SCSL-2004-14-AR72(E)
(568-596)

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SPECIAL COURT FOR SIERRA LEONE
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THE APPEALS CHAMBER

Before:	Justice Geoffrey Robertson, Presiding Justice George Gelaga King Justice Emmanuel Ayoola Justice Renate Winter
Registrar:	Robin Vincent
Date:	13 March 2004

PROSECUTOR Against SAM HINGA NORMAN
(Case No.SCSL-2004-14-AR72(E))

DECISION ON PRELIMINARY MOTION BASED ON LACK OF JURISDICTION (JUDICIAL INDEPENDENCE)

Office of the Prosecutor:

Desmond de Silva
Luc Côté
Walter Marcus-Jones
Abdul Tejan-Cole

Defence Counsel:

James Blyden Jenkins-Johnson
Sulaiman Banja Tejan-Sie

Intervener:
Michiel Pestman for *Moinina Fofana*

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

SEIZED of a Preliminary Motion Based on Lack of Jurisdiction: Judicial Independence, filed on 26 June 2003 on behalf of Sam Hinga Norman ("the Preliminary Motion");

NOTING the Prosecution Response filed on 7 July 2003[1]; the Applicant's Reply filed on 14 July 2003[2]; and the referral of the Motion to the Appeals Chamber under Rule 72(E) of the Rules of Procedure and Evidence of the Special Court ("the Rules") on 17 September 2003[3];

NOTING the intervention by Moinina Fofana for which substantive submissions were filed on 31 October 2003[4];

NOTING that an oral hearing was held on 5 November 2003;

HAVING CONSIDERED THE ORAL AND WRITTEN SUBMISSIONS OF THE PARTIES;

HEREBY DECIDES AS FOLLOWS:

I. INTRODUCTION

1. This ruling concerns a Preliminary Motion filed on 26 June 2003 on behalf of Sam Hinga Norman ("the Applicant"), one of the persons standing trial before the Special Court for Sierra Leone ("the Court") in Case No. SCSL-2004-14[5]. The Preliminary Motion was referred to the Appeals Chamber of the Court pursuant to Rule 72(E) of the Rules of Procedure and Evidence of the Special Court ("the Rules").

2. By the Preliminary Motion the applicant challenges the jurisdiction of the Court to try him.

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[1] Prosecution Response to the Third Defence "Preliminary Motion based on Lack of Jurisdiction: Judicial Independence", 7 July 2003 ("Prosecution Response").
[2] Reply - Preliminary Motion based on Lack of Jurisdiction: Judicial Independence, 14 July 2003 ("Defence Reply").
[3] Order Pursuant to Rule 72(E): Defence Preliminary Motion on Lack of Jurisdiction: Judicial Independence, 17 September 2003.
[4] Reply to the Prosecution Response to the Motion on Behalf of Moinina Fofana for leave to intervene as an interested party in the Preliminary Motion filed by Mr. Norman based on Lack of Jurisdiction: Judicial Independence and Substantive Submissions, 31 October 2003.
[5] The Preliminary Motion was filed under Case No.SCSL-2003-08. Following the Decision and Order on Prosecution Motions for Joinder of 27 January 2004, and the subsequent Registry Decision for the Assignment of a new Case Number of 3 February 2004, this new case number has been assigned.

3. By virtue of Rule 72(B) of the Rules, preliminary motions by an accused are objections based on lack of jurisdiction; defects in the form of indictment; the denial of request for assignment of counsel; and abuse of process or applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B).

4. Rule 72(B) does not expressly describe a motion based on the fairness of a trial or alleging an infringement of the right of an accused to a fair hearing or, in effect, seeking a reclusion of the judges as a preliminary motion. An objection that the Court lacks judicial independence is basically, and in substance, an objection to the fairness of the trial and an allegation that the right of the accused to a fair hearing is likely to be infringed by the trial. Evidently, it is to enable the applicant to find a platform within Rule 72 from which to raise these issues as a threshold issue that the objection has been described as a jurisdictional objection.

5. Notwithstanding that doubt may legitimately be entertained whether an allegation of real likelihood of bias is a challenge to the jurisdiction of the Court, the ground of the objection raised by the applicant's motion that the Court lacks judicial independence is sufficiently fundamental to make it imprudent to deny a hearing of the Preliminary Motion on the merits and not to determine the issues raised by the Preliminary Motion.

II. THE SPECIAL COURT FOR SIERRA LEONE

6. The Court is established by an agreement made on 16 June 2002 between the United Nations ("UN") and the Government of Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996[6].

7. The basic documents of the Court are:
   (a) The Agreement between the UN and the Government of Sierra Leone ("the Agreement");
   (b) The Statute of the Court which is annexed to the Agreement and forms an integral part thereof ("the Statute")[7]; and
   (c) The Rules of Procedure and Evidence of the Special Court.

[6] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 ("Special Court Agreement"), Article 1(1).
[7] Statute of the Special Court for Sierra Leone, 16 January 2002.

8. The issues raised by the Preliminary Motion do not involve an interpretation of these basic documents. It is thus unnecessary to have recourse to supplementary means of interpretation, including, for example the preparatory works of the Agreement and the circumstances of its conclusion other than to state in summary such circumstances as are contained in the preamble of the Agreement. This disclosed that the initiator of the Agreement was the UN Security Council. By its Resolution 1315 (2000) of 14 August 2000, the Security Council expressed deep concern "at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity"[8]. It requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law[9]. The Agreement resulted from the negotiations held for the establishment of the Court pursuant to the resolution.

9. The object and purpose of the Agreement is sufficiently clear from the preamble. It is also sufficiently clear that the intention of the parties to the Agreement is to achieve that purpose through the judicial process by employing the mechanism of a court deliberately described as independent.

