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

THE APPEALS CHAMBER

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

Registrar: Robin Vincent

Date: 4th day of November, 2003

The Prosecutor Against: Sam Hinga Norman
(Case No. SCSL-2003-08-PT)

and

The Prosecutor Against: Morris Kallon
(Case No. SCSL-2003-07-PT)

and

The Prosecutor Against: Augustine Gbao
(Case No. SCSL-2003-09-PT)

DECISION ON THE APPLICATIONS FOR A STAY OF PROCEEDINGS AND DENIAL OF RIGHT TO APPEAL

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
James C. Johnson, Senior Trial Counsel
Sharan Parmar, Assistant Trial Counsel

Defence Office:
Mr. Sylvain Roy, Acting Chief of Defence Office
Claire Carlton-Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatu Kah-Jallow, Defence Associate

Defence Counsel:
Quincy Whitaker
James Oury
Steven Powles
Girish Thanki

THE SPECIAL COURT FOR SIERRA LEONE ("the Court")

NOTING THE SUBMISSIONS OF THE PARTIES
DECIDES AS FOLLOWS:

1. There are nine indicted defendants presently in the custody of the Special Court awaiting a trial which international criminal law (Article 14(3)(c) of the International Covenant on Civil and Political Rights) guarantees must be held "without undue delay". Most have already been detained for eight months, yet no trial date has been fixed, although we understand that the Prosecution has motioned for the joinder of some accused - an issue that should be speedily determined so that trial dates can then be fixed. Several of them have quite properly raised legal issues which in logic and in common sense should be settled, one way or the other, prior to the commencement of the trial, if indeed it is permitted to commence at all: issues such as the lawfulness of the establishment of the Court, and the validity of the amnesty apparently promised to them by the Lomé Agreement. The Trial Chamber has referred these to the Appeals Chamber as the highest chamber in the Special Court system, for expeditious determination, and we have set aside this week for oral hearings to determine the very full submissions made by the parties and by interveners and *amici*. The application we now consider is to stay all these preliminary applications, and the hearings thereon, until the Trial Chamber can rule on the lawfulness of the procedure under which they were referred to the Appeals Chamber - and until, at some distant point thereafter, the Appeals Chamber can consider the inevitable appeal from that Trial Chamber decision.
2. The grant of a stay would obviously entail very considerable expense, inconvenience and delay. However, since it is urged on the basis of an alleged international law right – of accused persons (and, logically, of prosecutors) to enjoy a two-tier appellate determination of pre-trial preliminary motions, we have given careful consideration to these applications. Initially, it was thought that the matter could be dealt with on the extensive written submissions, but at the request of the defence we scheduled oral arguments in which the argument for such a right was fully and forcefully expounded by Ms Whitaker (for Chief Hinga Norman) and by Mr Powles (for Mr Kallon). They have put before us a paper produced by Amnesty International, which repeats and adopts their arguments, although curiously without any reference to the refutations presented by the Prosecutor. These arguments in reply were orally developed before us by Mr Coté and we are grateful to all counsel for their assistance. In the result, we have no hesitation in refusing a stay.

In view of the course we adopt, applications made in the Trial Chamber raising issues as to the lawfulness of Rules 72 and 73 will serve no purpose.

