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SCSL - 2003 - 11 - PT

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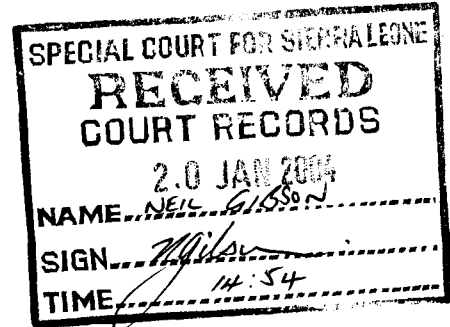
**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
FREETOWN - SIERRA LEONE

**IN THE APPEALS CHAMBER**

Before: Judge Geoffrey Robertson, QC, President  
Judge Emmanuel O. Ayoola  
Judge Gelaga King  
Judge Renate Winter

Registrar: Mr Robin Vincent

Date filed: 20 January 2004



**THE PROSECUTOR**

**Against**

**MOININA FOFANA**

CASE NO. SCSL - 2003 - 11 - PT

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**PROSECUTION RESPONSE TO ADDITIONAL SUBMISSIONS PERTAINING  
TO THE PRELIMINARY MOTION BASED ON LACK OF PERSONAL  
JURISDICTION: ILLEGAL DELEGATION OF JURISDICTION BY SIERRA  
LEONE**

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Office of the Prosecutor:

Mr Desmond de Silva, QC, Deputy Prosecutor  
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Mr Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:

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

**SPECIAL COURT FOR SIERRA LEONE**  
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**I. INTRODUCTION**

1. The Prosecution files this Response to the Defence document entitled “Additional Submissions pertaining to the preliminary motion based on lack of jurisdiction: illegal delegation of jurisdiction by Sierra Leone” (the “**Additional Submissions**”) dated 6<sup>th</sup> January 2004 and filed on behalf of Moinina Fofana (the “**Accused**”)<sup>1</sup>.
2. The Additional Submissions filed by the Defence add nothing in any relevant sense to the arguments already canvassed in the Defence Motion. Those arguments have been adequately dealt with in the Response by the Prosecution.

**II. ARGUMENT**

3. For the avoidance of doubt, the position of the Prosecution is as follows:

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<sup>1</sup> Registry Page (“RP”) 1312-1317.

- (1) The Prosecution agrees with the Defence that the Special Court was established by a treaty between Sierra Leone and the United Nations.<sup>2</sup>
- (2) Whereas the Special Court Agreement is a Treaty at International Law the Lome Agreement is not.
- (3) The Lome Agreement cannot, therefore, deprive Sierra Leone of the capacity under International Law to enter into the Special Court Agreement.
- (4) The Lome Agreement had no basis in law until the Lome Peace Agreement (Ratification) Act 1999 and even then its basis was limited to domestic Sierra Leone law. Even in the event of a conflict between Sierra Leone's domestic law and the Special Court Agreement (no way conceded by the Prosecution) the domestic law of Sierra Leone cannot be invoked to invalidate the Treaty Provisions of the Special Court Agreement.<sup>3</sup>
- (5) In any event, Article IX of the Lome Agreement was not intended to cover crimes under Articles 2-4 of the Special Court Statute and this was reflected in the disclaimer entered by the Special Representative of the Secretary General at the time of the signing, namely that Article IX of the Agreement would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.<sup>4</sup>
- (6) At paragraph 16 of the Defence Reply, the Defence cite the example of the amnesty in South Africa in support of the proposition that international law does not prohibit the granting of amnesties for international crimes. The amnesty that fell for consideration by the South African Constitutional Court cannot be used as authority to support such a broad proposition. The amnesty in the South Africa context was a conditional amnesty which was granted on an individual and discretionary basis (not a blanket amnesty) in return for testifying before the South African Truth and Reconciliation Commission. Whilst such a conditional amnesty *may* in certain conditions be regarded as valid under international law, it

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<sup>2</sup> Preliminary Motion, paras 4-6

<sup>3</sup> Article 27(1) of the 1986 Vienna Convention on the Law of Treaties

<sup>4</sup> See Security Council Resolution 1315 (2000), 14 August 2000, preambular paragraph 5; Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "Report of the Secretary-General), Para 23.

does not give rise to the conclusion that international law does not prohibit the granting of blanket amnesties for international crimes.

