319.

SCSL-04-14-T
(11429 - 11445).

11429

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding
Justice Raja Fernando
Justice George Gelaga King
Justice Renate Winter
Justice Geoffrey Robertson

Registrar: Robin Vincent

Date: 17 January 2005

PROSECUTOR Against Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-T)

DECISION ON PROSECUTION APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 2 AUGUST 2004 REFUSING LEAVE TO FILE AN INTERLOCUTORY APPEAL

Office of the Prosecutor:
Luc Côté
James C Johnson
Christopher Staker
Adwoa Wiafe

Court-Appointed Counsel for Norman
Dr Bu-Buakei Jabbi

Court-Appointed Counsel for Fofana:
Michiel Pestman

Court-Appointed Counsel for Kondewa:
Charles Margai

THE APPEALS CHAMBER of the Special Court for Sierra Leone ("Special Court" or "Court");

SEIZED of the Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, filed on 30 August 2004 ("Appeal");

NOTING the 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 filed jointly on behalf of Norman, Fofana and Kondewa on 10 September 2004;

NOTING the Prosecution Reply to Defence Response to Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 refusing Leave to File an Interlocutory Appeal filed on 15 September 2004;

HEREBY DECIDES:

I. PROCEDURAL HISTORY

1. On 20 May 2004 the Trial Chamber rendered its Decision on Prosecution Request for Leave to Amend the Indictment, refusing the Prosecution request to add counts of sexual violence by a majority with Judge Boutet dissenting ("Trial Chamber Amendment Decision").

2. On 4 June 2004, the Prosecution applied to the Trial Chamber pursuant to Rule 73 (B) of the Rules of Procedure and Evidence ("Rules") for leave to file an interlocutory appeal against the Trial Chamber Amendment Decision ("Prosecution Leave to Appeal Request"). On 2 August 2004, this application was refused by the Trial Chamber in its majority Decision ("Majority Opinion") 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 ("Impugned Decision"). Judge Boutet's Dissenting Opinion was filed on 5 August 2004.

3. On 30 August 2004, the Prosecution filed an appeal against the Impugned Decision. The Prosecution filing consists of both an argument on the Court's jurisdiction to entertain the appeal and its submissions on the merits of the appeal. Attached to the appeal are submissions on appeal against the Trial Chamber Amendment Decision.

4. On 10 September 2004 the Defence filed a consolidated 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 and the Prosecution filed a Reply on 15 September 2004.

5. The filing of the Defence Statement overlapped with the Appeals Chamber Order on Time Limits for response and reply of the same date.

II. SUBMISSIONS OF THE PARTIES

1. The Prosecution Appeal

6. The Prosecution requests the Appeals Chamber to:

(1) Find that it has the power to entertain an Appeal against the Impugned Decision, and to exercise this power;

(2) Reverse the Impugned Decision, and hold that the Appeals Chamber will entertain an interlocutory appeal against the Trial Chamber Amendment Decision;

(3) Proceed to deal with the interlocutory appeal against the Trial Chamber Amendment Decision.[1]

The Question of Jurisdiction

7. The Prosecution proceeds on the footing that there is no express provision in the Rules which permits a party to appeal to the Appeals Chamber against a decision of the Trial Chamber under Rule 73(B) refusing leave to file an interlocutory appeal without leave of the Trial Chamber. However the Prosecution submits that it is clear from the jurisprudence of both the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") that the Appeals Chamber has the power to hear appeals in certain circumstances, even when the appeal is not expressly provided for in the Statute or Rules.

8. The Prosecution referred to three cases in which it submits that the ICTY exercised appellate power even when an appeal was not expressly provided for in the Statute or the Rules:

[1] Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, para.23.

