

051

SCSL-2003-11-PT
(1100-1111)
THE APPEALS CHAMBER

1100

Before: Judge Geoffrey Robertson, President
Judge Emmanuel Ayoola
Judge George Gelaga King
Judge Renate Winter
Fifth Judge to be determined
Registrar: Mr. Robin Vincent
Date: 31 October 2003

THE PROSECUTOR

v.

SAM HINGA NORMAN

CASE NO. SCSL-2003-08-PT

MOININA FOFANA intervening

**REPLY TO THE PROSECUTION RESPONSE TO THE MOTION ON BEHALF OF
MOININA FOFANA FOR LEAVE TO INTERVENE AS AN INTERESTED PARTY
IN THE PRELIMINARY MOTION FILED BY MR. NORMAN BASED ON A LACK
OF JURISDICTION: JUDICIAL INDEPENDENCE
&
SUBSTANTIVE SUBMISSIONS**

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions

Counsel for Mr. Norman

Defence Office:

Mr. Sylvain Roy, Acting Chief

For Mr. Fofana, intervening:

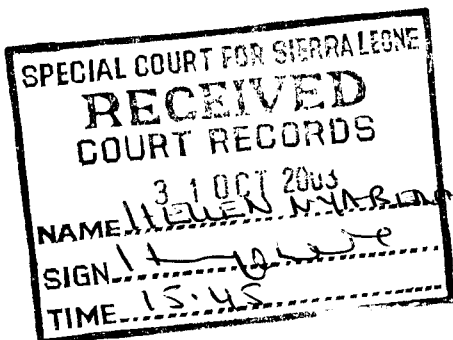
Mr. Michiel Pestman

Mr. Victor Koppe

Mr. Arrow John Bockarie

Prof. André Nollkaemper

Dr. Liesbeth Zegveld



1. The Defence for Mr. Fofana is filing three separate documents to deal with each of the three preliminary motions in which it has requested to intervene. The current document contains the Defence reply to the “Prosecution Response to Request on behalf of Moinina Fofana to Intervene in the Preliminary Motions Filed by Mr Norman Based on Lack of Jurisdiction: Judicial Independence and Child Recruitment”, filed on 27 October 2003 (the “Prosecution Response”), insofar as it deals with the issue of judicial independence, as well as the Defence substantive submissions on the issue of judicial independence as suggested on 23 October 2003 by the President of the Special Court in the “Special Practice Direction on Expedited Timetable for Filing Submissions before the Appeals Chamber of the Special Court for Sierra Leone”.

Reply to the Prosecution Response

2. As a preliminary point the Defence notes that the Prosecution does not dispute that the Defence is indeed an interested party in the terms of Article 5 of the Practice Direction on Filing Documents under Rule 72 of the Rules of Procedure and Evidence before the Appeals Chamber of the Special Court for Sierra Leone (“Article 5” and “Practice Direction”). The dispute therefore revolves around whether the Appeals Chamber should exercise its discretion under Article 5 in favour of the accused as an interested party wishing to intervene. The Defence submits that when, as in this case, the interested party is another accused before the court, that discretion should be exercised in favour of the interested party unless good reasons exist for not doing so.

3. Much of the Prosecution Response is based on a misunderstanding of the original Defence request. Mr. Fofana is not asking for leave to intervene for the purpose of requesting a stay or adjournment of proceedings in Mr. Norman’s case. If Mr. Fofana’s request is granted there will be no need, in the Defence’s eyes, for a postponement of either the hearing of Mr. Norman’s preliminary motion or delivery of judgement on it. Mr. Fofana is asking to intervene at the scheduled hearing so that his arguments may be made available to the Court when it first comes to deliberate on this matter. The alternative courses of action are suggested as possible solutions to the problem perceived by the Defence in the event that the application to intervene is denied.

