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SCSL-2003-11-PT
(2942-2952)

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IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe
Registrar: Mr. Robin Vincent
Date: 30 November 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

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

Office of the Prosecutor:

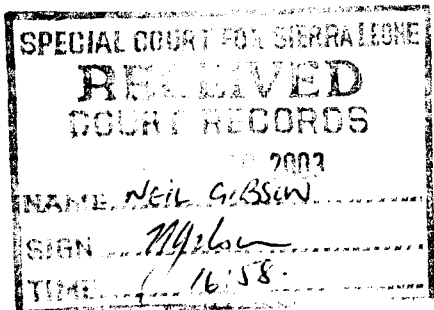
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Mr. Luc Côté, Chief of Prosecutions
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For Mr. Fofana:

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



1. In the Preliminary Defence Motion of 14 November 2003, the Defence for Mr. Fofana filed a preliminary motion alleging lack of jurisdiction of the Special Court over the defendant. It argued that the jurisdiction of the Special Court is based on an unlawful transfer of powers by the United Nations. It further argued that the agreement with the United Nations made it possible for Sierra Leone to transfer its territorial and personal jurisdiction to the Special Court; that the United Nations does not, like Sierra Leone, possess personal or territorial jurisdiction over suspects of international crimes, and that the only power of the United Nations to act in regard to international crimes is its powers to act in regard to threats to the peace and security. In addition, the Defence argued that while there can be no doubt that the Security Council can delegate its powers in regard to peace and security, international law imposes certain limitations on the power of delegation. In setting up the Special Court, that is a separate legal person outside the sphere of control of the United Nations, the Security Council has failed to comply with these limitations. Consequently, the establishment of the Special Court was an illegal delegation of powers and therefore the Special Court is without jurisdiction.

2. In its response to this Preliminary Defence Motion, the Prosecution makes a large number of observations as to the powers of the United Nations and the Security Council that do not address let alone undermine the substance of the motion of the Defence. The Defence is, for instance, in full agreement with the observations that the United Nations can enter into agreements,¹ that the Secretary-General can represent the United Nations and conclude agreements,² and that in general Article 24(1) of the Charter can provide a direct basis for action.³ The Prosecutor also correctly contends, citing the *Expenses case* and the *Tadic Case*, that the Security Council has wide discretionary powers to determine how to respond to threats to the peace and security,⁴ and that the power may be conferred on entities external to the United Nations itself.⁵

3. However, the Prosecution does not provide any substantial arguments that refute the central proposition of the Defence Motion: that the powers of the Security Council to delegate

¹ Prosecution response, para. 6.

² Prosecution response, para. 7.

³ Prosecution response, para. 9.

⁴ Prosecution response, para. 12-13.

⁵ Prosecution response, para. 12.

powers that aim to restore international peace and security are limited and that the establishment of a international legal person by treaty with Sierra Leone to contribute to the restoration of the peace and security exceeds these limits.

4. It is well-established that the Security Council can delegate powers to individual states or to international organisations outside the United Nations. However, as argued with supporting references in the Defence Motion, such delegation is always limited by the condition that the exercise of delegated powers must remain under the control of the Security Council. The reason is that without such control, the entity to which the powers are delegated may use these powers to attain national ends that are not necessarily similar to the purposes of the United Nations.⁶

5. The Prosecutor essentially advances two arguments that seek to address the limitations of the powers of the Security Council to delegate or transfer powers in regard to peace and security.

Consent of a state does not annul the limitations of the powers of the Security Council

6. First, the Prosecutor contends that the Security Council could have established the ICTY and the ICTR under Article 24, with the “consent of the state concerned”, while apparently recognizing that that legal basis would have left these Tribunals without some of the powers that have been critical for their effectiveness.⁷ This statement also lacks any substantiating analysis as to the scope of the power to set up an international tribunal by treaty. The Prosecutor appears to suggest that when a state has given its consent, no limitations on the power of the Security Council to delegate or transfer powers with regard to peace and security apply. This argument must be rejected. Clearly, the Security Council has delegated many powers which for their implementation are dependent on consent of the state concerned, for instance the delegation of the power to the Secretary-General to establish peace-keeping forces. The limitations on the power of the Security Council to delegate powers apply fully in this context, and it is not clear at all what the legal relevance of the Prosecutor’s discussion of the role of consent is.

