SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice George Gelaga King
Justice Emmanuel Ayoola
Justice Geoffrey Robertson
Justice Raja Fernando

Registrar: Robin Vincent

Date: 25 May 2004

PROSECUTOR Against ALLIEU KONDEWA
(Case No. SCSL-2004-14-AR72(E))

DECISION ON PRELIMINARY MOTION ON LACK OF JURISDICTION: ESTABLISHMENT OF SPECIAL COURT VIOLATES CONSTITUTION OF SIERRA LEONE

Office of the Prosecutor:

Desmond de Silva QC
Luc Côté
Walter Marcus-Jones
Abdul Tejan-Cole

Defence Counsel:

James MacGuill
James Evans
Charles Margai

THE APPEALS CHAMBER of the Special Court for Sierra Leone ("Special Court");

SEIZED of the Preliminary Motion based on Lack of Jurisdiction: Establishment of Special Court Violates Constitution of Sierra Leone filed on behalf of Allieu Kondewa on 7 November 2003 ("Preliminary Motion");

NOTING that the Prosecution Response was filed on 14 November 2003;

NOTING that the Preliminary Motion was referred to the Appeals Chamber under Rule 72(E) of the Rules of Procedure and Evidence ("Rules") on 4 December 2003;

NOTING the Decision of the Appeals Chamber (composed of Justice Winter, Justice King and Justice Ayoola) on Constitutionality and Lack of Jurisdiction in the Kallon, Norman and Kamara cases of 13 March 2004 ("Decision on Constitutionality");

HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES;

HEREBY DECIDES:

I. DISCUSSION

1. The Defence argues in its Preliminary Motion that the establishment of the Special Court was unlawful because it violated the Constitution of Sierra Leone. The arguments are similar to the ones raised in preliminary motions brought on behalf of Morris Kallon, Sam Hinga Norman and Brima Bazzy Kamara which were the subject of an oral hearing on 5 November 2003. On 13 March 2004, the Appeals Chamber, constituted by Justice Winter, Justice Ayoola and Justice King, rendered its Decision on Constitutionality in respect of those preliminary motions.

2. In its Decision on Constitutionality, the Chamber held that the Special Court was competent to determine the legality of its own creation. On the question of constitutionality itself, the Chamber found that the Special Court was established by the Agreement between the UN and the Government of Sierra Leone ("Agreement"), that it is a treaty-based court and that the implementation of the Agreement at the national level required incorporation into the national law of Sierra Leone in accordance with

constitutional requirements. The Chamber held that this incorporation occurred through the Special Court Agreement Ratification Act of March 2002 ("Ratification Act"). In addition, the Chamber held that the Special Court does not form part of the judiciary of Sierra Leone as stated in section 11(2) of the Ratification Act and is established outside the national court system. The Chamber quoted the UN Secretary-General's Report, according to which the Special Court "is not anchored in any existing system".[1] In conclusion, it was held that the relevant constitutional requirements had been fulfilled and that the Special Court acts only in an international sphere.

3. It is therefore unnecessary to say any more on the merits of the Preliminary Motion as all relevant arguments are dealt with and dismissed in the Decision on Constitutionality.

II. DISPOSITION

4. For the reasons set out in the Decision on Constitutionality and in consequence of it, this Preliminary Motion is dismissed.

Done at Freetown this twenty-fifth day of May 2004

Justice Winter
Presiding

Justice King

Justice Ayoola

Justice Fernando

[Seal of the Special Court for Sierra Leone]

Justice Robertson appends a Separate Opinion to this Decision.

[1] Decision on Constitutionality, para. 51, quoting Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, para. 9.

SEPARATE OPINION OF JUSTICE ROBERTSON

1. This Preliminary Motion challenges the Special Court's jurisdiction on the ground that the Agreement by which it was established is a nullity because one party, the Government of Sierra Leone, had no lawful authority to enter into it. This lack of authority is alleged to derive from the fact that it acted unconstitutionally by failing to secure the ratification by referendum required for such a treaty by the country's constitution[1]. The Office of the Prosecutor ("Prosecution") responds that the objection is unsustainable as a matter of local constitutional law but in any event, the constitutional breach alleged was not of a kind which could invalidate the treaty under international law.

Limits of Reviewability

2. A threshold question arises as to whether a tribunal is competent to review the legality of its own creation, and if so to what extent. This question was considered by the first post-Nuremberg international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), both established by the Security Council under Chapter VII of the United Nations ("UN") Charter as measures to deal with threats to international peace and security. The ICTY Trial Chamber hearing the *Tadić* case declined to review this Security Council decision, on the basis that to do so would involve juristic incursion into forbidden political territory: Security Council resolutions and decisions were non-justiciable.[2] The Appeals Chamber in *Tadić*, however, ruled that questions of whether the Security Council had power under the UN Charter to act as it did and whether its action was taken rationally and in good faith, invited legal answers (whatever their "political" ramifications) which the judges were qualified and entitled to give "particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter".[3] This is an important

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[1] Constitution of Sierra Leone, 1991, Act No. 6 of 1991.

