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SCSL-2003-11-PD-007
(88-98)

THE SPECIAL COURT FOR SIERRA LEONE

Before: Judge Boutet
Designated Judge

Registrar: Robin Vincent

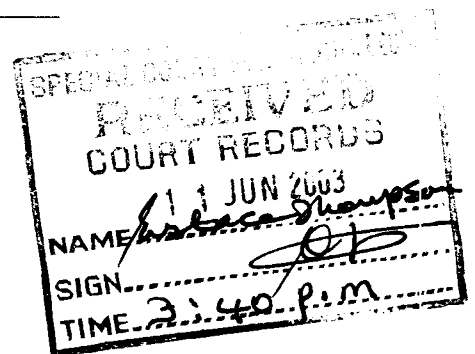
Date filed: 11 June 2003

IN THE MATTER OF THE DETENTION OF A SUSPECT PURSUANT TO RULE 40 *BIS*

MOININA FOFANA

Case No. SCSL-2003-11-PD

URGENT
APPLICATION FOR RELEASE FROM PROVISIONAL DETENTION



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This application is filed by the Defence Office of the Special Court for Sierra Leone (the "**SCSL**") acting on behalf of Moinina FOFANA (the "**Suspect**") pursuant to its mandate set out in Rule 45 of the Rules of Procedure and Evidence (the "**Rules**") and the Power of Attorney granted to the Defence Office by the Suspect on 30 May 2003.

I. INTRODUCTION

1. The Defence Office applies to the Trial Chamber pursuant to Rule 40 *bis* (K):

    - For a Declaration that Rule 40 *bis* is *ultra vires* the Statute;
    - For a Declaration that a Suspect may raise the issue of arbitrary arrest and detention before the Judge sitting pursuant to Rule 40 *bis* (J) and that, if raised, the Judge must address the issue as part of his duty to ensure the rights of the Suspect are respected;
    - For an Order, made pursuant to Rule 40 *bis* (K), for the Suspect's immediate release from provisional detention as ordered by Judge Boutet on 28 May 2003 on the grounds that the Suspect's rights under the SCSL Statute and Rules and under international law have not been respected.

2. Moreover, given the importance of these issues, the Defence requests an oral hearing at the earliest available opportunity, at which live evidence may be called and submissions by *Amicus Curiae* invited by the Trial Chamber.

II. THAT RULE 40 *BIS* IS *ULTRA VIRES* THE STATUTE

3. The SCSL Statute makes no provision for the detention of Suspects. Indeed, the only mention of "suspects" in the Statute is in Article 15(2), which refers to the right of the OTP "*to question suspects*", but says nothing about detaining them.

4. The position is the same with respect to the Statutes of the International Criminal Tribunal for the former Yugoslavia (the "**ICTY**") and the International Criminal Tribunal for Rwanda (the "**ICTR**"). Indeed, those two tribunals have almost identical provisions which expressly state that a person shall be taken into custody *only after an indictment has been confirmed against him*:

> "*A person against* whom an indictment has been confirmed *shall, pursuant to an order or an arrest warrant of the International Tribunal* [for Rwanda], *be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal* [for Rwanda]"[1]

5. Oddly, the SCSL has no provision in its Statute comparable to ICTY Article 20 and ICTR Article 19. Thus the SCSL Statute is silent even as to the detention *of an Accused.*

6. The rule which permits the detention of suspects, Rule 40 *bis*, was, as its title suggests, *not* part of the Rules of the ICTY and ICTR when they were first adopted. Rule 40 *bis* was introduced at the ICTY in the wake of a highly political affair, in which two persons were transferred to the ICTY's custody, *as witnesses*, in order to defuse a potentially explosive situation in the region when two Bosnian Serbs were detained by the Bosnian authorities.[2] Following this affair, Rule 40 *bis* was adopted by the ICTY at its tenth plenary session on 22–23 April 1996. It has since been amended at least twice.

7. The ICTR followed suit by adopting Rule 40 *bis* on 15 May 1996. The rule has been amended thrice. It became highly controversial in the *Barayagwiza case* when the Appeals Chamber, in its first Decision, held that the rule had been seriously violated.

