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(2386 – 2390)

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SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

Before: Judge Robertson, Presiding
Judge Ayoola
Judge King
Judge Winter

Registrar: Mr Robin Vincent

Date: 1st day of November 2003

The Prosecutor Against
(PROSECUTION)

Morris Kallon
(RESPONDENT)

The Redress Trust And Lawyers Committee For Human Rights
(APPLICANTS)

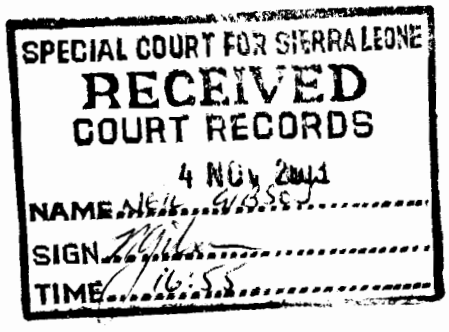
Case No. SCSL-2003-07

DECISION ON APPLICATION BY THE REDRESS TRUST, LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE INTERNATIONAL COMMISSION OF JURISTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND TO PRESENT ORAL SUBMISSIONS

Office of the Prosecutor:
Luc Coté, Chief of Prosecution

Defence Counsel:
Mr. James Oury
Mr. Steven Powles

Applicants:
Richard Hermer



1. The Appeals Chamber of the Special Court of Sierra Leone ("Special Court"), is seized of an Application by the Redress Trust and Lawyers Committee for Human Rights for Leave to File Amicus Curiae Brief and to Present Oral Submissions ("Application") filed on 24 July 2003 in an application by Morris Kallon ("Kallon Application")[1] which has been referred to the Appeals Chamber under Rule 72. The Kallon Application raises an issue as to the validity of an amnesty apparently granted by Article IX of the Lomé Agreement. The present Application, properly described as an application to intervene, is made pursuant to Rule 74, which provides:

> "a) a chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any state, organisation or person to make submissions on any issue specified by the chamber."

2. The Application was referred to the Appeals Chamber by the Presiding Judge of the Trial Chamber on 2 October 2003. Judge King, sitting as the pre-hearing judge of the Appeals Chamber, on 14 October 2003 transmitted the Application to be decided by the Appeals Chamber. By so doing, he placed the Appeals Chamber in a position to provide not only a determination of the Application itself, but some general guidance on the interpretation of Rule 74 and the procedure to be followed in future by potential interveners.

3. The kinds of intervention envisaged by Rule 74 are by no means novel in common law jurisdictions. Appeal Courts, in particular, when confronted with new or complex points of law, have an inherent power to permit or invite submissions from an *amicus* - a "friend of the court". The Latin translation is not always apt, because such submissions are made without any warrant that the Court will be predisposed or indeed disposed to accept them. Counsel invited under Rule 74 by the Court or its presiding judge, usually because of his or her expertise in the legal subject under question, will be expected to present all relevant material and if appropriate to express a view on the law: counsel for the parties should feel no inhibition in examining or challenging that view.

4. More recently, the highest courts in the UK and Australia have been willing to grant leave to interested parties, such as corporations or NGOs, to make submissions on points of law arising in cases before them - a practice that has long been adopted by the US Supreme Court. The intervening parties may have a direct interest, insofar as this decision will be likely to create a precedent affecting them in the future. The intervener's interest may be indirect, in the sense that a State or NGO or campaigning group may wish to have the law clarified or declared or developed in a particular way. An example of a grant of leave to intervene in a similar matter to this is provided by the House of Lords in the Pinochet cases,[2] where Amnesty International was permitted to file submissions and develop them in oral argument, whilst other organizations such as Human Rights Watch (an NGO allied to the Lawyers Committee) were allowed to file written submissions.

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[1] *Prosecutor v Morris Kallon*, Case No. SCSL-2003-07-PT, "Preliminary Motion based on Lack of Jurisdiction / Abuse of Process: Amnesty Provided by Lomé Accord", 16 June 2003.

[2] [1998] 3 WLR 1456; [1999] 2 WLR 827.

NGOs and law professors and even States have been permitted to intervene, usually to address points of law, at the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR").

5. Our Rule 74, adopted without amendment from the equivalent ICTR Rule, does not discriminate between the different interests of parties seeking to intervene: it focuses on the potential assistance they can provide to the Court. The "proper determination" of the case refers, quite simply, to the Court reaching the decision which most accords with the end of justice - i.e. that gets the law right. Sitting as we do in Freetown, albeit with the benefit of the Internet and of capable resident lawyers, we can nevertheless be assisted by outside counsel provided at its own expense by an organization with a legitimate interest in the subject matter of our hearings. The issue is whether it is desirable to receive such assistance, and "desirable" does not mean "essential" (which would be over-restrictive) nor does it have an over-permissive meaning such as "convenient" or "interesting". The discretion will be exercised in favour of an application where there is a real reason to believe that written submissions, or such submissions supplemented by oral argument, will help the Court to reach the right decision on the issue before it.

6. The Rule may, however, be approached differently in the Trial Chamber as distinct from the Appeals Chamber. What is desirable in the latter may be most undesirable in the former where the equality of arms principle may require that the parties engage in an adversarial exercise untrammeled by interventions from third parties, however well-intentioned. The overriding need to get on with the trial, without disruption and fairly both to prosecution and defence, may well make it undesirable to grant leave to any "State or organisation or person" to make submissions on facts, or even on law, in the course of the trial. Any third party which is in possession of material it wishes the Trial Chamber to notice should properly convey it to the Prosecution or the Defence - preferably, to both. It will then be up to these parties in litigation to decide whether or to what extent to deploy it at the trial. At an appellate level, however, different considerations will apply and it may be possible for a more generous view to be taken as to the grant of leave.

