

(77-88)

**SPECIAL COURT FOR SIERRA LEONE**

OFFICE OF THE PROSECUTOR

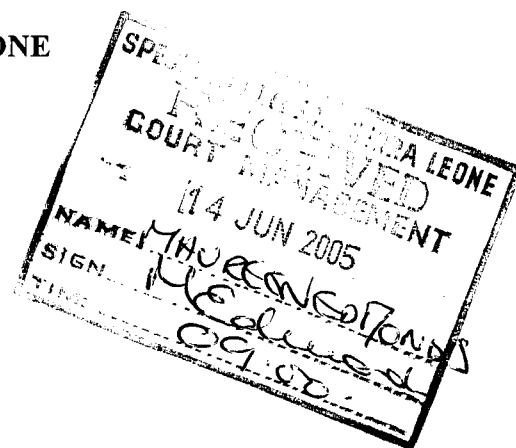
FREETOWN - SIERRA LEONE

**TRIAL CHAMBER I**

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

Registrar: Mr. Robin Vincent

Date filed: 14 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)

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**PROSECUTION RESPONSE TO URGENT JOINT DEFENCE MOTION ON  
STAY OF THE CONTEMPT PROCEEDINGS**

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**Office of the Prosecutor**

Luc Côté  
Lesley Taylor

**Defence Counsel for Brima Samura**

Wilbert Harris

**Defence Counsel for Margaret Fomba Brima**

Haddijatou Kah-Jallow

**Defence Counsel for Neneh Binta Bah Jalloh**

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**Defence Counsel for Ester Kamara**

Willbert Harris

SCSL - 05 - 01

SCSL - 05 - 02

**SPECIAL COURT FOR SIERRA LEONE**

OFFICE OF THE PROSECUTOR


FREETOWN – SIERRA LEONE

<b>Independent Counsel</b>	<b>Against</b>	<b>BRIMA SAMURA</b> (Case No. SCSL-05-01)
<b>Independent Counsel</b>	<b>Against</b>	<b>MARGARET FOMBA BRIMA</b> <b>NENEH BINTA BAH JALLOH</b> <b>ANIFA KAMARA</b> <b>ESTER KAMARA</b> (Case No. SCSL-05-02)

**PROSECUTION RESPONSE TO URGENT JOINT DEFENCE MOTION ON  
STAY OF THE CONTEMPT PROCEEDINGS**

1. On 10<sup>th</sup> June 2005, Trial Chamber I ordered the Prosecution to file the “Document” previously filed before Trial Chamber II, in response to a defence motion relating to the contempt proceedings, before Trial Chamber I.
2. The Prosecution hereby files the document entitled Prosecution Response to Urgent Joint Defence Motion on Stay of Contempt Proceedings, previously filed on 12<sup>th</sup> May 2005 in Case No. SCSL-16-T.

Filed at Freetown on 14<sup>th</sup> June 2005

  
\_\_\_\_\_  
Lesley Taylor  
Senior Trial Counsel

SCSL-2004-16-T  
(8643-8652)

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**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
FREETOWN - SIERRA LEONE

Before: Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: 12 May 2005

**THE PROSECUTOR**

**Against**

**ALEX TAMBA BRIMA  
BRIMA BAZZY KAMARA  
SANTIGIE BORBOR KANU**

CASE NO. SCSL - 2004 - 16 - T

(Filed in response to a Motion citing Case No. SCSL-2005-01&02)

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**PROSECUTION RESPONSE TO URGENT JOINT DEFENCE MOTION ON  
STAY OF THE CONTEMPT PROCEEDINGS**

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Office of the Prosecutor:

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Lesley Taylor

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Momo Fofanah

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Kevin Metzger  
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Defence Counsel for Santigie Borbor Kanu:

Geert-Jan A. Knoop  
Cary J. Knoop  
A.E. Manly-Spain

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

**THE PROSECUTOR**

**Against**

**ALEX TAMBA BRIMA  
BRIMA BAZZY KAMARA  
SANTIGIE BORBOR KANU**

CASE NO. SCSL – 2004 – 16 – T

(Filed in response to a Motion citing Case No. SCSL-2005-01&02)

