

THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice Raja Fernando, Presiding, Justice Emmanuel Ayoola, Justice George Gelaga King, Justice Geoffrey Robertson and Justice Renate Winter;

BEING SEISED OF the "Joint Defence Appeal Motion against 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 2005 by Trial Chamber II" filed on 3 May 2005 ("the Appeal");

CONSIDERING the "Prosecution Response to the 'Joint Defence Appeal' dated 3 May 2005" filed 12 May 2005 ("the Response");

CONSIDERING the "Joint Defence Reply to the Prosecution Response to the 'Joint Defence Appeal' Dated 3 May 2005", filed on 16 April 2005 ("the Reply");

CONSIDERING the Order of the President of 17 May 2005 assigning the matter to the full bench of the Appeals Chamber;

NOTING the Decision on the Report of Independent Counsel Pursuant to Rule 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence of 29 April 2005 ("the Impugned Decision");

REFERRING to the Appeals Chamber 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) of 23 June 2005 ("the Appeals Chamber Decision on the First Contempt Appeal");

CONSIDERING the Statute of the Special Court (the "Statute") and the Rules of Procedure and Evidence ("the Rules");

NOW DETERMINES THE APPEAL ON THE BASIS OF THE WRITTEN ARGUMENTS OF THE PARTIES:

1. The Defence is challenging the Impugned Decision rendered by Trial Chamber II in which, after considering the matters disclosed in the Report of the Independent Counsel appointed by the Registrar in accordance with the Oral Ruling of 10 March 2005 pursuant to Rule 77(C)(iii) of the Rules, the Trial Chamber (i) ordered that orders in lieu of indictments be issued against the alleged contemnors, pursuant to Rule 77(C)(iii) of the Rules; (ii) directed that the Independent Counsel prosecute the alleged contemnors; (iii) decided that the Interim Order of 10 March 2005 shall remain in force until the final judgement in the respective contempt proceedings is delivered; and (iv) assigned the contempt proceedings pursuant to the orders in lieu of indictments to Trial Chamber I in accordance with Rule 77(D).

2. The grounds of this Appeal are (i) that the Trial Chamber erred in law and/or in fact by erroneously finding that there were "sufficient grounds" to institute proceedings against the alleged contemnors without disclosing the report of the Independent Expert, (ii) that the Trial chamber erred in law and/or in fact by issuing the Impugned Decision without first deciding on several pending Motions, and (iii) that the Trial Chamber erred in law and/or in fact by failing to provide any arguments as to why the Impugned Decision considers that there are sufficient grounds to proceed against the alleged contemnors.

3. It is the view of the Appeals Chamber that the Impugned Decision and the Defence's three grounds of Appeal are

directly related to the contempt proceedings under Rule 77. Those proceedings directed against the alleged contemnors are distinct from the proceedings in the main AFRC Case against the Appellants. The only part of the Impugned Decision which concerns the AFRC Case is the decision that the Interim Order of 10 March 2005 shall remain in force until the final judgement in the respective contempt proceedings is rendered, but the Defence does not challenge this aspect of the Impugned Decision in its Appeal.

Background: the First Contempt Appeal

4. The background is fully set out in the Appeals Chamber Decision on the First Contempt Appeal. In brief, Prosecution Witness TFI-023 complained on 10th March 2005 that she had been subjected to threats from four women, including the wives of the Accused, as she was being driven from court the previous evening. The Prosecution produced witness statements incriminating Mr Samura, the investigator of the Brima Defence team, as the person who divulged to the women the identity of this witness. Pursuant to Rule 77(C), the Trial Chamber decided on this material that there was reason to believe that a contempt may have been committed. It further appointed an experienced Independent Counsel to report back as to whether there was sufficient grounds for instituting contempt proceedings. The attempted appeal by the three AFRC Accused against these two decisions failed, so this court held, because Rule 77(J) only permitted appeals against final contempt decisions - i.e. against conviction and acquittals - and because the appellants lacked standing since they were not potential defendants in the contempt investigation.

