192) SCSL-2004-14-T (9512-9519) 9512

SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

Before: Judge Emmanuel Ayoola, Presiding
Judge A. Raja N. Fernando
Judge George Gelaga King
Judge Geoffrey Robertson QC
Judge Renate Winter

Registrar: Robin Vincent

Date: 10 September 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

DEFENCE STATEMENT CONCERNING JURISDICTION OF THE APPEALS CHAMBER TO HEAR THE PROSECUTION'S "APPLICATION" FOR LEAVE TO APPEAL AGAINST THE DECISION ON REQUEST FOR LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:
Luc Côté
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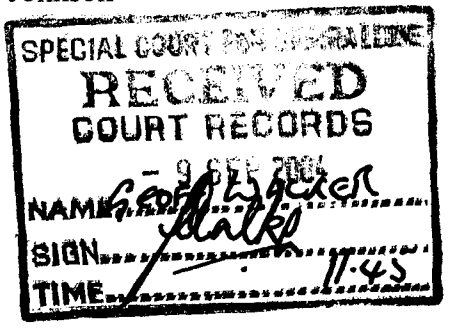

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Introduction

1. The Defence for Hinga Norman, Moinina Fofana and Allieu Kondewa file this statement in reply to the "Prosecution's Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal."[1] This appeal was dated 30 August 2004 and was purportedly made in reliance on jurisprudence from the ICTY, as the Rules of Evidence and Procedure for the Special Court of Sierra Leone ("**the Rules**") do not allow for such an appeal.

2. On 9 February 2004, the Prosecution filed a request before the Trial Chamber to amend the Indictment in the case against Samuel Hinga Norman, Monina Fofana, and Allieu Kondewa.[2] The Prosecution sought to add new charges to the indictment, to add new locations to the indictment, and to extend the time frame of the indictment by two years and four months.

Background

3. In a decision dated 20 May 2004, the Trial Chamber refused the Prosecution's request.[3] The majority of the Trial Chamber concluded that granting the Prosecution's motion would result in an "abuse of process that will certainly have the effect of bringing the administration of justice into disrepute."[4]

4. On 4 June 2004, the Prosecution applied to the Trial Chamber for leave to file an interlocutory appeal against the Trial Chamber's decision to refuse the application to amend the indictment.[5] This motion for leave was filed pursuant to Rule 73(B) of the Rule of Procedure and Evidence.

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[1] "Prosecution's Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal," 30 August 2004, Registry Pages ("**RP**") 9116-9140.
[2] "Request for Leave to Amend the Indictment the Indictment Against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa," filed by the Prosecution on 9 February 2004, RP 102-108.
[3] *Majority Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa*, 20 May 2004, RP 7001-7040.
[4] *Id* para 86.
[5] "Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, 4 June 2004, RP 7234-7250.

5. In a decision dated 2 August 2004, the Trial Chamber rejected the Prosecution's request to file an interlocutory appeal.[6] The majority of the Trial Chamber found that the Prosecution had not satisfied the requisite test governing applications for the grant of leave to file an interlocutory appeal.

6. On 30 August 2004, the Prosecution submitted the "application" that has prompted this statement.[7]

The Prosecution's Argument

7. The Prosecution's argument consists of two parts. First, the Prosecution contends that the Appeals Chamber has jurisdiction to hear this appeal. Second, the Prosecution argues that the Appeals Chamber should exercise this jurisdiction. The Defence submits that only the jurisdictional issue should be considered at this stage and only once the jurisdictional issue has been resolved should an examination of the substantive merits occur.

8. The Prosecution admits that the Rules do not allow for an appeal of the Trial Chamber's decision. The Prosecution cite four ICTY decisions in support of the argument that such an appeal should be allowed.[8] However, the rules that apply at the ICTY are differently worded from the relevant provisions of the Rules. The Prosecution asserts that these cases are evidence of an unwritten rule which supersedes the written rules of this court. This unwritten rule, according to the Prosecution, grants the Appeals Chamber jurisdiction to hear any appeal.