4. The Defence is fully aware of the principle of *stare decisis*. Indeed, it is the existence of this principle, and the fact that, we assume, the Special Court will be applying the principle in its work, that has triggered the current application. The Appeals Chamber's deliberations on these first challenges to this new Court's jurisdiction cannot be described, in the words of the Prosecution, as "the ordinary course of business". These important legal questions will be given the most serious and thorough examination the first time that they are raised; it is natural, and in accordance with principle of *stare decisis*, that these first judgements will thereafter be applied, *mutatis mutandis*, to subsequent jurisdictional challenges. The practice of the *ad hoc* criminal tribunals for Rwanda and the former Yugoslavia have shown this to be the case, and this is precisely why Mr. Fofana wishes to make his supplementary arguments available to the Court before they render their first judgement on these issues.

5. Indeed, the Defence imagines that it was exactly this point that caused the President of the Special Court to draw up Article 5 of the Practice Direction. It should be noted that the intervention procedure set out in Article 5 applies only to preliminary motions filed under Rule 72. The Defence submits that Article 5 recognises the interest of the Court in hearing from all interested parties before rendering a decision on challenges to its jurisdiction; and in particular those major challenges which will naturally arise at the beginning of the Court's active life.

6. Failure to appreciate the exceptional nature of these first hearings on jurisdiction leads the Prosecution to warn of "disastrous consequences for the work of the Court" if the application to intervene is granted; an opening of "the floodgates for parties to bring requests throughout the life of the Special Court", and the setting of "a dangerous precedent whereby all accused persons could file amicus briefs or request to make oral submissions in other cases before the Special Court whenever an issue arises in one case that may have an affect [*sic*] on them".¹ It has already been recalled that Article 5 applies only to preliminary motions, and that requests to intervene are therefore limited to a particular stage of proceedings, and cannot be made "whenever an issue arises in one case that may have an [e]ffect on" another accused. It should further be noted that the arguments which weigh in favour of the current application will not apply in all future cases. Mr. Fofana wishes to intervene precisely because this will be the first time that these questions are deliberated. This will not be the case in a putative

application concerning two new accused a year from now, and it is not therefore correct to speak of Mr. Fofana's intervention in the current matter setting a precedent for all accused persons.

7. To briefly address the judicial economy argument further, allowing Mr. Fofana (and other interested accused) to intervene in this motion concentrates the argument before the Court and reduces the number of hearings. This gain in efficiency is presumably another reason for the inclusion of Article 5 in the Practice Direction.

8. Mr. Fofana would very much have liked to file his own motion on the topic of the independence of the court in time for it to have been considered along with Mr. Norman's motion. Given the fact that the Prosecution has applied to join the two cases, the Defence imagines that the two motions would indeed have been heard together. However, the Defence received the supporting material only on Monday, 27 October 2003; disclosure having been delayed by the Trial Chamber decision on protective measures which was delivered some three and a half months after the original application². The Defence respectfully submits that it should not be penalised for the no doubt unavoidable delay in the rendering of that decision.

9. The Defence urges the Appeals Chamber to exercise its discretion to allow it to intervene in Mr. Norman's motion under Article 5 of the Practice Direction.

Substantive Submissions

Introduction

10. The Defence of Mr. Fofana has sought the permission of the Court to intervene as an interested party in the proceedings before the Appeals Chamber in the case of Mr. Norman pertaining to the Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence).

11. The Defence of Mr. Fofana supports the main arguments of Mr. Norman's motion on judicial independence. However, it takes the position that Mr. Norman's motion is not a

¹ Prosecution Response, p. 3.

² Trial Chamber, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 16 October 2003, SCSL-2003-11-PT.

motion in terms of Rule 72(E) of the Rules of Procedure and Evidence, that therefore at this stage of the procedure, the Appeals Chamber is not the proper organ to deal with this preliminary motion and that the motion should be handled by the Trial Chamber.

Qualification of challenges to the independence of the Special Court

12. The Rules of Procedure and Evidence of the Special Court distinguish between two categories of motions: ‘preliminary motions’ (governed by Rule 72) and ‘motions’ (governed by Rule 73). Rule 72(B) lists five objections or applications that qualify as preliminary motions:

Objections based on lack of jurisdiction

Objections based on defects in the form of the indictment

Applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B)

Objections based on the denial of request for assignment of counsel; or

Objections based on abuse of process.