- In *Prosecutor v. Tadic,*[2] a defence counsel had been found guilty of contempt of the ICTY by the Appeals Chamber ruling in first instance. The Prosecution submits that although the Rules at that time made no provision for an appeal against such a first decision of the Appeals Chamber, an appeal was in fact entertained by the Appeals Chamber constituted differently.[3]

- In *Prosecutor v. Brdanin and Talic,*[4] the Trial Chamber of the ICTY rejected a motion filed by a witness who sought to have a subpoena set aside on the ground that he enjoyed a testimonial privilege as a journalist. The Appeals Chamber permitted the journalist to appeal against that decision, and ultimately allowed the appeal, notwithstanding the lack of any legislative provision for appeals by witnesses against orders addressed to them.[5]

- In *Prosecutor v. Milosevic*[6], the Appeals Chamber entertained an interlocutory appeal brought by *amici curiae* , although acknowledging that "not being a party to the proceeding, the *amici* are not entitled to use Rules 73 [of the Rules of the ICTY] to bring an interlocutory appeal".[7]

9. The Prosecution further submits that the Appeals Chamber of the ICTY[8] expressly held that the Appeals Chamber has an inherent power, which derives from its judicial function, to reconsider any of its decisions and even final judgements which can be exercised where it is persuaded that the judgement or the decision considered has led to an injustice and that such jurisdiction will be exercised to ensure that its exercise of the jurisdiction which is expressly given to it by the Statute is not prostrated and that its basic judicial functions are safeguarded.

---

[2] *Prosecutor v. Tadic,* Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt by Prior Counsel, 27 February 2001.

[3] Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, para.6.

[4] *Prosecutor v. Brdanin and Talic,* Case No. IT-99-36-AR, Appeals Chamber, Decision on Interlocutory Appeal, 11 December 2002.

[5] Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, para.6.

[6] *Prosecutor v. Milosevic,* Case No. IT-02-54-AR, Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004.

[7] Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, para.6.

[8] *Prosecutor v. Delalic et al.* Case No. IT-96-21*bis*, Appeals Chamber, Judgment on Sentence Appeal, 8 April 2003.

10. While not suggesting that the Appeals Chamber has a general power to hear any appeal from any decision of a Trial Chamber in any circumstances, the Prosecution submits that the jurisprudence of the ICTY and ICTR reflects a general principle that any decision that is erroneous and that has led to an injustice, and which is not capable of being remedied by other means, must be capable of being corrected by the Appeals Chamber.[9]

11. The Prosecution argues that interlocutory decisions of a Trial Chamber are capable of effective remedy in a post-judgment appeal or where an interlocutory appeal is necessary to avoid irreparable prejudice, in which case the Trial Chamber can grant leave to appeal pursuant to rule 73(B). However, the refusal of the Trial Chamber to grant leave to appeal is unlikely to be capable of effective remedy in a post-judgment appeal.

Submissions on reasons why the Court should exercise its inherent power

12. The Prosecution submits that the Appeals Chamber should exercise its inherent power in relation to the Impugned Decision by reason of specified errors in the decision of the Trial Chamber and for the following reasons:

a) The Trial Chamber in its Impugned Decision erred in the interpretation and application of Article 73 (B) in determining whether to grant leave to bring an interlocutory appeal.

b) The effects of the alleged errors in the Impugned Decision cannot be cured by a post-judgment appeal. The Prosecution amendment request seeks to have additional charges against the Accused tried as part of the present trial proceedings. If the Appeals Chamber were to decide in a post-judgment appeal that the Trial Chamber should have granted leave to appeal, and that the Prosecution should have been given leave to amend the indictment, it would be too late at that stage to include additional charges since the present trial proceedings would be completed.

c) The Prosecution has no other means of dealing with the adverse effects of the Impugned Decision. If the Prosecution is denied the possibility of amending the Indictment to deal with additional charges, it is unlikely that the Accused will be tried at all in respect of additional charges and therefore the judgment in the present case will not reflect the full alleged criminal culpability of the Accused.

