

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-2004-14¹ 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.

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(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 (notwithstanding 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.

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

⁷ Security Council Resolution 1315, 14 August 2000, para. 1

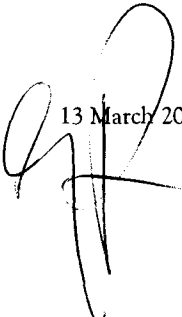
⁸ *Ibid*, para. 4.

⁹ *Ibid*, para. 8(c).

¹⁰ See Report of the Secretary-General, para. 68.

¹¹ Report of the Secretary-General, para. 70.

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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.

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 Council¹⁴ 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

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.

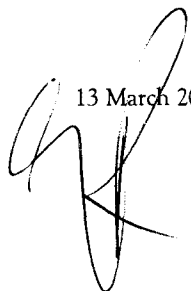
14. This approach may well be justified in a provincial court setting. The Supreme Court’s solution of an independent salaries commission, as a *quid pro quo* for judges foregoing their freedom to negotiate wages and conditions, is unexceptional and actually reflects the long-standing position in Britain 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.

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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.

³² *R v Bow Street Magistrate, Ex p. Pinochet* (No. 2), [2000] 1 AC 119.

³³ *Ibid*, 134(B).

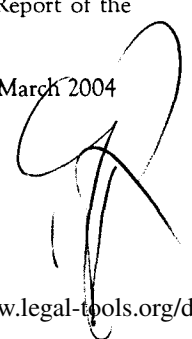
³⁴ *Prosecutor v Morris Kallon*, Case No. SCSL-2003-07-PT, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File *Amicus Curiae* Brief and to Present Oral Submissions, 1 November 2003.

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]

Case No.SCSL-2004-14-AR72(E)

13 March 2004