The role of the Appeals Chamber

3. The Special Court for Sierra Leone was established by an agreement between the United Nations and the Sierra Leone government made on 16th January 2002. Article 2 of that Agreement provides that the Court shall comprise one (or more) Trial Chambers and an Appeals Chamber. The Court operates pursuant to a statute, Article 14 of which adopts the ICTR rules of procedure and evidence extant at the time of the Agreement, subject to the power of the Special Court judges to amend or add to them if they "do not, or do not adequately, provide for a specific situation". The exercise of this broadly permissive power may be guided by the Criminal Procedure Act 1965 of Sierra Leone.
4. Every criminal legal system must provide a process for trying and sentencing defendants and for hearing appeals from the trial verdict. Thus Article 20 of the Statute requires the Appeals Chamber to hear appeals by convicted persons and from the Prosecutor in relation to alleged errors in law, procedure or fact made by the Trial Chamber. But Article 20 does not purport to be an exhaustive or limiting definition of the powers of the Appeals Chamber, which may function in many other respects that are important to the working of the Special Court. And that Court, like all other court systems, must provide for the disposal of issues which do not concern either the conviction or sentence of any particular defendant - general issues which may be raised, for example, by a defendant or by the Prosecution prior to any conviction. Such issues will include challenges to the lawfulness to the Court itself; matters which the common law describes as "pleas in bar" such as pardon or amnesty; questions as to the existence in international criminal law of the crime charged; the jurisdiction of the Court to try an offence or alleged offender. Such issues must be determined, and the way in which they are determined will be settled, where the constitutive documents are silent, by Rules of Procedure agreed by the judges in plenary sessions.
5. These general propositions may be evidenced and authorised by the precedents and practice of international tribunals. When the ICTY was set up, as the first of the post-Nuremberg war crimes tribunals, its Statute provided no right of appeal from pre-trial decisions by the Trial Chamber, even those concerning the lawfulness of the Court itself. The judges, in their plenary sessions, created such a right by devising Rule 72 in its original form, allowing interlocutory appeals "as of right" in respect of jurisdictional issues. The four judges of the ICTY Appeals Chamber explained

this expansion of their pre-trial role as a common sense step to ensure that justice worked within their system.

> Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorised, to pass on that issue, if not the Appeals Chamber of the International Tribunal? [...] Would the higher interests of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded an unwarranted trial. After all, in a court of law, common sense ought to be honoured, not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.[1]

6. The Rules inherited by the Special Court from the ICTR provided by Rule 72 that such issues would be raised by way of a "preliminary motion", the determination of which could be the subject of appeal - as of right where the decision went to jurisdiction and by way of certified leave if the decision involved an issue which would significantly affect the fair and expeditious conduct of the trial. At its first plenary, in March 2003, the judges of the Special Court unanimously decided to amend this rule because it did not adequately provide for disposal of preliminary motions pursuant to the Court's obligation to do justice expeditiously and effectively, as well as fairly. The evidence for that derives from the experience of the ICTR itself, and the text of the Special Court constitutive documents and the intentions of their framers, who were obviously concerned that this new court should give full force and effect to the ICCPR right to expeditious trial. Since that right has not been mentioned in any of the submissions before us, it may assist all who appear in this Court for us to spell it out.

The right to expeditious trial

7. This right has a particular resonance in Sierra Leone, which on British occupation and thereafter was vouchsafed the great guarantee of Magna Carta: "To no one will we sell, to no one will we refuse or delay, right or justice". That is a central component of the common law of the Commonwealth as reflected today in criminal proceedings by the availability of the motion for abuse of process to secure the release of defendants oppressed by delays caused by prosecutors or

[1] *Prosecutor v Dusko Tadic,* Case No. IT-94-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6.

courts. It would be indulgent to cite all the historical and literary examples of criminal justice systems which have in the public perception failed or succeeded according to whether their processes have been completed within a reasonable time. The right is now firmly entrenched in international law, through the force of Article 14(3)(c) of the ICCPR and decisions of courts such as the European Court of Human Rights and the Privy Council.

8. It appears in the ICCPR as a right guaranteed to a defendant, but for international human rights law it offers a vital and concomitant guarantee to victims of war crimes and crimes against humanity. If there can be no peace without justice, there can be no peace until justice is done. Victims and relatives of victims are entitled to have those accused of hideous offences which have caused them so much grief to be tried expeditiously: they may not achieve personal closure until the process concludes. Similarly, the international community which establishes special courts expects them to work expeditiously as well as fairly. That justice delayed is justice denied is no less true for being a truism.

9. We are urged by the Defence to follow precisely in the footsteps of the ICTR and ICTY, and to revert to Rule 72 as it exists in the former, there being – it is asserted – no reason to change it. But these courts are significantly different institutions and have personnel and budgets very greatly in excess of ours. At the time of our second plenary – July 2003 – the average length of time at the ICTR that detainees have had to spend awaiting trial was 43 months. Nine detainees of that court had been awaiting trial for more than 5 years. At the ICTY, the average length of pre-trial detention was 20 months. That is, of course, before the trials themselves, which have also taken a long time to complete – on average, 21.5 months at the ICTR from Prosecution opening statement to delivery of the Trial Chamber verdict. Some of these delays are attributable in part to preliminary procedural motions being decided first by the Trial Chamber, often after extensive argument, before being processed for final determination by the Appeals Chamber. It is against this background that the changes to Rule 72 must be understood. So too must the intentions of the United Nations and the Government of Sierra Leone in establishing the Special Court.