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[6] *Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa*, 2 August 2004, RP 8862-8867.

[7] See footnote 1 above.

[8] *Prosecutor v. Tadic, Appeal Judgment on Allegations of Contempt by Prior Council* Case No. IT-94-1-A-AR7.7, Appeals Chamber 27 February 2001; *Prosecutor v. Brdanin and Talic, Decision on Interlocutory Appeal* Case No. IT-99-36-AR73.9 Appeals Chamber 11 December 2002; *Prosecutor v. Milosevic, Decision on the Interlocutory Appeal by the* Amici Curiae *Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case* Case No. IT-02-54-AR73.6 Appeals Chamber, 20 January 2004, paras. 4-5; *Prosecutor v. Delalic et. al (Celebici Case) Celebici Judgement on Sentence Appeal*, Case No IT-96-21-*Abis*, Appeals Chamber, 8 April 2003.

Subsequently, the Prosecution argues that the Appeals Chamber has jurisdiction over this appeal, despite the fact that such jurisdiction is not granted by the Rules.

Argument

9. The Defence submits that the Appeals Chamber does not have jurisdiction over this appeal. The Prosecution admits that the Rules do not allow for such an appeal. This in itself should be sufficient cause to dispose of the appeal. If the Rules of the court can be altered mid-trial in order to benefit a specific party, the Rules themselves risk losing meaning, and rights guaranteed to the accused risk being seriously jeopardized. As a previous ICTY Appeals Chamber put it:

> The rule of law, which lies at the heart of society, is necessary to ensure peace and good order, and that rule is directly dependent upon the ability of courts to enforce their process and to maintain their dignity and respect.[9]

10. Moreover, no part of Rule 73(B)'s history, nor of Rule 73(B) itself, nor of other language used in the Rules, indicates that the Appeals Chamber has the jurisdiction to review the Trial Chamber's decision on granting leave to file an interlocutory appeal.

11. Further, if the Appeals Chamber allows the Prosecution's "Application", it is submitted that they will effectively be amending the Rules *ultra vires* as it would be other than in accordance with Rule 6 of the Rules which require unanimous adoption by all judges of any such amendment.

12. There is a long history of international tribunal plenary committees considering whether the Trial Chamber or the Appeals Chamber should have jurisdiction to grant leave to file an interlocutory appeal. Rule 72 of the ICTR, in a previous

[9] *Prosecutor v. Tadic, Judgment on Allegations of Contempt against Prior Council Milan Vujin, IT-94-1-A-R77*, 31 January 2000.

form, gave power to the Appeals Chamber to grant such an appeal. However, on 8 May 2002 this rule was changed, and this power was transferred to the Trial Chamber.[10] Additionally, as the Trial Chamber noted in an earlier decision, the Special Court's plenary committee has already amended this specific rule with regards to this specific issue.[11] Rule 73(B) previously allowed for no interlocutory appeals. However, the plenary committee decided that the rule should include a limited right to appeal, and the committee granted the Trial Chamber, and the Trial Chamber alone, jurisdiction to rule on whether such an appeal was warranted.

13. The language of Rule 73(B) also indicates that the Trial Chamber alone has jurisdiction to grant leave to file an interlocutory appeal. The plenary committee, when it decided that interlocutory appeals would be allowed, couched this right in very restrictive language. Rule 73(B) states that in exceptional circumstances and to avoid irreparable prejudice to a party, "the Trial Chamber *may* give leave to appeal" [emphasis added]. Thus, even if both prongs of the test are met, the Trial Chamber still need not grant leave to appeal. It is only if these two prongs are met that the Trial Chamber *shall even consider* granting leave to appeal.