III. RELEVANT PROVISIONS OF THE BASIC DOCUMENTS

Provisions relating to Judges

10. Article 2 of the Agreement provides for the composition of the Special Court and appointment of judges.

11. Briefly, the Special Court is composed of a Trial Chamber and an Appeals Chamber with the possibility of creation of a second Trial Chamber. The Chambers are composed of no fewer than eight judges, specifically described in the Agreement as "independent judges." The number of judges may be brought up to eleven on the creation of a second Trial Chamber. Of the eight judges five are appointed by the Secretary-General upon nominations forwarded

[8] U.N. Security Council Resolution 1315, 14 August 2000, p. 1.
[9] *Ibid.* para. 1.

by States and three by the Government of Sierra Leone. Two of the judges appointed by the Secretary-General serve in the Trial Chamber together with one appointed by the Sierra Leone Government, while three of the five judges appointed by the Secretary-General serve in the Appeals Chamber together with two appointed by the Sierra Leone Government.

12. Article 2(4) of the Agreement and Article 13(3) of the Statute provide that "Judges shall be appointed for a three-year term and shall be eligible for re-appointment."

13. Article 13(1) of the Statute provides that:

> The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

14. Rule 15 of the Rules provides that: "A Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has had any personal association which might affect his impartiality."

Provisions relating to Funding and Management of the Court

15. Article 6 of the Agreement provides for the funds of the Court in the following terms:

> The expenses of the Special Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operation plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first three years of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-general and the Security Council shall explore alternate means of financing the Special Court.

16. Article 7 of the Agreement provides for the establishment by "interested States" of a Management Committee "to assist the Secretary-General in obtaining adequate funding, and

provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States." The Management Committee is composed of important contributors to the Special Court.

Provision regarding the Termination of the Agreement

17. By virtue of Article 23 of the Agreement, the Agreement shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court.

IV. SUMMARY OF ARGUMENTS

18. The applicant by his counsel argues that the right to a fair hearing is breached where there are legitimate grounds to fear that a tribunal is not independent. Absence of executive and legislative control over judicial salaries is an aspect and mark of judicial independence.[10] The funding arrangements made for the Court in Article 6 of the Agreement and the function of the Management Committee which consists of representatives of donor States create a legitimate fear of interference in justice delivery by the Court through economic manipulation, since, it was argued, donor States could indicate their displeasure with any decision of the Court by withholding their contribution to the funds of the Court. With basically only three major donor States funding the Court, the ability of the court to carry out its judicial activities will be impaired, if at least one of them were to withhold its voluntary contribution to the funds, thereby bringing the operations of the court below the standard of judicial independence required of States as set out in the International Bar Association's Minimum Standards of Judicial Independence.[11] On the strength of the case thus put, the applicant sought a declaration the Special Court lacks jurisdiction over any of the accused before it and prays that proceedings be stayed pending the implementation of sufficient financial guarantees.[12]

19. For their part the Prosecution argued that the Court is insulated from bias or reasonable apprehension of bias by the selection process of judges of the Court, diplomatic immunity granted to judges of the Court, the merely advisory nature of the role of the Management

[10] Preliminary Motion para. 2.
[11] See *ibid.* para. 16, 17 and Defence Reply, para. 5 and 10.
[12] *Ibid*, para. 22-23.

Committee and the several structural safeguards contained in the basic documents of the Court.[13]

V. SAFEGUARD OF JUDICIAL INDEPENDENCE

20. Safeguard of judicial independence takes several forms. However, since the question raised by the motion falls within a narrow compass it is unnecessary to enter into any lengthy discourse of the concept of judicial independence or of the various mechanisms usually put in place to safeguard judicial independence.

21. One prominent safeguard of judicial independence in a democratic State is the doctrine of separation of powers which, in regard to the independence of the judiciary, operates to reserve to the judiciary the exercise of judicial powers of the State and protects the judiciary from being so dependent on other arms of Government as to raise a reasonable apprehension of a real likelihood that judicial functions of the judiciary are performed under the influence of another arm of Government or body.

22. In practice, in regard to the judiciary, there are various models of separation of powers. However, in hardly any is the judiciary required or expected to raise revenue by itself to fund its operations so that it could maintain judicial independence. Indeed, as will be seen shortly, were the judiciary to run its operations and pay its judges from moneys generated from its judicial activities the apprehension of likelihood of bias would become more real and reasonable.

23. In some models the executive deals with staffing and administration of the judiciary, sometimes under the umbrella of a Ministry of Justice. In others the executive is excluded from participation in such process. In some models the judiciary is self-accounting, in others the budget of the judiciary is part of the budget of a Ministry of Justice in which the judiciary is treated, at least for budgetary purposes, as a department of the Ministry of Justice.

VI. FUNDING ARRANGEMENT AND INDEPENDENCE

24. Where the allegation is that the funding arrangement of a judiciary raises a real likelihood of bias so that an accused entertains a reasonable apprehension that he cannot have a fair trial,

[13] Prosecution Response, para. 9, 11, 13.

much more is required than merely showing that the court derives its funding from a source which may be displeased by its decisions. There are other considerations, the principal of which is whether such funding arrangement leads to a real likelihood that the court will be influenced by such arrangement to give decisions, not on the merits of the case, but to please the funding body or agency. Such factors as the obligation, moral or legal, of the funding body or agency and the guarantee of payment of judicial remuneration, however the judiciary is funded, are relevant factors.

25. Denial of adequate funding of the judiciary which would emasculate its performance while the payment of judicial remuneration remained protected must be distinguished from denial of funding where judicial remuneration is unprotected and would therefore affect the payment of judicial remuneration. The former is a shirking of responsibility by the state to provide an efficient or any machinery of justice, while the latter may raise a concern of real likelihood of judicial bias. The conclusion seems clear that it is not every inadequacy in funding arrangement that leads to an inability of courts to dispense justice without bias.

26. It has long been acknowledged that judicial independence rests on the twin pillars of security of tenure of the judge and guarantee of judicial remuneration and its protection from the whims and caprices of governments or bodies charged with the responsibility of funding the judiciary.

27. As early as 1701 it was provided by the Act of Settlement that:

> Judges Commission be made *Quamdiu se bene gesserint* [that is, during good behaviour] and their salaries ascertained and established.[14]

Commenting on that English statute, Chief Justice Burgher, delivering the lead opinion of the US Supreme Court in *United States v. Will*[15], said:

> The English statute is the earliest legislative acknowledgment that control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces within government.[16]

[14] Act of Settlement, 12 & 13 Will. III, ch. 2, § III, cl. 7 (1701).
[15] *United States v. Will* 449 U.S. 200 (1980).
[16] *Ibid.* at p. 218.