10. The UN deliberately chose to establish a Special Court on a different model to existing tribunals. That it was concerned to avoid undue delay in holding and conducting trials is plain from Security Council resolution 1315 itself, the preamble to which recites the need to establish "a strong and credible court [...] to expedite the process of bringing justice and reconciliation to Sierra Leone and the region". References to expedition are found in paragraph 1, and in paragraph 8(b) to the necessity for "the efficient, independent and impartial functioning of the special court". The consequent report of the Secretary-General seeks "to assure the population

that while a credible special court cannot be established overnight, everything possible will be done to expedite its functioning" (paragraph 7), and paragraph 42 argues for the establishment of an appeals chamber separate from that of the ICTR precisely because the alternative "might delay beyond acceptable human rights standards the detention of the accused pending the hearing of appeals." The report concludes (paragraph 74) by urging the Security Council to "bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone".

11. These concerns are reflected in the Court's Statute and Agreement, most notably in the provision for three year terms for its Prosecutor, Registrar and all its judges- an implication that this is an appropriate time frame in which to deal at least with the initial indictees. Of course, there may be later indictments and the three year terms of office are renewable. However, it is clear that the judges must give full force and effect to the need for expeditious trial. Ms. Whitaker conceded that this value must be 'balanced' against the right of preliminary appeal for which she was contending although if the latter right, on examination, turns out either to the non-existent or to have no real value for defendants, there is nothing to be weighed in the balance. We remind ourselves that there are indictees arrested in March 2003 who have been in prison now for over eight months. They are entitled to a trial process which will result either in their liberty or their punishment and which will have that result just as soon as is compatible with their fair trial rights. The international community, the people of Sierra Leone and their alleged victims all have a concomitant interest in expeditious determination of guilt or innocence.

Rule 72 as amended

12. Rule 72, as inherited by the Special Court from the ICTR permitted certain motions raising jurisdictional questions to be appealed, prior to trial, to the appeals chamber. The judges of the Special Court met in plenary session in March 2003, to consider whether the ICTR machinery was appropriate for the Special Court. They decided that defendants would be given additional rights to take preliminary issues, with leave of the Trial Chamber, to the Appeals Chamber, such as motions which in the Trial Chamber's judgment would "affect the fair and expeditious conduct of proceedings" (72(F)) and certain trial chamber decisions which might otherwise cause irreparable prejudice. To this very considerable extent, the plenary enhanced defence rights. But the judges were aware of the problem of undue delay and the propensity for Rule 72 "preliminary motions" which often involve complicated questions of international law, to contribute many months and even years of delay, if they are first argued out in a Trial Chamber with the arguments

repeated, after that Chamber's reserve judgement, in the Appeals Chamber whose judgement, again reserved, must be delivered before the trial itself can begin. Conscious of the duty to secure expeditious justice, the plenary determined to amend Rule 72.

13. The remedy was found in an amendment which would permit the Trial Chamber to "fast-track" a preliminary motion by referring it for a decision to the Appeals Chamber. The power given to the Trial Chamber was discretionary to the extent that the Rule provided that substantial issues relating to jurisdiction "may be referred". However, Trial Chamber judges put on the agenda for the following plenary – in August – a reconsideration of the Rule, and at this meeting the judges unanimously decided to amend Rule 72 by removing the discretion to refer preliminary motions once the Trial Chamber had determined that they "raise a serious issue relating to jurisdiction". The operative part of Rule 72 now reads as follows:

> (E) Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which raise a serious issue relating to jurisdiction shall be referred to the Appeals Chamber, where they will proceed to a determination as soon as practicable.
>
> (F) Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which, in the opinion of the Trial Chamber, raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial shall be referred to the Appeals Chamber, where they will proceed to a determination as soon as practicable.

