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SCSL-2003-11-PT.
(1320-1334)

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THE TRIAL CHAMBER

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

Registrar: Mr. Robin Vincent
Date: 14 November 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

PRELIMINARY DEFENCE MOTION ON THE LACK OF JURISDICTION MATERIAE: NATURE OF THE ARMED CONFLICT

Office of the Prosecutor:
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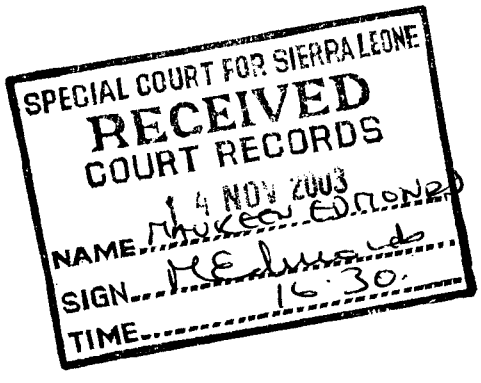

1. The Prosecutor has charged Mr. Moinina Fofana with crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law, in violation of Articles 2, 3 and 4 of the Statute of the Special Court for Sierra Leone.

2. The defence for Mr Fofana herewith files a preliminary motion on lack of subject-matter jurisdiction under Articles 3 and 4 of the Statute. It will argue that the jurisdiction of the Special Court under Articles 3 and 4 is limited to internal armed conflicts. The facts relevant to the armed conflict in Sierra Leone in the period covered by the indictment of Mr. Fofana, however, undoubtedly attest that the conflict was of an international nature. It follows that the Special Court lacks jurisdiction *materiae* to deal with the crimes listed in Articles 3 and 4 of the Statute. These arguments will be explained below.

Articles 3 and 4 of the Statute apply only in internal armed conflicts

3. Article 3 of the Statute empowers the Special Court to prosecute persons who have committed serious violations of article 3 common to the Geneva Conventions of 12 August 1949 and of Additional Protocol II of 1977. Both instruments apply only in internal armed conflicts.

4. The *chapeau* of Common Article 3 reads:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions (...)".

5. Article 1 of Additional Protocol II reads:

> "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing

conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

6. It follows that Article 3 of the Statute is only applicable in internal armed conflicts. This conclusion has been drawn by many experts who have commented on the Statute of the Special Court for Sierra Leone[1].

7. Article 4 of the Statute provides:

"The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law or armed conflict,

c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities."

This article lacks an explicit reference to the nature of the underlying conflict. However, on closer analysis, it becomes clear that the article is concerned with internal armed conflicts only. The article is taken from Article 8(2)(e) of the

Statute of the International Criminal Court. Article 8 of the ICC Statute defines war crimes. The relevant part of Article 8(2)(e) states that the term war crimes includes:

> "(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
> (...)
> (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
> (...)
> (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;"

Prof. Swart, Judge at the ICTY, commented on Article 4 of the Statute:

> "the Statute of the Special Court for that country has regard solely to war crimes committed in an internal conflict. Articles 3 and 4 of the Statute borrow from the Statute of the ICTR as well as the Rome Statute. Article 3 of the Statute reproduces Article 4 of the ICTR Statute almost verbatim. In addition, Article 4 defines three more crimes in language copied from Article 8.2(e) of the Rome Statute."[2]

8. The conclusion that Articles 3 and 4 apply to internal armed conflict finds support in the overall focus of the Statute on internal armed conflicts. Article 5 confers jurisdiction over crimes committed under Sierra Leonean law. Domestic law of

[1] Beresford / Muller, The Special Court for Sierra Leone: An Initial Comment, 14 LJIL (2001) p. 642, Firtz / Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, 25 Fordham International Law Journal (2001) p. 408.

Sierra Leone exclusively applies to internal matters of Sierra Leone. It follows that this article grants jurisdiction over crimes committed in an internal armed conflict.

9. The jurisdiction of the Special Court over internal conflict is further evidenced by the general context of its establishment. The Special Court was created by an agreement between the United Nations and the government of Sierra Leone. The sole involvement of Sierra Leone, and the absence of other states as signatories to the Agreement, proves that both parties to the agreement considered the conflict a matter solely concerning Sierra Leone and the world community at large.