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**PROSECUTION RESPONSE TO URGENT JOINT DEFENCE MOTION ON  
STAY OF THE CONTEMPT PROCEEDINGS**

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**I. Background**

1. On 3 May 2005 an “Urgent Joint Defence Motion on Stay of the Contempt Proceedings” (“the Motion”) was filed. The Motion seeks a stay of the contempt of court proceedings “until the pending motions on this issue (mentioned above) are dealt with by the Appeals Chamber, particularly the appeal against the interim measures, and in any event the appeal against the Decision<sup>1</sup>.”
2. The Motion earlier referred to two pending motions before Trial Chamber II<sup>2</sup> and two pending appeals before the Appeals Chamber.<sup>3</sup> Strictly speaking there are no

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<sup>1</sup> The Decision refers jointly to the “Decision on the Report of Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence” of 29 April and the Corrigendum thereto of 2 May 2005.

<sup>2</sup> The “Confidential Joint Defence Request for Disclosure of Independent Investigator’s Report on Contempt of Court Proceedings and Request for Stay of Proceedings” filed 4 April 2004 and the “Joint Defence Application for Leave to Appeal against the Ruling of Trial Chamber II of 5 April 2005” filed 8 April 2005.

*motions* pending before the Appeals Chamber. The Prosecution therefore assumes that the Motion is referring to both the motions pending before Trial Chamber II and the appeals pending before the Appeals Chamber in seeking the relief.<sup>4</sup>

3. The Motion argues (as summarised by the Prosecution):
- a) That Defence Counsel representing the AFRC Accused have standing in the contempt proceedings because:
    - i. the AFRC trial and the contempt proceedings are intertwined and, particularly, that the Article 17(3) rights of the Accused are in jeopardy by the simultaneous hearing of the two proceedings;
    - ii. the AFRC Accused are directly affected by the Decision and particularly the interim orders; particularly that the investigator assigned to Alex Tamba Brima has been suspended and that the rights enshrined in Articles 14 and 17(1) of the ICCPR, Article 6 of the ECHR and Article 17(2) of the Statute have been negatively affected by the ban of the wives of the Accused from the public gallery.
  - b) That the Decision was rendered prior to expected decisions in the two outstanding appeals and, thereby, was premature, negated the right of the Accused to an interlocutory appeal under Rule 77(J) and infringed the right of the Accused to a fair trial by influencing the perception of prosecution witnesses.
  - c) That the Decision was rendered prior to decisions in the two motions pending before Trial Chamber II and, thereby, infringed the right of the Defence to file motions pursuant to Rule 73.
  - d) That the integrity of the judicial system is threatened by the possibility that the pending appeal decisions could render null and void what is already a fait accompli, which would also cause serious prejudice to the Accused.

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<sup>3</sup> The Confidential Joint Defence Notice of Appeal filed 11 March 2005 (and associated documents) and the "Joint Defence Notice of Appeal Against Decision on Independent Counsel" filed 3 May 2005 (and associated documents).

<sup>4</sup> See para. 21 of the Motion.

- e) That the possibility that lead counsel for the First Accused in the AFRC trial may have to give evidence in the contempt proceedings may interfere with confidentiality obligations under the applicable Code of Conduct.
4. The Prosecution submits that the three Accused have no standing to bring the Motion and it should be dismissed at the threshold. In the alternative, if the Learned Judge decides that the Motion can be entertained, the Prosecution submits that the motion should be dismissed on its merits.

## II Argument

### The Accused have no Standing

5. The Parties to the contempt proceedings are the five alleged contemnors who are being prosecuted, and the Independent Counsel who is conducting the Prosecution. The Prosecution submits that third parties cannot have standing to bring motions to stay those proceedings.
6. This is illustrated by the style in which the Motion has been filed. The Parties are cited as The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu. However the case number applicable to those proceedings – SCSL-04-16-T – does not appear on the Motion. Rather the Motion cites two case numbers – SCSL-2005-01&02. The parties to those two proceedings are The Prosecutor v Brima Samura (SCSL-2005-01) and The Prosecutor v Margaret Fomba Brima, Neneh Binta Bah, Anifa Kamara and Ester Kamara (SCSL-2005-01).<sup>5</sup>
7. If the Motion had been filed correctly before the Learned Judge, using case numbers SCSL-2005-01&02 and citing the parties to the contempt proceedings, the lack of standing would have been immediately apparent. If the Motion had been filed citing the AFRC parties and using case number SCSL-04-16-T, the

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<sup>5</sup> It should be noted that the Registrar appointed Ms Adelaide Whest as Independent Counsel to prosecute the matters pursuant to Rule 77(C)(iii). Ms Whest is not a member of the Office of the Prosecutor.