14. The Rule as amended is not one of automatic referral nor one that (as has been argued) deprives the defendant for all time of a second bite of the legal cherry. It will be for the Trial Chamber to determine, under (E) that the motion raises a serious issue related to jurisdiction, and under (F) whether it would significantly affect the proceedings. The referral requires a judicial determination: the Rule does not turn the Trial Chamber into a post box. More important, if unspecified, is the inherent power of the Appeals Chamber to return the referred motion, in whole or in part, to the Trial Chamber for determination. It may turn out, on closer examination by this Chamber, that the motion is not one of 'pure' law, in that it really does call for a determination of facts, perhaps after hearing evidence, and this Chamber may be persuaded that it is more appropriate to have a Trial Chamber decision. It may be – especially in relation to motions referred under Rule 72(F) – that the issues can, on examination, readily or properly be decided by the Trial Chamber in the course of the trial, and taken up if necessary in a notice of appeal. There may be other grounds which have a particular relevance to a specific motion, in

respect of which substantial benefits will derive from having a first-tier determination by the Trial Chamber. We would need to be convinced, in any particular case, that a Trial Chamber pre-determination would be of particular assistance for us to consider before reaching a conclusive determination and we must make crystal clear that any such request for us to remit the matter for Trial Chamber determination must be made as part of the substantive application in the written submissions or at an oral hearing (where such is permitted). We will not consider a remission request other than in the course of the referred application.

The Applications

15. Perhaps understandably, given the novelty of the Rule, the applicants have not taken this course, although they may wish to do so, and will of course be permitted to do so, during their oral arguments. They have instead brought a plethora of motions challenging the power of the plenary to make the Rule, essentially on three grounds, and brought these motions both in this Chamber and in the Trial Chamber, which has listed one for a hearing later in the week. They have now sought to withdraw their motions in this Chamber, consistently no doubt with an argument that every decision made in the criminal process should be capable of appeal, and ask for a stay of all referred motions in this court. The Gilbertian situation that might result is a good example of the kind of confusion and delay that any legal system must avoid. The listed motions - which concern the lawfulness of the court and the validity of the amnesty - would be put on ice. The Trial Chamber would cogitate on the legality of Rule 72 - reserving judgment for weeks and perhaps until December or January. The losing party would seek leave for a pre-trial appeal under Rule 73, but as Ms. Whitaker concedes that may not be granted. If not granted, the Appeals Chamber would sit to hear the preliminary motions in February with judgments in April or May which would be juristically uncertain because of the awaiting challenge to the Rule under which they were referred which would not be heard until after someone was convicted as part of his appeal. If the Trial Chamber did grant leave, we would have the Rule 72 challenge in February and although (as will appear) we would dispose of it very quickly, we would have to reschedule the hearings on the substantive motion and might not be able to give decisions until July 2004. August is a recess, so no trials would start (if they were permitted to start at all) until at least September. What consequence would that have for the right to a trial without undue delay?
16. Mr. Powles frankly stated that he would consider filing an abuse of process motion if his client were detained for more than 12 months without a trial fixture - and his client has been detained since March 2003. We give no encouragement to the thought that his hypothetical motion might

succeed, but the fact that it would be properly brought signals the danger of allowing parallel proceedings in Trial and Appeals Chambers - indeed, the danger of permitting lengthy preliminary issues to be debated and decided in Trial Chambers before they proceed to authoritative determination in the Appeals Chamber. That is exactly what the amendment to Rule 72 was designed to prevent.

17. The issue of the lawfulness of the Rule 72 amendment is squarely before us. It has been argued orally and in written submissions, in order to show that this court should stay the referred motions because the challenge to the method of referral is likely to succeed in the Trial Chamber later this week. It is also before us by virtue of the motions which have been filed on the subject, which the applicants now ask our leave to withdraw. It is before us, most obviously, as an incidental and ancillary question to these applications referred to us by the Trial Chamber - obviously we must consider the lawfulness of that method of referral in the course of our determination of the motions themselves. In consequence, we proceed to judgment on the substantive challenge to Rule 72, which is based on the propositions (a) that it is contrary to basic human rights norms; (b) that it is *ultra vires* section 20 of the Statute; and (c) that it was adopted in breach of the rule-making power in section 14 of the Agreement. For the reasons which follow, each ground of challenge is manifestly ill-founded.

