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SCSL-2003-11-PT
(3332 - 3343)

THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, President
Judge Emmanuel Ayoola
Judge George Gelaga King
Judge Renate Winter
Fifth Judge to be determined

Registrar: Mr. Robin Vincent

Date: 26 January 2004

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

DEFENCE REPLY TO THE PROSECUTION RESPONSE TO THE ADDITIONAL WRITTEN SUBMISSION PERTAINING TO THE PRELIMINARY MOTION ON LACK OF JURISDICTION: ILLEGAL DELEGATION OF POWERS BY THE UNITED NATIONS

Office of the Prosecutor:
Mr. Desmond de Silva, Deputy Prosecutor
Mr. Luc Côté, Chief of Prosecutions
Mr. Walter Marcus-Jones
Mr. Christopher Staker
Mr. Abdul Tejan-Cole

Defence Office:
Mr. Sylvain Roy, Acting Chief

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

1. On 20 January 2004, the Prosecution filed a response, pursuant to Rule 72 (G) (ii), to the Defence's "Additional Submissions Pertaining to the Preliminary Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations" (hereafter: the "Prosecution Response"). Pursuant to Rule 72(G)(iii) of the Rules, the Defence for Mr. Fofana hereby files its reply.

Reply

2. The Prosecution Response in certain respects narrows the points of disagreement between the Defence and the Prosecution. However, in doing so it makes a number of statements that misrepresent and distort the position of the Defence and, as a result, obscure what in essence is a rather simple legal issue: that there are limits to the power of Security Council to create international legal persons for the exercise of its principal function of maintaining peace and security, and that the creation of the Special Court exceeds those powers.

3. Four elements of the Prosecution Response require a reply to remove any confusion as to the legal issue before the Appeals Chamber.

4. First, the Defence strongly objects to the "train of reasoning" by which the Prosecution attempts to summarise the argument of the Defence. In particular, it objects to the Prosecution's statement that "the Defence argument is essentially that the Security Council has 'delegated' its powers to prosecute suspects of international crimes to the Special Court".[1] The Defence has made it clear from the outset that the act of delegation that is at issue in the establishment of the Special Court is primarily the delegation of an implied power from the Security Council to the Secretary-General,[2] rather than to the Special Court. It was the conclusion of the Agreement by the Secretary-General that was an act of delegated authority. The Prosecution appears to overlook the essential role of the Secretary-General, and thereby has not at all addressed the critical question as to the limits to the powers of the Security Council to delegate powers to the Secretary-General to set up an organ outside the United Nations.

[1] Prosecution Response, para. 13 (1).
[2] Preliminary Motion, paras. 6-7; Defence Additional Submissions, para. 3.

5. In a more indirect manner, it may not be incorrect to refer to the establishment of the Special Court as an act by which the Security Council has, through the Secretary-General, delegated certain powers to the Special Court.

6. As the Prosecution rightly notes, with reference to the Decision of the Appeals Chamber of the ICTY, the Security Council can establish an international tribunal as an "instrument for the exercise of its own principal function of maintenance of peace and security".[3] It is a conceptual question whether this is an act of delegation, and whether there thus would be two acts of delegation: one to the Secretary-General and one to the Special Court. However, the question of whether or not one construes the conferral of power on an international tribunal as "delegation" or as another legal act is without relevance to the key issue before the Appeals Chamber: the identification of the limits to the powers of the Security Council, directly or through the Secretary-General, to create institutions for the exercise of its own principal function of maintenance of peace and security.

7. In either interpretation, the establishment involves an act of delegation by the Security Council, at least to the Secretary-General and, under a broader concept of delegation, also to the Special Court. The conclusion by the Prosecution that it is unnecessary to consider the legal principles governing delegation of powers because there "simply has been no delegation ... of powers"[4] therefore needs to be rejected. It must be added that this conclusion by the Prosecution fully contradicts its position, shared by the Defence, that the Secretary-General himself has no powers to set up an international tribunal.[5]