10. Several reports of the Secretary-General prior to the establishment of the Special Court indicate that he saw the conflict as internal[3].

11. While the Security Council makes no explicit mention of the nature of the conflict, its exclusive reference, in resolution 1315 (2000) (preamble, and paragraph 2), to crimes committed "within the territory of Sierra Leone against the people of Sierra Leone", evidences the Security Council's belief that the conflict should be characterized as internal in nature. Its recommendation, in the same resolution (paragraph 2), that the personal jurisdiction of the Special Court should be focused on leaders who have threatened the establishment of and implementation of the peace process in Sierra Leone also points into the same direction (compare also Article 1 of the Statute).

12. In scholarly writings, the view has also been expressed that the Special Court Agreement has determined the conflict to be non-international in nature[4].

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[2] Bert Swart, Internationalized Courts and Substantive Criminal Law, in: Cesare P.R. Romano, Jann Kleffner, André Nollkaemper (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (forthcoming).

[3] Report of The Secretary-General on the Situation in Sierra Leone, S/1995/975, 21 November 1995, p. 36: "The internal conflict that has raged for the last four years has damaged or destroyed much of the vital physical and social infrastructure of the country."

[4] Beresford / Muller, The Special Court for Sierra Leone: An Initial Comment, 14 LJIL (2001) p. 642, Firtz / Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, 25 Fordham International Law Journal (2001) p. 408.

13. On the basis of the foregoing, we conclude that the Special Court is intended to be empowered to adjudicate violations of international humanitarian law that occurred in the context of an internal armed conflict. The Statute should therefore be construed to give effect to that purpose.

International humanitarian law makes a fundamental distinction between international and internal armed conflicts

14. The determination of the nature of the conflict as either internal or international has legal consequences for the applicability of international humanitarian law. International humanitarian law treats the two classes of conflicts in a markedly different way.

15. The continued relevance of the distinction between international and internal armed conflicts is illustrated by several recent treaties on international humanitarian law. An example is the 1998 Rome Statute for the International Criminal Court. Article 8 of the Rome Statute distinguishes between grave breaches and other serious violations of the laws and customs applicable in international armed conflicts on the one hand, and violations of common article 3 and other serious violations of the laws and customs applicable in armed conflicts not of an international character on the other hand.

The legal criteria for establishing the international character of an armed conflict

16. An armed conflict can be characterised as international under a number of different conditions.

17. First, an armed conflict becomes an international armed conflict if two or more states are a party to the conflict (art. 2 Geneva Conventions). An armed conflict is rendered international if there is a direct intervention by one state in the other state. In the Blaskic Case, the Trial Chamber of the ICTY determined that the presence of soldiers of the army of Croatia on the territory of Bosnia and Herzegovina was proof of direct intervention and on that basis characterised the conflict as international.

18. Second, an armed conflict becomes an international armed conflict when a state that is not itself involved in a conflict exercises control over armed groups or private individuals that are engaged in a conflict with another state.

19. The legal criteria for establishing when this second criterion – control by a state over armed groups or individuals engaged in an armed conflict with another state - is applicable, thereby rendering the conflict international, have been determined by the ICTY. In the Tadic Appeal case, the Appeals Chamber considered the conditions under which, in an armed conflict, armed factions act as *de facto* State organs, rendering the conflict international. The Tribunal has specified what degree of authority or control must be wielded by a (foreign) State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal.

20. According to the ICTY, the degree required for rendering a conflict international, depends in part on the nature of the armed faction that is controlled. When the armed faction *is not militarily organised*, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question.

21. A different standard applies if the armed faction is military organised. For an armed faction that is military organised it must be proved that the State wields

overall control over the group. This is a less demanding standard than the issuing of specific orders:

> "This requirement [of overall control] does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts."[5]

22. In addition to the criterion of specific order over individuals and non-organized armed groups, the Appeals Chamber in *Tadic* identified a third criterion for rendering an armed conflict international:

> "This test is the assimilation of individuals to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions)."[6].

