.¹¹

B) On the Disclosure Obligations of the Independent Counsel

11. Rule 66 of the Rules provides for the general requirement of disclosure of materials by the Prosecution to the Defence. In particular, Rule 66(A)(iii) provides the following:

(A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:

- i. Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 bis at trial.
- ii. Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of

¹⁰ The relevant provisions of both the ICTY and the ICTR, however, allow for the possibility of the appointment of an *amicus curiae* in case of a conflict of interest within the Office of the Prosecutor.

¹¹ Rule 77(E) provides as follows:

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

the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.

- iii. At the request of the defence, subject to Sub-Rule (B), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, upon a showing by the defence of categories of, or specific, books, documents, photographs and tangible objects which the defence considers to be material to the preparation of a defence, or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

12. This Rule has been the subject of the evolving corpus of jurisprudence of this Court.¹² With particular reference to its scope and obligations, Trial Chamber I previously held in one of its decisions on this issue that “It is of course the role of the Trial Chamber to enforce disclosure obligations in the interests of a fair trial, and to ensure that the rights of the Accused, as provided in Article 17(4)(e) of the Statute, to examine or have examined, the witnesses against him or her, are respected”.¹³

IV. DELIBERATIONS

A) On the Standing of the Independent Counsel

13. I have considered the submission of the Principal Defender and that of the Independent Counsel regarding the interpretation of Rule 77(C)(iii). The Principal

¹² See, for example: *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 dated Respectively 9th October 2004, 19th and 20th October 2004 and 10th January 2005, 3 February 2005; *Id.*, Ruling on Oral Application for the Exclusion of “Additional” Statement for Witness TF1-060, 23 July 2004; *Id.*, Sesay - Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004. See also *Prosecutor v. Brima, Kamara and Kanu*, Case No SCSL-04-16-PT, Kanu - Decision on Motions for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements, 30 July 2004; *Id.*, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or Rule 68, 4 May 2005.

¹³ *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para. 7.

Defender has essentially submitted that considering the specific wording of this provision, with the use of the word "the", it requires that the Independent Counsel who conducted the investigation should now be the same prosecuting the contempt matter.

14. Looking at some of the information background,¹⁴ I note that the Registrar appointed Mr. Louis Tumwesige as the first Independent Counsel exclusively to conduct the investigation into the contempt allegations and to report back to Trial Chamber II "whether there are sufficient grounds to instigate contempt proceedings".¹⁵ This Independent Counsel fulfilled his mandate, reported back to Trial Chamber II and the said Chamber found that the Alleged Contemnors should be prosecuted for contempt. Due to the unavailability of Mr. Tumwesige, the Registrar has now appointed a different Independent Counsel in the name of Mrs. Adelaide Whest to conduct the prosecution of the Contempt Proceedings.

15. In my opinion, interpreting Rule 77(C)(iii) in the narrow way suggested by the Principal Defender in her Preliminary Objection would be to frustrate the purpose of the Statute to have fair and expeditious contempt proceedings if the appointed Independent Counsel was for any reason unable to carry out his or her duties. To apply such reasoning, in my opinion, would defeat the real purpose of the Statute in this respect.

16. Reiterating the reasoning of a Decision of this Trial Chamber, no rule, however formulated, should be applied in a way that contradicts its purpose. A kindred notion is that a statute or rule must not be interpreted so as to produce an absurdity. In effect, it is rudimentary law that a statute or rule must be interpreted in the light of its purposes.¹⁶ Furthermore, as the Appeals Chamber recently held, the purpose of the Rules is:

¹⁴ 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, *supra* note 4.

¹⁵ *Id.*

¹⁶ See *Prosecutor v. Normal 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.

“to enable trials to proceed fairly, expeditiously and effectively and they are to be interpreted according to that purpose. ... [T]heir language should be given its ordinary meaning but they must be applied in their context and according to their purpose in progressing the relevant stage of the trial process fairly and effectively.”¹⁷

15. Thus, with reference to Rule 77(C)(iii), I find that this provision must be understood to allow the Registrar to appoint any Independent Counsel in order to investigate and/or prosecute contempt matters. 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.

16. Moreover, I am not convinced that these Alleged Contemnors will suffer any prejudice from having now an Independent Counsel to prosecute the contempt proceedings different from the first Independent Counsel that conducted the initial investigation. In my view, this practice, justified in the circumstances by the unavailability of the first Independent Counsel, will serve to ensure the complete independence of the appointed Independent Counsel conducting the prosecution of the Alleged Contemnors and is in the overall interest of justice.

B) On the Disclosure Obligations of the Independent Counsel

17. The Principal Defender submitted that pursuant to Rule 77 of the Rules, the provision of Rule 66 of the Rules shall apply, as appropriate, to the contempt proceedings. Conversely, the Independent Counsel submitted that due to the very nature of the case, no disclosure of materials to the Defence is *per se* necessary.

¹⁷ *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 45.

18. In the present circumstances, I find that the Independent Counsel is under an obligation to disclose the materials in her possession to the Defence. Pursuant to the provisions of Rule 77(E), Rule 66 of the Rules shall apply, as appropriate, to the proceedings. The purpose of these provisions is indeed to ensure that proceedings involving allegations of contempt before this 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. In particular, I would like to state that persons prosecuted pursuant to such Rule are guaranteed the same safeguards and are entitled to the full respect of their fundamental rights.

19. No particular redaction of such materials prior to their disclosure to the Defence will be necessary. As noted by the Principal Defender, all Defence Counsel of the Contempt Proceedings are reminded, however, of their duty and obligation to abide by this Court provisions and orders concerning the protection of victims and witnesses applies before these proceedings and the Defence shall not disclose these materials to third parties.¹⁸

V. CONCLUSIONS

20. Contempt proceedings are designed to be fair, to respect the rights of the accused persons, and to be expeditious. Based upon the foregoing considerations I hereby find that the appointment of Mrs. Adelaide Whest to be proper and in accordance with the Rules.

ACCORDINGLY I ORDER as follows:

A) With reference to the standing of the Independent Counsel:

- 1. Deny the Preliminary Objection raised by the Principal Defender;

¹⁸ For the specific instance of the identifying information on the particular protected witness involved in the Contempt Proceedings, namely Witness TF1-023, see *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004. See also Decision of 29 April 2005, supra note 3, para. 5.

2. The continuation of the Contempt Proceedings;

B) With reference to the disclosure obligations of the Independent Counsel:

The disclosure by the Independent Counsel to the Defence, for the preparation of the Contempt Proceedings, of all materials in her possession.

Done in Freetown this 23rd day of June, 2005



Hon. Justice Pierre Boutet