8. Second, the Defence strongly objects to the statement of the Prosecution that the Defence argument "rests on an assumption that the Security Council itself has a power to prosecute 'suspects of international crimes'".[6] The Defence has not stated that the Security Council itself has the power to prosecute suspects and its argument in no way rests on that assumption. Similarly, the Defence has not argued that if the Special Court Agreement were terminated the powers of the Security Council to prosecute suspects would be "re-assumed".[7]

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[3] Prosecution Response, para. 15.
[4] Prosecution Response, para. 14.
[5] Prosecution Response, para. 6.
[6] Prosecution Response, para. 15.
[7] *Ibidem.*

9. Third, the Defence objects to the Prosecution's summary of the Defence argument in paragraph 13(2) of the Prosecution Response. The Defence does not argue that Articles 22 and 23 of the Special Court Agreement alone deprive the Security Council of the ability to re-assume its powers with regard to the maintenance of peace and security. The Prosecution here attaches undue weight to Articles 22 and 23 of the Special Court Agreement; [8] in fact, Articles 22 and 23 are irrelevant.

10. What counts is the fact that the United Nations and Sierra Leone have created a new and independent international legal person that is beyond the control of the United Nations.

11. If Articles 22 and 23 had *not* been included in the Agreement, the legal situation would have been identical. That situation would still be that the United Nations could not unilaterally terminate or amend the Agreement. That would follow from Article 54 of the Vienna Convention of 1986:

> "The termination of a treaty or the withdrawal of a party may take place:
> (a) in conformity with the provisions of the treaty; or
> (b) at any time by consent of all the parties after consultation with the contracting States and contracting organizations."

12. For this reason also the Prosecution's argument that, even if the Special Court Agreement were unconstitutional, Articles 22 and 23 could simply be severed from the Agreement[9] is quite incomprehensible. The result of the absence of special provisions on termination, or of severing the provisions from the agreement, is not an unfettered freedom to terminate an agreement, but the application of exactly the same principle as laid down in the aforementioned Vienna Convention.

13. Fourth, the Prosecution argues that the Defence argument also rests on the fallacious assumption that "prosecuting and trying international crimes constitutes an exercise of responsibility for the maintenance of peace and security".[10] This is not necessarily a fallacious

[8] Prosecution Response, para. 8.
[9] Prosecution Response, para. 8.
[10] Prosecution Response, para. 17.

assumption. The Defence has from the outset argued that the Special Court was established to give effect of the responsibility of the Security Council for the maintenance of peace and security in Sierra Leone.[11] That construction is fully in line with the Decision of the Appeals Chamber of the ICTY that the ICTY was an "instrument for the exercise of its own principal function of maintenance of peace and security".[12] While the Special Court itself is not endowed with the responsibility for maintaining peace and security, its existence and exercise of responsibilities cannot be seen apart from its function for the maintenance of peace and security.

14. In any case, the assumption that the Prosecution incorrectly characterises as fallacious is in itself immaterial to the legal issue before the Appeals Chamber.

15. What is relevant is the Prosecution's implied proposition that the fact that the Special Court is an instrument for the exercise of the Security Council's own principal function of maintenance of peace and security would guarantee that the Special Court will in all circumstances function in a way that is in line with the Security Council's interpretation of what is necessary for the maintenance of peace and security.[13] That proposition is to be rejected. There is no logical link between, on the one hand, the fact that an institution is an instrument for the exercise of the Security's Council principal function of maintaining peace and security and, on the other hand, the question of whether the practice of such an institution actually furthers that function. This is precisely the reason why in respect of the ICTY and the ICTR, and indeed in respect of all forms of delegated authority, the Security Council should retain eventual control.

16. The Defence notes that the two paragraphs[14] that follow the Prosecution's identification of the question of whether the Security Council should retain the power to amend or terminate the establishment of an institution (the Prosecution incorrectly phrases that question too widely as applying to any "measure") do not contain any legal argument. The Prosecution does not address the authorities that have been provided by the Defence that show that the question should be answered in the affirmative, but it simply states, without argument or

[11] Preliminary Motion, paras. 6-7.
[12] Prosecution Response, para. 15.
[13] Prosecution Response, para. 17.
[14] Prosecution Response, paras. 19 and 20.

authorities, that the question should be answered in the negative. The Prosecution Response here, therefore, does not call for any additional submissions from the Defence.