[2] *Prosecutor v Dusko Tadić*, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, 10 August 1995.

[3] *Prosecutor v Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 21.

assertion of judicial independence,[4] although its narrow scope should be noted: the Tribunal was prepared to consider its own legitimacy by reference to Security Council decisions, but would only declare itself unlawful if such decisions obviously misinterpreted the UN Charter or were grounded upon a spurious or invented threat to the peace. Both the ICTY Appeals Chamber in *Tadić* and subsequently an ICTR Trial Chamber hearing the *Kanyabashi*[5] case entertained (but rejected) arguments that the Security Council had acted unlawfully in establishing these international war crimes courts.

3. The Special Court, unlike the ICTY and ICTR, is not an emanation of the Security Council, and nor is it established as part of a UN administration, like the models in East Timor and Kosovo. In common with the International Criminal Court ("ICC"), its establishment is the consequence of a treaty[6], and in the present motion the applicant does not dispute that the UN was empowered by its Charter to enter into such a treaty with a sovereign state. What it contests is the capacity of that state to enter into such a treaty with the UN.

4. An international treaty may be renounced or challenged as invalid by a state party if it can prove fraud, duress, mistake or other grounds upon which a contract cannot bind: the burden, however, is heavy.[7] A court established by an international treaty may interpret that treaty and may declare its own establishment unlawful (or disapply offending provisions) if the treaty fails to provide for the essential characteristics of a court - e.g. for judicial independence,[8] or for protection of the fundamental rights of defendants. No such defect has been alleged in this case. Whether it can, at the instance of a defendant, declare the treaty invalid on grounds available to a state party - i.e., fraud, duress, mistake - is open to question. It would call for application, at the behest of a

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[4] Compare the reluctance of the International Court of Justice ("ICJ") to review Security Council decisions: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion, 21 June 1971. For discussion see J. Jones and S. Powles, *International Criminal Practice*, (Oxford: 2003, 3rd Edition), p.13.

[5] *Prosecutor v Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on Defence Motion on Jurisdiction, 18 June 1997.

[6] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, done at Freetown, 16 January 2002 ("Agreement" or "Special Court Agreement").

[7] See I. Brownlie, *Principles of Public International Law*, 5th ed (Oxford: 1998), 617-620.

[8] See *Prosecutor v Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence), 13 March 2004.

defendant rather than the State, of the test laid down by Article 46 of the Vienna Convention on the Law of Treaties ("1969 Vienna Convention"):[9]

i. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

ii. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

A virtually identical provision is contained in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("1986 Vienna Convention").[10] The Agreement which established the Special Court is such a treaty since it is between a state (Sierra Leone) and an international organisation (the United Nations).

5. The International Law Commission considers that Article 46 of the 1969 Vienna Convention sets out the test recognized under customary international law in relation to invalidity of treaties, and this opinion is supported by international tribunal decisions and state practice.[11] Although Sierra Leone is not in fact a party to the 1969 Vienna Convention, "the rules set forth in the Convention are invariably relied upon even when the states are not parties to it".[12]

6. The right of a state which seeks to invalidate its own consent must necessarily be of very limited compass. What must be proved is a flagrant violation of the State's constitution (the "internal law of fundamental importance") by a government or ratifying power, which violation was at the relevant time "objectively evident", for example by earning international opprobrium. The argument that <u>any</u> breach of constitutional requirements will invalidate a state's accession to a treaty is anachronistic and untenable. International law (sourced on treaties) and interstate

[9] Adopted 23 May 1969, entered into force 27 January 1980, UNTS vol. 1155, 331.
[10] Adopted 21 March 1986, not yet in force, 25 ILM 543, at Article 27.
[11] See Brownlie, *Principles of Public International Law*, 608.
[12] See Aust, *Modern Treaty Law and Practice* (Cambridge University Press: 2000), 10-11.

agreements would be intolerably uncertain if they could be undone by a municipal court decision on some fine or novel constitutional point, rendered possibly years after a treaty had commenced operation. The argument was firmly rejected by the ICJ in *Cameroon v Nigeria*:[13] it found that an obscure constitutional limitation on the power of the Nigerian Head of State could not invalidate an agreement that he had the ostensible authority to make. The power of heads of state to conclude treaties may be assumed by other parties to them, and "there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which may become important for the international relations of these States".[14] This approach is consistent with the international law rule that a state may not invoke its municipal or internal law to justify its failure to perform an international duty.[15] It follows that customary acts of international ratification, such as signature of a treaty by a head of state, or the passage of a ratifying act by a parliament, will bind a state unless the constitutional violation by president or parliament is so blatant that it must or should have come to the serious notice of the other party or parties.