8. It is well-known and universally accepted that the Rules of Procedure and Evidence – of the ICTY, ICTR and SCSL – have to be in conformity with the Statute. This is because the Statutes were adopted by bodies with the ultimate normative authority – the Security Council in the case of the ICTY and ICTR, the Government of Sierra Leone and the United Nations in the case of the SCSL – which have delegated rule-making authority to the Judges only to the extent that the exercise of that rule-making authority does not conflict, or unduly exceed, the express provisions of the Statutes.

9. It is submitted that the SCSL Statute would have provided for the detention of suspects if that were considered necessary. It does not do so. It only contemplates the SCSL exercising its jurisdiction over persons against whom an indictment has been confirmed, i.e. *Accused persons*. Rule 40 *bis* is, therefore, *ultra vires* the Statute as it impermissibly exceeds the limits set by the Statute.

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1 Article 20 ("*Commencement and conduct of trial proceedings*") of the ICTY Statute; Article 19 of the ICTR Statute (emphasis added).

2 See Salvatore Zappalà, Human Rights in International Criminal Proceedings (Oxford University Press, 2003), pages 52-53 for an account of the *Đukić and Krsmanović* case, which he describes as an "*example of the ill-functioning of the system* [of the *ad hoc* tribunals with respect to the rights of suspects], *in terms of uncertainty about the status of persons* [...]".

10. In the alternative, Article 14(2) of the SCSL Statute stipulates that, in dealing with a "*specific situation*" which is not adequately provided for by the Rules of Procedure and Evidence, the SCSL Judges "*may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.*" While the *Criminal Procedure Act 1965* does not itself deal with the situation of the Suspect, the *Constitution of Sierra Leone 1991*, from which the *Criminal Procedure Act 1965* derives its status as a law, does. Section 17(3) of the *Constitution* provides for a maximum ten (10) day time period for the detention of suspects for the most serious (capital) offences. This time-limit of 10 days is so radically different from that permitted under Rule 40 *bis* (up to 90 days), that it indicates the unlawfulness of Rule 40 *bis* or, in the alternative, that Rule 40 *bis* should be re-interpreted (and ultimately amended) to allow only a 10-day time-limit for the detention of suspects without charge.

III. THAT THE SUSPECT MAY RAISE THE ISSUE OF ARBITRARY ARREST AND DETENTION BEFORE THE SINGLE JUDGE UNDER RULE 40 *BIS* (J)

11. At the hearing on Bonthe Island held pursuant to Rule 40 *bis* (J) on 4 June 2003, the Defence Office sought to argue on behalf of the Suspect that he was arbitrarily and unlawfully detained and therefore should be immediately released.

12. Judge Boutet invited submissions on the question whether such matters could be raised under Rule 40 *bis* (J). The Defence Office refers to its arguments on this point, which are set out in the transcript of the hearing. The Defence Office re-states its position that it would be an overly restrictive, indeed perverse, interpretation of Rule 40 *bis* (J), which would permit a Judge to say, in effect, to an Accused: "you may be unlawfully and arbitrarily detained, but although Rule 40 *bis* (J) requires me to ensure that your rights are respected, and although your most fundamental human right, the right to liberty, may be in the process of being grossly violated, that is of no concern to me today." It is submitted that, on the contrary, the Judge sitting at the Rule 40 *bis* (J) hearing *does* have jurisdiction to entertain applications for release based on arbitrary arrest and detention. The Suspect requests a Declaration to that effect. It is in the interests of justice for such a Declaration to be made, since the matter may arise in other cases.

IV. AN ORDER FOR IMMEDIATE RELEASE BASED ON RULE 40 *BIS* (K)

13. Rule 40 *bis* (K) of the Rules provides that:

"*(K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber, all applications relative to the propriety of provisional detention or to the suspect's release.*"

14. The Suspect applies under Rule 40 *bis* (K) for an Order for his immediate release on the grounds that:

    A. The conditions for ordering transfer and provisional detention set out in Rule 40*bis*(B)(iii) were not met, in particular, at the time the Order was made, it was not necessary to order the Suspect's detention:

       1) to prevent his escape;
       2) to prevent the injury or intimidation of any victim or witness or the destruction of any evidence; or
       3) for any other legitimate investigative purpose; and

    B. The Suspect's procedural rights under the Statute and Rules, particularly his right to be informed of and served with the reasons for requesting his transfer and detention, were violated in the course of arrest and detention.