5. Trial Chamber II also imposed, on 10th March, certain "interim orders": it suspended Mr Samura from the Brima Defence team and ordered the appointment of a new investigator, and it banned the four women suspects from entering the public gallery. The Appeals Chamber held that these "interim measures", augmenting the protection already given to the witness, were capable of appeal because they were made under Rule 75 and not Rule 77. Such an appeal could, however, only be brought with leave of the Trial Chamber under Rule 73(B), and that leave had not been obtained.

Submissions of the Parties

6. The current Contempt Appeal differs from the previous one only slightly. It is relying on the following grounds of appeal:

- i. The Defence submits that Trial Chamber II erred in law and/or in fact by erroneously finding that there were "sufficient grounds" to institute proceedings against the investigator of the Brima Defence team and the four women without disclosing the report of the Independent Expert.
- ii. The Defence further submits that Trial Chamber erred in law and/or in fact by issuing the Impugned Decision without first deciding on several pending Motions dealing with procedural as well substantive aspects of the Trial Chamber's initial Decision and that the Trial Chamber should have awaited their outcome.
- iii. The Defence finally submits that Trial Chamber II erred in law and/or in fact by failing to provide any arguments as to why the Impugned Decision

considers "that there are sufficient grounds to proceed against" the alleged contemnors.

7. The Appeals Chamber notes that, although the Impugned Decision prolonged the interim measures ordered on the 10 March 2005, the Defence does not challenge this aspect any more. Thus, it is not necessary to discuss if and to what extent Trial Chamber II had the power to pronounce the said measures.
8. Before addressing the merits of the Appeal, the Appeals Chamber shall however address the preliminary issues of the Appellants right to appeal and of their *locus standi* which are raised by the Prosecution in its Response.

First Preliminary Issue: Right to Appeal

9. In the Decision on the First Contempt Appeal it was stated that:

"'Any decision' means in context 'any final decision' and not 'any decision taken by the Court at any time in the course of investigating or processing a contempt allegation.'" ¹

10. The Appeals Chamber further refers to the Separate and Concurring Opinion of the Honourable Justice Ayoola ("the Concurring Opinion") appended to the same Decision in which it is stated that :

"In view of Rule 77(J) which provides that: "Any decision rendered by a single Judge or Trial Chamber under this Rule shall be subject to appeal", it is expedient to consider the nature of the power exercised by a Judge or Trial Chamber under Rule 77(C). In so far as the powers exercised by a Judge or trial Chamber can be said to be a result of a decision to exercise such powers, it can be

¹ Appeals Chamber 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) filed 23 June 2005, para. 29.

said that the exercise of such powers implies a 'decision'. However, it cannot be said that such decisions are judicial decisions. They are decisions of an executive nature and are not decisions, at that stage, that depend on any dispute or on the resolution of any conflicting facts or issues. The choice between options available under 77(c) (ii) or (iii) is determined not by law but by administrative convenience and expediency. Rule 77(J) deals with judicial decisions. Hence the use of the words 'decision rendered'. " ²

11. The Concurring Opinion further states that:

"Choice of power that a Judge or Trial Chamber decides to exercise pursuant to Rule 77(C) does not amount to a prosecutorial decision, but may lead, eventually, to that. Even in regard to prosecutorial decisions, there may be several ways of challenging such decisions, but an appellate process is not one of them. The Appeals Chamber is not set up to exercise a general and roving supervisory jurisdiction over the Trial Chamber so as to review such exercise of power conferred upon it by Rule 77(C)." ³

12. It follows from these findings that a preliminary decision rendered under Rule 77(C) of the Rules is not a decision capable of appeal to this Chamber pursuant to Rule 77(J). It is the view of this Chamber that the impugned decision is not subject to appeal, for the reasons given in the Decision on the First Contempt Appeal which apply equally to the right to appeal asserted in this second case.

Second Preliminary Issue: Locus Standi

13. In its Decision on the first Appeal on Contempt, the Appeals Chamber decided that:

"This appeal is brought without leave by the three defendants in the AFRC trial. None are subject to the contempt investigation ordered by the Trial Chamber.

² Separate and Concurring Opinion of Hon. Justice Ayoola on the Decision on Appeal against the 10 March 2005 Oral Ruling on the Allegations of Contempt filed 23 June 2005 and appended to the Appeals Chamber Decision *ibid* para. 28.

³ *Ibid*, para. 31.