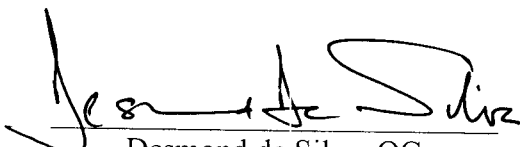
- (7) Above all, the Special Court is bound to apply Article 10 of its own Statute and, in doing so, is compelled to deny the Defence of the Accused based on the Lome Agreement.
4. For the aforementioned reasons dealt with more fully in the Prosecution Response, the Prosecution submits that the arguments of the Defence are wholly misconceived and that the Defence submission that the Special Court should decline jurisdiction for all crimes committed before the signing of the Lome Agreement on 7 July 1999 should be rejected in its entirety.


### III. CONCLUSION.

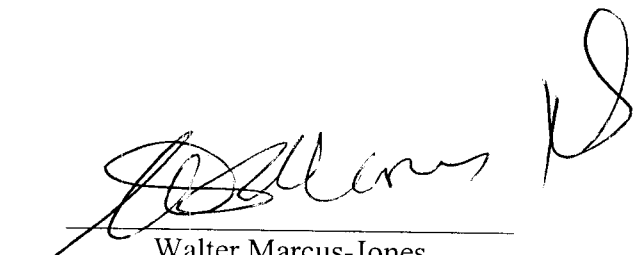
5. There is no valid legal basis for the submission that the Special Court should decline jurisdiction for all crimes committed before the signing of the Lome Accord on the 7<sup>th</sup> July 1999.

Freetown, 20 January 2004.

For the Prosecution,

  
Desmond de Silva, QC  
Deputy Prosecutor

  
Abdul Tejan-Cole  
Appellate Counsel

  
Walter Marcus-Jones  
Senior Appellate Counsel

**PROSECUTION INDEX OF AUTHORITIES**

1. 1986 Vienna Convention on the Law of Treaties, Article 27(1) [extract].
2. Security Council Resolution 1315 (2000), 14 August 2000, preambular paragraph 5 [extract].
3. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, Para 23 [extract].

**ANNEX 1:**

1986 Vienna Convention on the Law of Treaties, Article 27(1) [extract].



*International Law  
Commission*

**VIENNA CONVENTION ON THE LAW OF TREATIES  
BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS  
OR BETWEEN INTERNATIONAL ORGANIZATIONS**

(21 March 1986)

The Parties to the present Convention,

Considering the fundamental role of treaties in the history of  
international relations,

Recognizing the consensual nature of treaties and their  
ever-increasing importance as a source of international law,

Noting that the principles of free consent and of good faith and the  
pacta sunt servanda rule are universally recognized,

Affirming the importance of enhancing the process of codification and  
progressive development of international law at a universal level,

Believing that the codification and progressive development of the  
rules relating to treaties between States and international organizations  
or between international organizations are means of enhancing legal order  
in international relations and of serving the purposes of the United  
Nations,

Having in mind the principles of international law embodied in the  
Charter of the United Nations, such as the principles of the equal rights

case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

### PART III

## OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

### SECTION 1.

#### OBSERVANCE OF TREATIES

##### Article 26

##### *Pacta sunt servanda*

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

##### Article 27

Internal law of States, rules of international organizations



and observance of treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.
2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.
3. The rules contained in the preceding paragraphs are without prejudice to article 46.