13. Rule 72(B) does not list objections based on lack of independence as objections that qualify as preliminary motions. Both in the ICTY and the ICTR challenges based on the lack of independence were brought by the defence as part of motions on jurisdiction³. In none of these cases did the prosecutor object to treating these challenges as part of jurisdictional motions, and the Tribunals proceeded to rule on these motions under Rule 72.

14. As long as no legal consequence is attached to the distinction between a preliminary motion on jurisdiction and a preliminary motion on independence, there is no reason to object to considering them under the same heading. Indeed, in some jurisdictions, for instance in the United Kingdom, independence is even considered as a matter of jurisdiction⁴.

15. However, in the present case the qualification of a motion as a jurisdictional motion carries significant legal consequences. Under Rule 72(E), preliminary motions “which raise a

³ For the ICTY, see Trial Chamber of the ICTY “Decision on the Defence Motion on Jurisdiction”, *Prosecutor vs. Dusko Tadić*, Case No. IT-94-1-T, 10 August 1995; for the ICRT, see Trial Chamber of the ICTR “Decision on the Defence Motion on Jurisdiction,” in: *Joseph Kanyabashi vs. the Prosecutor*, Case No. ICTR-96-15-T, 18 June 1997.

⁴ Wang Tieya and B. Bing Jia, ‘Is Defective Composition a Matter of Lack of Jurisdiction within the Meaning of Rule 72?’, in: R. May et.al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, The Hague: Kluwer, 2001, pp. 45-53 at pp. 49-50.

serious issue relating to jurisdiction shall be referred to the Appeals Chamber, where they will proceed to a determination as soon as practicable". The equation of motions challenging independence with motions challenging jurisdiction thus effectively removes a right of appeal for the defendant and thus limits his rights. This serious legal consequence compels the Court to closely consider whether the equation of motions challenging independence with motions challenging jurisdiction is justified. The ICTR has found it imperative to consider closely whether a particular motion was jurisdictional when such qualification had legal consequences, for instance in the form of a right to interlocutory appeal. For instance, in the Kanyabashi case⁵, Judge Wang Tieya and Judge Nieto-Navia stated in their Joint Separate and Concurring Opinion of 3 June 1999 "that an appeal under Rule 72 cannot be upheld unless there has been a prior determination that its basis is jurisdictional"⁶.

Interpretation

16. The terms of Rule 72 of the Rules and Procedure and Evidence have to be interpreted on the basis of Article 31 of the Vienna Convention on the Law of Treaties of 1969⁷. Under Article 31(1) of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose⁸. The purpose of interpretation in international law is to ascertain the intention of the parties from a text⁹. The prime criterion for the interpretation thus is the text¹⁰. Under Article 31, the terms of the treaty have to be considered in their context and in the light of the object and purpose of the treaty.

17. It is submitted that a close analysis of the relevant authorities and the principles of interpretation leads to the conclusion that a challenge to the independence of a court cannot be considered as a challenge to the jurisdiction of a court.

⁵ *Joseph Kanyabashi vs. the Prosecutor*, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I of 3 June 1999.

⁶ Appeals Chamber of the ICTR decision of 3 June 1999 "*Joseph Kanyabashi vs. the Prosecutor*", Case No. ICTR-96-15-T, Joint separate and concurring opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia at para. 2.

⁷ See *Prosecutor v. Théoneste Bagasora and 28 Others*, Case No. ICTR-98-37-A, 8 June 1998, para. 28.

⁸ Article 31(1) of the Vienna Convention of the Law of Treaties of 1969 reads: "A treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose."

⁹ P. Reuter, *Introduction to the Law of Treaties*, London: Kegan Paul International, 1995, par. 141 at p. 96.

¹⁰ *Idem*, par. 143 at p. 96.

18. First, jurisdiction and independence are governed by separate provisions of the Statute and the Rules of Procedure and Evidence. The jurisdiction of the Special Court is governed by Article 1 of the Statute and detailed in Articles 2-10. The independence of the Court is in part determined by the rules on the composition of the Court in Articles 11-16 of the Statute. In part it is also determined by the powers of the Management Committee envisaged by Article 7 of the Agreement between the United Nations and the Government of Sierra Leone. For yet another part, a variety of provisions of the Agreement, the Statute and the Rules of Procedure and Evidence define the operation of the Court and thereby implicitly seek to protect it against interference that may undermine its independence. In any case, the independence is *not* determined or affected by the provisions on jurisdiction. Conversely, the jurisdiction of the Court is not determined or affected by the rules on independence. Jurisdiction and independence are treated separately and, indeed, are separate principles.