---

[9] Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, para.8.

d) The issues at stake are of particular importance.

e) If the Impugned Decision contains the errors that the Prosecution alleges, it thus has caused injustice, since the Prosecution would be denied the possibility of bringing important charges against the Accused, despite the existence of evidence justifying these charges.[10]

2. The Defence Statement

13. The Defence having noted that the Prosecution's argument consists of two parts, namely: first that the Appeals Chamber has jurisdiction to hear this appeal and second, that the Appeals Chamber should exercise this jurisdiction, submits that only the jurisdictional issue has to be considered at this stage, since it is only if the jurisdictional issue has been resolved in favour of the Prosecution that the merits could be examined.[11] Proceeding on that footing, the Defence Statement only contained submissions relating to the first part, with a request that an opportunity be given it to respond further on the second question, if necessary.

14. The Defence submits that the Appeals Chamber does not have jurisdiction over this appeal since, as admitted by the Prosecution, the Rules do not allow for such an appeal. The Defence argues that if the Rules of the Court can be altered mid-trial in order to benefit a specific party, the Rules themselves are at risk of losing meaning and the rights of the accused risk being seriously jeopardised.[12]

15. The Defence further argued:

- That no part of Rule 73 (B)'s history, or of Rule 73 (B) itself, or 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[13] and that if we allow the Prosecution's "Application", it will amount to an amendment of the Rules *ultra vires*,

[10] Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, para.10.
[11] 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, para.7.
[12] Ibid, para.9.
[13] Ibid, para.10.

as there would have been no compliance with Rule 6 of the Rules which requires unanimous adoption by all judges for such an amendment.[14]

- That a Plenary of the Special Court had already amended this specific rule with regard to the specific issue. Rule 73(B) previously did not allow for interlocutory appeals. The Plenary decided that the Rule should include a limited right to appeal and, using a very restrictive language, granted the Trial Chamber, and the Trial Chamber alone, jurisdiction to rule on whether such an appeal was warranted.[15]

- That Rule 73 was last amended recently and if the Prosecution had any objection to the Rule it could have used the appropriate forum to make such objection heard.[16]

16. In regard to the cases cited by the Prosecution, the Defence submits that they do not support the conclusion that the Appeals Chamber should hear this appeal since each case that the Prosecution cites was governed by ICTY rules that vary significantly from Rule 73.[17] In addition, even if the Appeals Chamber should find these cases relevant, none of the cases suggest that the Appeals Chamber has jurisdiction over this appeal.[18]

17. The Defence makes further observations that it would reserve the right to apply to the Trial Chamber to have all witnesses who have already testified in the CDF trial recalled if the application is granted and that as it indicated during the Status Conference before the Trial Chamber of 7 September 2004, if such an appeal were allowed it "may well apply to the Trial Chamber to recommence the entire trial, re-questioning all the witnesses that have appeared, because facing a different indictment means that [the accused] may well have additional questions to ask."[19]

3. The Prosecution Reply

18. The Prosecution agrees with the Defence that the Appeals Chamber must decide whether it has jurisdiction to hear the Prosecution Appeal before it can deal with the merits of the

---

[14] 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, para. 11.
[15] Ibid, paras12 and 13.
[16] Ibid, para.15.
[17] Ibid, para.16.
[18] Ibid, paras17-19.
[19] Pages 38-39 of Transcript of CDF status conference, 7 September 2004, by Quincy Whitaker (counsel for Norman).

appeal against the Impugned Decision. However the Prosecution considers that there is no reason why the Appeals Chamber should address these issues in two separate phases of these proceedings. It should rather determine whether the appeal falls within its jurisdiction and if so determine that appeal as happened in the *Tadic Jurisdiction Appeal*.[20] The Prosecution concedes that if the appeal against the Trial Chamber's decision of 2 August 2004 is allowed, it will be necessary to have a separate phase in which the appeal against the Trial Chamber's decision of 20 May 2004 is heard. In order to avoid delays, the Prosecution's arguments on the appeal against the Trial Chamber's decision of 20 May 2004 have already been set out in an annex to the Prosecution Appeal.[21]