⁶ D. Sarooshi, *The United Nations and the Deployment of Collective Security*, 1999, pp. 154-155.

⁷ Prosecution response, para. 11.

7. It may be that the Prosecutor intends to argue that states concerned with a particular threat or breach of the peace can at all times set up by treaty an international tribunal to which they transfer their jurisdiction to prosecute individuals who are suspected of international crimes related to that threat to the peace or security. As already noted in the Defence motion, this indeed is well-established. However, that does not mean that the Security Council or the United Nations, with responsibility for the response to crimes that threatens the international community as a whole, can simply with the consent of one state place the responsibility for that response outside the context of the United Nations. The situation may have been different if the Special Court had been set up by agreement involving a wider group of concerned states. This, however, was not done. By the agreement with Sierra Leone, the United Nations has, on the one hand, allowed Sierra Leone to transfer the prosecution of suspects to the international level (with, as noted in the Defence motion, adverse consequences for the legal position of suspects) and, on the other hand transferred the responsibility for matters of concern to the international community as a whole to a court beyond its influence or control. The consent of the state concerned can remedy neither of these defects.

8. The fact that Sierra Leone was not the only state concerned is of particular relevance here. It may be relatively easy to accept that the ICTR could have been set up by treaty under Article 24 with the consent of Rwanda. But it is much less clear what it means to say that the ICTY could have been set up under Article 24 with the "consent of the state concerned". Does this mean that the Security Council could, directly or through delegation of treaty making power to the Secretary-General, set up the ICTY with the consent of the Federal Republic of Yugoslavia? In that case the threat to the peace and security consisted of a threat to the peace and security in the region. If the ICTY had been set up by a treaty, that would have had to be effectuated by a treaty between all states concerned. The situation is essentially the same in the case of Sierra Leone. In Resolution 1315(2000) the Security Council had determined that the situation in Sierra Leone continued to constitute a threat to the international peace and security in the region.

The Security Council has failed to retain control over the Special Court

9. The only argument of the Prosecution that directly addresses this Defence Motion's argument that delegation is always limited by the condition that the exercise of delegated powers must remain under the control of the Security Council, is contained in the paragraphs 14 and 16. The Prosecution submits that the delegation or transfer of its responsibility "does not denude the Security Council of the right to exercise that power or to control and/or supervise the exercise of that power" and that the Security Council has remain seised of the problem of the maintenance of the peace and security in Sierra Leone since Resolution 1315(2000). In the absence of any supporting analysis, it is not clear what is meant. Clearly the Security Council still receives information on the situation in Sierra Leone and can put the matter on its agenda. The Security Council still can act with regard to a variety of matters pertaining to peace and security in Sierra Leone. However, the Security Council could not unilaterally, at least not without violating the Agreement with Sierra Leone, re-assume its powers and change the Statute or terminate the operation of the Special Court. It is in this respect that the United Nations has delegated its powers without maintaining control, and in that respect that there is a fundamental difference between the ICTR and the ICTY, on the one hand, and the Special Court, on the other.

10. It might be said that the Security Council could always, using its Chapter VII powers, terminate an existing treaty. However, it cannot be presumed that the Security Council in that way has intended to remain in control of the matter. Article 23 of the Special Court Agreement provides:

"This Agreement shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court."

It would be in violation of the principle of good faith if the United Nations were to rely on the possibility of breach of Article 23 as a ground for the proposition that the delegation of powers is within the generally accepted limit that delegation is always limited by the condition that the exercise of delegated powers must remain under the control of the Security Council.

Conclusion

11. The Defence for Mr. Fofana submits that the jurisdiction of the Special Court is based on the illegal exercise of powers by the United Nations and that, therefore, the Special Court lacks jurisdiction to try him.