7. If a state can renege on a treaty by pleading the flagrant unconstitutionality of its act of accession, may an individual defendant enter a plea when indicted by a court established by such a treaty? May he, furthermore, do so if the state party rejects or purports to waive the lack of constitutionality? Defendants could not challenge a court like the ICC established by a multilateral treaty and invested with universal jurisdiction: if one ratification were unconstitutional according to the internal law of that state, this could not affect the lawfulness of the ICC itself. The Applicant must show the position to be otherwise in the case of a bilateral treaty such as the Agreement to establish the Special Court. In other words, he must not only show that the constitutional violation was flagrant, but that he can take advantage of it when the state continues to condone it. I will assume in Mr Kondewa's favour that he can do so, at least where the alleged breach affects a fundamental right (here, to liberty).

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[13] *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, 10 October 2002, (2002) ICJ Reports.
[14] Ibid, para. 266.
[15] Article 27, 1969 Vienna Convention.

The Agreement

8. Democratic elections in Sierra Leone in 1996 produced for a five year term a government led by President Ahmad Tejan Kabbah. The country had since 1991 been engulfed in civil war, which continued until a peace agreement was signed at Lomé, in Togo, on 7 July 1999.[16] Renewed fighting led the President and his government in June 2000 to request the UN Security Council to set up a war crimes tribunal by establishing a special court.[17] On 14 August 2000, the Security Council adopted resolution 1315, which recognised the need for the UN to assist Sierra Leone to end impunity by establishing a "strong and credible special court" to address breaches of international humanitarian law.[18] This resolution was not expressly adopted under Chapter VII, although by reiterating that the situation in Sierra Leone "continues to constitute a threat to international peace and security in the region,"[19] the Security Council implied that the creation of the Court was indeed a measure that would be justified by the powers granted under that chapter.

9. Negotiations for a special court agreement were conducted with ministers of the Sierra Leone government at the United Nations in September 2000. On 4 October 2000 the Secretary-General presented his report on the Court's establishment.[20] The nature and specificity of the Special Court was described in paragraph 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

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[16] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, annexed to Letter Dated 12 July 1999 from the Chargé d'Affaires *ad interim* of the Permanent Mission of Togo to the United Nations addressed to the President of the Security Council, S/1999/777, 12 July 1999 ("Lomé Peace Agreement").

[17] Letter from President Kabbah with enclosure, 12 June 2000, annexed to the Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, S/2000/786, 10 August 2000.

[18] S/RES/1315, 14 August 2000, preamble.

[19] Ibid.

[20] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 ("Report of the Secretary-General").

> 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, prosecutors and administrative support staff. 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. [...] (internal citations omitted)

The Secretary-General's reference to incorporation of what was at this stage a draft agreement into the national law of Sierra Leone "in accordance with constitutional requirements" certainly envisaged a ratification process, but evinced no familiarity with, much less acceptance of, any particular method of ratification.

10. The Agreement took more than a year to finalise: the delay was primarily caused by the continuation of the war and the problem of finding donors to fund the operation of the Court's first three years. Eventually the Agreement, to which the Statute was annexed, was signed on 16 January 2002 at a ceremony in Freetown. Mr. Hans Corell, UN Under-Secretary-General for Legal Affairs, represented the United Nations, and Mr. Solomon Berewa, Attorney General and Minister of Justice, signed on behalf of the Government of Sierra Leone. Article 1 of the Agreement actually established the Special Court ("There is hereby established a Special Court for Sierra Leone")[21] with the object "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". By Article 17, the Government undertook to co-operate with the Special Court in relation to, *inter alia*, arrest, detention and transfer of indictees.

11. The Statute, which forms part of the Agreement, provides in Article 1, "Competence of the Special Court", in part:

> 1. The Special Court shall, except as provided in subparagraph (2), 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

[21] Emphasis added.

committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

12. The subject-matter jurisdiction of the Special Court comprises crimes against humanity (Article 2), violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II (Article 3) and other serious violations of international humanitarian law (Article 4). Article 5 provides for the punishment of certain "crimes under Sierra Leonean law" namely offences relating to the sexual abuse of girls under 14 years of age and setting fire to dwelling houses, public buildings or private buildings. This Article was included because the Security Council had recommended in paragraph 2 of resolution 1315 that the subject matter should include "crimes under relevant Sierra Leonean law" - the relevance being, evidently, to existing international law crimes of war. The Secretary-General's report explains that "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".[22] The Security Council was apparently anxious to ensure that those primarily responsible for some of the alleged horrors of this war - sexual enslavement of young girls, for example, and the burning of Freetown - should not escape punishment, and added the two local law crimes in case the international crimes available under Articles 2-4 of the Statute were inadequate. The elements of these two crimes are defined by municipal law, but they cannot be prosecuted in the Special Court unless they partake of a further, non-municipal law element, i.e. they must only be charged against "persons who bear the greatest responsibility for serious violations of... Sierra Leonean law," including leaders who, in committing these crimes, derailed the peace process. As it happens, the Security Council's caution has proved over-abundant: those who bear the greatest responsibility for rapes of children and for burning down towns, can in fact and for all relevant purposes, be appropriately prosecuted under the international laws available pursuant to Articles 2-4. The Prosecution has brought no charges at all pursuant to Article 5, and has announced that it has no intention of doing so.