The Appeals Chamber found that private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as *de facto* State organs[7]. While the Appeals Chamber only referred to individuals acting in collusion with State authorities, there is no reason why the same would not hold for military groups.

[5] ICTY, Appeals Chamber, Prosecutor v. Tadic, IT-94-1, 15 July 1999, para. 137.
[6] *Ibidem*, para. 141.
[7] *Ibidem*, para. 144

23. Third, an armed conflict becomes an international armed conflict if an international (or regional) organisation is involved in enforcement action. If UN or ECOWAS forces, or forces of other international or regional organisations, become involved in enforcement action, as opposed to peace keeping, they become a party to the conflict.[8] The same applies when an international (regional) organisation is involved in peace-keeping, but uses force, for instance in the exercise of self-defence.

24. The status of peace enforcement forces as parties to the conflict can also be deduced from the fact that it is generally recognised that, while ECOWAS, the United Nations, or any other international organisation are not themselves party to international agreements on the laws of war, these laws are directly relevant to such forces. To the extend such forces are themselves involved in using force, they become a party to the conflict and are bound by international humanitarian law[9].

25. Moreover, the nature of the conflict does not depend exclusively on the position taken by the international organisation. National contingents in the service of an international organisation remain bound, to the same extend and to the same degree, by international humanitarian law, which would apply if the same forces were engaged in an international armed conflict for their own state. The applicability of international humanitarian law implies the involvement of the armed forces, either through the international organisation or on their own behalf, are to be considered as a party to the armed conflict, therewith internationalising the armed conflict.

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[8] C. Greenwood, "International Humanitarian Law and United Nations Military Operations", *Yearbook of International Humanitarian Law* (1) 1998, p. 34.

[9] Compare: Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law'. In Section 1, the Secretary-General sets out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control. Principles and rules of international humanitarian law set out in the Bulletin are 'applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extend and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence'.

The conflict in Sierra Leone should be characterized as international

26. There is abundant evidence that the conflict in Sierra Leone from 1996 onwards must be characterised as international. The international nature of the conflict is caused, in the first place, by the direct involvement of Liberia in the conflict in Sierra Leone and the control of the Liberian authorities over the RUF and AFRC; in the second place by the role of ECOMOG and Nigeria as party to the conflict; and in the third place by the relationship between the Government of Sierra Leone/ECOMOG/Nigeria on the one hand and the CDF on the other. Below, these three situations will be subsequently discussed.

Involvement of Liberia

27. There is ample evidence that the state of Liberia was during the entire period covered by the indictment a party to the conflict in Sierra Leone, thus rendering the conflict international. In addition to its direct involvement, Liberia was also involved in the conflict by exercising control over the RUF. The armed forces of the RUF and AFRC fighting within the territory of Sierra Leone against the central authorities of Sierra Leone acted under control of Liberia.

28. Liberia's involvement in the Sierra Leone conflict and control over the RUF and AFRC is supported by numerous reports of the UN and non-governmental organisations. In its 1998 Report "Sierra Leone 1998 – A year of atrocities against civilians", Amnesty International reports:

> "Liberia was widely reported to be providing combatants, arms and ammunition to AFRC and RUF forces in Sierra Leone. Liberian fighters were present in Freetown at the time of the ECOMOG intervention, and survivors of the gross human rights abuses which followed stated that the armed groups which had attacked them included Liberians."

29. The UN Panel of Experts, appointed pursuant to UN Security Council resolution 1306 (2000), found:

"unequivocal and overwhelming evidence that Liberia has been actively supporting the RUF at all levels, in providing training, weapons and related matériel, logistical support, a staging ground for attacks and a safe haven for retreat and recuperation."10

30. Ambassador Greenstock of the UK said:

"a variety of reliable sources show that President [Charles] Taylor [of Liberia] is orchestrating the activities of the RUF. He is giving direct military support, encouraging attacks against UNAMSIL and Sierra Leone government forces, providing strategic direction, influencing decisions on leadership and on command and control. Moreover, he is using the RUF to retain control of Sierra Leone diamonds reserves."[11]

31. Strong support for Liberia's involvement in the conflict in Sierra Leone and the control over the RUF by Liberia also follows from the indictment of Charles Taylor[12]. Charles Taylor is widely recognised as the real power behind the RUF[13]. From his indictment it follows that Taylor held "positions of superior responsibility"[14], was "exercising command and control over his subordinates [members of the RUF]"[15] and "provided guidance to the RUF" for at least the period between March 1997 and April 1999[16].