Human Rights Norms

18. The Applicants argue that the consequence of Rule 72 is that all preliminary motions relating to jurisdiction "are not subject to review of any kind contrary to basic human rights norms". They are in fact subject to determination by an Appeals Chamber which is the highest court in the Special Court system and the issue is whether that contravenes "basic human rights norms". The only such "norm" cited by the applicants is Article 14(5) of the ICCPR which provides that "everyone convicted of crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law". It is obvious that this right applies only to those who have been convicted and sentenced and not to those in the position of the applicants who have yet to be tried. Moreover, Article 14(5) of the ICCPR is effectuated in terms by Article 20 of the Statute which requires the Appeals Chamber to hear appeals from convicted persons about alleged errors of procedure, law or fact made by the Trial Chamber. Our inherent jurisdiction to dispose of pre-trial motions referred by the Trial Chamber is in no way, shape or form a contravention of Article 14(5).

19. It is not necessary, in order to dispose of this ground, to consider whether Article 14(5) has crystallised as a rule of customary international law, other than to remark that the very agreement by the UN to the terms of Article 20 of the Special Court Statute affords some evidence that it has indeed reached the status termed by international lawyers "jus cogens" - i.e. a rule binding on all states through their acknowledgement of its imperative force. It did not have that status in 1946 - see the Nuremberg Charter - and there are reservations, by countries as important as Italy, Germany, Belgium and Norway to the extension of this Rule to convictions rendered by higher courts.[2] Certainly, there is a right in international law to appeal against a death sentence and to review any substantial prison sentence or any conviction for a serious offence, although it is doubtful whether "review" implies an automatic right to argue that the conviction was wrong, as distinct from an opportunity to seek leave to make such an argument. There is no treaty authority and no significant precedent to which our attention has been drawn which elevates and extends the right to have a conviction or sentence reviewed to a general right to have every issue, particularly an issue determined by the highest court, capable of or subject to a review procedure.
20. There is, in short, no "human rights norm" - basic or not - of the kind for which the applicants contend. This is unsurprising since any such "right" would undermine and tend to demolish what is a basic human rights rule, namely the right in criminal cases to expeditious justice. We have detailed that right in paragraphs 7-11 above, and explained why it is binding upon us. There being no competing international law right, the question of 'weighing competing values' urged by Ms. Whitaker, does not arise.
21. It is true that some preliminary motions may have a dramatic effect on trials – they may preclude convictions altogether. That does not alter the fact that the Article 14(5) right relied on is bestowed only on persons who have been convicted. No decision or evidence has been advanced to suggest that higher courts would decide pure issues of law differently were there to have been a preliminary determination in a lower court. The International Court of Justice itself – the World Court – has no first tier, and the European Court of Human Rights now sits without a preliminary determination by a Commission – a body removed largely because of the fact that the first tier was productive of delays. (The ECHR often has the benefit of decisions by national courts, although not in cases where there have been no domestic remedies to exhaust.) In the common law system, the rule that jurisdictional points may be taken at any time means that the highest court in a two or three tier system may have to decide them for the first time. The US

[2] See Separate Opinion of Judge Shahabuddeen in *Prosecutor v Rutaganda*, Case No. ICTR-96-3-A, Judgment (Appeals Chamber), 26 May 2003.

Supreme Court, too, has an original jurisdiction. European countries have made reservations to Article 14(5) of the Covenant to preserve the right of their highest courts to enter convictions in criminal cases without appeal - a frequent occurrence where the prosecution is given the right of appeal against an acquittal, and the highest appeal court decides to convict. This exception to Article 14(5) is reflected in Article 2(2) of the Seventh Protocol to the European Convention of Human Rights where the right of convicts to appeal is excluded "in cases in which the person concerned may be tried in the first instance by the highest tribunal, or was convicted following an appeal against acquittal."

22. This position obtains in the ICTY and ICTR, the Appeals Chamber of which has the power to convict following a trial chamber acquittal and from this conviction there is no appeal. The Special Court Appeals Chamber has a similar power.