19. The Prosecution submits that the Defence position relating to the absence of an applicable Rule is directly contradicted by the decisions of the Appeals Chamber of the ICTY. The Prosecution recalls that the existence of an inherent jurisdiction is well established in the case law of the ICTY and has been recognised by the Appeals Chamber of the Special Court in *Prosecutor v. Norman, Kallon and Gbao,* Decision on Application for a Stay of Proceedings and Denial of Right to Appeal of 4 November 2003. Therefore, it has to be considered established beyond doubt that an international criminal court has a certain inherent jurisdiction and inherent powers by virtue of its judicial character.[22]

20. The Prosecution reiterates its earlier submission that an Appeals Chamber can, in certain circumstances, in the exercise of its inherent jurisdiction, hear appeals that are not expressly provided for in the Statute or Rules.[23] According to the Prosecution, the Defence failed to address the question whether the present case is one of those particular circumstances but simply seeks to deny altogether the existence of the Court's inherent powers.[24] The Prosecution argues that it would not be inconsistent with Rule 73 (B) for the Appeals Chamber to hear the Prosecution Appeal as the exercise of its inherent jurisdiction is in addition to and complements the express provisions in the Rules.[25] The Prosecution, while not arguing that the Appeals Chamber has the general power to hear any appeal from any decision of a Trial Chamber, submits that there is a general principle that any decision that is erroneous and has led to injustice, and which is not capable of being remedied by any

[20] Prosecution Reply to Defence Response to Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, para.5.
[21] Ibid, para.6.
[22] Ibid, paras 11 -12.
[23] Ibid, paras 13-14.
[24] Ibid, paras 14-15.
[25] Ibid, para. 16.

other means, should be subject to correction by the Appeals Chamber pursuant to its inherent power to intervene.

21. With regard to the argument whether the provisions in the Rules relating to interlocutory appeals were carefully considered by the Plenary, the Prosecution's reply is that in the present case the question that arises is what occurs if the Trial Chamber errs in its interpretation and application of the requirements of Rule 73 (B). No provision is made in the Rules to deal with this situation, and there is nothing to suggest that the Plenary ever expressly considered it.[26]

III. APPLICABLE LAW

22. Rule 73 deals with appeals from interlocutory decisions of the Trial Chamber. It provides:

> (A) Subject to Rule 72, either party may move before the Designated Judge or a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Designated Judge or the Trial Chamber, or a Judge designated by the Trial Chamber from among its members, shall rule on such motions based solely on the written submissions of the parties, unless it is decided to hear the parties in open Court.
>
> **(B) Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.**
>
> (C) Whenever the Trial Chamber and the Appeals Chamber of the Court are seized of the same Motion raising the same or similar issue or issues, the Trial Chamber shall stay proceedings on the said Motion before it until a final determination of the said Motion by the Appeals Chamber.

[26] Ibid, para. 21.

IV. ANALYSIS

23. The threshold question to be decided is not whether the Appeals Chamber can exercise jurisdiction to entertain an appeal from a decision of the Trial Chamber rendered pursuant to Rule 73(A) of the Rules, but whether in certain cases it can exercise inherent power to dispense with the need to comply with the provisions of Rule 73(B) in order to admit an appeal from an interlocutory decision of the Trial Chamber refusing leave to appeal to the Appeals Chamber.

24. That question raises an immediate procedural question whether in the situation that has arisen the appellant without first obtaining the leave of the Trial Chamber pursuant to Rule 73(B) can initiate these appeal proceedings, by directly approaching the Appeals Chamber. There is no reason to treat a motion for leave to appeal an interlocutory decision of the Trial Chamber as anything other than a motion under Rule 73(A) of the Rules. But for the need to deal with the issue raised in these proceedings once and for all in order to clear any doubt as to the limits of the Court's inherent jurisdiction, it would have been in order to refuse to entertain the proceedings on the ground that there is no procedural foundation for approaching the Appeals Chamber in matters such as this, touching on a decision of the Trial Chamber rendered in a motion under Rule 73(A), without prior leave of the Trial Chamber. While it is undisputed that the Court has an inherent jurisdiction which it exercises as and when such is appropriate, it is an assumption of the extent of the inherent powers of the Court that goes too far, to assume that the Court also has an inherent jurisdiction to fashion a procedure for originating proceedings before it outside the express provisions of the Rules.