32. The individual responsibility of Charles Taylor necessarily implies the responsibility of the State of Liberia. Crimes of all state organs are attributed to the state. This holds in particular when crimes of committed by heads of states. A

[10] Report of the Panel of Experts Appointed Pursuant to UN Security Council Resolution 1306 (2000), Paragraph 19 in Relation to Sierra Leone, S 2000/992, para 182.
[11] Source: Amnesty International, 31 August 2000.
[12] Indictment in The Prosecutor against Charles Ghankay Taylor, SCSL-2003-01-I.
[13] International Crisis Group Report: "Sierra Leone : Time for a New Military and Political Strategy" ICG Africa Report N° 28, 11 April 2001, p. 13.
[14] § 27 of the indictment in The Prosecutor against Charles Ghankay Taylor, SCSL-2003-01-I.
[15] § 27 of the indictment in The Prosecutor against Charles Ghankay Taylor, SCSL-2003-01-I.
[16] § 22 of the indictment in The Prosecutor against Charles Ghankay Taylor, SCSL-2003-01-I.

finding or serious allegation of individual responsibility thus implies responsibility of the state for acts undertaken in the territory of Sierra Leone[17].

33. In conclusion, under the criteria set forth by the ICTY, the forces of the RUF acted under control of and/or may be assimilated with organs of the state of Liberia.

Involvement of Ecomog and/or Nigeria in the conflict

34. During the entire period covered by the temporal jurisdiction of the Special Court, ECOMOG and/or Nigeria acted as party to the conflict, with the result that the conflict was internationalized.

35. ECOMOG troops had used Sierra Leone as a base for the ECOMOG intervention in Liberia since 1991. The ECOMOG troops based around Freetown were Nigerian.[18] In response to an attack by the National Patriotic Front of Liberia on Sierra Leone on 23 March 1991 Nigeria sent 1,200 troops to Sierra Leone.[19] In this period, preceding the fall of the Kabbah regime, Nigerian troops were already involved in attacks on the RUF. NGO's reported:

> "Nigeria has also provided troops since the beginning of the conflict. By mid-1995 there were some 2,000 Nigerian Soldiers in Sierra Leone, based mostly in Freetown and at the international airport at Lungi. Nigerian combat aircraft were used for aerial bombardements of rebel positions."[20].

36. After the coup against the regime of Kabbah in May 25, 1997, ECOMOG was involved in an armed attack aimed at the reinstatement of the Kabbah regime, which eventually succeeded in February 1998. After the coup, Nigeria sent new

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[17] See with further references to authorities, André Nollkaemper, Concurrence between individual responsibility and state responsability in international law, In: *International and Comparative Law Quarterly*, vol. 52, July 2003, pp. 615-640.

[18] R. Mortimer, From ECOMOG to ECOMOG II: Intervention in Sierra Leone *in: 'Africa in World Politics, The African State System in Flux', Harbeson and Rothchild (ed.)*, p. 190, H.A. Saliu, ECOMOG as a permanent force: issues and constraints in: Africa Quarterly, Vol 40, No. 2. 2000, p. 57.

[19] A. Adebajo, Liberia's Civil War – Nigeria, ECOMOG, and Regional Security in West Africa, Lynne Rienner Publishers, p. 82. , M. Vehnämäki, Diamonds and warlords: The geography of was in the democratic Republic of Congo and Sierra Leone, p. 64.

