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SCSL-2003-11-PT
(1303-1311)

1303

THE TRIAL CHAMBER

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

Registrar: Mr. Robin Vincent

Date: 14 November 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

**PRELIMINARY DEFENCE MOTION ON THE LACK OF JURISDICTION:
ILLEGAL DELEGATION OF POWERS BY THE UNITED NATIONS**

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions

Defence Office:

Mr. Sylvain Roy, Acting Chief

Mr. Ibrahim Yillah

Defence Counsel:

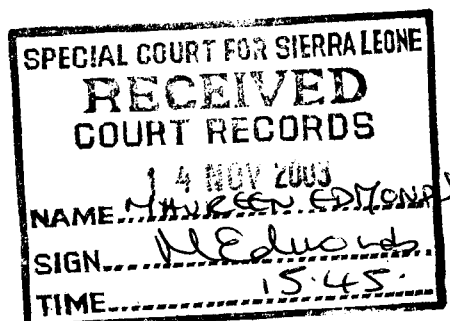
Mr. Michiel Pestman

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 jurisdiction of the Special Court over the defendant. It will argue that the jurisdiction of the Special Court is based on an illegal exercise of powers by the United Nations. Consequently, the Special Court lacks jurisdiction over Mr. Fofana. These arguments will be explained below.

The Special Court is allowed to determine the validity of the delegation of jurisdiction

3. As an international court, the Special Court is empowered to determine its own jurisdiction, including the legality of its establishment. It thus has the power to determine the legality of the transfer of powers by the states and/or international organisations that have established it. It was on this basis that the ICTY in the Tadic Case and the ICTR in the Kanyabashi Case reviewed the legality of their establishment by the Security Council. It is in on this basis that the Special Court has the power to review the legality of the transfer of powers by Sierra Leone and the United Nations.

The maintenance of the peace and security in Sierra Leone was the primary responsibility of the Security Council

4. The Security Council of the United Nations determined that the situation in Sierra Leone constituted a threat to international peace and security in the region in terms of Article 39 of the United Nations Charter (S/RES/1315(2000)).

5. The peace in Sierra Leone and the maintenance of international peace and security in the region thereby became the primary responsibility of the Security Council. The member States have also delegated primary responsibility in these matters to the Security Council as a general matter. Article 24 of the United Nations Charter provides:

“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

The Special Court was established to give effect to the responsibility of the Security Council for the maintenance of peace and security in Sierra Leone

6. The determination by the Security Council that there was a threat to international peace and security in S/RES/1315(2000) led to its request to the Secretary-General to conclude an agreement with Sierra Leone to establish an independent special court. The conclusion by the Secretary-General of the agreement was, therefore, the exercise of authority delegated by the Security Council to act to protect international peace and security. It follows that the Special Court was established to give effect to the Security Council's responsibility for the maintenance of international peace and security.

7. The United Nations did not set up the Special Court in the same way that it established the ICTY and the ICTR. In particular, the role of the Security Council in the establishment of the Special Court was different. In the Tadic Case, the ICTY accepted that the Security Council could establish an international tribunal in the exercise of its Chapter VII powers¹. In the present case, however, the

¹ *Tadic* Decision, par.55 (attached as annex to the Reply & Substantive Submissions for Leave to Intervene as an Interested Party in the Preliminary Motion Filed by Mr. Norman Based On A Lack Of Jurisdiction: Judicial Independence.

Security Council rather authorised the Secretary-General to conclude an agreement to set up the Special Court.

8. Either it could be said that the Security Council delegated its powers in the field of international peace and security to the Secretary-General, or it could be said that the Secretary-General used his own powers in that field. After all, the Security Council does not have exclusive responsibility for the maintenance of peace and security but rather primary powers that may be shared by other organs of the United Nations².

The conclusion by the Secretary-General of the Special Court Agreement was an unlawful exercise of powers of the United Nations

9. In both of the above-mentioned interpretations, however, the powers of the Secretary-General are limited.
10. As to the first interpretation, the Security Council can indeed delegate its primary responsibility for the maintenance of peace security. For instance, it can create international criminal tribunals such as the ICTY and the ICTR that subsequently possess binding powers vis-à-vis states and that can try individuals. However, the delegation of such powers is subject to certain conditions. The most important condition for present purposes is that the Security Council must ensure that it

“can exercise effective authority and control over the way in which the delegated powers are being exercised”³.

In case of the establishment of an international criminal tribunal this obviously does not mean that the Council can interfere with the judicial functions of the tribunal, as that would violate the principle of judicial independence. However, it

² International Court of Justice, *Certain Expenses of the United Nations*, *Advising Opinion of 20 July 1962*, ICJ Rep. (1962), p. 163.