25. The Prosecution, in invoking the inherent jurisdiction of the Appeals Chamber, proceeded on the footing that there is no express provision in the Rules which permits an appeal to the Appeals Chamber against a decision of the Trial Chamber under Rule 73(B) refusing leave to file an interlocutory appeal. If a decision refusing leave to appeal is regarded as falling within Rule 73(A) and (B) of the Rules, it cannot reasonably be argued that an appeal by leave of the Trial Chamber has not been provided for by the Rules. An appeal from the decision of the Trial Chamber refusing leave to appeal could itself, in such a case, have been brought pursuant to leave sought and granted by the Trial Chamber. The prospect of an

endless series of applications for leave to appeal from a decision of the Trial Chamber that would make it absurd to contemplate an appeal by leave of the Trial Chamber from such refusal, does lend some strength to the view that the intention of the Rules, though not expressly stated, is to exclude appeals from refusal of the Trial Chamber to grant leave to appeal.

26. The original Rule 73(B) did not provide for an interlocutory appeal at all. It was an addition of a second limb by an amendment adopted at the August 2003 Plenary that made provision for appeal by leave.

27. The equivalent ICTY/R rule (Rule 73(B)) states:

> Decisions on all motions are without interlocutory appeal save with certificate by the Trial Chamber, which may grant such certificate if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

28. The old ICTY rule provided that decisions were without interlocutory appeal save with the leave of a bench of three judges of the Appeals Chamber which could grant leave if one of the following tests were satisfied.

> (1) if the impugned decision would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial including post-judgment appeal.
>
> (2) if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally.

29. The underlying rationale for permitting such appeals is that certain matters cannot be cured or resolved by final appeal against judgment. However, most interlocutory decisions of a Trial Chamber will be capable of effective remedy in a final appeal where the parties would not be forbidden to challenge the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules.

30. A comparison of the provisions of the ICTY/R Rules referred to above with our Rules does not carry a consideration of the issues in this matter insofar as the question here is not whether or not there are provisions for appeal in interlocutory decisions in our Rules, but

whether refusal of the Trial Chamber to grant leave to appeal can be made subject of appeal to the Appeals Chamber by invoking the inherent jurisdiction of the Chamber.

Inherent Jurisdiction

31. The Prosecution argues that notwithstanding the absence of express grant of jurisdiction to the Appeals Chamber to grant leave to appeal or to entertain appeals from a refusal by the Trial Chamber of leave to appeal, the Appeals Chamber has an inherent jurisdiction to grant leave to appeal and to entertain this appeal. It is undoubted that courts have inherent powers to do what is necessary to fulfill their mandate, to carry out their judicial functions and to do that which is necessary to the fair administration of justice. A court also has the inherent power to control its proceedings to ensure that justice is done. On the other hand, an allegation of miscarriage of justice or the fact of being dissatisfied with a decision of the Trial Chamber does not, on its own, confer the right to appeal.

32. The Appeals Chamber may have recourse to its inherent jurisdiction, in respect of proceedings of which it is properly seized, when the Rules are silent and such recourse is necessary in order to do justice. The inherent jurisdiction cannot be invoked to circumvent an express Rule. When in the course of proceedings which the Appeals Chamber is already properly seised of, a situation arises which it has to deal with in order to further its jurisdiction and fulfill the purpose for which it is already vested with powers, the Appeals Chamber may have recourse to its inherent jurisdiction to exercise powers which will help to further and fulfill that purpose as justice demands, notwithstanding that the rules do not expressly confer such powers. Inherent powers of the court are powers which are inherent in a court by virtue of its nature. They are powers necessary for the administration of justice. They are not powers derived from the Rules or from statute but are powers which must be exercised in the interest of justice by reason of absence of express statutory provisions to cover a particular situation. It is an attribute of judicial power.