23. That the Article 14(5) principle is applicable only to convicts was plainly stated by the ICTY Appeals Chamber in *Prosecutor v. Delic* where the unconvicted accused argued that the Article included a right to appeal against a detention order. At paragraph 19 the bench stated "it is clear from the plain words of this article that the right to review in question applies only to *conviction and sentence*, not to provisional release or other interlocutory matters".[3] This authority is directly against the applicants. The only case they cite is that concerning Milan Vujin, who was found guilty of contempt of court by one Appeals Chamber and where right to appeal had to be effectuated by setting up another appeals chamber to hear his appeal.[4] This case relevantly serves as an example of the exercise of an inherent power by an Appeals Chamber in order to function effectively (there being no power to punish contempt provided by the statute). But it certainly cannot support the applicants' argument: it was a straightforward and correct application of Article 14(5) because Vujin had been convicted of an offence carrying professional dishonour and up to seven years in prison. As a convict, he was entitled to an appeal, and the appeals chamber accepted that it should have referred the matter first to the trial chamber, rather than have convicted Vujin itself.

24. The position in Sierra Leone is of some importance, given our power to rely on its procedural law in amending our own rules. There is no right of appeal against an interlocutory decision in criminal proceedings, but these may be stayed while a constitutional question - including human rights issues - are referred without trial court determination to the Supreme Court of Sierra

[3] *Prosecutor v Delic,* Case No. IT-96-21-T, Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delic, 22 November 1996.
[4] *Prosecutor v Tadic*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt against Prior Counsel, Mila Vujin, 31 January 2000.

Leone under sections 124 and 127 of the Constitution. From such decisions, binding of course on the court of criminal trial, there is no appeal. We note in passing that Chief Hinga Norman's counsel threatens to submit a complaint against Sierra Leone to the Human Rights Committee under the Optional Protocol for determination of the legality of the amended Rule 72.[5] We say nothing about the legitimacy of such a course but mention the matter only to make plain that any complaint, petition or other communication, to any body other than a Chamber of this Court, will not be permitted to serve as the basis for an application to stay the proceedings.

25. International law comprises a set of binding rules which crystallise through a process of treaty ratification, state practice, court decisions and juristic writings. The Nuremberg Tribunal to which we owe the legacy of international criminal law, comprised four international judges from whose legendary decision on 30 September 1946 there was no appeal – a fact that has not detracted from its authority and persuasiveness. It completed all processes within twelve months. By the time its legacy began to be appreciated, in 1993-4, with the establishment of the ICTR and the ICTY, international law had moved on at least to the extent that it can now be stated that every conviction and every sentence for a war crime or a crime against humanity must be capable of review, by way of right in the defendant to seek leave to argue before an independent and impartial court that there were errors of fact or law which occasioned a wrongful conviction or sentence. Our aim is scrupulously to adhere to established fair trial guarantees, by procedures which avoid crippling delays and exorbitant expense. No system of human justice is infallible, however many protections are offered to defendants: we can only do justice that is expeditious, fair and efficient. It may not be exquisite, but it will not be rough.

Ultra Vires

26. The applicants further urge that Article 20 of the Statute is a defining or limiting provision which confines the Appeals Chamber to a second instance role and such a role only in respect of appeals from persons convicted by the Trial Chamber or else by the Prosecutor. This is untenable: Article 20 is a statutory guarantee of the Covenant promise in Article 14(5), but it does not serve, expressly or impliedly, to strip the Appeals Chamber of all other function or of its inherent powers. Indeed, on such a reading, the Appeals Chamber would not be able to consider jurisdictional issues at all until after a conviction - an interpretation which would fly in the face of the ICTY appeal decision in *Tadic*[6] which held that "such a fundamental matter as the jurisdiction

[5] Defence Reply para. 13.
[6] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 4.

of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial". The point of the fast-track mechanism in Rule 72 is to serve the interests of defendants by permitting them to make challenges which might set them at liberty sooner rather than later and it is ironic that they, through their counsel, should challenge it.

27. In any event, the Special Court has an inherent power to organise itself, through its procedural rules, in a way that its judges agree will best assist its work so long as such rules do not contravene any express provision of the Agreement and Statute. Such power in common law courts has been upheld by the House of Lords (*Jones* 1964) and by the ICTR Appeals Chamber in *Tadic* which explains that inherent jurisdiction "is a necessary component of the judicial function"[7] and does not need to be expressly provided for in the constitutive documents of the tribunal.

ICTR Rules must rule the Special Court?