13. Since international crimes invariably entail the commission of a number of offences under municipal law, there had to be a primacy provision in the Statute as well as a safe-guard against

[22] Report of the Secretary-General, para. 19.

double jeopardy. The latter is Article 9 ("*non bis in idem*"); the former is found in the "concurrent jurisdiction" provisions of Article 8:

> 1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.
>
> 2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

This is a primacy power writ small,[23] in the sense that it does not apply to any other state (and cannot, unless and until the Special Court is endowed with Chapter VII powers). It does not make the Special Court a part of the legal system of Sierra Leone, notwithstanding the overlap in jurisdiction, because the power is, for example, to subject a defendant who is already appearing in a national court instead to an international jurisdiction with which the local courts cannot interfere. The Special Court exists in another dimension: it may be situated in Sierra Leone but is no part of the court system established and regulated by the constitution and other local laws of that country.

14. In due course, the Special Court Agreement 2002, (Ratification) Act 2002[24] was passed by the Parliament of Sierra Leone and received Presidential assent on 29 March 2002. It contained a Memorandum of Objects and Reasons under the hand of the Attorney General, which states, in part:

> The object of this Bill is to make provision for the ratification and implementation of the Agreement between the Government of Sierra Leone and the United Nations signed on 16 January 2002, for the establishment of the Special Court for Sierra Leone.
>
> It is a requirement of the Constitution under the proviso to subsection 4 of Section 40 thereof, that an international agreement which, among other things imposes any charge on the finances of the State, i.e. the Consolidated Fund, must be ratified by either an

[23] Article 9 of the ICTY Statute (adopted 25 May 1993 by Security Council resolution 827) states: "(1) The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991; (2) The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

[24] The Special Court Agreement, 2002 (Ratification) Act, 2002, Sierra Leone (as amended), March 2002 ("Ratification Act").

> Act of Parliament or by resolution of Parliament supported by a simple majority vote in Parliament. In addition to compliance with the Constitution, ratification by an Act of Parliament also serves the purpose of transforming the Agreement into local statute and therefore making it directly applicable in Sierra Leone.

The preamble to the Ratification Act recites the fact that the Agreement was signed by the President and requires ratification by Parliament under Section 40(4) of the Constitution. Its clauses transpose the Agreement and Statute into Sierra Leonean law, providing the machinery of co-operation in relation to arrest and detention (Part VI) and establishing new criminal offences of obstructing or corrupting the Special Court (Part VIII). Section 13 provides that offences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone and Section 11(2), importantly for this application, provides: *The Special Court shall not form part of the Judiciary of Sierra Leone.*[25]

Analysis

15. From the above summary it can be appreciated that the Special Court, as Professor Diane Orentlicher has pointed out, is not accurately described in the Secretary-General's report as a court of "mixed jurisdiction and composition:"[26] it is in reality an international court onto which a few national elements have been grafted.[27] It is important to understand further that:

    i. The Special Court is established by the Agreement itself,[28]and not by the Ratification Act.

    ii. The Agreement with the Special Court's Statute annexed constitutes a treaty in international law and consequently is governed and must be interpreted by international law.[29]

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[25] Emphasis added.

[26] See Report of the Secretary-General, para. 9. Although in context, the Secretary-General meant no more than that the Special Court had a compositional mix of judges appointed by the UN and by the Sierra Leone government, and that it had jurisdiction to try two domestic offences as well as a number of international crimes.

[27] D. F. Orentlicher, "Striking a Balance, Mixed Law Tribunals and Conflicts of Jurisdiction", in Lattimer & Sands (eds), *Justice for Crimes Against Humanity*, (Hart: 2003), 215.

[28] Article 1(1): "There is hereby established a Special Court for Sierra Leone..." (emphasis added).