19. Second, there exists a distinction between the jurisdiction of a court and the exercise of the jurisdiction by that court¹¹. Even though a court may possess jurisdiction, in terms of subject-matter jurisdiction, personal jurisdiction or temporal jurisdiction, it may be unable to exercise it because defects in terms of its composition or its (lack of) independence violate fundamental rules of international law. Lack of impartiality or independence may affect the lawful exercise of jurisdiction, but not of jurisdiction itself¹²:

“We would however go so far as to state that even a prejudgement manifesting partiality does not necessarily lead to a finding of lack of jurisdiction. An impartial judicial institution may lack jurisdiction over certain types of case in a constitutional sense. Conversely, having been conferred by statute with this jurisdiction, it may at some point in the exercise of it appear to be lacking impartiality. In the latter case, the natural course of remedy would be the lodging of an appeal against a decision of a lower court which appeared to be partial in making the decision. But this recourse to interlocutory appeal does not retroactively deprive the lower court of its jurisdiction over the case *ab initio*. An appellate court may treat the issue of partiality as a legal error invalidating the decision under appeal, but cannot proceed to question the

¹¹ Wang Tieya and B. Bing Jia, *supra* note 4, p. 48.

¹² *Idem*, p. 51.

existence of the jurisdiction of the lower court, as opposed to the way in which the jurisdiction has been exercised by the lower court.”¹³.

20. If a court is not independent or impartial, this will affect the rights of the defendant. Indeed, the requirement of independence of the judiciary is a fundamental principle of human rights law, contained *inter alia* in Article 14 of the ICCPR¹⁴ and Article 6 of the ECHR¹⁵. This fundamental principle of human rights law is to be upheld by the Special Court. As the Appeals Chamber of the ICTY noted in its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the Tadic Case:

“For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”¹⁶.

In practice the Tribunals have made ample reference to international human rights standards as defined *inter alia* in the ICCPR and the ECHR¹⁷. At several stages during the pre-trial and the trial phase, the rights of the accused, as defined *inter alia* in the ICCPR and the ECHR, may be at issue. A violation of these rights may, depending on the context and the nature of breach, lead to a variety of legal consequences, to be determined by the Trial Chamber and subsequently the Appeals Chamber. They may render the *exercise* of jurisdiction illegal¹⁸.

¹³ Joint separate and concurring opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia, *supra* note 6, para. 30.

¹⁴ Article 14(1) of the International Covenant on Civil and Political Rights of 1966 reads in relevant part: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, *independent* and impartial tribunal established by law (...) [emphasis added].”

¹⁵ Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 reads in relevant part:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an *independent* and impartial tribunal established by law (...) [emphasis added].”

¹⁶ Appeals Chamber of the ICTY “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, *Prosecutor vs. Dusko Tadić*, Case No. IT-94-1-T, 2 October 1995, at para. 45; see also Trial Chamber of the ICTY “Decision on Preliminary Motions”, *Prosecutor vs. Slobodan Milosevic*, Case No. IT-02-54, 8 November 2001, at para. 4, recognizing “the obligation to guarantee fully the rights of the accused”.

¹⁷ G. McIntyre, “Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY,” in: G. Boas and W.A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden: Martinus Nijhoff, 2003, pp.193-238 at pp. 198, 199, 201 and *passim*.

¹⁸ *Idem*, p. 197.

However, none of these breaches of the rights of the defendants results in a denial of the jurisdiction of the court itself.

21. It also is be recalled that the Secretary-General in its Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) stated that the ICTY must, at all stages of its proceedings fully respect internationally recognised standards regarding the rights of the accused¹⁹. He added that these standards are, in particular, contained in art. 14 ICCPR. That article includes as one of its core rights the principle of independence²⁰. Again, the principle of independence is not considered in jurisdictional terms.