28. Finally, the applicants protest that the rule change was not within the contemplation of Article 14 of the Statute. But it was the unanimous opinion of the judges in plenary session, that the Rules we inherited did not adequately provide for the disposal of important preliminary motions in a manner that was consonant with the principle of fair and expeditious justice, having regard to the time frame of the Special Court and the Magna Carta promise which is entrenched in the common law of Sierra Leone and in Article 14(3) of the ICCPR.

29. Furthermore, Article 14 of the Statute specifically directs the Court's attention to the law of Sierra Leone in deciding whether the ICTR rules contain adequate provisions for situations that may arise. We have directed attention to the force of Magna Carta. Under Sierra Leone law there is no right of appeal against interlocutory decisions in criminal proceedings - quite obviously to avoid disruption and delay to those proceedings. Moreover, as we explain in paragraph 24 above, constitutional issues requiring a stay of criminal proceedings are determined by the Supreme Court of Sierra Leone without appeal. This is a further indication of the inadequacy, from common law and Sierra Leone perspective, of an ICTR rule which permits what may well be a pre-trial delay of many months while a case is rehearsed in the Trial Chamber before coming to the Appeals Chamber for authoritative determination.

Conclusion

30. We do not lightly dismiss the value of having a lower court determination to assist our consideration of preliminary issues. But those issues, by their very nature, are matters of law and

[7] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 18.

require no factual judgements of the kind that trial courts expertly make and which appeal courts presumptively respect. Where pure legal issues are concerned, so long as an Appeal Chamber has the assistance of competent counsel to propound available arguments and direct attention to relevant cases, there can be no real likelihood that its decision would be different with the benefit of a Trial Chamber decision. If there is such a likelihood - if it turns out that an issue referred under Rule 72 or 73 does require a factual determination for example or could more appropriately be decided in the course of the trial, the Appeals Chamber may decline the reference by remitting the matter for Trial Chamber decision. But in order to get on with the trial, at the very least to have it begin within a reasonable time of a defendant's arrest, we are firmly of the view that the fast-track mechanism of Rule 72 is necessary and will serve to enhance rather than undermine the basic right to expeditious justice.

31. The applicants would have us make an order which would contribute many months of delay to the trials of all indictees. They wish to have their application determined first by the Trial Chamber and then by the Appeals Chamber, staying all substantive applications that have been referred to us under Rule 72 until this application is finally determined. Notwithstanding the prosecution's apparent willingness to tie the Special Court up in this Gordian knot, we intend to cut it now – by refusing a stay, deciding the motion (which we refuse leave to withdraw), with a decision which is, in any event, ancillary to our power to decide the referred motions. Rule 72 shall stand as a lawful rule of procedure in this Court. We refuse the stay applications.

Done at Freetown

This 4th day of November 2003

Justice Robertson,
Presiding Judge

Justice Ayoola

Justice Winter

Justice King appends a separate opinion.

Seal of the Special Court

SEPARATE OPINION OF JUDGE KING

1. I agree and endorse the reasoning and conclusions of the judgment that has been read out by the Presiding Judge, but I would like to add a few words of my own on one or two issues. It seems to me that the principal and crucial question that arises for determination in this application for a stay and for disposing of the *ultra vires* declaration is whether the Judges of the Special Court sitting in Plenary have the power to amend Rule 72 of the Rules of Procedure and Evidence as they have done. The amendment, Rule 72 (E), reads: "Preliminary Motions made in the Trial Chamber prior to the Prosecutor's opening statement which raise a serious issue relating to jurisdiction shall be referred to the Appeals Chamber where they will proceed to a determination as soon as practicable."

2. The Defence submits on behalf of the Applicant that this Appeals Chamber, the highest tribunal of the Special Court, has no jurisdiction to determine a matter before it has been determined by the Trial Chamber. They further submit that the Appeals Chamber does not have jurisdiction to hear motions at first instance, nor as a creation of statute, they contend, does this Chamber have an inherent jurisdiction through which such capacity could be implied.

3. Ironically and in the teeth of those contentions, the Defence have come to us to hear, at first instance, their Motion which is labelled: "Application to stay determination of all preliminary motions – denial of right to appeal." The Defence have themselves exposed the fallacy of their contention, for if this Court does not have jurisdiction to hear motions at first instance, why have they brought the Motion to us at first instance? There is obviously no merit in the submission and I dismiss it in this short shrift.