In the same vein as in the Act of Settlement, several modern Constitutions make provision for the security of tenure of judges and for protection of judicial remuneration. Thus, by section 138(1) of the Constitution of Sierra Leone of 1991[17], it is provided that:

> The salaries, allowances, gratuities and pensions of Judges of the Superior Court of judicature shall be charged upon the Consolidated Fund.

Section 138(3) of the same Constitution provided that:

> The salary, allowances, privileges, right in respect of leave of absence, gratuity or pension and other conditions of service of a Judge of the Superior Court of Judicature shall not be varied to his disadvantage.

A similar but shorter provision to the same effect is contained in section 1 of Article III of the Constitution of the United States[18] which provides that:

> . . . The Judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance of office.

28. Some would reason that a safeguard of judicial independence is the payment of handsome remuneration to judges. Another view, and this would appear to be the better view, is that the level of remuneration of a judge is an acknowledgment of the high skill he possesses and which he is expected to bring to the discharge of his judicial function in order to enhance the quality of justice. Be that as it may, of more value in securing judicial independence are the assurance and guarantee of security of tenure and guarantee and protection of the level and payment of judicial remuneration.

VII. THE MAIN QUESTION

29. Notwithstanding what would appear to be a digression to the wider area of the concept of judicial independence relevant, perhaps, as a backdrop to a consideration of the main issue raised by the Preliminary Motion, the question in these proceedings, in the final analysis, falls within a narrow compass. The question relates to the funding of the Court and it is whether funding of the Court by voluntary contribution of interested States coupled with the

[17] The Constitution of Sierra Leone 1991, 24 September 1991.
[18] U.S. Const. art. III, § 1 (2004).

structure of the Management Committee deprives the Court of the necessary guarantees of independence and impartiality.

30. As earlier stated, mere complaint about funding arrangements of a Court cannot by itself be a ground for imputing a real likelihood of bias to a judge. What is material and has to be established is that such funding arrangements are capable of creating a real and reasonable apprehension in the mind of an average person that the judge is not likely to be able to decide fairly. A rough and ready test which seems apt can be fashioned out of a passage in the lead opinion of Chief Justice Taft in the U.S. Supreme Court case of *Tumey v. Ohio*[19] where he said:

> . . . the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honour and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.[20]

In the U.S. case of *Ward v. Village of Monroeville*[21], the U.S. Supreme Court formulated a test thus:

> whether the mayor's situation is one which 'would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused...'[22]

31. The test in these two cases, adapted by substituting 'Court's' for 'mayor's' in the first line in the passage above, seems apt for the purpose of this case, having regard to the suggestion which is the pith and substance of the argument advanced by counsel for the applicant that the funding arrangement of the Court is such as would reasonably be seen as likely to put pressure on the judges of the Court to convict the accused so that they may thereby please the donor States to prevent them from withholding their contributions to the funds of the Court.

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[19] *Tumey v. Ohio*, 273 U.S. 510 (1927).
[20] *Ibid.* at p. 532.
[21] *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), citing *Tumey*, *ibid.*
[22] *Ibid.* 60.

Astonishing as the suggestion may seem, and, indeed is, it is one that evokes the need to apply the test stated above and to examine whether it has any foundation in fact.

32. Before reverting to the present case, it is of interest to note, albeit very briefly, one case in which the above test has been applied to the advantage of the accused and another in which it has been held inapplicable. All are cases decided by the U.S. Supreme Court which appears to have developed a rich jurisprudence in this area of law.

33. In *Tumey v Ohio*[23] the facts, taken from the syllabus, are as follows: Under statutes of Ohio, offences against stay prohibition, involving a wide range of fines enforceable by imprisonment may be tried without a jury before the mayor of any rural village situated in the county (however populous) in which offences occur. His judgment upon the facts is final and conclusive unless so clearly unsupported as to indicate mistake, bias, or wilful disregard of duty. The fines are divided between the State and the village. The village, by means of the fines collected, hires attorneys and detectives to arrest alleged offenders anywhere in the county and prosecute them before the mayor. In addition to his salary, the mayor, when he convicts, but not otherwise, receives his fees and costs amounting to a substantial income. The fine offers means of adding materially to the financial prosperity of the village, for which the mayor, in his executive capacity, is responsible. It was held that the due process of law was denied the defendant in the case. The court held that the mayor had a pecuniary interest as a result of his judgment such as to disqualify him. The court said:

> It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecuniarily successful conduct of such a court. The mayor represents the village, and cannot escape his representative capacity. [...] With his interest as mayor in the financial condition of the village, and his responsibility therefore, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?[24]

As a statement of principle the court said:

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[23] *Supra* note 19.
[24] *Tumey v. Ohio*, *supra* note 19, at p. 533.

> But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.[25]

34. On the other hand, in *Dugan v. Ohio*[26] the petitioner was convicted and fined by the mayor of a city for a violation of the Ohio liquor law committed within the city limits. The legislative powers of the city were exercised by a commission of five, of whom the mayor was one, and its executive powers by the commission and a manager, who was the active executive. The functions of the mayor, as such, were judicial only. His sole compensation was a salary fixed by the vote of the other commissioners, and payable out of a general fund to which the fines accumulated in his court under all laws contributed, the salary being the same whether the trial before him resulted in convictions or acquittals. It was held that the mayor's relation to the fund and to the financial policy of the city were too remote to warrant a presumption of bias towards conviction in prosecutions before him as a judge.[27]

35. In this case direct pecuniary interest in the result of a trial is not suggested by the applicant's case. Nonetheless, it was suggested that apprehension that the funding of the Court may be so severely diminished were the court to render decisions which displease major donors to the funds of the court, to the detriment of the ability of the Court to pay remunerations to judges, would have the same prejudicial consequences for the ability of the judges to dispense justice fairly as if they had direct pecuniary interest in the proceedings.

36. The position is sufficiently clear to enable it to be stated in the following propositions:

(a) A judge is disqualified from adjudication where he has a direct, personal or pecuniary interest in the litigation and, particularly, in criminal trials where pecuniary benefit accrues to him by his convicting.[28] .

