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SCSL-2003-09-PT
(1505-1510)

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IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr Robin Vincent

Date filed: 24th November 2003

Case No. SCSL 2003 – 07 – PT

In the matter of:

THE PROSECUTOR

Against

AUGUSTINE BAO

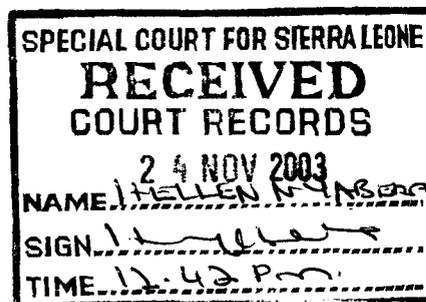
Reply to Prosecution Response to the Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone

Office of the Prosecutor

Mr Desmond de Silva QC
Mr Walter Marcus-Jones
Mr Christopher Staker
Mr Abdul Tejan-Cole

Intervening for Mr Gbao

Mr Girish Thanki
Prof Andreas O'Shea
Mr Kenneth Carr



Power of the United Nations, through the Secretary-General, to conclude a treaty creating the Special Court for Sierra Leone

1. The Prosecution avers that no authority is relied upon by the Defence for the proposition that the United Nations has acted unlawfully in transferring power which vests in it and more particularly in the Security Council of the United Nations. The Defence relies upon the provisions of the United Nations Charter as a whole and those referred to in the Prosecution response, which set out the powers of the United Nations and further on customary international law.
2. It is respectfully submitted that the Prosecution has been unable to refer to any provision in the United Nations Charter which grants it the power to create a new international organisation with a separate legal personality exercising the powers, initially granted to it by the international community of states. Neither has the Prosecution referred to any state practice or *opinio juris* supporting the existence of such a power under customary law for international organisations generally to create new international organisations with a separate legal personality under international law. Nor has the Prosecution referred to any judicial decision supporting the proposition that international organisations or the United Nations itself is vested with such far-reaching powers. On the contrary, it is submitted that the absence of state practice recognising the creation of new legal persons by international organisations suggests that the position under customary international law remains that only states are full subjects of international law possessing the capacity to create new legal persons.
3. The *Reparations for Injuries* case, cited by the Prosecution, does not support that position. It merely confirms state consent to the creation of a new legal person in the United Nations itself and the power of the United Nations under the United Nations Charter to conclude treaties. That decision further confirms that the treaty making power of an international organisation, including the United Nations, is defined by the intentions of the states creating that

organisation under its constituent instrument.¹ International Organisations therefore do not have the power to conclude any treaty, but only those authorised under their constituent instruments. In the case of the United Nations, member states have not expressed a clear intention to give the United Nations the power to create new legal persons through treaty or to delegate its powers in such a manner that it loses direct control over the activities of the new organisation created. The United Nations is only vested with the power to create subsidiary organs, which fall under the direct control of the United Nations.² The situations of the International Criminal Tribunals for the Former Yugoslavia and Rwanda are quite different since they are not created as separate international organisations but as subsidiary organs to the United Nations, remaining under its direct control, authority and funding. Further, they represent an exercise of the powers of the Security Council and not the delegation and transfer of such powers.³

The voluntary renunciation of sovereign power to prosecute international crimes

4. The Prosecution asserts that the state of Sierra Leone could not voluntarily renounce its sovereign power to try international offences because amnesties for international offences are illegal under international law. If this were the case, which is not admitted,⁴ it is submitted that this would not prevent the state from voluntarily renouncing its sovereign power, but would merely have the consequence that by doing so it has violated its international obligations. It would therefore not affect the fact that the state had lost its capacity to

¹ *Reparation for Injuries in the Service of the United Nations*, 11 April 1949, ICJ Reports 1949, 174 (annexed to the Prosecution Response).

² See Article 29 of the United Nations Charter and the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion 13 July 1954, ICJ Reports 1954, 47. (annexed to the Prosecution Response); *Application for Review of Judgement No 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 12 July 1973, 166 (annexed to the Prosecution Response).

³ See *Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory on Jurisdiction*, Case No. IT-94-1-AR72, 2 October 1995 (AC), paras 33-36 (annexed to the Prosecution Response).