[29] See Article 2(1)(a) of the 1969 Vienna Convention: 1. For the purposes of the present Convention: a. "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. See also Article 2(1)(a) of the 1986 Vienna Convention: 1. For the purpose of the present Convention: (a) "treaty" means an international agreement

iii. The Agreement entered into force, independently of the local ratifying legislation, by virtue of mutual notification by the parties under Article 21, which is not preconditioned upon ratification.[30]

16. The consequence of the above analysis is that this body is an international organisation - an international court, no less - created by an international treaty. The Special Court is an international tribunal established by an international treaty and operating in an international law dimension. It derives no power from the law of Sierra Leone and is not a part of the court system of that State. As an international organisation based in that State with power to contract and hold property, it has certain rights and obligations under local law which are granted or effectuated by the Agreement and the Ratification Act, but this does not mean it is a 'Sierra Leone court' any more than the ICC or any other international tribunal to which the state of Sierra Leone is party by a treaty. Even the mutual assistance provisions provided in the Ratification Act as part of the cooperation envisaged by Article 17 of the Agreement[31] are careful to make this distinction. Under Section 20 of the Ratification Act, for example, a Special Court order "shall have the same force as if it had been issued by a judge... of the Sierra Leone Court." (emphasis added) The plain fact, both in theory (see Section 11(2) above) and in practice is that the Special Court for Sierra Leone is not a Special Court of Sierra Leone.

17. For this reason, the word "hybrid" that has crept into many academic commentaries as an adjectival description of the Special Court should not be taken literally. "Hybrid" denotes the offshoot of two different species and may be used of a body composed of incongruous elements. The Special Court, however, is the creation of international law. It has no connection with Sierra Leone law other than (a) by provisions necessary for its operation in Sierra Leone and (b) by a

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governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation.

[30] Article 21 of the Agreement provides that "The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with".

[31] Article 17 provides: 1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation. 2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to: (a) Identification and location of persons; (b) Service of documents; (c) Arrest or detention of persons; (d) Transfer of an indictee to the Court.

power it possesses but has not used to try major perpetrators of the crimes of arson and specific abuses of young girls defined by national law. The Special Court derives no juristic authority from national law and does not operate in any sense as a national court subject to the Constitution of Sierra Leone. This is further evidenced by the fact that one possible model for a "special national court" invested with power to try certain international law offences was discussed by the Secretary General as an "alternative solution" but was not pursued by the Security Council.[32]

18. The fact that (as I think, superfluously) the Special Court has been accorded power to try persons who bear grave responsibility for crimes of arson and sexual abuse of girls as defined by municipal law does not alter its status as an international criminal tribunal: the Special Court has international jurisdiction plus. There is nothing inherently improbable about a criminal court being empowered to try offences under both international and domestic criminal laws, although charges would need to be carefully separated: for example, all domestic law defences, even if unparalleled in international law, would need to be available to charges based on domestic law, in order to avoid breach of the rule against retroactivity. However, practical problems aside, principle does not prevent the establishment by treaty of a court with international criminal jurisdiction and the power additionally to try defendants under certain clearly defined criminal laws of the country where the crime was committed. In the context of creating courts to deal with alleged international terrorists, for example, the convenience and effectiveness of such a court can readily be imagined. In the civil arena, international courts may, if empowered by the treaty under which they sit, additionally decide issues of municipal law[33]: there is no reason in principle to deny such a role to an international criminal court.

19. That said, there is no exact precedent for such a criminal court and examples of a state yielding any part of its sovereign power to prosecute and try offences against its own law are uncommon, outside the context of extradition. One example may be the recent UK agreement with New Zealand that the latter state should take over the prosecution and try members of the Pitcairn

[32] Report of the Secretary-General, para. 72.
[33] See e.g., *Case concerning the payment of various Serbian loans issued in France*, (1929) PCIJ Series A, No. 20 as discussed by Brownlie, *Principles of Public International Law*, 38.

Island community on criminal charges under UK law which had been investigated by Scotland Yard pursuant to the UK's jurisdiction over the island.[34] The rarity of such an arrangement will be relevant for the application of the Vienna Convention test under Article 46 (see paragraph 6 above). It is by no means unusual for states to permit their citizens to be made defendants to criminal charges in international courts - over one hundred states have now ratified the ICC - but the novelty of a state agreeing to grant to an international court some power to prosecute its citizens under its own national law must at least put other parties to that agreement on notice that there may well be constitutional requirements to be met before the state can share or surrender an aspect of its own judicial power, a jealously guarded attribute of state sovereignty. Although Article 5 of the Statute is virtually a dead letter - none of the defendants have been charged with municipal law crimes - and the Prosecutor states that none will be so charged - its presence in the Agreement will put the other parties to it on notice that 'a rule of internal law of fundamental importance' i.e. a constitutional provision, is likely to be engaged. I return to consider the relevance of this factor in paragraphs 32-35 below.

20. Having dealt at some length with the nature of the Special Court I can proceed to consider the challenge brought on behalf of Mr Kondewa to the lawfulness of its establishment.