(b) A judge is not disqualified from adjudicating where there is no objective reason to infer on any showing that failure to convict (or acquit) in any case or cases would deprive him of or affect his fixed remuneration.[29]

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[25] *Tumey v. Ohio, supra* note 19, at p. 523.
[26] *Dugan v. Ohio*, 277 U.S. 61 (1928).
[27] *Ibid.*, at p. 65
[28] See *Ward v. Village of Monroeville supra* note 21 ; See *Tumey v. Ohio, supra* note 19.
[29] *Dugan v. Ohio, supra* note 19.

(c) A judge should disqualify himself if a reasonable and informed person would believe that there is a real danger of bias.

(d) A reasonable person will not rush to an assumption that a judge will violate his oath and the duties of his office on a remote and speculative belief that his remuneration may be affected in any way by the decision he gives.

VIII. ABSENCE OF FACTUAL BASIS FOR ALLEGATION.

37. On the true facts, it is manifest that the assumptions on which the applicant based his challenge to the jurisdiction of the Court are far-fetched and have no factual basis that can support the contention that the funding arrangement of the Court could reasonably occasion the denial of a fair hearing. The judges of the Court are on fixed term contracts of three years, though subject to re-appointment. The remuneration payable to each judge is certain and fixed by the contract of appointment. The liability of the Court to pay such remuneration is not in any way conditional upon whether the parties to the Agreement establishing the Court are able to raise voluntary contributions to fund the court, since, indeed, by Article 6 of the Agreement it is provided that:

> "Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Special Court." Finally, the Agreement establishing the Court can only be terminated by virtue of Article 23 of the Agreement "upon completion of the judicial activities of the Special Court."

38. It is clear from these indisputable facts that there is no way in which the remuneration of the judges of the Court is tied to the funding of the court by voluntary contribution of donor States or can be subject to manipulation.

39. The concerns which engender the applicant's motion are of limited scope and relate only to the funding of the Court by voluntary contribution. Reference by counsel to the Canadian Supreme Court case *Reference Re Remuneration of Judges*[30] seems unnecessary beyond a mention of the now uncontroversial principle, which applicant's counsel stated the decision stood for, that judicial salaries must be protected from executive, legislative or managerial manipulation. The issues discussed in that case of circumstances in which reduction of judicial salary may be

[30] *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3.

permissible or whether judges may negotiate their salaries are really not material to the determination of the main issue in this case. The Canadian Supreme Court ruled that the way the reduction of salaries was carried out was unconstitutional. In our case, the question is whether the judges would feel pressured to produce results in the form of convictions in order to attract sufficient funds for the Special Court, lest their salaries be reduced. Special Court judges' salaries are certain and fixed by the contract of appointment. The reduction of judges' salaries is in itself unrealistic. Similarly, although in the final analysis the ground on which an objection is raised in this case boils down to likelihood of bias, the bias alleged is not of the same type as was discussed in the case of *ex parte Pinochet* (No. 2)[31] where the bias alleged was not as to pecuniary interest of the judges in the result of the proceedings, but one likely to be occasioned by the close relationship of one of the judges to a cause promoted by an intervener (Amnesty International) who was in the rather unusual circumstances of the case deemed to have been a party.

40. It may well be stated, if only in an attempt at relative exhaustiveness, that if the voluntary contributor States to the funds may be said to have a 'cause' it is not a cause that is in issue in the case or that can be said to be of controversy in democratic societies. That 'cause' is that a man will not be condemned without a fair and public trial and that there must be an end to impunity of serious violations of international humanitarian law. It is in furtherance of the 'cause' that the Court in its Rules established a Defence Office for the purpose of ensuring the rights of suspects and accused.[32]

41. Undoubtedly, states which have contributed to the funds of the Court must have done so because they believe in due process of law and the rule of law. It is far-fetched, preposterous and, almost, bad taste to suggest that donor states, which in their national practice promote and respect human rights and the rule of law and promote such values internationally, would be committed to funding and sustaining a court in the expectation that it will operate contrary to those same values.

42. Although the objection of the applicant has been couched in terms of judicial independence and bias, it is expedient and sufficient to limit the determination of the objection to the limited question that has been identified. The Court is not one functioning as an arm of a

[31] *R. v. Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119.
[32] Rule 45 of the Rules.

state in a particular legal order or system. Its jurisdiction is of an extremely limited nature and the lifespan of the Court itself is predictably limited. It is for this reason that it is unnecessary to examine at any length the functions of the Management Committee, which in no way approximates either to the executive or the legislature in a State nor wields powers of such organs which may be subject to review by the Special Court. The Committee has no cause to influence and cannot, in performance of its role, influence the Court in the determination of cases before it.

43. It suffices for the determination of the Preliminary Motion to hold that the funding arrangements of the Court cannot be reasonably seen in any way to lead to any real likelihood of bias in the Court in the determination of matters before it.

IX. DISPOSITION

44. For all of the above reasons, this Preliminary Motion is dismissed.

Done at Freetown this 13th Day of March 2004

Justice Robertson, Presiding | Justice King | Justice Ayoola | Justice Winter

[Seal of the Special Court for Sierra Leone]

SEPARATE OPINION OF JUSTICE GEOFFREY ROBERTSON:

1. This is a challenge to the jurisdiction of the Special Court by Sam Hinga Norman in Case No. SCSL-2004-14[1] on the grounds that the arrangements for funding its operations and the structure of its Management Committee deprive the Court of those guarantees of independence and impartiality which are essential prerequisites for its exercise of judicial power over the Applicant, or indeed over anyone else. Although, as an intervener points out,[2] domestic laws differ about whether this challenge goes strictly to jurisdiction (the exercise of judicial power), as distinct from legality (the right to exercise that power), the distinction is beside any practical point. If the structure of any body purporting to exercise judicial power is so fundamentally flawed that its judges may realistically be perceived as puppets moved by the purse strings or the politics of their progenitors or paymasters, then it cannot be acknowledged as a "court" at all. It will be an emanation of power, of the state or some conglomeration of states, but it will lack the defining quality of legality, namely independence *from* the state. In international criminal law, there can be no such creature as a 'kangaroo court': entities which lack independence and impartiality are not courts at all and their decisions, however portentous, do not have the quality of legality.