Their counsel have not been assigned to represent any of the five alleged contemnors nor do they purport to have been instructed to represent them. It follows that they have no standing, in any event, to prosecute an appeal against the two decisions taken by the Trial Chamber in relation 1) to its reason to believe that a contempt had been committed by others or 2) to its direction for an independent investigation of that alleged contempt." ⁴

14. Again, in Concurring Opinion, it is stated that:

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

(ii) The parties to the proceedings in the course of which the alleged contempt may have arisen do not by virtue of that fact become parties to the contempt proceedings, when initiated, unless they are the alleged contemnors." ⁵

15. It is the view of the Appeals Chamber that, in the present Appeal, the issue of the Appellants' lack of *locus standi* arises in the same terms as in the first Appeal. The Impugned Decision as well as the Defence grounds of Appeal are enshrined in the contempt proceedings, which are parallel to the proceedings in the AFRC Case. The only part of the Impugned Decision which concerns the AFRC Case is the decision that the Interim Order of 10 March 2005 shall remain in force until the final judgement in the respective contempt proceedings is rendered, but, as noted before, the Defence does not challenge this aspect of the Impugned Decision in its Appeal.

16. The arguments developed by the Defence in its Reply to the Prosecution Response on the issue of standing do

⁴ Appeals Chamber 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) filed 23 June 2005, at para. 33.

⁵ Separate and Concurring Opinion of Hon. Justice Ayoola on the Decision on Appeal against the 10 March 2005 Oral Ruling on the Allegations of Contempt filed 23 June 2005 and appended to the Appeals Chamber Decision *ibid* para. 31.

not provide anything which might cause a change to the ruling of the Appeals Chamber in its Decision in the First Appeal on Contempt. In particular, the Appeals Chamber is not convinced by the submissions of the Defence that the outcome of the contempt proceedings will affect the fairness of the case against the Accused in the AFRC trial and that they therefore have a reasonable interest to a participation in these proceedings. The contempt proceedings are parallel to the Case against the Accused and their outcome shall have no effect on the Trial against them, as none of the Accused is indicted for having had a part in the alleged contempt. Therefore, it is the view of the Appeals Chamber that the Appellants have no *locus standi* in the current Appeal.

17. We hereby authorise Court Management to serve this Separate and Concurring Opinion during the official recess period of the Special Court.

As the Appellants have neither the Right to Appeal nor standing,

THE APPEALS CHAMBER DISMISSES

the Appeal in its entirety.

The Honourable Justice George Gelaga King appends a Separate and Concurring Opinion.

The Honourable Justice Geoffrey Robertson appends a Separate and Concurring Opinion

Done in Freetown this 17th August 2005.

R. Fernando

Justice Raja
Fernando
Presiding

Emmanuel Ayoola

Justice Emmanuel
Ayoola

Geoffrey Robertson

Justice Geoffrey
Robertson

Renate Winter

Justice Renate Winter

[Seal of the Special Court for Sierra Leone]



1. I have had the privilege of reading the draft Decision of Justice Renate Winter and I agree that the Appeal should be dismissed in its entirety. However, I am appending this separate opinion because my reason for the dismissal is only on one ground and that alone, that is, that the three Accused, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu have no **locus standi** to bring this appeal.
2. This present appeal dealing primarily with Contempt of Court is an offshoot of a preceding Contempt of Court Appeal brought by the same three Accused¹ and in which this Appeals Chamber delivered its Decision on 23 June 2005. In that Decision although I wrote a separate and partial dissenting Opinion, this Chamber held **unanimously** that the three Accused had no standing to prosecute that appeal.
3. As this Appeal arises out of the same circumstances as its predecessor, it is for the same reasons I gave earlier that I find that the three Accused in this instant Appeal have no locus standi. I shall, therefore, repeat what I said:

'As far as the three Accused, Alex Tamba Brima, Brima Bazzy Kamara and Sanitigie Borbor Kanu are concerned, as I have already premised, they are not and have not been charged with Contempt of Court. They are neither alleged nor suspected to be contemnors. The Contempt of Court proceedings which arose in the course of their trial on indictment were in respect of the five persons I have already named: Brima Samura (not to be mistaken for 1st Accused Alex Tamba Brima), Margaret Fomba, Neneh Binta Bah, Anifa Kamara and Ester Kamara. It is obvious, therefore, that the three Accused lack standing in the contempt of court proceeding and I so hold. It is equally obvious that since those Accused persons have no standing in those