[20] Amnesty International Report, Sierra Leone: Human rights abuses in a war against civilians, 13 September 1995, p. 3.

troops to Sierra Leone, in order to annul the coup. Nigerian aeroplanes launched an offensive and carried out bombing missions in November 1997.[21]

37. The hostilities after the coup against Kabbah were not conducted by Nigerian troops only. On 23 October 1997, the extraordinary ECOWAS summit in Conakry[22] adopted the Conakry Accord (also known as the Sierra Leone Peace Plan).[23] Article 7 of the Sierra Leone Peace Plan provides inter alia for "the reinstatement of the legitimate government of President Tejan Kabbah within a period of six months".

38. It follows that during the relevant period, ECOMOG and/or Nigeria were a party to the conflict, and thereby internationalized the conflict.

Control of the Government of Sierra Leone/ECOMOG over the CDF

39. In addition, the conflict between Liberia, the RUF and the AFRC, on the one hand, and the CDF, on the other, must be qualified as international, because sufficient links existed between the CDF on the one hand and Sierra Leone and/or ECOMOG on the other.

40. There is ample evidence that the CDF fought alongside the Sierra Leone Army (SLA) and ECOMOG to protect and reinstate the regime of Kabbah. Reports of the Secretary-General on Sierra Leone state that ECOMOG acted in concert with the CDF[24].

[21] Mortimer, p. 197.
[22] Mortimer, p. 198.
[23] Communiqué of the Sixth Meeting of Foreign Affairs Ministers of the Committee of Five on Sierra Leone, 23 October 1997, available at http://www.sierra-leone.org/ecowas102397.html.
[24] Fourth Report of the Secretary-General on the Situation in Sierra Leone doc. S/1998/103, 18-03-98, § 6; Fifth Report of the Secretary-General on the Situation in Sierra Leone, doc. S/1998/486, 09-06-98, pp. 4-5.

Conclusion

41. In the light of the above discussion, in the case at issue, there is abundant evidence that the conflict in Sierra Leone from 1996 onwards must be characterised as international.

42. The parties to the conflict are on the one hand Liberia, the RUF and the AFRC, and, on the other hand, the Government of Sierra Leone, ECOMOG/Nigeria, assisted or supported by the CDF. The combination of (i) the direct involvement of Liberia and the control of the Liberian authorities over the RUF and AFRC; (ii) the role of ECOMOG and Nigeria as party to the conflict; and (iii) the relationship between the Government of Sierra Leone/ECOMOG/Nigeria and the CDF renders the conflict international.

43. It follows that Articles 3 and 4 of the Statute are not applicable and that the Special Court has no jurisdiction to try the defendant on the basis of these articles.

COUNSEL FOR THE ACCUSED

For Mr. Michiel Pestman

Prof. Dr. P. André Nollkaemper

Dr. Liesbeth Zegveld

Defence List of Authorities

1. S. Beresford and A.S. Muller, "The Special Court for Sierra Leone: An Initial Comment," 14 Leiden Journal of International Law (2001), pp. 635–651.

2. Firtz / Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, 25 Fordham International Law Journal (2001) p. 408.

3. Bert Swart, Internationalized Courts and Substantive Criminal Law, in: Cesare P.R. Romano, Jann Kleffner, André Nollkaemper (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (forrthcoming).

4. Report of The Secretary-General on the Situation in Sierra Leone, S/1995/975, 21 November 1995.

5. C. Greenwood, "International Humanitarian Law and United Nations Military Operations", *Yearbook of International Humanitarian Law* (1) 1998, p. 34.

6. Report of the Panel of Experts Appointed Pursuant to Un Security Council Resolution 1306 (2000), Paragraph 19 in Relation to Sierra Leone, S 2000/992.

7. Indictment in The Prosecutor against Charles Ghankay Taylor, SCSL-2003-01-I.

8. International Crisis Group Report: "Sierra Leone : Time for a New Military and Political Strategy" ICG Africa Report N° 28, 11 April 2001.

9. André Nollkaemper, Concurrence between individual responsibility and state responsibility in international law, In: *International and Comparative Law Quarterly*, vol. 52, July 2003, pp. 615-640.

10. Communiqué of the Sixth Meeting of Foreign Affairs Ministers of the Committee of Five on Sierra Leone, 23 October 1997, available at http://www.sierra-leone.org/ecowas102397.html.