2. "Independence and impartiality" is an alliterative conjunction found in most human rights treaties, although the two concepts are in fact disparate and have different legal histories. "Independence" means putting judges in a position to act according to their conscience and the justice of the case, free from pressures from governments, funding bodies, armies, churches, newspapers or any other source of power and influence that may otherwise bear upon them. It was established in the common law by an enactment of the long parliament in 1641, as an early victory (to be defended subsequently by arms) in the struggle against Stuart absolutism. "*Impartiality*", on the other hand, is generally regarded as the judicial characteristic of disinterest towards parties and their causes. The common law began to develop concrete rules against bias in the nineteenth century, beginning with the disqualification of judges who held stock in companies which were parties in their court. There is, of course, an overlap: judges who are not independent of the state will be perceived

[1] The Preliminary Motion was filed under Case No.SCSL-2003-08. Following the Decision and Order on Prosecution Motions for Joinder of 27 January 2004, and the subsequent Registrar's Decision for the Assignment of a new Case Number of 3 February 2004, Case No.SCSL-2004-14 has been assigned.
[2] Counsel for Moinina Fofana, oral argument, 5 November 2003.

(and may actually become) partial to the state when it is a party to litigation. But for present purposes any such overlap, real or perceptual, is not alleged: the Applicant's challenge is to the perception created by the fact that certain states contribute the lion's share of funds and nominate representatives to the Management Committee.

3. The Applicant eschews any suggestion that the Special Court lacks the quality of independence through any constitutive arrangement other than funding, in particular the funding of judicial salaries.[3] These arrangements for what has been termed a "voluntary contribution" are certainly novel, and some apprehension about them was expressed, prior to their implementation by the Security Council and the Sierra Leone government, by the UN's own Secretary General,[4] although these concerns related to whether the funding would be sufficient and not to independence. In order to establish that novel arrangements affect judicial independence, there must be a realistic danger that they are or will be productive of pressure on the judges of the Court to decide cases in a particular way - in respect of this Applicant, to convict him. The Applicant argues that the funding arrangements "create a legitimate fear of political interference by economic manipulation".[5] When pressed in oral argument, his counsel conceded that this must translate into a fear that major donors would withhold funding unless the Court convicted all or most of its indictees and that such fear would so play on the minds of the judges that they would strive (not withstanding the burden of proof or the state of the evidence) to convict the Applicant. This is a far-fetched and difficult proposition.[6] Nonetheless, courts which claim true independence should be ready to examine any respect in which learned counsel allege that this fundamentally important quality may be imperiled. Courts which are so starved of funds that they cannot do justice should close themselves down rather than continue under the expectation that sufficient funding will be forthcoming only if they render verdicts acceptable to the funding body.

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[3] Defence Reply, para. 7.

[4] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, paras 68-72. ("Report of the Secretary-General")

[5] *Prosecutor v Sam Hinga Norman*, Case No. SCSL-2003-08-PT, Preliminary Motion based on Lack of Jurisdiction: Judicial Independence ("Preliminary Motion"), 26 June 2003, para. 2.

[6] Oral argument, 5 November 2003.

The Funding Arrangements

4. The Special Court originated in Security Council Resolution 1315 of 14 August 2000, pursuant to which the Secretary-General was requested to negotiate an agreement with the government of Sierra Leone "to create an independent special court"[7] which would emphasise "the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges".[8] The Secretary-General was asked to make recommendations concerning "the amount of voluntary contributions, as appropriate, of funds, equipment and services to the special court"[9] This sub-paragraph signaled the Security Council's intention that the Special Court, while receiving technical support from the United Nations mission in Sierra Leone and from fellow members of the Commonwealth and the ECOWAS States, should have its operational costs funded by contributions volunteered by individual states. Given the paucity of funds available from the government of Sierra Leone, this intention is manifest from Resolution 1315.[10] The plan was for individual states to pledge sufficient funds to enable the Court to complete its mandate (which would include building a courthouse to be left as a legacy to the country, together with a well-trained and resourced legal profession). The states would themselves exercise a degree of fiscal control over the Court through a Management Committee, which would determine non-judicial policy, budgets and resources.

5. The Secretary-General's report delivered pursuant to that Resolution in October 2000 recommended recourse to *assessed* contributions. It frankly doubted whether a financial mechanism based on voluntary contributions would viably and sustainably provide the assured and continuous funding necessary for the Court. The Secretary-General warned that:

> The risks associated with the establishment of an operation of this kind with insufficient funds, without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organisation, and its exposure to legal liability.[11]

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[7] Security Council Resolution 1315, 14 August 2000, para. 1
[8] *Ibid*, para. 4.
[9] *Ibid*, para. 8(c).
[10] See Report of the Secretary-General, para. 68.
[11] Report of the Secretary-General, para. 70.

These risks had, by July 2001, reduced sufficiently for the plan to proceed. The Secretary-General's office, having initially costed the Court's first three years at US$114.6 million, reduced its estimate to US$57 million for "a scaled-down operation" which would nonetheless maintain "its nature and *sui generis* character, international standards of justice and the applicable law".[12] Pledges to cover this scaled-down sum for a scaled-down court were duly received. The Secretary-General, significantly, had already reserved "the right to revert to the Council at any time in the course of the operation of the Special Court and ask it to reconsider alternative means of financing the Court".[13] A Special Court agreement was concluded between the UN and the Government of Sierra Leone on 16 January 2002 ("the Agreement").

6. The Agreement sets out in Article 6 the provision for the Expenses of the Special Court:

> The Expenses of the Special Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and twelve months of its operations plus pledges equal to be anticipated expenses of the following twenty four months of the Court's operation. It is further understood that the Secretary General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first three years of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary General and the Security Council shall explore alternate means of financing the Court.

Read with paragraph 70 of the Secretary-General's report, with its reference to the moral responsibility, credibility and legal liability of the UN, the last sentence of Article 6 can best be read as an assurance that the Security Council accepts continuing responsibility for the Court and will make up the balance should voluntary contributions prove inadequate. It will, at very least, fund operations which are essential to its justice mission for as long as that mission takes.