¹ See Case No. SCSL-04-16-AR77
Case No. SCSL-04-16-

proceedings it automatically follows that their respective counsel cannot have a standing on their behalf and I so hold.²

4. On 10 March 2005 Trial Chamber II gave an oral ruling in which, inter alia, it ordered the Registrar to appoint an independent counsel to investigate and prosecute the five alleged contemnors hereinbefore referred to.³
5. Consequent upon that oral ruling the Registrar on 11 March 2005 appointed Mr Louis Tumwesige as Independent Counsel⁴ and on the 16 March 2005, Mr Tumwesige submitted the report of his findings to the Trial Chamber which issued its Impugned Decision on 29 April 2005, ordering the Independent Counsel to prosecute the five alleged contemnors. It is against this Impugned Decision that the three Accused have appealed to this Appeals Chamber.
6. The crucial question to be determined in this instance is whether the Defence Counsel in this appeal have a standing vis-à-vis the five alleged and suspected contemnors. There is no evidence that any of the Defence Counsel was instructed by those alleged contemnors or anybody else to represent them. There is no evidence that the Defence Counsel or any of them has filed any power of attorney with the Registrar to show that they had been engaged by any of the suspected contemnors to represent them as required by the Rules of Procedure and Evidence.⁵ It is also quite clear to me that there is no evidence to show that any of the Defence Counsel has any private, substantive or legally protected interest that is being harmed or threatened as a result of the Independent Counsel's Report. The Defence Counsel do not come within the ambit of "aggrieved person"⁶ even when that test is applied. In all these circumstances, therefore, the

² Ibid, para 25.

³ Transcript 10 March 2005 p.15 lines 24-29, p.16 lines 1-13.

⁴ See Impugned Decision - Preamble.

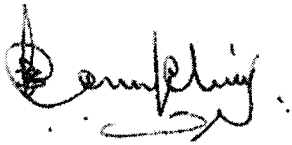
⁵ Rule 44(A).

⁶ See R. v. Russell ex parte Beaverbrook Newspapers Ltd [1969] IQB 342.

inescapable conclusion is that the Defence Counsel have no locus standi to represent the five alleged contemnors in whom the legal right to appeal inheres.

7. As I have held that the three appellants, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, have no locus standi, it follows that I cannot thereafter deal with the substance of the grounds of appeal. To adjudicate on the merits will be a futile exercise as whatever conclusions are reached will be merely *obiter dicta* and therefore not binding as precedent.
8. I hereby authorise Court Management to serve this Separate and Concurring Opinion during the official recess period of the Special Court.

Done at Freetown this day 17th day of August 2005



Justice George Gelaga
King

[Seal of the Special Court for Sierra Leone]



1. This is an interlocutory appeal by three defendants in the AFRC trial over their Trial Chamber's decision of 29th April 2005 to institute contempt proceedings against five persons (none of them defendants) alleged to have been involved in the intimidation of a protected prosecution witness. It is brought without leave of that Trial Chamber, on the assumption that Rule 77(J) permits the appeal of any judicial decision which is taken under Rule 77 (C) in the course of investigating a possible contempt or initiating a prosecution for it, and on the further assumption that defendants in the main trial have standing to bring such an appeal, even though they are not suspected contemnors. Both assumptions were rejected in an earlier decision of this court in the First Contempt Appeal, for reasons which the chamber now decides must render this appeal incompetent as well. I concur, and append my separate opinion.