COUNSEL FOR THE ACCUSED
Fof

Mr. Michiel Pestman

Prof. Dr. André Nollkaemper

Dr. Liesbeth Zegveld

Defence List of Authorities

1. D. Sarooshi, *The United Nations and the Deployment of Collective Security*, 1999, pp. 154-155.

THE UNITED NATIONS
AND THE DEVELOPMENT OF
COLLECTIVE SECURITY

*The Delegation by the UN Security Council
of its Chapter VII Powers*

DANESH SAROOSHI

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in effect a kind of *ad hoc* Article 43-type agreement. If such an agreement is concluded it should include an express provision that will ensure the Member States concerned will continue to act until the Council's objective is achieved. By conclusion of this agreement, the legal obligation on States not to withdraw their troops from a UN authorized force until the achievement of the Council's stated objectives would be reinforced. This is an important safeguard which the Council may wish to use to guarantee not only the efficacy of collective action to restore or maintain international peace and security, but also its credibility.

To summarize this section, the Security Council has the competence to delegate its Chapter VII powers to UN Member States and can do so either by means of a decision or recommendation. In either case there is no obligation on States to take up this delegation of powers. This does not, however, preclude States from exercising these powers where there is a conflict with their other treaty obligations, nor does it mean that States can withdraw their troops from a force carrying out enforcement action without Council authorization.

With an increase in the practice of the Council delegating its Chapter VII powers to Member States, it is envisaged that future challenges to the legality of such delegations will shift from the issue of the competence of the Council to do so to the non-observance by the Council of the limitations on this competence.

II. LIMITATIONS ON THE COMPETENCE OF THE COUNCIL TO DELEGATE CHAPTER VII POWERS TO MEMBER STATES

There are inherent dangers in the practice of the Council delegating Chapter VII powers to Member States.⁴³ The main danger is that those Member States will exercise the delegated powers to achieve their own self-interest and not that of the UN.⁴⁴ As Abi-Saab has noted, in the case of an authorization given to a group of States to undertake enforcement action, the risk

⁴³ These have been alluded to by the Secretary-General in the *Supplement to An Agenda for Peace*: 'The experience of the last few years has demonstrated both the value that can be gained and the difficulties that can arise when the Security Council entrusts enforcement tasks to groups of Member States. On the positive side, this arrangement provides the Organization with an enforcement capacity it would not otherwise have and is greatly preferable to the unilateral use of force by Member States without reference to the United Nations. On the other hand, the arrangement can have a negative impact on the Organization's stature and credibility. There is also the danger that the States concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Security Council when it gave its authorization to them.' (Boutros-Ghali, B., *Supplement to An Agenda for Peace* (1995), para. 80.)

⁴⁴ A problem related to a delegation of Chapter VII powers may be that private actors will also be able to exert a disproportionate influence on the way in which this power is being

is great that it will be abused as a vehicle for the realization of the national interest of the States concerned rather than for the realization of the purposes of the Organization.⁴⁵ This is contrary to the very reason for centring in the UN the responsibility for maintaining and restoring international peace and security: to regulate the use of force by States to attain their national ends.⁴⁶

This issue of self-interest is not, however, always antithetical to the collective security purpose for which a Chapter VII power is delegated to Member States. In many cases there may be a convergence of a State's political interests and the UN's interest in maintaining or restoring international peace and security, although the latter of course being the reason for the delegation of Chapter VII power. The development of this notion of a convergence of self-interest is of some importance to the efficacy of the UN system for maintaining international peace and security. The perception by States that their own self-interest rests in large part in terms of the interests of the international community at large will see a Security Council which is better able to maintain or restore international peace and security, since the Council will be able to delegate its Chapter VII powers to UN Member States with the security that Member States will take up the delegation of powers and that the powers will be exercised to achieve the Council's objectives. The problem, as outlined above, arises, however, when the interests of a State are in conflict with those of the UN, as defined by the Security Council. However, the existence of limitations on the competence of the Council to delegate Chapter VII powers to Member States provides a safeguard against such a potentially negative consequence of a delegation of Chapter VII powers. There are two types of limitations on the competence of the Council to delegate Chapter VII powers to UN Member States.