Motion would be before Trial Chamber II. That Chamber has no power to stay contempt proceedings before the Learned Judge.

- 8. If the three AFRC Accused claim that they are facing difficulties as a result of the prosecution of the five alleged contemnors, the appropriate course of action is to move the Trial Chamber seized of the AFRC trial proceedings for appropriate relief. The AFRC Accused have indeed done so.<sup>6</sup> The AFRC Accused have also purported to file appeals with the Appeals Chamber arising from decisions of Trial Chamber II made under Rule 77(C)(iii).<sup>7</sup>
- 9. The fact that the Accused may feel that they are facing difficulties in their own proceedings does not give them standing to intervene in other proceedings. Similarly, the fact that there are motions and appeals pending in and from their own proceedings, or that the Accused are dissatisfied with Rulings in those proceedings, does not give them standing to intervene in other proceedings.
- 10. The Accused submit that the AFRC trial and the contempt proceedings are intertwined. Trial Chamber II has held that the two proceedings are separate and

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<sup>6</sup> Numerous oral applications for adjournments of the trial have been made, some successfully. See also the "Joint Defence Request for Disclosure of Independent Investigator's Report on Contempt Proceedings and Request for Stay of Proceedings", filed 4 April 2005; the "Prosecution Response to Joint Defence Request for Disclosure of Independent Investigator's Report on Contempt Proceedings and Request for Stay of Proceedings", filed 14 April 2005; and the "Confidential Joint Reply on Prosecution Response to Joint Defence Request for Disclosure of Independent Investigator's Report on Contempt Proceedings and Request for Stay of Proceedings", filed 19 April 2005. See also the "Joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005", filed 8 April 2005; the "Prosecution Response to joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005", filed 14 April 2005; and "Confidential Joint Reply to Prosecution Response to Joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005", filed 19 April 2005

<sup>7</sup> See the "Joint Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii)", filed 11 March 2005; the "Additional Joint Defence Appeal Submissions Pertaining to Joint Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and the Order Pursuant to Rule 77(C)(iii)", filed 14 March 2005; the "Prosecution Response to the 'Joint Defence Notice of Appeal'", filed 4 April 2005; and the "Joint Defence Reply to the Prosecution Response to the 'Joint Defence Notice of Appeal'", filed 11 April 2005. See also the "Order under Rule 117(A)" made by Judge Ayoola on 6 April 2005 in relation thereto. See further the "Joint Defence Notice of Appeal on Decision on Independent Counsel", filed 3 May 2005; and the "Joint Defence Appeal Against Decision on the Report of Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence of 29 April 2005 by Trial Chamber II", filed 3 May 2005. The Prosecution Response thereto is due 13 May 2005.

distinct.<sup>8</sup> The Prosecution submits that it is impermissible for the Accused to seek to intervene in the contempt proceedings in an effort to obtain a different Ruling.

11. The Accused also state that the “right of the Accused persons to hear witnesses Article 17(3), is at stake in such a convergence of proceedings.”<sup>9</sup> Article 17(3) articulates the presumption of innocence. Even assuming for the sake of argument that prosecution witnesses and potential defence witnesses might be negatively influenced by publicity surrounding the contempt proceedings (which the Prosecution does not concede), such influence cannot affect the presumption of innocence of the Accused before Trial Chamber II. Further, any such influence would occur (if at all) whether the contempt proceedings and the trial proceedings ran simultaneously or consecutively.