Constitutional Invalidity

21. The applicant contends that the Special Court was established in breach of Section 108 of the Constitution of Sierra Leone, which requires that a bill to alter certain entrenched sections must, after its passage through parliament, be submitted to a referendum and approved thereat by at least two-thirds of all votes cast.[35] Many of the constitutional provisions included in Section 108(3) relate to the judiciary (Chapter VII of the Constitution), most notably Section 120, which provides in part:

> (1) The Judicial power of Sierra Leone shall be vested in the Judiciary of which the Chief Justice shall be the Head.

[34] See Pitcairn Trials Bill, Government Bill, 11 October 2002; Statutory Instrument 2002 No. 2638, The Pitcairn (Amendment) Order 2002, 22 October 2002 (in force 20 November 2002).
[35] See *Kondewa* Preliminary Motion, paras 5-6.

(2) The Judiciary shall have jurisdiction in all matters civil and criminal including matters relating to this Constitution, and such other matters in respect of which Parliament may by or under an Act of Parliament confer jurisdiction on the Judiciary.

(3) In the exercise of its judicial functions, the Judiciary shall be subject to only this Constitution or any other law, and shall not be subject to the control or direction of any other person or authority.

(4) The Judicature shall consist of the Supreme Court of Sierra Leone, the Court of Appeal and the High Court of Justice which shall be the superior courts of record of Sierra Leone and which shall constitute one Superior Court of Judicature, and such other inferior and traditional courts as Parliament may by law establish.

Another entrenched section is Section 122(1):

> The Supreme Court shall be the final court of appeal in and for Sierra Leone and shall have such appellate and other jurisdiction as may be conferred upon it by this Constitution or any other law [...].

Also entrenched is Section 124, which gives the Supreme Court original and exclusive jurisdiction in all matters relating to the interpretation of any provision of the Constitution or where a question arises as to whether parliament has exceeded its authority under the Constitution. However, Section 125, which gives the Supreme Court "supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority" by writ or prerogative order, is not entrenched and may in consequence be altered by an Act of Parliament.

22. The applicant argues that the Agreement and the Ratification Act altered the above sections of the Constitution by creating the Special Court and giving it concurrent jurisdiction and primacy over the competent domestic courts. To satisfy the test laid down by Article 46 of the 1969 Vienna Convention, they must further show that the constitutional breach must have been "manifest" to the United Nations in view of the rarity of this kind of court (paragraph 19 above) and was evidenced by the Secretary-General's statement about the Agreement, namely that "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".[36]

[36] See Report of the Secretary-General, para. 9. See *supra*, paragraph 9.

23. This Court is not a part of the judicial system of Sierra Leone. The power to interpret the Constitution is reserved, by Section 124 of the Constitution itself, to the Supreme Court. That does not, however, mean that the judges of the Special Court have no power to decide the meaning of constitutional provisions if that meaning emerges as an issue of fact relevant to their consideration of a preliminary motion or appeal. Since the alleged breach of Article 108 is the premise for this motion, we are entitled to form an opinion, whilst of course acknowledging that our view cannot bind the Supreme Court.

24. I note, by way of introduction, that the 1991 Constitution descends from the Independence Constitution of 1961, an early "Westminster model" with provisions that must be interpreted both generously and purposely.[37] The purpose of Article 108, read as a whole, was to entrench certain sections which are regarded as fundamental to the functioning of democracy. Constitutions are not meant to be suicide pacts, but this Constitution, even in times of declared public emergency, remains incapable of alteration other than through its own due processes (see Section 29(6)(d)). The purpose of including Sections 120-124 and other Chapter VII sections amongst the entrenched provisions was plainly to preserve at all costs the independence, integrity and authority of the judges of Sierra Leone. That follows both from the provisions that are entrenched (which relate to the composition of an appointment to the bench, the jurisdiction of the Higher Courts and the right of access and appeal) and the provisions (having more to do with machinery and formalities) which are not entrenched.

25. In construing purposefully the phrase "The judicial power of Sierra Leone" which is vested by the Constitution in the judiciary, it is made mandatory for the Supreme Court to apply the "fundamental principles of state policy" set out in Chapter 2 - (see Section 4 of the Constitution). These include, under Section 10(d):

> respect for international law and treaty obligations, as well as the seeking of settlement of international disputes by negotiation, conciliation, arbitration or adjudication.