Jurisprudence of the ICTY

33. The Prosecution refers to a number of ICTY and ICTR decisions where the Appeals Chamber has found that it has the power to hear appeals in certain circumstances even where no appeal is provided for in the Statute or the Rules of those Tribunals. The three

cases referred to by the Prosecution have earlier been alluded to. These cases do not establish a general principle that an appellate court can exercise an inherent power to confer on itself jurisdiction to entertain an appeal or that it can in exercise of such power side-step the Rules and by itself grant leave to appeal notwithstanding that the Rules do not vest such power in it but in another tribunal. All of these cases can easily be distinguished from the current case.

34. The Prosecution also refers to the ICTY Appeals Chamber's power to **reconsider** its own decisions. The ICTY Judgment on Sentence Appeal in the *Delic* case was referred to as being relevant. The accused in that case argued that according to the 'law of the case' doctrine, a party is entitled to litigate issues which have already been decided when the strict application of the res judicata principle would cause 'manifest injustice' to a party. The Appeals Chamber stated:

> The Appeals Chamber has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice. The Appeals Chamber has previously held that a Chamber may reconsider a decision, and not only when there has been a change of circumstances, where the Chamber has been persuaded that its previous decision was erroneous and has caused prejudice. Whether or not a Chamber does reconsider its decision is itself a discretionary decision.[27]

35. A power to reconsider would arise in the event of a clear error of reasoning. Judge Shahabuddeen added in a separate opinion that the 'clear error' should be "something which the court manifestly or obviously overlooked in its reasoning and which is material to the achievement of substantial justice."[28] However, the Appeals Chamber was clearly referring to the power of a Chamber to reconsider its own decision and not to review the decision of another Chamber.

36. In the *Prosecutor v. Tadic* (Appeal Judgement on Allegation of Contempt against Prior Counsel, Milan Vujin) the appellant – defence counsel - was found guilty of contempt by the Appeals Chamber at first instance pursuant to Rule 77 of the ICTY Rules of Procedure and Evidence and fined. He was treated by the Appeals Chamber as an accused whose right of

---

[27] *Prosecutor v Delic et al.*, Case No. IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, para. 48.

[28] *Prosecutor v Delic et al.*, Case No. IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, Separate Opinion of Judge Shahabuddeen, para. 15.

appeal from conviction is protected by Article 14(5) of the International Covenant on Civil and Political Rights ("the Convention"). The Appeals Chamber having noted that Rule 77 of the ICTY Rules did not expressly provide for the right to appeal a contempt conviction of the Appeals Chamber, reasoned that the Convention provided that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"[29] and that article 14 of the Convention reflects an imperative norm of international law to which the Tribunal must adhere. Following from this reasoning, it held that that the procedure established under Rule 77 of the Rules being of a penal nature pursuant to which a person convicted under the Rule faces a potential custodial sentence of up to 7 years imprisonment, a person found guilty of contempt by the Appeals Chamber must have the right to appeal the conviction. It is evident that the Appeals Chamber had recourse to an "imperative norm of international law" rather than inherent jurisdiction to entertain the appeal, because "it is the duty of the International Tribunal to guarantee and protect the rights of those who appear as accused before it."[30]

37. In *Prosecutor v. Brdjanin and Talic*[31] the appellant was a person who had unsuccessfully applied to the Trial Chamber to have a subpoena issued against him set aside. The Trial Chamber granted him certification for leave to appeal. It was pursuant to that leave that an appeal was brought to the Appeals Chamber. The Appellant in that case did not appeal as a witness but as a person affected by the issue of a subpoena, failure to comply with which would have rendered him liable to be held for contempt.