Restrictive interpretation of the amendments of the Rules of Procedure and Evidence

22. The amendment of the Rule of Procedure and Evidence on 1 August 2003 effectively removed a right of the Defence of appeal for certain motions. The Defences agrees with the argument submitted on this issue by Mr. Norman in his case (“Application to Stay Determination of all Preliminary Motions – Denial of Right to Appeal”²¹) that the amendment of the rules was *ultra vires*. However, irrespective of whether that argument will be accepted by the Appeals Chamber, the amendment of Rule 72 should be interpreted restrictively. An interpretation that would expand the concept of jurisdiction to cover the distinguished concept of independence, would further expand the powers of the Appeals Chamber and would reduce the rights of the defendant. The right of appeal is a fundamental human right protected by article 14 paragraph 5 of the ICCPR, which provides that “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. As noted *supra* in para. 20, the Special Court is bound by the fundamental principles of human rights. It is a settled principle of interpretation of international human rights law that restrictive interpretation of human rights is rarely admissible²². An amendment of the Rules of Procedure and Evidence that infringes on individual rights must be interpreted restrictively.

¹⁹ S/25704 at para. 106; available at: <http://www.un.org/icty/basic/statut/S25704.htm>.

²⁰ Human Rights Committee, General Comment nr 13, adopted on 12 April 1984 at its twenty-first session, *Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*.

²¹ Filed by the Defence for Mr Norman on 2 October 2003, doc. no. SCSL-03-08-PT-077.

²² A. Orakhelashvili, “Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights,” *European Journal of Human Rights* (14) 2003, pp. 529-568 at p. 534.

Alternative basis for challenges to the independence of the Special Court

23. It follows that a challenge to the independence of a court is not to be equated with a challenge to the jurisdiction of a court. The question then arises what is the proper basis and procedure for challenges to the independence of the Special Court.

24. The Rules on Procedure and Evidence do not contain a rule expressly protecting the independence of the Court or the Judges. The only article that may seem of relevance is Rule 15 on Disqualification of Judges. This provides that

“a Judge may not sit at trial or appeal in any case in which he has a personal interest or concerning which he has or has had any personal association which might affect his impartiality”

and contains a procedure pertaining to disqualification of judges who are not impartial. However, the Rule only deals with impartiality of Judges, not with their independence. In international law, independence and impartiality are two separate principles.

25. The conclusion must be that the possibility of lack of independence was not foreseen by the drafters of the Statute and the Rules of Procedure and Evidence. In this situation a variety of options exists. A challenge to the independence might be considered in terms of a motion under Rule 73. It might also through an extensive interpretation of ‘impartiality’ be brought under Rule 15. It might also be argued that the list of preliminary motions in Rule 72(B) is not exhaustive and that it should be understood as including objections to the lack of independence of the Special Court. Indeed, there are good arguments that support that option, as it is imperative that motions on lack of independence are dealt with as a priority, and are not “kept for decision at the end of a potentially lengthy, emotional and expensive trial”²³. It is not for the Defence to make that determination. The one interest of the Defence is to make clear that the challenge to the independence is not brought under the challenge to jurisdiction. It has been shown that the two concepts are separate and that to equate them would adversely affect the rights of the Defence.

²³ See *Tadic* Interlocutory Appeal, *supra* n. 16.

Conclusion

26. The motion filed on behalf of Mr. Norman not a motion in terms of Rule 72(E) of the Rules of Procedure and Evidence. At this stage of the procedure, the Appeals Chamber is not the proper organ to deal with this preliminary motion; it should be handled by the Trial Chamber.

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Defence Index of Authorities

1. Wang Tieya and B. Bing Jia, 'Is Defective Composition a Matter of Lack of Jurisdiction within the Meaning of Rule 72?', in: R. May et.al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, The Hague: Kluwer, 2001, pp. 45-53.
2. P. Reuter, *Introduction to the Law of Treaties*, London: Kegan Paul International, 1995, pp. 95-99.
3. G. McIntyre, "Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY," in: G. Boas and W.A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden: Martinus Nijhoff, 2003, pp.193-238.
4. A. Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights," *European Journal of Human Rights* (14) 2003, pp. 529-568.