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SCSL-2003-11-PT.
(1335-1341)

1335

THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Mutanga Itoe

Registrar: Mr. Robin Vincent

Date: 17 November 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

**PRELIMINARY DEFENCE MOTION ON THE LACK OF PERSONAL
JURISDICTION**

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions

Defence Office:

Mr. Sylvain Roy, Acting Chief

Mr. Ibrahim Yillah

Defence Counsel:

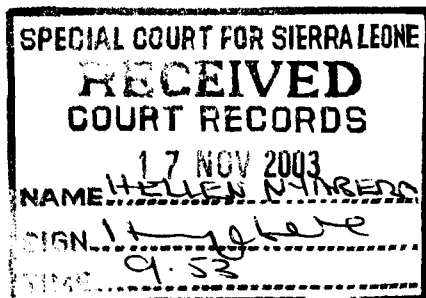
Mr. Michiel Pestman

Mr. Victor Koppe

Mr. Arrow John Bockarie

Prof. André Nollkaemper

Dr. Liesbeth Zegveld



1. The Prosecutor has charged Mr. Moinina Fofana with crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law, in violation of Articles 2, 3 and 4 of the Statute of the Special Court for Sierra Leone.
2. The defence for Mr Fofana herewith files a preliminary motion on lack of personal jurisdiction of the Special Court over the defendant. It will argue that the Special Court only has jurisdiction over persons who bear the greatest responsibility for the serious violations of international law that are within the subject-matter jurisdiction of the Court. Mr. Fofana does not belong in that category of persons and the Special Court thus cannot exercise jurisdiction over him. Consequently, the Special Court lacks personal jurisdiction over Mr. Fofana. These arguments will be explained below.

The Special Court has a limited personal jurisdiction

3. The personal jurisdiction of the Special Court is defined in Article 1(1) of its Statute:

“The Special Court shall ... have the power 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, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”
4. In his report on the Establishment of the Special Court for Sierra Leone (S/2000/915), the Secretary-General of the United Nations takes the position that Article 1 should not be seen as a “distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases” (para. 30). However, this interpretation cannot be accepted and is certainly not binding on the Special Court. In Resolution

1315(2000), the Security Council defined the mandate for the negotiations by the Secretary-General with Sierra Leone. The Security Council recommended:

“that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.” (*emphasis added*)

5. The Special Court was established to give effect to the primary responsibility of the Security Council to maintain international peace and security. The Security Council requested the Secretary General to conclude an agreement with Sierra Leone to establish an independent Special Court.
6. The Security Council intended the criterion of “persons who bear the greatest responsibility” as a limitation of the personal jurisdiction of the Special Court. The question whether the Secretary-General could under the internal law of the United Nations be duly authorized to conclude the Special Court Agreement is a complex one that is not addressed here. But in any case it is clear that the Secretary-General cannot go beyond the mandate given to him by the Security Council and that he is not authorized to interpret Article 1 of the Statute, that faithfully gives effect to the intention of the Security Council, in any other way than was intended by the Security Council. In interpreting Article 1 of the Statute, the Special Court should give decisive weight to the interpretation of the Security Council.
7. The limitation in Article 1 of the Statute has also been accepted as a limitation on the personal jurisdiction of the Special Court that could give rise to jurisdictional challenges in scholarly writings. It has been expressly distinguished from the Statutes of the ICTY and the ICTR, which leave the decision as to whom to charge to the Prosecutor¹.

¹ Beresford and Muller, 14 LJIL (2001) 644.

8. It follows that the Special Court only has jurisdiction over a limited category of persons, namely those “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, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone”.

Challenges to the personal jurisdiction of the Special Court should be dealt with in the pre-trial stage

9. The determination of who is included in “persons who bear the greatest responsibility for serious violations of international humanitarian law” may raise complex factual issues. A court with a similarly limited personal jurisdiction may be tempted to handle these questions at the trial stage rather than at the pre-trial stage. Yet, it is submitted that challenges to personal jurisdiction should properly be dealt with at the pre-trial stage.
10. The jurisdiction of a court, including its personal jurisdiction, defines its legal capability to try a case. No court should try a person if it does not possess the legal capability to do so.
11. The difference between deciding on the personal jurisdiction at the pre-trial stage and deciding on personal jurisdiction at the trial stage is more than a technicality. It can affect the length of the time that the defendant is detained by a court that, according to the defence, has no legal power to try him. In addition to the legal principle that requires the court to decide jurisdictional issues before the trial, the interests of the defendant require a speedy determination of the jurisdiction of the Court.

12. There is one other reason why it would not be proper for the Court to consider the matter of personal jurisdiction only during the trial. The defendant will be tried on the basis of the indictment. The criterion of “persons who bear the greatest responsibility for serious violations of international humanitarian law” is not part of the indictment. This could mean that if the Prosecutor were to prove that the defendant committed some or all of the crimes he is accused of, the Court would have to find him guilty. The argument that he did not “bear the greatest responsibility for serious violations of international humanitarian law” may thus not be a defence against the indictment.

The defendant does not belong to the category of “persons who bear the greatest responsibility for serious violations of international humanitarian law”

13. It is not clear what the drafters of the Statute meant by the phrase “persons who bear the greatest responsibility for serious violations of international humanitarian law”.
14. One interpretation is that it refers to leaders of the parties (or the states) that had the greatest responsibility for the (continuation of the) conflict and the threat to the establishment and implementation of the peace process in Sierra Leone. Clearly, Mr. Fofana does not belong in this category. Throughout the conflict, the CDF fought on the side of the Government of President Kabbah and ECOMOG to preserve and restore peace in the country. Numerous reports of the Secretary-General expressly state that the CDF acted in concert with ECOMOG, which had the support of the international community².
15. A second interpretation of the phrase “persons who bear the greatest responsibility for serious violations of international humanitarian law” is that it refers simply to those individuals who were responsible for the majority of the crimes committed during the armed conflict in Sierra Leone. Neither the indictment nor the material

² Fourth Report of the Secretary-General on the Situation in Sierra Leone doc. S/1998/103, 18-03-98, § 6; Fifth Report of the Secretary-General on the Situation in Sierra Leone, doc. S/1998/486, 09-06-98, pp. 4-5.

disclosed by the Prosecution support the contention that Mr. Fofana belonged to that category. In addition, Mr. Fofana's name is never mentioned in any of the public reports on the conflict, such as the reports of the Secretary General, those of Amnesty International and those of Human Rights Watch. It is possible to establish a preliminary list of names of people who appear to be responsible for the majority of the atrocities committed during the armed conflict from this public material; Mr. Fofana, however, does not figure among them.

Conclusion

16. It follows that the Special Court only has jurisdiction over persons who bear the greatest responsibility for the serious violations of international law that are within the subject-matter jurisdiction of the Court. Mr. Fofana does not belong in that category of persons and the Special Court thus cannot exercise jurisdiction over him.

COUNSEL FOR THE ACCUSED

 Mr. Michiel Pestman

Prof. Dr. P. André Nollkaemper

Dr. Liesbeth Zegveld

Defence List of Authorities

1. S. Beresford and A.S. Muller, "The Special Court for Sierra Leone: An Initial Comment," 14 *Leiden Journal of International Law* (2001), pp. 635–651.
2. Fourth Report of the Secretary-General on the Situation in Sierra Leone, doc. S/1998/103, 18-03-98.
3. Fifth Report of the Secretary-General on the Situation in Sierra Leone, doc. S/1998/486, 09-06-98.