Background: the first contempt appeal

2. The background is fully set out in the judgements in the First Contempt Appeal. In brief, prosecution witness TFI-023 complained on 10th March that she had been subjected to threats from four women, including the wives of the defendants, as she was being driven from court the previous evening. The prosecution produced witness statements incriminating Mr Samura, the investigator on the *Brima* team, as the person who divulged to the women the identity of this witness. Pursuant to Rule 77(C), the Trial Chamber decided on this material that there was reason to believe that a contempt may have been committed. It further decided against trying the matter summarily and instead appointed an experienced independent counsel to report back as to whether there were sufficient grounds for instituting contempt proceedings. An attempted appeal by the three AFRC

defendants against these two decisions failed, so this court held, both because Rule 77(J) permitted only appeals against final contempt decisions - i.e. against conviction and acquittals - and because the appellants lacked standing since they were not potential defendants in the contempt investigation. Judge Ayoola, in a separate concurring opinion, held that decisions to investigate or to direct a prosecution are not decisions to which the right of appeal, provided by Rule 77J, can apply.

3. The Trial Chamber on 10th March had imposed certain "interim orders": it suspended Mr Samura from the *Brima* defence team and directed the appointment of a new investigator, and it banned the four women suspects from entering the public gallery. The Appeals Chamber held that these "interim measures", augmenting the protection already given to the witness, were capable of appeal because they were made under Rule 75 and not Rule 77. Such an appeal could, however, only be brought with leave of the Trial Chamber under Rule 73(B), and that leave had not been obtained.

Background to this appeal

4. The contempt investigation and the interim orders were seriously disruptive of a trial that had hitherto proceeded smoothly and it was of utmost importance to the administration of justice that the allegations should be resolved expeditiously. On 10th March, after it made the decision to proceed to have the contempt investigated by independent counsel, the Trial Chamber adjourned for five days at the defence request. The Registrar, with commendable alacrity, appointed an experience independent counsel the following day. That counsel, Mr Lewis Tamwesige, was also conscious of the need for expedition, and submitted a report of his findings to the Trial Chamber five days later - on 16th

March. I note with some concern that the Trial Chamber decision to direct him to prosecute was not issued until 29th April - fully six weeks later.

5. This delay caused further disruption to the trial. After the initial 5-day adjournment, a further fortnight's adjournment was granted to enable the defence office to find and employ another investigator to serve the *Brima* team, but when the court reconvened on 5th April it transpired that the defence office had submitted the names of various candidates to Mr Brima personally, and he had vetoed them all. The defendants were said to have taken umbrage at the interim orders, to the extent that they refused to attend the resumed hearing in person. Their lead counsel were inexplicably absent from that hearing. The co-counsel who did appear said that although they were capable of cross-examining the next prosecution witnesses they could not do so because the unresolved allegations against Mr Samura had "tainted" (their word) all the information he had supplied for cross-examination. Although they did not represent any of the five persons suspected of contempt, they lodged an application for disclosure to themselves of the independent counsel's report. When the next prosecution witness testified, they asked to reserve their cross-examination to some future date - a request that the court did not grant, although it indicated that it would be prepared to entertain an application for recall of the witness, without any guarantee that the application would be granted.

6. The matters raised by the AFRC defendants at the hearing on 5th April were dealt with appropriately by the Trial Chamber, although it had not yet taken the step of directing a prosecution. It deprecated the practice of the defence office of submitting the names of investigators to a defendant personally, as if these investigators were akin to

counsel they might chose to instruct. The role of the "investigator" is ill defined: it simply means a member of the defence team who is not legally qualified but is being hired by the Principal Defender, usually at the instigation of the leading counsel of a particular defence team, to act as an enquiry agent. The investigator is not employed by or responsible to the defendant: his employer is the Principal Defender, who as head of the Defence Office makes him available to work under the direction of a team leader. It is initially for the Principal Defender to decide whether the "equality of arms" principle justifies the employment of such a person and his allocation to a particular defence team, and all matters relating to that employment must be determined by the Principal Defender in consultation with the lead counsel. The Principal Defender is subject to the direction of the court and its interim order that Mr Samura be suspended pending conclusion of his contempt trial was, in effect, an order to the Principal Defender to suspend Mr Samura for that period.

7. The defence - Mr Brima's counsel in particular - complained at the hearing on 5th April that the suspension of Mr Samura had caused problems for its preparations. That I can readily accept, but there was a serious allegation against him which had to be resolved. He had only been employed as an investigator for two months but he had the expressed confidence of counsel, which made it difficult for the trial chamber to accept that the information he had provided was "tainted" by the allegation - even if proved - that he had disclosed the name of a protected witness: it rejected this argument as "speculative". Trial Chambers must offer defendants as fair a trial as possible and do their best to avoid giving cause for any sense of grievance, but they cannot allow repeated adjournments or indefinite delays or be expected to inconvenience witnesses (especially protected

witnesses) by having them recalled months later, at a time when cross-examination is more convenient for a defence counsel. Good cause will need to be shown - and not merely asserted - before leave is given to recall a witness in these circumstances.