³ D. Sarooshi, *The United Nations and the Deployment of Collective Security*, 1999, p. 41, p. 159.

does mean that the Council must remain empowered to terminate the operation of a tribunal or amend the terms of the statute⁴. This condition applies equally to the relationship between the Security Council and the Special Court. The Security Council must be able to terminate the court's life or amend its statute if its power is legitimately delegated. But as that the Special Court was established by bilateral treaty, the Security Council clearly cannot now unilaterally re-assume its powers and change the Statute or terminate the operation of the Special Court. It follows that the delegation of powers in regard of maintenance of peace and security to the Special Court is illegal.

11. As to the second interpretation, it would appear that while the Secretary-General may have independent powers to deal with peace and security, these do not extend to the establishment of an international tribunal. In the *Certain Expenses Case*, the International Court of Justice based its conclusion that the General Assembly was also empowered to concern itself with matters of peace and security on express provisions of the Charter, in particular Article 14⁵. However, the Articles of the Charter dealing with the powers of the Secretary-General contain no such basis. Articles 97-101 of the United Nations Charter attribute important functions and powers to the Secretary-General, but none of these comes close to providing a basis for the conclusion of an agreement that establishes an international criminal court to address threats to peace and security.
12. It follows that the conclusion of the Special Court Agreement is an unlawful exercise of powers by the United Nations and that the Agreement is therefore invalid.

The conclusion of the Special Court Agreement by the United Nations was an essential condition for the establishment of the Special Court

⁴ Sarooshi, 104.

13. Prosecution of international crimes is not only a matter that falls within the power of the United Nations. States can, acting within their jurisdiction under international law, prosecute international crimes without involvement of the United Nations. In this respect there exists an overlap between the maintenance of peace and security by the United Nations, on the one hand, and the right of states to conduct criminal prosecution on the other.

14. However, the right of states to conduct criminal prosecutions only exists within the national legal order. It is true that states may cooperate to transfer their powers to an international court. This is what happened in Nurenberg:

“The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law”⁶.

15. Unlike the Nurenberg Tribunal, the Special Court was created by only one state. Sierra Leone is the only state with territorial or personal jurisdiction that has transferred its powers to the Special Court. In the absence of another state, the United Nations was essential for transferring the jurisdiction of Sierra Leone to an international court. This indispensable role of the United Nations makes it imperative that it acts within its powers.

16. The United Nations does not, like Sierra Leone, possess personal or territorial jurisdiction over suspects of international crimes. The only power of the United Nations to act in regard to international crimes that threaten international peace and security derives from art. 39 of the United Nations Charter. It is possible that the General Assembly possesses similar powers; the Secretary-General, however, does not.

⁵ ICJ, *Certain Expenses Case*, ICJ Rep. (1962), p. 163.

17. Given the obvious interests at stake for the defendant, the consent of Sierra Leone is not enough to remedy this illegal exercise of powers by the United Nations. By way of comparison, in the Tadic case, the Appeals Chamber accepted the defendant's plea based on violation of state sovereignty, an issue closely related to state consent. While in the Tadic case, the Trial Chamber had argued that the defendant lacked *locus standi* to invoke a breach of sovereignty, the Appeals Chamber stated

“Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.”⁷

This conclusion should similarly apply to the present argument by the defendant that the consent of Sierra Leone is not sufficient to repair the United Nations transgression of powers granted by the United Nations Charter.

Conclusion

18. It follows that the role of the United Nations was indispensable for the conclusion of the Special Court Agreement. It also follows that, within the United Nations, only the Security Council has the authority, under Article 39 of the United Nations

⁶ See *Trial of the Major War Criminals*, Vol. 22, 41.

⁷ *Tadic* Decision, par.55 (attached as annex to the Reply & Substantive Submissions for Leave to Intervene as an Interested Party in the Preliminary Motion Filed by Mr. Norman Based On A Lack Of Jurisdiction: Judicial Independence.

Charter, to maintain international peace and security and, therefore, to conclude an agreement to establish the Special Court. The unconditional delegation of these Security Council powers to the Secretary General was unlawful. In addition, the Secretary General did not possess independent powers to conclude an agreement creating an independent legal person, not being an United Nations organ, such as the Sierra Leone Special Court.

19. The establishment of the Special Court was an illegal delegation of powers; the Special Court is therefore without jurisdiction to try any defendant.

COUNSEL FOR THE ACCUSED

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Mr. Michiel Restman

Prof. Dr. P. André Nollkaemper

Dr. Liesbeth Zegveld

Defence List of Authorities

1311

1. International Court of Justice, *Certain Expenses of the United Nations*, Advising Opinion of 20 July 1962 (summary)
2. D. Sarooshi, *The United Nations and the Deployment of Collective Security*, 1999, pp. 41, 104, 159.
3. *Trial of the Major War Criminals*, Vol. 22, p. 461, retrieved on 12 November 2003, from <http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm>.