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[12] Letter dated 12 July 2001 from the Secretary-General to the President of the Security-Council, UN Doc. S/2001/693, 13 July 2001.
[13] *Ibid.*

7. Article 7 of the Agreement sets out the functions of the Management Committee:

> It is the understanding of the Parties that interested States may wish to establish a Management Committee to assist the Special Court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters. The Management Committee will include representatives of interested States that contribute voluntarily to the Special Court, as well as representatives of the Government of Sierra Leone and the Secretary General.

8. This Article should be read with the Terms of Reference set out in a letter of the President of the Security Council[14] whereby the Management Committee comprises representatives of the Government of Sierra Leone and of the Security Council itself (i.e. its two most senior legal advisers) together with representatives of states which are a) important contributors and b) willing to assist in the Court's administration. At the time of the hearing of this matter, on 5 November 2003, these countries comprised Canada (in the chair) together with Lesotho, the Netherlands, Nigeria, the UK and the USA. The functions of the Committee are described in Section 4 (iv) of the Terms of Reference. The Management Committee for the Special Court will, *inter alia*:

a) assist in the establishment of the Special Court including in the identification of nominees for the positions of Registrar, Prosecutor and judges, for appointment by the Secretary General;

b) consider reports of the Special Court and provide advice and policy direction on all institutional aspects of its operation;

c) oversee the Special Court's annual budget and other financially-related reports, and advise the Secretary General on these matters;

d) assist the Secretary General in ensuring that adequate funds are available for the operation of the Special Court;

e) encourage all states to cooperate with the Special Court;

[14] Terms of Reference for the Management Committee of the Special Court, set out in the Annex Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, Appendix III, S/2002/46.

f) report, on a regular basis, to the Group of Interested States for the Special Court.

9. The Agreement provides by Article 2(4) that judges should be appointed for a three year term and should be eligible for re-appointment. A majority is appointed by the Secretary General, upon nominations forwarded by states, and a minority by the Government of Sierra Leone. Their qualifications are set out in Article 13 of the Statute of the Court:

i) The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any government or any other source.

ii) In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

iii) The judges shall be appointed for a three year period and shall be eligible for reappointment.

Arguments of the Parties

10. The Applicant, noting that these arrangements are different from those in the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), and that the Secretary-General had initial misgivings, (see paragraph 5 above), says that Articles 6 & 7 of the Agreement create an opportunity for pressure to be brought to bear by states, which may have an agenda that does not necessarily comport with justice. The Applicant focuses on those states which are represented on the Management Committee, in particular those which are major donors: because of

> "this Court's reliance on voluntary contributions to pay judicial salaries... there is nothing in the Court's structure which prevents donor states from communicating their displeasure with judicial decisions... and then acting on that displeasure when it comes time to pledging or paying contributions to the Court".[15]

[15] Preliminary Motion, para. 17.

The Applicant argues that a reasonable observer will have legitimate ground to fear for the Court's independence because the voluntary contribution system insufficiently insulates the judiciary from the possibility of financial pressure. The Applicant relies on the Canadian Supreme Court's reasoning in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*[16]in support of a rule that judicial salaries must be protected from executive, legislative or managerial intermeddling, preferably by having them fixed irreducibly by an independent commission.

11. The Prosecutor responds that the Agreement and Statute entirely insulates the Court in its judicial capacity from interference by or through the Management Committee and amply satisfies international standards for independence of the judiciary. Cases of the European Court of Human Rights (ECourtHR) are cited in support of a presumption of independence and impartiality and a consequently high burden on the Applicant to displace it. The ICTR decision in *Kanyabashi*[17] is relied upon to show that all international judges must be assumed to act without fear or favour according to their oaths of office. (To which argument the Applicant replied, "were an oath sufficient guarantee of independence, the international standards cited by the Prosecution would be considerably shorter."[18])

12. It is a curiosity of the written submissions from both sides - quickly exposed in oral argument - that Special Court judges were wrongly assumed to have one year renewable contracts. It was pointed out to counsel that all judges are on contracts that run for three years, so that concerns about executive intermeddling to reduce judicial benefits (as in the Canadian case relied upon by the Applicants) were unrealistic. There was no issue raised as to renewability: there is a view (which I share) that judicial independence requires that judges on contracts should not have them renewed more than once. [19]

Discussion

13. I do not consider that the decision of the Canadian Supreme Court in *Reference re Remuneration of Judges* supports the Applicant's argument. That case certainly provides the

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[16] Supreme Court of Canada, *Reference Re. Remuneration of Judges of the Provincial Court of Prince Edward Island, R v Campbell; R v Ekmecic; R v Wickman; Manitoba Provincial Judges Association v Manitoba (Minister of Justice)* [1997] 3 SCR 3.
[17] *Prosecutor v Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Defence Motion on Jurisdiction, 18 June 1997.
[18] Defence Reply, para. 12.
[19] See C. F. Amerasinghe, *Principles of the Institutional Law of International Organisations* (Cambridge University Press: 1996), 455.

most detailed discussion of the principles that should govern financial security as an element of judicial independence. Correctly, as I think, it identifies the perceptual standard as that of the reasonable onlooker informed of the history and traditions of judicial independence and viewing the funding arrangements realistically and practically.[20] It explains that the reason why judicial salaries must be set at a comparatively high public service level is to remove both the temptation to corruption and the public contemplation of the possibility of such temptation:

> the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friendland has put it, speaking as a concerned citizen, it is "for our sake, not for theirs".[21]

But even the Canadian justices accept that salary reductions may be made in emergencies which threaten the state (such as war or bankruptcy) and that judges may suffer cuts as part of 'across the board' pay reductions for senior civil servants. Similarly, the International Bar Association's Minimum Standards of Judicial Independence provide that "judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure".[22] But in such cases and in all other situations where judicial emoluments are subject to adjustments, the Canadian Supreme Court ruled that government must first have the recommendation of an independent and objective commission. It was the consequence of this decision that provincial governments were required to set up such independent bodies. The Applicant urges that this reasoning applies to international criminal courts.

