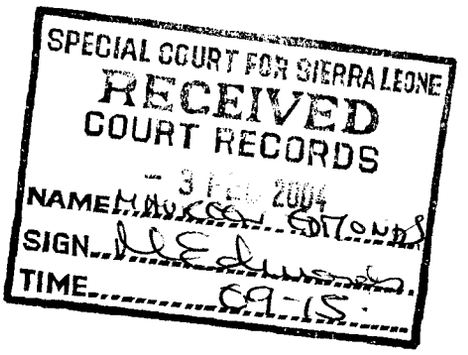
001 SCSL-2004-11-PT. (1 – 8) 1

THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, President
Judge Emmanuel Ayoola
Judge George Gelaga King
Judge Renate Winter
Fifth Judge to be determined
Registrar: Mr. Robin Vincent
Date: 2 February 2004



THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

DEFENCE REPLY TO THE PROSECUTION RESPONSE TO THE ADDITIONAL WRITTEN SUBMISSION PERTAINING TO THE PRELIMINARY MOTION BASED ON LACK OF JURISDICTION: THE NATURE OF THE ARMED CONFLICT

Office of the Prosecutor:
Mr. Desmond de Silva, Deputy Prosecutor
Mr. Luc Côté, Chief of Prosecutions
Mr. Walter Marcus-Jones
Mr. Christopher Staker
Mr. Abdul Tejan-Cole
Ms. Kathryn Howarth

Defence Office:
Mr. Sylvain Roy, Acting Chief

For Mr. Fofana:
Mr. Michiel Pestman
Mr. Victor Koppe
Mr. Arrow John Bockarie
Prof. André Nollkaemper
Dr. Liesbeth Zegveld

3/2/04

1. The Defence for Mr. Moinina Fofana hereby files its Reply to the "Prosecution Response to Additional Submissions Pertaining to the Preliminary Motion Based on Lack of Jurisdiction: the Nature of the Armed Conflict", filed on 26 January 2004 ("the Response to Additional Submissions").

2. The Response to Additional Submissions raised no new points and the Defence will not repeat arguments made in its earlier written filings. However, the Defence would take this opportunity to urge the Appeals Chamber to hold an oral hearing before determining this matter.

3. Under Rule 117 of the Rules and Procedure and Evidence, the current matter "may be determined entirely on the basis of written submissions". The Defence submits that this discretion not to hold an oral hearing should not be exercised where significant challenges to jurisdiction are concerned, and even less so where the court is deciding on such challenges for the first time.

4. Here, the Defence would refer the Chamber to the ruling of Trial Chamber II at the ICTR in the *Kanyabashi* case which granted an oral hearing on a jurisdictional challenge despite the fact that some of the questions raised had already been resolved by the Appeals Chamber of its sister institution at the ICTY:

> "Notwithstanding the fact that some of the questions raised by the Defence Counsel have already been addressed in the decision on 2 October 1995 by the Appeals Chamber for the Former Yugoslavia, the Trial Chamber finds that, in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence and in the interest of justice, that the Defence Counsel's motion deserves a hearing and full consideration."[1]

In the *Milosevic* case, Trial Chamber III at the ICTY came to the same conclusion. In spite of the fact that some of the jurisdictional arguments raised by the defendant in that case had been

[1] ICTR, Trial Chamber II, The Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-T, 18 June 1997, para. 6.

dealt with before by the Appeals Chamber, the Trial Chamber decided to hear both parties and the *amici curiae*, arguing that:

> "Indeed, any judicial body is bound to take seriously a challenge to the legality of its foundation".[2]

5. The question before the Appeals Chamber in the current matter is not only fundamental but has not been presented to this or any similar court before. In the respectful submission of the Defence, therefore, the motion is one in which the discretion not to hold a hearing should *not* be exercised.

6. In addition to this legal argument, the Defence believes that a number of practical considerations favour an oral hearing on the Motion. The Defence imagines that the Appeals Chamber may well wish to put additional questions to it, and is keen to offer any possible assistance to the Chamber in resolving supplementary queries.

7. The Defence further believes that it would be beneficial for both parties to have the opportunity to deliver their arguments "in one piece", as the filing procedure prescribed for motion referred under Rule 72 (E) has resulted in rather fragmentary submissions.