⁴ See *Prosecutor v Morris Kallon, Augustine Bao intervening*, Arguments on Behalf of Augustine Bao in Support of Morris Kallon's Preliminary Motion based on Lack of Jurisdiction/Abuse of Process in the Event of Permission Being Granted to Intervene, Case No. SCSL 2003 – 07 – PT, filed on 23 October 2003, and further the subsequent oral arguments presented on 3 and 4 November 2003 (transcripts in the process of being produced).

conclude a treaty to exercise a power it has voluntarily renounced. If the Lome Accord were not an international agreement, which is not admitted,⁵ it is submitted that this would not prevent the state from voluntarily renouncing its power to conclude a treaty to prosecute through its conclusion, since it can unilaterally renounce its sovereign powers and this does not require any bilateral or multilateral agreement. It is submitted that the Prosecution's reliance on Article 10 of the Statute of the Special Court is misplaced since here the Defence is not relying on the Defendant's right to amnesty as a bar to prosecution but on the state's renunciation of sovereign power to conclude a treaty for the establishment of an international criminal court, as a basis for asserting the invalidity of the Special Court Agreement.

Fraud, perfidy or error

5. The Prosecution appears to be alleging, while citing no authority for this proposition, that where a legal argument is based on certain factual circumstances, that the evidence supporting those factual circumstances must be fully presented in the body of the preliminary motion. It is submitted that this area of procedure is completely unsettled in international criminal procedure. In particular, Rule 72 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone provides for a procedure of written pleading and where appropriate, oral hearing. Further, it provides for an unprecedented procedure in international criminal courts, by requiring serious questions of jurisdiction to be referred to the Appeal Chamber directly. This opens up a new procedural arena in which more extended pleadings are required.
6. It is submitted that the time limits and page limits of written pleadings on preliminary motions, together with the possibility of further written arguments under the Appeal Chamber's practice direction on Rule 72, suggest that the written procedure for preliminary motions was not intended necessarily in all

⁵ Idem.

cases to represent an exhaustive opportunity to present the evidential basis of an argument if required.

7. In this case there is firstly a dispute on the law. The Defence avers that by failing to give full disclosure to the United Nations of the express and/or implied representations made by the government of Sierra Leone to the RUF, the government of Sierra Leone has concluded the treaty through fraud or perfidy, or alternatively that the United Nations has concluded the treaty through error. The Prosecution disputes that any such failure to provide information would, as a matter of law, invalidate the said agreement. The Defence has, contrary to the Prosecution assertion, relied on authority for its proposition in citing McNair on *The Law of Treaties*.⁶ It is submitted that this legal dispute needs to be decided, being the premise or foundation of the factual allegation. The factual basis of the Defence legal argument is based on the Defence instructions and is properly pleaded in the preliminary motion.
8. It is respectfully submitted that the evidence supporting these factual allegations is more appropriately dealt with in an oral hearing on the facts through witness testimony. The Appeals Chamber has the discretionary power to provide for a hearing on the evidence or order the Trial Chamber to conduct a hearing on the evidence if requested by the parties.⁷ While it may be expedient and indeed necessary in certain cases to provide affidavit evidence supporting factual allegations and to attach this to a motion, it is submitted that this cannot, as a matter of practical reality, be required in all cases involving preliminary motions. Nothing in the Rules of Procedure and Evidence expressly requires this. The Defence is needs to seek, through investigation, the necessary witnesses as to how the disarmament came about: the representations made by the President himself or through agents of the government or other governments, together with the failure to fully appraise the United Nations. The Defence has been handicapped by delays in the

⁶ See Preliminary Motion on Lack of Jurisdiction due to Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone for the Establishment of the Special Court for Sierra Leone, filed on 6 November 2003.

⁷ See *Prosecutor v Kallon and Norman, Bao intervening*, Decision on a Request for a Stay of Appeal Chamber Proceedings on Lack of Jurisdiction/Abuse of Process, 5 November 2003 (Appeal Chamber) (read out on 5 November 2003, but as yet unpublished to our knowledge).

putting into place of a procedure for the appointment of defence investigators and also by the difficulties involved in obtaining the testimony of those present at meetings and negotiations, in some cases being high ranking state officials. In such cases, it is submitted that it is unreasonable and impracticable to require that the evidence be pleaded in the preliminary motion itself, having regard to the constraints involved in the filing of written pleadings, particularly at the beginning of the operation of the Court when defence resources and facilities have been the subject of gradual implementation.

9. It is submitted that the issues raised here are of such importance addressing the very foundation of the Special Court for Sierra Leone, that they should not be discarded through the application of an unreasonably technical formulation or interpretation of international criminal procedure. If this matter is referred to the Appeals Chamber under Rule 72 of the Rules of Procedure and Evidence, then a request will be made for an oral hearing on the evidence supporting the Defence factual allegations either before the Trial Chamber or before the Appeal Chamber.

RELIEF REQUESTED

It is therefore requested that the Defence Preliminary Motion be referred to the Appeal Chamber for determination of the question of whether the Court lacks jurisdiction by virtue of the invalidity of the Special Court Agreement, in accordance with Rule 72 of the Rules of Procedure and Evidence.

Girish Thanki
Andreas O'Shea
Kenneth Carr