4. The second fallacy, in my judgement, is the Defence submission that because the Appeals Chamber is a creature of statute, The Statute of the Special Court for Sierra Leone ("the Statute"), it does not have inherent jurisdiction. It seems to me that the Defence are, in effect, applying the connotation, 'inherent jurisdiction' in contradistinction to that jurisdiction of the Court which is conferred on it by the Statute. But, with respect, they are clearly wrong in so doing, for it is trite to say that this Court may exercise its inherent jurisdiction even in respect of matters regulated by the Statute or Rules of Court. The Prosecution seems to have got it right in their submission that barring an express prohibition in the Statute, it appears clear that a Court can vary its practice beyond the explicit terms of its Statute.

5. As was said by Hallett, J.A., in *ABN Bank v. NsC Diesel*[8], quoting Halsbury's Laws of England:

> ...the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

Having regard to that dictum which I accept and adopt and considering the *raison d'etre* for the Court's inherent jurisdiction, I ask: Is it not in the best interests of the Indictee and is it not in furtherance of a fair trial that the question of whether or not this Special Court has jurisdiction should be determined and settled *in limine* by the highest tribunal of the Special Court?

[8] (1991) 101 N.S.R (2d) 361363.

6. In my judgement, exercising the Court's inherent jurisdiction as we have done in amending the said Rule clearly redounds to the advantage of the Indictee. By means of that amendment, we decide once and for all and at the very beginning the issue of lack of jurisdiction. We thereby obviate the possibility of an Indictee going through the ordeal of a lengthy trial only to find at the end of the day that the trial should not have taken place because the Court lacked jurisdiction. I reinforce my view in the dictum in case of *Prosecutor v. Tadic*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", where the Appeals Chamber held that "a fundamental matter as jurisdiction should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial." [9] The Amended Rule is, therefore, a rule of fairness which is weighted heavily in the Indictee's favour.

7. Inherent jurisdiction apart, I opine that the Statute gives this Court ample power to amend its Rules as we have done. Article 14 (2) of the Statute provides:-

> The Judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

8. It has not and cannot be contended that the Special Court as a whole did not amend the Rules in the manner I have related. It is, nevertheless, instructive and of considerable importance to note that the section specifies that the Sierra Leone Criminal Procedure Act ("the Act") should, in the circumstances, be this Court's guide, as appropriate. The procedure which is followed in criminal trials in Sierra Leone is as laid down in the Act. In such trials, whenever a question arises whether an enactment was made in excess of power conferred upon any authority or person by law or under the Sierra Leone Constitution, the trial will be suspended and the question referred to the Supreme Court, the highest Court in the Sierra Leone Judiciary, which has the original and exclusive jurisdiction to deal with it, vide Sections 124 and 127 of the Constitution of Sierra Leone, Act No. 6 of 1991. Guided by the Act and this procedure, I do not entertain any doubt that the question whether the amendment complained of is *ultra vires* the Statute must be determined by this Appeals Chamber to the exclusion of the Trial Chamber.

9. The Defence were clearly right in bringing their complaint of the Amendment being *ultra vires* to the Appeals Chamber. Unfortunately, however, acting on what I regard as precipitate opinion to the contrary, they misdirected themselves when they purported, precipitately as well, to withdraw their application so as to pursue it in the Trial Chamber instead.

10. Finally, let it not be said that the Special Court does not adhere to the United Nations Covenant on Civil and Political Rights ("ICCPR") and norms of international law. The Defence strenuously submit that the right of appeal on questions of law in a criminal trial is established in international law and pray in aid article 14 (5) of the ICCPR. The section provides that "everyone **convicted** of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law." There has been no conviction in this case and Article 14 (5) is irrelevant and inapplicable.

11. For the reasons I have given I have come to the conclusion that the amendment to Rule 72 is well within the powers of this Court. Accordingly I refuse to declare the amendment *ultra vires* the Statute or that it violates the ICCPR and basic international human rights norms as alleged or at all. It follows that

[9] *Prosecutor v Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6.

the stay application must be dismissed and it is hereby dismissed.

The Hon Mr Justice G. Gelaga King