A. ARBITRARY ARREST AND DETENTION

1. The OTP's Request and Investigator's Declaration provided no factual basis upon which judicial control could be exercised

15. On 26 May 2003, the Office of the Prosecutor (**"OTP"**) filed a request pursuant to Rule 40*bis*(A) for the transfer and provisional detention of the Suspect. The OTP argued that the conditions in Rule 40 *bis* (B)(iii) were met, namely that "*provisional release* [was] *a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.*" On 28 May 2003, Judge Boutet acceded to the request and ordered the transfer and provisional detention of the suspect.

16. The OTP's Request was made *ex parte*. The OTP was, therefore, under a duty to make full and frank disclosure to compensate for the absence of one party from the proceedings. Moreover, it was in the OTP's interests to provide as much detail as possible as to the necessity of arrest for the reasons set out in Rule 40 *bis* (B)(iii) in order to convince the Judge to make the Order requested.

17. Yet the OTP Request merely stated on this subject:

    "*4. I* [DAVID M. CRANE] *submit that the provisional detention of MOININA FOFANA is a necessary measure to prevent his escape, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or is otherwise necessary for the continued conduct of the investigations.* [...]

> *CONSIDER provisional detention to be a necessary measure to prevent the escape of MOININA FOFANA, the physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the continued conduct of the investigation."*

18. In other words, the OTP merely reproduced the words of Rule 40 *bis* (B)(iii) without providing any factual details whatsoever. No details were provided of why the OTP considered that the Suspect would seek to escape. No details were provided of which victims or witnesses the Suspect might possibly intimidate (or of how he would know their identities). No details were provided of evidence that might be destroyed. No details were provided of why arrest and detention might otherwise be necessary. Notwithstanding the duty, and interest, of the OTP in providing full details of these elements, if they were present, the OTP did nothing more than recite the words of the rule. The Judge was, therefore, in no position to assess whether indeed there was any factual basis for the arrest and detention under Rule 40 *bis* (B)(iii). It was, therefore, impossible for him to perform his duty of exercising judicial control over the OTP's activities, as required by Rule 40 *bis* (B) (iii).

19. The position is no different taking into account the Declaration of Tamba P. Gbekie, Investigator at the OTP, dated 26 May 2003 in support of its request for the Suspect's transfer and provisional detention. On the subject of why it might be necessary to detain the Suspect, the Declaration states merely:

> *"8. I firmly believe that the detention of the Suspect, MOININA FOFANA, is necessary to prevent escape or the intimidation and harassment of victims and potential witnesses, or both."*

20. This amounts to Mr. Gbekie stating his firm belief that the conditions in Rule 40 *bis* (B)(iii) are met; again, it provides no factual details on the basis of which the Judge could decide whether the conditions were indeed met, as is his function. Indeed, Mr. Gbekie's Declaration indicates that the alleged basis for ordering the arrest and detention of the Suspect was narrower than in the OTP Request, in that the former makes no reference to detention being necessary for any other investigative purpose besides preventing arrest or intimidation or persons. Moreover, the Declaration only refers to the prevention of intimidation of *potential* – not actual – witnesses, which shows that the OTP's request was improperly based on a category of persons ("*potential witnesses*") not covered by Rule 40 *bis* (B)(iii).

21. Since the material furnished to the Judge by the OTP in pursuit of its Request did not provide *any* factual basis for an Order under Rule 40 *bis* to be made, it is submitted that the Order was improperly made and should be vacated.

2. It was *not necessary* for any of the purposes set out in Rule 40 *bis* (iii) to order the Suspect's Detention

22. The following facts fatally undermine the claim that it was necessary to detain the Suspect:

- Mr. Fofana was arrested on 29 May 2003 in Mattru-Jong, Bonthe District.
- Up until his arrest on 29 May 2003, Mr. Fofana never imagined he was suspected of any crime within the Court's jurisdiction. He has no idea who or what evidence might have implicated him in such crimes.
- Mr. Fofana has four (4) wives and eighteen (18) children living in Bo and Gbap. He is the sole supporter of his wives and children. He also provides the sole support for his mother who lives in Gbap and provides as best he can for a number of extended family members in Gbap and elsewhere.
- He rents a house in Bo in which his family lives. That house will be repossessed if rent is not paid. Rent on the house is due soon.
- He is a Chiefdom Speaker in Gbap. As such, he is expected to remain with the people of the chiefdom – a commitment he regards as sacred.
- He is involved with several NGOs in projects to reconstruct damage in his chiefdom caused during the civil war and is an integral part of these reconstruction efforts.
- He has no passport or other travel documents. He has never travelled outside Sierra Leone and has no-one with whom he can stay outside the country.