7. The applicants are not mere busybodies: they are distinguished international organizations with long experience of dealing with issues relating to torture, international law and war crimes. We do not consider that they seek leave to intervene for any ulterior motive, for example to provide a publicity platform for themselves, or to use the Court's privileges and immunities to put declarations on the record or to promote some hidden agenda. They offer legal submissions on an issue that has difficulties and complications, presented through competent counsel. It may be, as the Prosecution protest, that these submissions will go wider than the issues before the Court, but if so, such inappropriate breadth will be ignored and will not be examined in the course of the short oral hearing they will be allocated. In any event, the Prosecution will have every opportunity to refute or confound their arguments as of course will the defence. There is a real likelihood that these submissions will assist - the Rule requires no more - in the judicial determination of the Kallon Application.

8. This decision accords with two ICTR Trial Chamber decisions which have been cited to us: *Akayesu*,[3] where the Secretary General of the United Nations was granted leave to make submissions on the scope of the immunity of a UN Commander (General Dallaire) that he was prepared to lift in the interests of making the Commander's evidence available to the defence, and *Semanza*, where the Belgian government, over defence objection, was given leave to make submissions as to international law and the interpretation of the Geneva Conventions "but not with respect to the particular circumstances of this or any other case".[4] This last qualification is important: leave to intervene will be granted much more readily if what is offered is legal argument – all facts should normally be proved or presented by the parties themselves.

9. Our attention has been drawn by the Prosecution to a Decision of the Trial Chamber of the Special Court on an application by the Defence Office to submit an amicus brief on this and other motions by Morris Kallon.[5] This application was filed prematurely in the Trial Chamber before both Kallon motions were referred to the Appeals Chamber. It would have been more appropriate, in retrospect, for the decision to have been taken in the Appeals Chamber, since the discretion to permit an amicus can only sensibly reside in the chamber (or the representative judge thereof) which is to hear the substantive motion in question. The actual decision to deny leave turned, quite unexceptionally, upon the fact that all interested defendants were at that time represented by counsel, whom the Defence Office could instruct to present its arguments without the need for any separate appearance. But we should caution against reading paragraph 9 of the Decision as the Prosecution reads it, i.e. as "setting forth the criteria which should govern" the grant of leave. The Trial Chamber was merely summarising three grounds (by no means exhaustive) upon which ICTR decisions on the subject had turned. The first was that the intervener "has strong interest in or views on the subject matter before the Court" although this cannot determine whether it is desirable that such views should be expressed. The second ground was "that it is desirable to enlighten the Tribunal on the events that took place" but it will seldom be appropriate, as we have explained, for third parties to "enlighten the Tribunal" by giving evidence of fact. The third ground - which counsels against giving leave for submissions on facts as distinct from legal issues - derives from *Semanza* as described in paragraph 8 above.

10. As with all our rules, Rule 74 should not be construed narrowly or technically. The issue on which leave is sought may be specified by the Chamber directly, or simply be an issue specified in the substantive motion. The potential intervener is widely defined as "any State, organisation or person" and notwithstanding the doubts of the Trial Chamber on this point, we think that definition is broad enough to include, for example, the Defence Office. That Office has a duty to provide assistance to indigent defendants, and

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[3] *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, "Order Granting Leave for Amicus Curiae to Appear", 12 February 1998.

[4] *Prosecutor v Laurent Semanza*, Case No. ICTR-97-20-T, "Decision on the Kingdom of Belgium's Application to File an Amicus Curiae Brief and on the Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response by the Defence", 9 February 2001, para. 10.

[5] *Prosecutor v Morris Kallon*, "Decision on the Application for Leave to Submit Amicus Curiae Briefs", 17 July 2003.

there may be occasions when it will be appropriate for it to seek to intervene to protect the interests of those indictees who are as yet unrepresented but who have a real interest in the outcome of another defendant's application. Whether it would be given leave, however, will depend, as with all other such applications, on the Court's assessment of the value of the assistance it is likely to render; an assessment easier for us to make the more the Court is told about the proposed submission.

11. It is necessary to avoid the procedural confusion that can occur if applications to intervene in the Appeals Chamber are filed in and determined by the Trial Chamber (or *vice versa*). Generally, such applications should be made on or after referral to the Appeals Chamber, in writing to the Legal Officer of this Chamber. He or she will consult with the pre-hearing judge and with the President and normally it should be possible for leave to be granted (for written submissions and in some cases for oral argument) in good time for those submissions to be filed at least a week before the hearing. It would assist if the application is accompanied by a description of the submissions which the potential intervener wishes to make. In the event that leave is granted for oral argument, the time allocated will normally be no more than one hour. It must clearly be understood that although the Court's Registry and the Chamber's legal officers will provide working facilities and suchlike assistance to intervening lawyers, those "States, organisations and persons" who are granted leave to intervene must do so at their own expense in terms of travel, accommodation and counsel's fees.

12. The Appeals Chamber finds that there is a real reason to believe that written submissions, supplemented by oral argument by the applicants, will assist it in reaching the right decision on the issues before it in the Kallon Application. It is therefore desirable for the proper determination of the Kallon Application to receive such assistance and the Appeals Chamber hereby grants leave to the applicants to intervene in writing and orally.

Done at Freetown

1st day of November 2003

Justice Robertson, Presiding Judge

Seal of the Special Court