## SECTION 2.

### APPLICATION OF TREATIES

#### Article 28

##### Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

#### Article 29

##### Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more

**ANNEX 2:**

Security Council Resolution 1315 (2000), 14 August 2000, preambular paragraph 5  
[extract].



**Resolution 1315 (2000)**

**Adopted by the Security Council at its 4186th meeting, on  
14 August 2000**

*The Security Council:*

*Deeply concerned* 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,

*Commending* the efforts of the Government of Sierra Leone and the Economic Community of West African States (ECOWAS) to bring lasting peace to Sierra Leone,

*Noting* that the Heads of State and Government of ECOWAS agreed at the 23rd Summit of the Organization in Abuja on 28 and 29 May 2000 to dispatch a regional investigation of the resumption of hostilities,

*Noting also* the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law,

*Recalling* that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law,

*Reaffirming* the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

*Recognizing* that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

*Taking note* in this regard of the letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General and the Suggested Framework attached to it (S/2000/786, annex),

*Recognizing further* the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace,

*Noting* the report of the Secretary-General of 31 July 2000 (S/2000/751) and, in particular, *taking note* with appreciation of the steps already taken by the Secretary-General in response to the request of the Government of Sierra Leone to assist it in establishing a special court,

*Noting further* the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone,

*Acknowledging* the important contribution that can be made to this effort by qualified persons from West African States, the Commonwealth, other Member States of the United Nations and international organizations, to expedite the process of bringing justice and reconciliation to Sierra Leone and the region,

*Reiterating* that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,

1. *Requests* the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, and *expresses* its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General referred to in paragraph 6 below;

2. *Recommends* that the subject matter jurisdiction of the special court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone;

3. *Recommends further* 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;

4. *Emphasizes* the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors;

5. *Requests*, in this connection, that the Secretary-General, if necessary, send a team of experts to Sierra Leone as may be required to prepare the report referred to in paragraph 6 below;

6. *Requests* the Secretary-General to submit a report to the Security Council on the implementation of this resolution, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the special court, including recommendations, no later than 30 days from the date of this resolution;

7. *Requests* the Secretary-General to address in his report the questions of the temporal jurisdiction of the special court, an appeals process including the advisability, feasibility, and appropriateness of an appeals chamber in the special court or of sharing the Appeals Chamber of the International Criminal Tribunals for the Former Yugoslavia and Rwanda or other effective options, and a possible alternative host State, should it be necessary to convene the special court outside the seat of the court in Sierra Leone, if circumstances so require;

8. *Requests* the Secretary-General to include recommendations on the following:

(a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court;

(b) the level of participation, support and technical assistance of qualified persons from Member States of the United Nations, including in particular, member States of ECOWAS and the Commonwealth, and from the United Nations Mission in Sierra Leone that will be necessary for the efficient, independent and impartial functioning of the special court;

(c) the amount of voluntary contributions, as appropriate, of funds, equipment and services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations;

(d) whether the special court could receive, as necessary and feasible, expertise and advice from the International Criminal Tribunals for the Former Yugoslavia and Rwanda;

9. *Decides* to remain actively seized of the matter.

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**ANNEX 3:**

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone,  
4 October 2000, S/2000/915, Para 23 [extract].



Security Council

Distr.: General  
4 October 2000

Original: English

Report of the Secretary-General on the establishment of a  
Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specificity of the Special Court, its jurisdiction (subject-matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

## II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based *sui generis* court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,<sup>1</sup> prosecutors and administrative support staff.<sup>2</sup> As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.<sup>3</sup>

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

## III. Competence of the Special Court

### A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

#### 1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.



**2. Crimes under Sierra Leonean law**

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

**B. Temporal jurisdiction of the Special Court**

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

**1. The amnesty clause in the Lomé Peace Agreement**

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,<sup>1</sup> the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement (“absolute and free pardon”) shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

“An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.”

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.

**2. Beginning date of the temporal jurisdiction**

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People’s Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since