23. Thus, when the order for detention was made, it was not necessary for any of the reasons set out in Rule 40*bis*(B)(iii). It is also submitted that, in line with the principles of statutory interpretation set out above – and given that detention of Suspects is not even contemplated in the Statute of the Special Court - the term, "*a necessary measure*" in clause (iii) of sub-rule (B) must be read very restrictively so that transfer and provisional detention will only be justified in circumstances where no other option is available to authorities to advance the enumerated purposes. As a matter of human rights law, the right to be free from arbitrary arrest and detention is a positive, fundamental right to which there are only very limited exceptions. Deprivation of the right is subject to the

overriding requirement that any deprivation of liberty must be "*in accordance with a procedure prescribed by law*" and "*lawful*".[3]

(a) Human Rights and International Law Considerations

24. If this Court has jurisdiction over the suspect,[4] such jurisdiction derives from, in part, the Court's ability to guarantee him fair treatment in accordance with international human rights norms. In *Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 10 August 1995 (the "*Tadić Jurisdiction Appeal*") the Appeals Chamber of the ICTY concluded that an international criminal tribunal must be "established by law". In order for such a tribunal[5] to be established by 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"*.[6]

25. The most important and influential internationally recognized human rights instruments place strict limits on the conditions under which individuals may be detained and require a correspondingly strict judicial inquiry into the necessity of such detention.[7]

26. These provisions demonstrate an international norm concerning arrest and detention: individuals can expect that arresting and detaining authorities will seek judicial authorization of an arrest and detention and that judicial sanction of such arrest and detention will only occur where it is strictly necessary – i.e. where no lesser measure will satisfy the legitimate investigatory or prosecutorial goals brought to judicial attention.[8]

27. This view of the requirement of necessity is supported by the ICTY President's *Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged Between Zejnil Delalić and Zdravko Mucić* dated 11 November 1996. [9]

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3 See Article 5 of the European Convention on Human Rights and Keir Starmer, European Human Rights Law (Legal Action Group, 1999), p.95.

4 The Suspect does not concede this Court's jurisdiction but is precluded from contesting it at the present time by practical considerations and Rules 72 and 73.

5 It is submitted that the differences between this Court and the ICTY, in terms of their establishment, are immaterial in relation to this point from the *Tadić Jurisdiction Appeal.*

6 *Tadić Jurisdiction Appeal* at paragraph 45.

7 See Article 9 of the *Universal Declaration of Human Rights*, Article 9 of the *International Covenant on Civil and Political Rights*, Article 5 of the *European Convention on Human Rights*, Article 7 of the *American Convention on Human Rights* and Article 6 of the *African Charter on Human and Peoples' Rights*.

8 See also S. Zappala, "Rights of Persons During an Investigation" Chapter 29.2 in Cassese, Gaeta & Jones eds., *The Rome Statute of the International Criminal Court*, Vol. II, (OUP, 2002), p.1181-1202 at 1190.

9 At paragraph 38.

(b) Not necessary to Prevent Escape

28. As noted above, the Suspect had no inkling whatsoever that he was about to be arrested at the SCSL's request; he had, therefore, no reason whatsoever to "*escape*".

29. Moreover, the Suspect has four wives and eighteen children, and is responsible for providing for an extended family of some forty persons. In these circumstances, there was absolutely no risk that he would suddenly disappear into the bush.

30. Finally, the Suspect has deep roots in the community and a position of leadership and responsibility – as Chiefdom speaker – that he would not suddenly disappear. The Suspect has never travelled outside Sierra Leone, has no travel documents and no realistic avenue of escape. All of these factors demonstrate the complete absence of necessity at the time the order was made of ordering detention to prevent escape.