14. It is submitted that if the committee had intended this right to be more expansive other language would have been used. For example, Rule 73(E) states that pre-trial motions concerning serious jurisdictional issues "shall be referred to a bench of at least three Appeals Chamber Judges." The language of Rule 73(B) and Rule 73(E) demonstrate that the members of the plenary committee, of which the Prosecution is a member, considered granting the Appeals Chamber limited jurisdiction over some issues and full jurisdiction over other issues. The plenary committee used very specific language in re-writing Rule 73(B) – language that

[10] Rodney Dixon. *Archibold International Criminal Courts Practice, Procedure, and Evidence* (2003), p. 534.
[11] *Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa*, 2 August 2004, RP 8862-8867, para 23.

clearly states that the Trial Chamber alone has jurisdiction to grant leave to file an interlocutory appeal.

15. The Defence further notes that Rule 73 was last altered by the Special Court's plenary committee on 29 May 2004. If the Prosecution had any objections to the rule, it could have used the appropriate forum to make such objections heard. Their failure to raise it at the appropriate time leads them to invite the Appeals Chamber to bypass the jurisdiction of the plenary session in breach of the Rules, as referred to above.

16. Further, the cases that the Prosecution cite do not support the conclusion that the Appeals Chamber should hear this appeal. Each case that the Prosecution cite was governed by ICTY rules that vary significantly from Rule 73 of the Rules. Rule 73 was amended in order to avoid the ambiguous situations presented by the cases that the Prosecution cites. The Defence submits that the Prosecution citing cases governed by a previous version of the rule in order to argue that the current rule is self-evidently flawed.

17. However, even if the Appeals Chamber should find these cases relevant, none of the cases suggest that the Appeals Chamber has jurisdiction over this specific appeal. First, it should be noted that in the *Brdanin* case the Trial Chamber granted leave to appeal, which significantly differs from the instant "application".[12] Additionally, the *Milosevic* decision, at the very most, indicates that the Appeals Chamber has the power to rule on issues that the framers of the Rules did not consider or envision.[13] However, this principle has already been incorporated into the Rule 73 of the Special Court, which allows for interlocutory appeals to be heard in exceptional circumstances and when irreparable prejudice to a party may occur. Thus, if the Trial Chamber is faced with an issue that the framers did not consider or envision, and this issue could cause irreparable

[12] *Prosecutor v. Brdanin and Talic, Decision to Grant Certification to Appeal the Trial Chamber's Decision on Motion to Set Aside Confidential Subpoena to give Evidence*, Trial Chamber, 19 June 2002.
[13] See footnote 8 above.

prejudice to party, the chamber has the power to refer the issue to the Appeals Chamber. But as the history of Rule 73(B) demonstrates, the plenary committed has already considered the issue at the hand. Further the application to amend the indictment is a standard application to be anticipated in any trial and thus the very issue before the Appeal Chamber is likely to have been within the consideration of the plenary meeting when the Rules were formulated.

18. Finally, the *Tadic* and *Celebici* decisions indicate, at most, that a chamber of last resort has the power to review its own previous decision given that there exists no other chamber to which a party can appeal.[14] Thus, with regards to this appeal, the *Tadic* and *Celebici* decisions suggest that the Trial Chamber may review its own decision if necessary, as the Trial Chamber is the chamber of last resort with regards to granting leave for interlocutory appeals.

19. None of the four cases indicate that the Appeals Chamber has jurisdiction to hear this appeal. As previously stated, no section of Rule 73(B) or of Rule 73(B)'s history or of the language of the Rules, indicate that the Appeals Chamber has jurisdiction to hear this appeal. Consequently, the Defence submits there is no merit in the Prosecution's argument to the contrary.

Conclusion

20. For the above reasons, the Defence submits the Appeals Chamber has no jurisdiction to consider the Prosecution's "application".

21. However, in the event that the Appeals Chamber finds that it does have jurisdiction to hear such an appeal, the Defence requests that the Appeals Chamber set a timetable for the Defence to respond on the substantive merits of the application.

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[14] See footnote 8 above.

22. Further the Defence reserve the right to apply to the Trial Chamber to have all witnesses who have already testified to date in the CDF trial to be recalled in the event of the application being granted so as to ensure that all matters on which the accused are indicted are fully examined.

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