38. In *Prosecutor v. Milosevic* the *amici curiae* were granted leave to appeal. On the appeal coming before the Appeals Chamber, that Chamber said:

> Not being a party to the proceedings, the *amici* are not entitled to use Rule 73 to bring an interlocutory appeal. The fact that the *amici* were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion.[32]

---

[29] *Prosecutor v. Tadic*, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt by Prior Counsel, 27 February 2001, p. 2.
[30] Ibid, p. 3.
[31] *Prosecutor v. Brdanin and Talic*, Case No. IT-99-36-AR, Appeals Chamber, Decision on Interlocutory Appeal, 11 December 2002.
[32] *Prosecutor v. Milosevic*, Case No. IT-02-54-AR, Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 4.

39. However, it seemed clear that the Appeals Chamber admitted the appeal because it found an identity of interest between the accused and the *amici*, a consideration of the appeal would not infringe the interest of the Accused and the Prosecution did not oppose consideration of the appeal which would in the case serve the interests of justice. In the event, the Appeals Chamber considered the appeal and dismissed it on the merits. It is instructive that Judge Shahabuddeen was of the opinion that the dismissal of the appeal "should have rested on the more fundamental fact that the interlocutory appeal ha[d] not been brought by a 'party' within the meaning of Rule 73(A) of the Rules of Evidence and Procedure of the Tribunal."[33]

40. It is clear that there is really nothing in these cases that establish a principle that could be of use in these proceedings. Those cases were not illustrative of inherent power being exercised to initiate appellate proceedings before the Appeals Chamber. It appears to be a misreading of the decisions of the ICTY to submit that the jurisprudence of the ICTY and ICTR reflects **a general principle** that any decision that is erroneous and that has led to injustice, and which is not capable of being remedied by other means, must be capable of being corrected by the Appeals Chamber. What can be discerned as emerging from the jurisprudence of the ICTY is that the Appeals Chamber has an inherent jurisdiction to reconsider **its own decision** to avoid injustice or miscarriage of justice.

The present case

41. In the final analysis this case must be determined by reference to what the Rules permit. Where the Rules make provision for a particular situation it is it is not a proper exercise of inherent jurisdiction for a tribunal to substitute its own view of what the rules should have been for what the Rules are. Such a claim would be an unwarranted usurpation of the rule-making powers of the tribunal, which in our own case is vested in the Plenary of the Court. Besides, the exercise of the inherent power of the court does not extend to an act that will be inconsistent with the express provisions of the Rules. It is a different thing where the court has jurisdiction or duty to grant a remedy but the rules are **silent** as to the procedure.

---

[33] *Prosecutor v. Milosevic*, Case No. IT-02-54-AR, Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, of 20 January 2004, Separate Opinion of Judge Shahabuddeen, para. 21.

42. In this case, the question whether the Appeals Chamber has inherent jurisdiction to grant leave to appeal to itself from an interlocutory decision of the Trial Chamber can, and should, be answered, shortly, in the negative. Rule 73(B) has made express provision for one and only one approach to the Appeals Chamber, namely by way of a successful application for leave made to the Trial Chamber. It would subvert that provision for us to permit applications to this Chamber to be made without leave and it would usurp the exclusive jurisdiction of the Trial Chamber to determine which – if any – of its interlocutory decisions should be reviewed on appeal in the course of the trial. The Appeals Chamber cannot invoke its inherent power in such circumstances.

43. An application made to the Appeals Chamber for leave to appeal an interlocutory decision of the Trial Chamber rendered pursuant to Rule 73(A) is incompetent. An appeal brought to this Chamber without the requisite leave of the Trial Chamber pursuant to Rule 73(B) is also incompetent.

Conclusion

44. For the reasons given, we find that the Appeals Chamber has no jurisdiction to grant leave to the Appellants to appeal from the interlocutory decision of the Trial Chamber and also has no jurisdiction to entertain the appellant's appeal brought without the leave of the Trial Chamber. In the result there is no need to consider the merits of the application for leave or of the proposed appeal. The application is accordingly struck out as being not properly brought before the Appeals Chamber.

Done at Freetown this seventeenth day of January 2005

Justice Ayoola
Presiding

Justice Fernando

Justice King

Justice Winter

Justice Robertson

[Seal of the Special Court for Sierra Leone]