12. The Motion argues that the Accused are directly affected by the contempt proceedings because the Accused Brima has been denied the services of an investigator. The Motion fails to refer to the fact that the Accused Brima has refused the services of a replacement investigator<sup>10</sup> and to the Ruling of Trial Chamber II of 5 April 2005 found that the Accused Brima had ample time to make alternative arrangements regarding the appointment of an investigator.<sup>11</sup>

<sup>8</sup> See AFRC Trial Transcript, 5 April 2005, p. 26 (lines 21-24): “This Trial Chamber emphasises that the current trial against the accused and the potential contempt of court proceedings against other persons are two different matters. The status of the potential contempt of court proceedings has no bearing on the present trial”. See also AFRC Trial Transcript, 2 May 2005, p. 14 (lines 19-23): “On the first application for an adjournment pending proceedings to come to an end, it is the decision of the Trial Chamber that the other matter is a different trial in a different forum with different accused. We so no good reason for an adjournment of this trial.”

<sup>9</sup> Para. 5 of the Motion.

<sup>10</sup> See AFRC Trial Transcript, 14 March 2005, p. pp. 3-5. See also AFRC Trial Transcript, 5 April 2005, p. 7 (line 14) to p. 8 (line 10).

<sup>11</sup> AFRC Trial Transcript, 5 April 2005, p. 25 (line 17) – p. 27 (line 12), especially at p. 25 (line 23) to p. 25 (line 15): “We consider since that date the Defence had ample time to make alternative arrangements regarding the appointment of a Defence investigator. The Chamber notes the provisions of Article 17 of the Statute which does not give an accused person any right to select an investigator. The Trial Chamber notes that the Defence office to start (sic) is legal obligation under Rules 45(A) and 45(B)(iii) over two weeks ago by furnishing each of the relevant Defence teams a list of potential investigators from which to choose a replacement for Brima Samura. The Trial Chamber cites with approval the principal laid down by the International Criminal Tribunal for Rwanda in the case of the *Prosecutor v Clement Kayishema and Ruzidana* in wich the tribunal held: “Once the Trial Chamber is satisfied that all of the necessary provisions for the preparation of a comprehensive defence were available, and were afforded to all Defence Counsel in



13. The Motion further argues that the Accused are directly affected by the contempt proceedings because their rights under Articles 14 and 17(1) of the ICCPR, Article 6 of the ECHR and Article 17(2) of the Statute have been impacted by the ban of their wives from the public gallery. No authority is cited for this proposition. The Prosecution submits that an interim order banning certain named individuals from the public gallery cannot amount to a breach of the right to a fair and public hearing in contravention of Article 14 of the ICCPR, Article 6 of the ECHR or Article 17(2) of the Statute. The concept of a public trial means simply one from which the public at large is not excluded. Indeed these Articles recognize that the right is subject to certain limitations. The interim order excluding from the public gallery certain named women suspected of threatening a witness does not, it is submitted, breach the right to a fair and public hearing. It is submitted that there is no right to be tried in the presence of family members.
14. The Prosecution further submits that Article 17(1) of the ICCPR is inapplicable to the exclusion of spouses from the public gallery. The words “privacy, family, home or correspondence” refer to matters in the private domain. The interim order did not affect the rights of the named women to visit the Accused in the detention facility. Further, even if the interim order could be taken to affect “family”, the order was not “arbitrary or unlawful”. It was based upon material before the Chamber from which that Chamber had “reason to believe” that certain persons may be in contempt of court within the meaning of Rule 77(C).
15. The Prosecution therefore submits that the Motion should be dismissed at the threshold due to the lack of standing of the three AFRC Accused to seek a stay of proceedings to prosecute other people for contempt.

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this case. The utilisation of those resources is not a matter for the Trial Chamber”. We further cite with approval the principle laid down by the International Criminal Tribunal for Rwanda in the case of the *Prosecutor v Pauline Nyiramasuhuko* and others where the president of the tribunal held: “whereas an indigent accused has a right to choose Defence Counsel to represent him, he does not have a similar right to the choice of an investigator.”