31. It is extremely important to note that the legality or otherwise of the order made under Rule 40 *bis* must be examined *at the time the order for provisional detention was made* and *on the basis of the material that was available to the Judge when he made the Order*. It would be of no avail to the OTP to argue that, *now that it has alerted the Suspect to his status as a suspect*, there is a risk that he may flee. This change of circumstances has absolutely no bearing on whether the order under Rule 40 *bis* was valid when made. Moreover, such an argument would be tautological; the OTP could then always retrospectively justify *any detention* by pointing to the newly created danger of the suspect escaping from the detention which has been unlawfully imposed on him.

(c) Not necessary to Prevent Injury or Intimidation of Victims or Witnesses or the Destruction of Evidence

32. By the same token, since the Suspect, when the Order was made, had no idea that he was suspected of any crimes within the jurisdiction of the Court, was equally unaware that there were any witnesses or evidence against him. Accordingly, he had neither the motive nor the opportunity to interfere with witnesses or to destroy evidence. In any event, the Suspect has no desire to obstruct the legitimate functioning of the Court.

(d) The Residual Clause in Rule 40 *bis* (B)(iii)

33. Clause (iii) of sub-rule (B) must be read very restrictively in accordance with the principals outlined above. It ought only to be invoked in highly exceptional

circumstances. Its invocation as a matter of course during pre-charge investigations would frustrate the other conditions contained in clause (iii), the arrest provisions of the Rules as a whole, the proportionality principle and the international human rights norms governing this Court.

34. If this residual clause were read to give wide latitude to the OTP during an investigation it would be *ultra vires* the Rules.

35. Furthermore, any argument to the following effect must be strenuously resisted, as it would pervert the intention of the Rules: that is the argument that it is necessary to detain a person because the OTP may indict them and therefore prefers to have them in custody even before they are indicted so as to be sure that they will gain custody. This would be a wrong interpretation of Rule 40*bis* (B)(iii) for two reasons. First, it would then justify detention of a suspect in every case, which would then render the conditions set out in Rule 40*bis* (B)(iii) otiose. Second, because that would justify detaining a suspect when it is merely *helpful* or *useful*, but not strictly "*necessary*" to do so, which would fall foul of the injunction eloquently spelt out by ICTY President in the Decision cited above (paragraph 27). In any event, the Suspect respectfully submits the circumstances of his case presented no fact which made his detention necessary for a reason unrelated to flight or tampering with evidence or victims.

36. Finally, it is submitted that since the Declaration of Mr. Gbekie makes no reference to this third limb of Rule 40 *bis* (B)(iii), and since that Declaration provides the factual basis for the request, this third limb cannot be invoked by the OTP in any event.

B. PROCEDURAL VIOLATIONS

39. In the hearing on Bonthe Island on 4 June 2003, Judge Boutet ordered the Registry to report on possible procedural violations of Rule 40 *bis*. The Defence repeats its submissions made at that hearing in terms of violations of due process and reserves the right to comment further upon once the Registry's reports are made available.

V. <u>THE DISPROPORTIONATELY SEVERE IMPACT OF DETENTION</u>

37. Even if there were a minor risk of one of the eventualities spelt out in Rule 40*bis* (B)(iii) occurring, as a matter of international human rights law that risk would have to be balanced against interference with the suspect's enjoyment of his rights, not only his right

to be free from detention but his right to a family life and the rights of those family members, in accordance with the principal of proportionality. An ICTY Trial Chamber defined that principle in its 13 December 2001 decision granting provisional release in *Hadžihasanović et al.*:

> "*A measure in public international law is proportional only when (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, it must be applied*".[10]

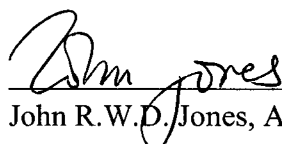
38. The act of detaining the Suspect before an indictment has been issued has left his wives, children and extended family without a provider, in hunger and at risk of losing their home. This disproportionate harm to the rights not only of the Suspect but of many others cannot be justified on the facts. In addition, the Defence refers to the conditions that exist at the Court's current detention facility on Bonthe Island which are relevant to the proportionality of the request for detention in relation to any perceived risk(s) and the balance of inconvenience.

VI. CONCLUSION

40. Whilst reserving the right to request alternate relief, the Suspect requests the Trial Chamber to vacate the order of Judge Boutet dated 28 May 2003 and to direct his release.

Dated this 11th day of June, 2003.

DEFENCE OFFICE



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[10] At paragraph 8.