The Order of 29 April

8. The Order which the defendants wish to appeal was eventually issued on 29th April. The delay has not been explained. No doubt the intervention of the Easter recess played some part, and there may have been some difficulty within the court over the procedural question of how the contempt trials could be accommodated. The AFRC Trial Chamber took the view that its members should not conduct the trial of the investigator or the trial of the four women. That meant that the contempt proceedings would have to be heard by a judge from Trial Chamber 1, the only other Trial Chamber in this court, which is fully occupied with two complex trials conducted in alternate session. The court has no *ad hoc* or alternate judges attached to any chamber, and must accommodate contempt proceedings as best it can, accepting an overriding duty to dispose of them expeditiously. It will usually be appropriate, when a Trial Chamber cannot deal with a contempt summarily, for the matter to be heard by a judge who has had no pre-existing involvement in the proceedings from which the contempt arose.

9. This follows from the unusual nature of the task imposed on the Trial Chamber by Rule 77(C)(iii), which provides that for serious suspected contempts, the chamber may

"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 investigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the

Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter."

10. This Rule requires the Chamber to decide firstly whether the report contains "sufficient grounds" - in effect, whether it makes out a *prima facie* case - for indicting a suspect. If so, the Chamber must then decide, as a matter of discretion, whether to direct a prosecution of that suspect. This echoes the old "voluntary bill" procedure of the common law, in which a High Court judge could decide to commit a suspect for trial without the need for committal proceedings. Under Rule 77(C)(iii) the judges of the court who make the determination that the evidence is *prima facie* probative of guilt are also given the discretion - which normally resides in a Director of Public Prosecutions - to decide whether, on public interest or other grounds, this sustainable prosecution should go ahead.

11. There can be an objection to having a judge who has been involved in a pre-trial determination as to likely guilt subsequently sit on the trial which must determine that guilt. It was explained by the European Court of Human Rights in the important case of *Hauschildt v Denmark*¹. A perception of partiality will arise if the judge's final decision can be seen as a self-fulfilling prophecy, in so far as a "guilty" verdict might endorse or justify his own pre-trial determination. In *Hauschildt*, a judge who had denied bail to the defendant because of the strength of the evidence against him was held to have been disqualified from going on to try him and to convict him on that evidence. In other cases, such as *Piersack v Belgium*² and *de Cubber v Belgium*³, lawyers who have been employed in the prosecution office at the time of the investigation or indictment of the defendant

¹ *Hauschildt v Denmark*, Judgment, 27 May 1981, Series A, No. 43.

² *Piersack v Belgium*, Judgment, 1st October 1982, Series A, No. 53.

³ *Cubber v Belgium*, Judgment, 26 October 1984, Series A, No. 86.

have been disqualified from sitting at his trial. As a matter of logic a judge who decides that there is a *prima facie* case or who directs a prosecution or performs (as here) both functions is perfectly capable, having heard all the evidence, of deciding that the prosecution has not come up to proof. But appearances are important and to avoid any perception of bias it is desirable, other than in summary proceedings dealing with contempts in the face of the court, for the contempt trial to be conducted by a judge who is not a party to the direction to prosecute. The power to assign such a judge, from another chamber, to the contempt trial is provided by Rule 77(D), viz

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

12. Although the phrasing of Rule 77(D) is elliptical, it permits the Trial Chamber which directs a prosecution pursuant to Rule 77(C)(iii) to assign the contempt trial to a single judge of that chamber, or to a single judge of another chamber. In the latter case, it is appropriate for the trial judge to be appointed by the presiding judge of that other chamber. In the event, the order of 29th April assigned the contempt trial to Trial Chamber 1, and the presiding judge of Trial Chamber 1 designated one of its members, Judge Boutet, to hear the trial of Mr Samura.