26. In this context, I do not read Section 108, as applied to Chapter VII entrenched provisions, so as to require a referendum whenever the parliament (or the government without the need for

[37] See *Minister of Home Affairs and Another v Collins MacDonald Fisher and Another*, [1980] AC 319, 328.

parliamentary assent) makes or accedes to an agreement which establishes an international court, irrespective of whether that court's decisions will impact on Sierra Leone or any of its citizens. The judicial power exercised by the Special Court under an international agreement is not "the judicial power of Sierra Leone" for reasons given above. For similar reasons, the power potentially exercised over Sierra Leoneans by the ICC (the government has also acceded to the Rome Treaty without a referendum) is not the judicial power of Sierra Leone. Nor, for that matter, is the power exercised by the International Court of Justice or the United Nations Human Rights Committee or the African Commission on Human and Peoples' Rights. The judicial power of Sierra Leone is simply not engaged by the decisions - however binding on the government or on individuals - exercised by innumerable judicial bodies created by international treaties, ranging from commercial arbitration tribunals provided by the World Bank under the ICSID[38] treaty, to the International Tribunal for the Law of the Sea. It cannot be imagined that the framers of the 1991 Constitution intended to require a referendum before the government could sign up to an international treaty of benefit to all people but which happened to contain (as many treaties do) provision for submission to a judicial or arbitral tribunal. This would not only be irrational: it would be in flat contradiction to the "fundamental principle" in Section 10(d).[39]

27. The answer to the argument that there must be a referendum before any new jurisdiction is created or accepted by treaty is that the judicial power protected by Chapter VII of the Constitution is the judicial power of Sierra Leone, and not the judicial power of the international community. The distinction is crucial, and well accepted (see Justice Deane's analysis in *Polyukhovich v Commonwealth*).[40] Most, if not all, commonwealth constitutions provide similar entrenched protection to federal courts, whose exclusive and independent power cannot be circumvented by governments which seek to invest some of that power in more partisan tribunals.[41] The Prosecution points out that many of these countries have ratified the Rome Treaty, and none have recognised any need for a referendum to adopt the ICC. In Australia, the issue was the subject of a parliamentary committee inquiry, since Chapter 3 of the Australian

[38] International Centre for Settlement of Investment Disputes.
[39] See *supra* paragraph 29.
[40] *Polyukhovich v Commonwealth*, (1991) 172 CLR 501, at 627.
[41] *Hinds v. DPP and Attorney General (Jamaica)* [1976] 2 WLR 366.

Constitution, (like Chapter VII of the Sierra Leone Constitution), vests judicial power in the Australian courts. The Committee reported:

> The ICC will not exercise the judicial power of the Commonwealth when it exercises its jurisdiction, even when that jurisdiction relates to acts committed on Australian territory by Australian citizens. Ratification of the Statute will not involve a conferral of the judicial power of the Commonwealth on the ICC. Nor would enactment by the parliament of the draft ICC legislation involve such a conferral...
>
> The judicial power exercised by the ICC will be that of the international community, not of the Commonwealth of Australia or any individual nation states. That judicial power has been exercised on previous occasions, for example in the International Court of Justice and the International Tribunal for the Law of the Sea. Australia has been a party to matters before both of these international judicial institutions.[42]

The same view appears to have been taken in South Africa and Canada. Although several states outside the Commonwealth have held referenda over ratification of the ICC treaty, general state practice favours the view that accession to a court creating treaty establishing the ICC does not involve any state party investing that court with its own judicial power.

28. Normally, procedures for the ratification of a treaty will be provided in the constitution of a state party: in the case of Sierra Leone, they are provided by Section 40(4)(d) of the Constitution, Chapter 5, The Executive, Part I, The President. Section 40(4)(d) provides:

> Notwithstanding any provisions of this Constitution or any other law to the contrary, the President shall, without prejudice to any such law as may for the time being be adopted by Parliament, be responsible, in addition to the functions conferred upon him in the Constitution, for -
>
> d. the execution of treaties, agreements or conventions in the name of Sierra Leone.

Section 40 (4) further provides:

> Provided that any Treaty, Agreement or Convention executed by or under the authority of the President which relates to any matter within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorises any expenditure out of, the Consolidated Fund or any other fund of Sierra Leone, and any declaration of war made by the President shall be subject to ratification by Parliament [...].

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[42] The Parliament of the Commonwealth of Australia, Report 45, The Statute of the International Criminal Court. Joint Standing Committee on Treaties, May 2002, para. 2.50.

29. Section 40(4) is expressed as "notwithstanding any provision of the Constitution or any other law to the contrary". This serves, on one interpretation, as a representation that a treaty endorsed under the Section by the President and then the Parliament will be valid notwithstanding other constitutional provisions, such as the terms of Section 108.

30. These procedures were duly followed by the implementing legislation, namely the Special Court Agreement and the Ratification Act. I do not consider that its terms, or the terms of the Special Court Agreement, alter any of the Chapter VII provisions entrenched by Section 108(3) of the Constitution because they relate to a court which exercises the judicial power of the international community, and not the judicial power of Sierra Leone.