The first involves a limitation on the competence of the Council to be able to delegate certain of its Chapter VII powers to Member States. These

exercized. Private actors in this case could be, for example, domestic political parties, which exercise control over a domestic legislative arm of government, or large multinational companies. This has been an issue that has plagued the delegation of governmental power in the United States: see Schoenbrod, D., *Power Without Responsibility* (1993).

⁴⁵ Abi-Saab, G., *United Nations Forces in the Congo* (1978), p. 20. See also Bowett, D., *United Nations Forces* (1964), p. 338; Duke, S., 'The State and Human Rights: Humanitarian Intervention Versus Sovereignty', in *Peacemaking, Peacekeeping and Coalition Warfare: The Future Role of the United Nations* (Mokhtari, F., ed.) (1994), p. 149 at p. 168; and Ferencz, B., *Global Survival: Security through the United Nations* (1994), pp. 138-9. See for a discussion of this possibility: Second Report on UNEF, A/3302, 5 Nov. 1956, paras. 4-5.

⁴⁶ Goodrich, L., and Simons, A., *The United Nations and the Maintenance of International Peace and Security* (1955), pp. 433-4. For an excellent description and analysis of international law regulating the use of force by States, see Brownlie, I., *International Law and the Use of Force by States* (1963).

substantive limitations have already been explained in Chapter 1 and prohibit the delegation by the Council of certain of its Chapter VII powers.⁴⁷

The second—what are termed conditions for a lawful delegation—only regulate the way in which the Council should delegate its powers and do not as such prohibit the delegation of a particular power. These conditions flow from the requirement, as explained in Chapter 1, that the exercise of delegated Chapter VII powers must always remain under the overall authority and control of the Council. The obligation to ensure that these conditions are imposed on the delegate rests with the Security Council, as delegator. The failure by the Council to do so in a particular case means that the delegation of Chapter VII powers is *ultra vires*.

There are three conditions for a lawful delegation by the Council of its Chapter VII powers to Member States. First, there must be a certain minimum degree of clarity in the resolution which delegates the power. Put differently, the objective for which the power is being delegated must be clearly specified. Second, there is an obligation on the Council to exercise some form of supervision over the way in which the delegated powers are being exercised. Third, the Security Council must impose on Member States a requirement to report to the Council on the way in which the delegated power is being exercised. All three of these conditions have been recognized by the Council itself,⁴⁸ as well as UN Member States,⁴⁹ as important conditions for a lawful delegation by the Council of its Chapter VII powers to Member States.⁵⁰ The source of each of these requirements is

⁴⁷ See *supra* Section III(2)(b)(i) in Chapter 1.

⁴⁸ Thus, in response to recommendations proposed by the Secretary-General, the Security Council provided for the following machinery in resolution 794: '[The Security Council] Requests the Secretary-General and the Member States acting under paragraph 10 [the provision delegating to Member States the power to use "all necessary means"] above, to establish appropriate mechanisms for coordination between the United Nations and their military forces; ... Decides to appoint an ad hoc commission composed of members of the Security Council to report to the Council on the implementation of this resolution; ... Requests the Secretary-General and, as appropriate, the States concerned to report to the Council on a regular basis, the first such report to be made no later than 15 days after the adoption of this resolution, on the implementation of this resolution and the attainment of the objective of establishing a secure environment so as to enable the Council to make the necessary decision for a prompt transition to continued peace-keeping operations.' See also the practice of the Security Council in Chapter 5.

⁴⁹ There was considerable emphasis placed on this machinery by States when deciding to adopt the draft version of resolution 794. All or some of these conditions appear in the statements in the Security Council by the representatives of Zimbabwe (S/PV.3145, pp. 7, 8-10); Ecuador (S/PV.3145, pp. 13-14); Belgium (S/PV.3145, pp. 24-5); France (S/PV.3145, pp. 29-30.); Austria (S/PV.3145, p. 32.); and Japan (S/PV.3145, p. 43.) Similarly, in the context of the Council authorizing 'Operation Turquoise' in Rwanda, see the statements in the Security Council by the representatives of the USA (S/PV.3392, p. 6); and Russia (S/PV.3392, p. 2).

⁵⁰ Accordingly, Erskine Childers has called for '... a General Assembly resolution stating that armed force cannot be employed using the name or authority of the United Nations unless