13. Although Rule 77(C)(iii) empowers the Trial Chamber to "direct the independent counsel to prosecute the matter", that counsel possesses in the course of conducting the case complete professional independence and is in no sense under the supervision or direction of the Trial Chamber in performing his duties. He is appointed in place of the court's own prosecutor, who would be conflicted and embarrassed if called upon to prosecute members of defence teams or possibly of his own office who have been accused of

contempt. The independent prosecutor may decide, on reviewing the case again or on receiving further information, that the evidence is insufficient to sustain a conviction and that the case should therefore be dropped. He may decide that a plea bargain is appropriate or that the defendant's ill health justifies a discontinuance. The Trial Chamber directs the independent counsel "to prosecute the matter", but does not constrain or control the exercise of his professional judgement in the course of that prosecution. It has no further function in a case that is assigned to a judge of another chamber, unless the prosecutor it appoints refuses to act or applies to be replaced.

Standing of the would-be appellants

14. The decision of the Trial Chamber on 29th April did not directly affect the 3 AFRC defendants who seek to appeal it. The orders made by the court did not apply to them or even mention them, but were directed to the instigation of proceedings against Mr Samura and the four women. However, the decision was headed as a decision delivered in their case, i.e. in *Prosecutor v Brima, Kamara and Kanu*. This was inappropriate and incorrect: the decision should have been headed and subsequently reported as a separate case, e.g. *Re a Decision to Prosecution Samura and ors for Contempt*. The mistaken heading lends first-blush support to the defendants' claim that they have standing to appeal it.

15. Furthermore, to the decision on 29th April were appended two *Orders in Lieu Of Indictment*, one relating to Samura and the other to the four women. Each order contained the charge and short particulars thereof, which was all that was necessary to satisfy Rule 77(C)(iii). Regrettably, the Order also contained an unnecessary "case summary" - several pages of very detailed allegations against the contempt defendants.

It is not clear whether these summaries were drafted by the independent prosecutor or by the court itself, but their attachment as part of the court order gave the impression that they carried the endorsement of the court that made that order. There is no warrant in Rule 77(C)(iii) for including a case summary in the *Order in Lieu of Indictment* and these detailed allegations should not in my view have been included. It is not appropriate for the court, in directing a prosecution, to prepare or seem to endorse a prosecution case summary. It should have been left to the independent prosecutor to prepare that summary, for disclosure to the contempt defendants and their counsel in due course.

16. The problems caused by appending a case summary to the court order soon became apparent. The Press Office of the Special Court issued a two page press release on 3rd May, "*Trial Chamber issues order to indict five people for contempt of court*". It is the duty of the press office to notify the public and the media about significant developments in the court and it was properly within that duty to release details of the new contempt indictments and their particulars. This press release therefore reported in some detail the allegations in the case summaries, as if they were allegations by the Trial Chamber itself, e.g. "The order in lieu of an indictment alleges..." The impression that must have been given to readers was that these allegations were being authoritatively made against the contempt defendants by the three Trial Chamber judges. There was no explanation that the allegations were untested and at this stage had been made only in hearsay statements. There was no balancing comment by or on behalf of the contempt defendants or the defendants in the AFRC trial. The Press Office was not in any way at fault: it fairly reported what was in the court order. But the regrettable consequence of including the case summaries in the order was nonetheless to put out, under the

imprimatur of the Special Court itself, a set of one-sided allegations which appeared to have been endorsed by the Trial Chamber.

17. This mistaken impression would not have prejudiced the contempt defendants at their trial before a judge, but it would obviously affect public perceptions of them and indirectly affect the AFRC defendants whose wives were among those whose prosecution was being announced with such apparently incriminating detail. This should not have happened and it may have contributed to a sense of grievance felt by the accused and their counsel, who point to the press release in this appeal to support their argument that they have a legitimate interest in bringing it. But a "legitimate interest", although it may provide standing in public law to challenge an administrative decision, is not sufficient for standing to appeal a decision to prosecute for contempt. That can only be accorded to persons who are the subject of that decision - i.e. the contempt defendants. For that reason alone, and notwithstanding my concern about publicity given to the case summary, the defendants have no standing to appeal a decision to prosecute third parties.