31. I note further that the Supreme Court's jurisdiction to deal with matters of international law is nowhere mentioned, (let alone made exclusive), in Sections 120 to 124 or anywhere else in Chapter VII of the Constitution. The Chapter makes no mention at all of military courts, which exercise quite severe powers under municipal service laws. Although "court" is defined in Section 171 to include courts martial, which have jurisdiction to try serious criminal offences, courts martial are nowhere mentioned in terms in Chapter VII and their abolition would not require a referendum. (Military courts are, however, integrated into Chapter III and the extent to which the human rights and fundamental freedoms provisions of that Chapter apply to them is clarified in Section 30(1)). In short, Section 108 and Chapter VII do not operate to protect local courts, inferior courts, traditional courts or military courts: these may not only be supervised by the Supreme Court under Section 125, but also altered or abolished by Parliament without a referendum. These distinct spheres of judicial power are unaffected by the entrenched provisions of Chapter VII, and so (for different reasons) is the sphere of international criminal law in which the Special Court operates.

32. I come, finally, to the ultimate issue, namely whether the alleged unconstitutionality, if proven, would be "manifest" in the sense defined by the 1969 Vienna Convention as the basis for state incompetence to ratify an international treaty. As explained above (paragraph 4), Article 46 of the 1986 Vienna Convention applies to treaties of this kind between a state (Sierra Leone) and an international organisation (i.e. the UN) and adopts virtually word for word the test for state

incompetence laid down by Article 46 of the 1969 Vienna Convention in respect of inter-state treaties, which reads in relevant part:

> Provisions of internal law of a State and Rules of an international organization regarding competence to conclude treaties
>
> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. [...]
>
> 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

33. The burden of proving the invalidity of a treaty is on the asserting party: here it must be shown that the ratification process adopted pursuant to Section 40(4) was so obviously in breach of Section 108 that the legal advisors to the Secretary-General must have been aware of the error or else were acting in bad faith by turning a blind eye to it. Since three members of this Court in the Decision on Constitutionality did not consider that the Agreement altered the entrenched provisions of Chapter VII so as to require a Section 108 referendum prior to ratification, I can hardly find that a flaw they failed to detect should have been objectively apparent to the UN. But put that opinion aside and assume that the Supreme Court of Sierra Leone were authoritatively to rule the ratification procedure unconstitutional for the reasons put forward by the Applicant. Could he then discharge the burden of proving that this violation was "manifest" to the UN?

34. Reliance might be placed on the report of the Secretary-General (see paragraph 9 above) although this goes only to show that the UN was aware that some constitutional process would be necessary in Sierra Leone. The Prosecution counters by pointing to the objective fact that at the relevant time, many Commonwealth countries with similar constitutions were ratifying the ICC treaty without recognising any need for constitutional change through a referendum or otherwise.[43] This argument is not overly persuasive: the Agreement is a bilateral treaty, and its unusual provision of jurisdiction in respect of crimes under municipal law through Article 5 of the Statute

[43] See e.g., Prosecution Response, para 15.

has no equivalent in the ICC Statute. It is this very fact that must have put the UN on notice that a constitutional process might well be required. But what has objectively to be evident is not the possibility of a special process but the fact of a violation of that process, in this case, that the constitutional route chosen, namely an Act of Parliament, was not followed by a further constitutional process, namely submission of the legislation to a referendum. I do not consider that this violation would have been objectively evident to the UN, assuming good faith and normal due diligence. The terms of Section 40(4) read with Section 10(d), seem to offer an entirely appropriate procedure for accession to this treaty; the Ratification Act was conspicuously well drafted and detailed, with an introductory memorandum from the Attorney General which certified the appropriateness of the procedure. There is no suggestion that the Government of Sierra Leone chose the Section 40(4) route deviously or in bad faith or in order to oppress any section of the population or to deny human rights. The violation - for such I now hypothesize it to be - would not be "manifest" so as to invalidate this treaty in customary international law.

35. Invalidation of treaties by flagrant government incompetence is - and must be - rare. It will predictably be attended by oppression or bad faith on the part of the state (or by corruption on the part of ministers of state) and will be the subject of some international concern and condemnation. Examples may be given of a President who violates his or her constitution by making an agreement with another state or organisation to exploit national assets whilst pocketing a secret commission. Or an agreement between two or more states which involves the flagrant breach of constitutional human rights guaranteed to an indigenous minority. The incapacitating violation, in other words, will be objectively evident because it is objectively wrong or immoral or seriously prejudicial to the rights of some citizens. "Incompetence" in international law will rarely if ever be found as a result of technical errors, oversights made in good faith, or mistakes made on the basis of plausible (but eventually unpersuasive) arguments of constitutional law.

Conclusion

36. For the reasons set out above, I too would dismiss this Preliminary Motion.

Done at Freetown this twenty-fifth day of May 2004

Justice Robertson

[Seal of the Special Court for Sierra Leone]