14. This approach may well be justified in a provincial court setting. The Supreme Court's solution of an independent salaries commission, as a *quid pro quo* for judges foregoing their freedom to negotiate wages and conditions, is unexceptional and actually reflects the long-standing position in Britain and some other commonwealth countries. It is not, however, an indispensable condition of judicial independence, desirable though it may be (given the increase in the number of international judges paid through UN instrumentalities) for the Secretary-General to have independent advice about their pay and conditions. But there is an obvious distinction between state or provincial governments - with attorneys general and

[20] *Reference Re. Remuneration of Judges*, para. 113.
[21] Ibid, para. 193.
[22] International Bar Association, Minimum Standards of Judicial Independence, 1982, para. 15b.

officials who prosecute (and may further political careers by prosecuting) - and the UN Secretary-General's office or a Management Committee. The latter do not themselves prosecute in any sense. They establish a court with an independent prosecutor and have no interest in the verdicts of trials, other than that they be reached fairly, expeditiously and cost-effectively. Relations with judges must be at arms length (hence Special Court judges do not sit upon, or normally even attend, Management Committee meetings) but it would be an unnecessary and costly burden to require the super-imposition on the managerial structure of an independent salaries commission.

15. The Canadian Supreme Court majority notes that the historical source of constitutional concern for judicial independence in the Anglo-American tradition goes back to political interference by the Stuart monarchs.[23] But that concern had an economic aspect: dismissal at the King's pleasure - suffered by Edward Coke in 1616 and by other judges disinclined to support the 'ship money' exactions in the 1630s - was a financial sword of Damocles over the bench. What Pym and Hampden and their supporters at the Inns of Court immortally established by their stand against Charles I was the principle that those lawyers appointed to the bench, whilst owing their appointment to a decision of the King, would henceforth be free from any pressure to act other than according to the law and their own conscience. The associated abolition of the Star Chamber (in which judges sat with ministers of state) established judicial independence from government. The beacon thus lit, however briefly (it was temporarily extinguished at the Restoration twenty years later) was of independence of thought and decision, disciplined only by precedent and peer review, subject to resources supplied at the discretion of central government and to a salary that was usually negotiated with government.[24] The tradition has been much refined over the centuries, but the principle remains the same and is readily applied to permanent judges in national courts. International courts invited to scrutinise the terms and conditions on which their judges are employed must be satisfied that they do not set up pressures which in the real world could lead to injustice. It cannot sensibly be thought that the funding arrangements for the Special Court set up any such pressures: the judicial pay is comparable with other international

[23] The origins of the principle lie in the Act of Parliament of 15 January 1642 whereby judges were henceforth to hold office on good behaviour and not at the pleasure of the Crown. This was much earlier than the Act of Settlement of 1701, see *Reference Re. Remuneration of Judges*, para. 83.

[24] For example, in 1649 Cromwell offered the Chief Justiceship of Ireland to John Selden for £1,000 per annum. When Selden refused, he reduced the offer to £500, a sum at which he secured the services of his own Solicitor-General.

courts, the contract is for three years and will not call for more than one renewal, and the Management Committee has no 'political' agenda or special interest in securing convictions.

16. Both parties have referred to jurisprudence of the ECourtHR and of the ICTY, although the cited cases concern challenges to impartiality rather than independence. They are, nonetheless, of assistance in relation to the test to be applied when judicial independence is questioned. Old ECourtHR cases - *Le Compte*[25], *De Cubber*[26] and *Piersack*[27] - speak of *presuming* "personal impartiality" of a judge until there is proof to the contrary, but this is merely to say that judges whose recusal is sought must be shown to have malice or bias against one party or another. This will be difficult to prove and may well be forensically embarrassing to make, but the self-same argument can, and usually will, be available as one of perception, involving what the European Court in the leading case of *Hauschildt v Denmark* describes as the "objective" (i.e. "justice must be seen to be done") test:

> Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the stand-point of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.[28]

17. The Court was careful to eschew any allegation of actual (i.e. subjective) bias although it is difficult to see how the trial judge had not been fatally compromised in this respect. He had repeatedly denied bail to Hauschildt, having reached reasoned decisions (as required by the statutory provision) that there was "a very high degree of clarity"[29] that the defendant was guilty. The judge then presided over a trial (he sat with assessors) in which his verdict of guilt was in the circumstances a self-fulfilling prophecy. The judge had, in formal legal

[25] *Le Compte, Van Leuven and de Meyere*, Judgment of 27 May 1981, Series A, No. 43.
[26] *De Cubber v Belgium*, (1985) 7 EHHR 236, para. 25.
[27] *Piersack v Belgium*, (1983) 5 EHHR 236, para. 25.
[28] *Hauschildt v Denmark*, Judgment, 27 May 1981, Series A, No. 43, para. 48.
[29] *Ibid*, para. 52.

proceedings, decided that a defendant was very probably guilty (for the purpose of denying him bail) and then, for the purposes of convicting and imprisoning him, decided that he really was sure of his guilt. There was, in common sense, a real danger of bias through predetermination of likely guilt by the very tribunal called upon to decide actual guilt at trial.

18. Strict application of the objective test means that a fundamental flaw which undermines judicial independence may not be 'balanced' or 'overborne' by other factors, such as the distinction of the judge or the content of the judicial oath or the application of statutes containing proper international standards. These were relied upon by the ICTR Trial Chamber in *Kanyabashi*[30] but they cannot, even collectively, legitimise an arrangement which produces improper pressure. It is better simply to apply the test of the reasonable and informed observer, as explained by the Canadian Supreme Court. There is always the risk, of course, that hypothetical 'reasonable observers' will be accredited with such extensive knowledge about the law and its traditions that they will be turned into lawyers, or indeed judges - a temptation that judges must guard against. What is required of the 'reasonable observer' is a fairly hard-nosed appreciation both of how institutional pressures and 'old boy networks' can operate, and a feet-on-the-ground ability to exclude far-fetched or theoretical risks. The standpoint of an experienced journalist or human rights researcher may not be inappropriate. Among the qualities of 'reasonableness' would include a recognition of the importance of efficient and expeditious prosecution of international crimes.