Jurisdiction

18. The decision itself is not amenable to appeal, in my view for the reasons given in paras 23 to 31 of the court's decision in the First Contempt Appeal. Rule 77 is a coherent and chronological code for investigating and if need be prosecuting contempt allegations and then appealing the verdict. On a purposive interpretation, the right of appeal given by sub-Rule J only arises after a conviction or an acquittal - in other words after a final decision and not in relation to any interlocutory decision taken by a court at any earlier stage in the proceedings. It does not arise,

even if leave is obtained under Rule 73(B). (In this case, no such leave was obtained).

Merits

19. There is, in any event, no basis for impugning the Trial Chamber's decision to direct a prosecution in these cases. It had ample reason to believe that a contempt had been committed. It appointed a special counsel, received his report, decided (as had he) that there were sufficient grounds to prosecute and exercised its discretion accordingly. This is an initiating process in which others should have no "right" to intervene - including the court prosecutor, the defence office, the potential contempt defendants and the accused men on trial for war crimes. The report of the independent counsel is a confidential document for consideration only by the Trial Chamber: it is not to be made available (and was not made available) either to the court prosecutor or to the defence office. The report may be disclosed to the contempt defendants in due course if they request it, and if it would assist their trial preparation. But the decision to initiate a prosecution on the basis of the report cannot itself be made the subject of any appeal. The remedy for mistaken initiation of a prosecution is provided by the duty of the Trial Court to acquit, once a reasonable doubt has been raised about the sufficiency of the proof offered at trial by the independent prosecutor.

20. The three short grounds of appeal against the order of 29th April are devoid of merit. The first ground asserts that the order should not have been made unless and until the independent counsel's report was disclosed to the defence in the AFRC trial so that they could comment upon it. I have explained that it is inappropriate for any party - the court prosecutor included - to possess or comment upon the

independent counsel's report to the court at the stage when that court is considering whether to authorise a prosecution.

21. The second ground is that the decision should not have been made until an Appeal Chamber had ruled in an appeal brought (incompetently, as it happens) against the decision to appoint an independent counsel. But there is no reason why even a competent appeal should cause a stay in proceedings, especially in a case of contempt which involves third parties. Otherwise, given the part-time operation of this Appeal Chamber, this would delay both trials and ancillary contempt proceedings for several months.

22. The third ground is that no reasons were given for the decision to prosecute. Nor should they have been given: any authority which authorises a prosecution should be astute to avoid prejudicing it by announcing reasons - these will be provided in due course to the defendants by the case summary and to the public by the testimony of prosecution witnesses at the trial. One criticism of the Trial Chamber for annexing the case summary to the order in lieu of indictment is that it gave unnecessary publicity to what could be perceived as its reasons for ordering the prosecution. A decision to prosecute must speak for itself: the sufficiency of the grounds for it must be tested first at trial and not by premature appeal to this court.

23. Neither in this attempted appeal nor the last have the applicants challenged the basic fact that a court order was in force preventing the disclosure of the name of witness TFI-023. There is no reference to a specific order in the decision of 29th April or in the case summary, other than by a footnote reference to decisions by another trial chamber in another trial. (See footnotes 4 and 23 to the decision of 29th April). The prosecution had applied to the Presiding Judge of Trial Chamber II to renew protective measures

applied to certain witnesses by Trial Chamber I, but on 3rd February 2005 withdrew its application at the invitation of the judge since the view was taken, by the court and all defence counsel, that Rule 75F rendered a new application redundant. The AFRC defendants might be estopped from challenging the correction of this interpretation of Rule 75(F), since they concurred in it, but that concurrence would not affect any of the contempt defendants. If there is any point to be taken on this interpretation, it can be raised by a convicted contemnor who pursues competent appeal to this court under Rule 77(J).

Conclusion

24. I concur in the chambers decision that it has no jurisdiction to entertain an interlocutory appeal from a Trial Chamber decision to initiate a prosecution for contempt under Rule 77(C)(iii), and that these defendants have no standing to appeal because the order did not apply to them.

25. I hereby authorise Court Management to serve this Separate and Concurring Opinion during the official recess period of the Special Court

Done at Freetown this day 17th day of August 2005



Justice Geoffrey Robertson

[Seal of the Special Court for Sierra Leone]