Relationship with Pending Matters

16. The argument that by referring the contempt matter to Trial I without waiting for the outcome of two purported appeals under Rule 77(J) negates the right of the Accused to an interlocutory appeal under Rule 77(J) presupposes that the AFRC Accused has such a right. The Prosecution submits that the AFRC Accused have no standing to bring an interlocutory appeal against a decision to investigate and then to prosecute others.<sup>12</sup>
17. The Prosecution accepts that if the Accused's appeal against the Trial Chamber's decision of 10 March 2005 were to succeed, the consequence might potentially be to render void the appointment of the Independent Counsel and, therefore, the report of the Independent Counsel. If so, it may also follow that any decision under Rule 77(C)(iii) taken in pursuance of the Independent Counsel's report would also be rendered void. However, until decisions are rendered by the Appeals Chamber these are matters of mere speculation. Further, unless and until the Trial Chamber's decision of 10 March 2005 is reversed on appeal, it operates as a valid decision. The Trial Chamber may proceed on that basis.
18. The right to bring an interlocutory appeal does not encompass an automatic right to a stay of proceedings. Rule 73(B) establishes that where the Trial Chamber grants leave for interlocutory appeal, such leave "shall not operate as a stay of proceedings unless the Trial Chamber so orders". Rule 72(H) similarly provides that references of preliminary motions by the Trial Chamber to the Appeals Chamber pursuant to Rule 72(E) and (F) "shall not operate as a stay of proceedings" and "shall not operate as a stay of the trial itself unless the Trial or Appeal Chamber so orders".
19. The Prosecution submit that these provisions reflect a general principle that an interlocutory appeal against a decision of a Trial Chamber does not of itself

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<sup>12</sup> See the Prosecution arguments in the documents referred to in footnote 7 above. In Particular, the Prosecution argues that even before the issue of standing is considered, Rule 77(J) does not, in the circumstances, allow for an appeal to be made.

prevent the proceedings before the Trial Chamber from continuing. In other words, an Accused cannot, by filing an appeal or application for leave to appeal against an interlocutory decision, force the trial proceedings to a halt until the interlocutory appeal is decided. This principle applies in relation to Rule 77 proceedings in the same way as it applies to proceedings within the primary jurisdiction of the Special Court.<sup>13</sup>

20. Similarly, the fact that there are two motions pending before Trial Chamber II cannot be said to infringe the right of the Accused to bring motions pursuant to Rule 73. The right in Rule 73 to move the Designated Judge or Trial Chamber for appropriate ruling or relief is conferred upon a *party*. The AFRC Accused may do so in the AFRC proceedings. The right does not accrue to those Accused in the prosecution of others. Further, the decision of Trial Chamber II in proceedings concerning other parties, cannot negate the right of the AFRC Accused to bring motions under Rule 73 in the AFRC proceedings because they claim standing in those other proceedings.
21. Where a party files a motion requesting the Trial Chamber to exercise its discretion in a particular way, it is a matter for the Trial Chamber when it will decide upon that motion. A party cannot, by filing such a motion, prevent the Trial Chamber from taking any action inconsistent with the ruling requested in the motion, until such time as the motion has been decided.

#### Lead Counsel for Brima as a Witness in the Contempt Proceedings

22. The Prosecution submits that if the Lead Counsel for Brima is called as a witness in the contempt proceedings, any issue as to obligations of confidentiality can be addressed at that time. It is noted that the possibility of interference with confidentiality obligations has not been particularised. Nor has it been explained why, if any such issue of confidentiality arises, it causes prejudice during the

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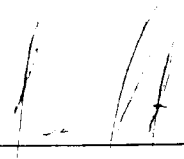
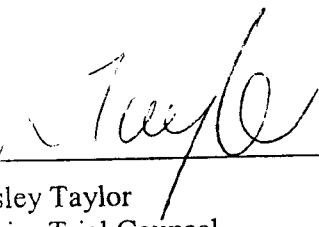
<sup>13</sup> Rule 77(E).

simultaneous hearing of the contempt proceedings and the AFRC trial proceedings, but not otherwise.

**III Conclusion**

23. For the reasons outline above, the Prosecution submits that the Motion should be dismissed at the threshold for lack of standing. Further, and in the alternative, the Motion should be dismissed on its merits.

Filed this 12<sup>th</sup> day of May,  
In Freetown,  
Sierra Leone.

  
\_\_\_\_\_  
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