19. This standard was exemplified by the ICTY Appeals Chamber decision in *Furundzija*, which rejected a challenge to a judge in a war crimes /rape trial on the ground that before her appointment she had been involved in international efforts to promote and protect the rights of women. The court pointed out that the judge's activities had been directed to a general support of human rights goals, "distinguishable from an inclination to implement those goals and objectives as a judge in a particular case".[31] Judges are not neuters in matters of politics and human rights: they may well hold and express views which are robustly supportive of democracy and civil liberty. The reasonable observer must expect them to deplore genocide, torture, mass murder and all crimes charged in international court indictments, but equally

[30] *Prosecutor v Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Defence Motion on Jurisdiction, 18 June 1997, paras 40-43.

[31] *Prosecutor v Anto Furundzija*, Case No. IT-95-17-1-A, Judgement, 21 July 2000, para. 200. See also *Crociani et al. v Italy*, Decisions and Reports, European Commission of Human Rights, (1981) vol. 22, 147.

to keep an open mind so far as the individual defendants' guilt of such crimes is concerned. They may, prior to their appointment, have expressed views on the way the law should develop: that should not disqualify them, as a judge, from deciding whether it has in fact developed in that or any other direction.

20. *Furundzija* provides a suitable backcloth to put the earlier English case of *ex parte Pinochet (No. 2)* in perspective. This involved a very exceptional situation, where a judge who was an unpaid chairman of a charity set up by Amnesty International was declared to be "a judge in his own cause" when that organisation was permitted to intervene at the hearing on the side of the prosecution.[32] What international judges, more used to receiving *amicus* submissions than the House of Lords (for whom Amnesty's intervention was virtually unparalleled) will find curious is the factual finding on which the decision was based, namely that "by seeking to intervene in this appeal and being allowed to do so, in practice Amnesty International became a party to the appeal".[33] Leave to file a written brief, or even to argue orally, does not make an intervener a "party" to a case under our rules, as explicated in a recent Decision of this Court in the case of *Kallon*.[34] Moreover, in the light of *Furundzija*, it can hardly have been objectionable for a judge to endorse the objects of the Amnesty charity, namely "to procure the abolition of torture, extra-judicial execution and disappearance". These are UN and international law objectives, and committing to them through membership of or unpaid work for an NGO should not automatically disqualify a judge. Some NGOs have expert legal departments and valuable on the ground experience of issues which may fall for decision by international courts: it would be regrettable if they were to be deterred from offering *amicus* assistance on the basis that this would disqualify any judge who had provided them with intellectual or financial support in the past or who remained an ordinary member of this organisation. Membership evinces approval of the general objects of an organisation, not of any legal argument that may be propounded in its publications or submissions.

21. The English judges went to great lengths in *Pinochet No 2* to uphold the impartiality principle, but the situation was highly exceptional and the case will not often serve as a precedent.

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[32] *R v Bow Street Magistrate, Ex p. Pinochet (No. 2)*, [2000] 1 AC 119.
[33] Ibid, 134(B).
[34] *Prosecutor v Morris Kallon*, Case No. SCSL-2003-07-PT, 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, 1 November 2003.

Normally, a past or present commitment to international human rights principles (including the ending of impunity) will not provide a basis for challenging an individual judge in an international criminal court. There must either be a familiar, financial, proprietary or similar link with a party (as to which, disqualification will be automatic) or else circumstances which could lead a reasonable and informed observer realistically to perceive a danger of bias.

Conclusion

22. It would, as the Secretary-General signaled, be an act of moral irresponsibility for the international community to establish a criminal court system, necessarily involving loss of liberty by arrest and detention as well as by the possibility of custodial sentence, which lacked the financial guarantees necessary to complete its task. Paying judicial salaries - conventionally set at a high level to remove the temptation to bribery - is but one essential requirement. There must be sufficient funding to keep prisoners in humane conditions and to provide indigent defendants with adequate legal representation. Were a budgetary cut made which removed the right to legal assistance guaranteed by Article 17(4)(d) of the Statute, for example, then the Court could not afford fair trial and should not attempt to do so. Even in this example, however, there is a question of degree. The cut would not remove the right if it merely denied an expensive counsel of choice, or confined representation to one counsel or to a public defender, so long as that lawyer was suitably experienced in criminal defence. Courts are not disabled from doing justice by funding arrangements which limit the money available to the parties, so long as fundamental defence rights are respected.

23. So far as judicial independence is concerned, there can be no presumption that the funding arrangements made for the ICTY and ICTR set any sort of fixed precedent. The arrangements for funding the International Criminal Court (ICC) are different and do permit voluntary contributions on top of a minimum derived from assessment. Other arrangements may prove equally satisfactory.[35] What matters in every instance is to ensure that payment is made or fixed in a manner that does not provide an incentive for a judge to decide any case in a particular way, in order to curry favour with the paymaster and so obtain

[35] An example is the "alternative solution" suggested by the Secretary-General at para. 72 of his report (Report of the Secretary-General on the establishment of a Special Court for Sierra Leone).

a personal benefit, be it an increase in salary or a reappointment or some other tangible advantage.

24. In the present case, it is impossible for any reasonable observer to identify any existing or potential financial temptation either to acquit or convict this Applicant, or all defendants from his faction, or all defendants. The interest of donor states is that the Court they pay for will be successful - but "success" cannot be judged by its conviction rate, let alone by any conviction of Chief Hinga Norman. "Success" will be judged by the Court's record in doing justice, expeditiously and fairly: a wrongful or wrongfully influenced conviction would amount to a "failure" - and one which would have the result of denigrating the Court and (by the Applicant's own implication) the donors who supported its justice mission. Although states all have foreign policy objectives, their purpose in funding an international criminal court cannot be assumed to include the obtaining of convictions against all or even most indictees. So far as the Sierra Leone Special Court is concerned, the purpose is to put on trial those credibly accused of bearing the greatest responsibility for war crimes and crimes against humanity committed in the country in recent years. That purpose would not be served by prosecutorial incompetence or judicial delay, and nor would it be served by unfair trials or biased verdicts of guilt. The donors have paid for a court: all they can expect is that it will do justice to every defendant according to law. The funding arrangements give no cause for concern that judges will perceive some financial advantage in finding verdicts of guilt which are not justified by the evidence.

25. For these reasons, and those given in the Decision of Justices Ayoola, Winter and King, this preliminary motion is dismissed.

Done at Freetown this 13th Day of March 2004

Justice Robertson
Presiding

[Seal of the Special Court for Sierra Leone]