8. Lastly, the shortcomings in the e-mail system at the Special Court have often restricted the Defence to filing only one page of each authority cited, and the Defence is aware that the Chamber is thereby deprived of the full context of each supporting citation. The Defence would use an oral hearing to present its authorities fully to the court with an explanation of their significance, in the Defence's eyes, and to answer any questions.

Conclusion

9. In conclusion, the Defence repeats the assertion that the Court lacks jurisdiction in this matter, and urges it to hold an oral hearing to determine the matter.

COUNSEL FOR THE ACCUSED

Mr. Michiel Pestman

Prof. André Nollkaemper

Dr. Liesbeth Zegveld

[2] ICTY, Trial Chamber III, The Prosecutor v. Milosevic, Case No. IT-99-37-T, 8 November 2001, paras. 1-3.

Defence list of authorities

1. ICTR, Trial Chamber II, The Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-T, 18 June 1997, para. 6.

2. ICTY, Trial Chamber III, The Prosecutor v. Milosevic, Case No. IT-99-37-T, 8 November 2001, paras. 1-3.

Trial Chamber 2

OR: ENG

Before:
Judge William H. Sekule, Presiding Judge
Judge Tafazzal H. Khan
Judge Navanethem Pillay

Registrar:
Mr. Frederik Harhoff
Decision of:
18 June 1997

THE PROSECUTOR

versus

JOSEPH KANYABASHI

Case No. ICTR-96-15-T

DECISION ON THE DEFENCE MOTION ON JURISDICTION

Office of the Prosecutor:
Mr. Yacob Haile-Mariam

Counsel for the Defence:
Mr. Evans Monari
Mr. Michel Marchand

THE TRIBUNAL,

SITTING AS Trial Chamber 2 of the International Criminal Tribunal for Rwanda ("the Tribunal"), composed of Judge William H. Sekule as Presiding Judge, Judge Tafazzal H. Khan and Judge Navanethem Pillay;

(...)

6. Notwithstanding the fact that some of the questions raised by the Defence Counsel have already been addressed in the decision rendered on 2 October 1995 by the Appeals Chamber for the Former Yugoslavia, the Trial Chamber finds that, in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence and in the interests of justice, that the Defence Counsel's motion deserves a hearing and full consideration. The Trial Chamber, therefore, grants relief from the waiver *suo motu* and will thus proceed with the examination of the Defence Counsel's preliminary motion.

(...)

8. The Prosecutor responded that the basic arguments in the Defence Counsel's motion were addressed by the Trial Chamber and, in particular, by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the Tadic'-case. The Trial Chamber notes that, in terms of Article 12(2) of the Statute, the two Tribunals share the same

Judges of their Appeals Chambers and have adopted largely similar Rules of Procedure and Evidence for the purpose of providing uniformity in the jurisprudence of the two Tribunals.

The Trial Chamber, respects the persuasive authority of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia and has taken careful note of the decision rendered by the Appeals Chamber in the Tadic case.

[BUT NEVERTHELESS PROCEEDS WITH EXAMINING THE MERITS OF THE PRELIMINARY DEFENCE MOTION]

(...)

Arusha, 18 June 1997.

William H. Sekule T.H. Khan Navanethem Pillay
Presiding Judge Judge Judge

Pronounced in open Court on the 3rd of July 1997

WH Sekule
Presiding Judge

8

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge Mohamed Fassi Fihri

Registrar:
Mr. Hans Holthuis

Decision of:
8 November 2001

PROSECUTOR

v.

SLOBODAN MILOSEVIC

DECISION ON PRELIMINARY MOTIONS

The Office of the Prosecutor:
Ms. Carla Del Ponte
Mr. Daniel Saxon
Mr. Dirk Ryneveld
Ms. Julia Baly
Ms. Cristina Romano
Mr. Daryl A. Mundis
Mr. Milbert Shin

The Accused:
Slobodan Milosevic

Amici Curiae:
Mr. Steven Kay
Mr. Branislav Tapuskovic
Mr. Michaïl Wladimiroff

I. INTRODUCTION

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (...) Both parties and the *amici curiae* were heard by the Trial Chamber on 29 October 2001.

(...)

3.This Decision deals with all the arguments, written and oral, raised by the accused , the Prosecution, and the *amici curiae*. Although some of the arguments have been dealt with before in the International Tribunal, the Chamber has considered all of them very carefully. Indeed, any judicial body is bound to take seriously a challenge to the legality of its foundation.