17. The Prosecution argues in the alternative that the United Nations do retain control over the Court and discusses the forms of control that are retained by the United Nations.[15] The practice cited shows that the United Nations themselves recognise the need to retain some form of control.

18. The key question is whether these forms of control are sufficient to protect the primary responsibility of the Security Council for the maintenance of peace and security in Sierra Leone and the region. It is submitted, and has been argued in the other Defence submissions on this matter, that this question is to be answered in the negative. Although the forms of control cited by the Prosecution are important, none of them allow the United Nations to change the Statute or terminate the existence of the Special Court if that were necessary for maintaining peace and security.

19. The forms of control cited by the Prosecution are simply insufficient to respect the limitations that the law of the United Nations imposes and thereby, the distribution of powers within the United Nations.[16]

Oral hearing

20. The Defence would like to take this opportunity to also urge the Appeals Chamber to hold an oral hearing before determining this matter.

21. Under Rule 117 of the Rules and Procedure and Evidence, the current matter "may be determined entirely on the basis of written submissions". The Defence submits that this discretion not to hold an oral hearing should not be exercised where significant challenges to jurisdiction are concerned, and even less so where the court is deciding on such challenges for the first time.

[15] Prosecution Response, paras. 21-22.
[16] Additional Submissions, para. 19.

22. Here, the Defence would refer the Chamber to the ruling of Trial Chamber II at the ICTR in the *Kanyabashi* case which granted an oral hearing on a jurisdictional challenge despite the fact that some of the questions raised had already been resolved by the Appeals Chamber of its sister institution at the ICTY:

> "Notwithstanding the fact that some of the questions raised by the Defence Counsel have already been addressed in the decision on 2 October 1995 by the Appeals Chamber for the Former Yugoslavia, the Trial Chamber finds that, in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence and in the interest of justice, that the Defence Counsel's motion deserves a hearing and full consideration."[17]

In the *Milosevic* case Trial Chamber III at the ICTY came to the same conclusion. In spite of the fact that some of the jurisdictional arguments raised by the defendant in that case had been dealt with before by the Appeals Chamber, the Trial Chamber decided to hear both parties and the *amici curiae*, arguing that:

> "Indeed, any judicial body is bound to take seriously a challenge to the legality of its foundation".[18]

23. The question before the Appeals Chamber in the current matter is not only fundamental but has not been presented to this or any similar court before. In the respectful submission of the Defence, therefore, the motion is one in which the discretion not to hold a hearing should *not* be exercised.

24. In addition to this legal argument, the Defence believes that a number of practical considerations favour an oral hearing on the Motion. The Defence imagines that the Appeals Chamber may well wish to put additional questions to it, and is keen to offer any possible assistance to the Chamber in resolving supplementary queries.

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[17] ICTR, Trial Chamber II, The Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-T, 18 June 1997, para. 6.

[18] ICTY, Trial Chamber III, The Prosecutor v. Milosevic, Case No. IT-99-37-T, 8 November 2001, paras. 1-3.

25. The Defence further believes that it would be beneficial for both parties to have the opportunity to deliver their arguments "in one piece", as the filing procedure prescribed for motion referred under Rule 72 (E) has resulted in rather fragmentary submissions.

26. Lastly, the shortcomings in the e-mail system at the Special Court have often restricted the Defence to filing only one page of each authority cited, and the Defence is aware that the Chamber is thereby deprived of the full context of each supporting citation. The Defence would use an oral hearing to present its authorities fully to the court with an explanation of their significance, in the Defence's eyes, and to answer any questions.

Conclusion

27. In conclusion, the Defence repeats the assertion that the Court lacks jurisdiction, and urges it to hold an oral hearing to determine the matter.

COUNSEL FOR THE ACCUSED

Mr. Michiel Pestman
Prof. André Nollkaemper
Dr. Liesbeth Zegveld

Defence list of authorities

1. ICTR, Trial Chamber II, The Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-T, 18 June 1997, para. 6.

2. ICTY, Trial Chamber III, The Prosecutor v. Milosevic, Case No. IT-99-37-T, 8 November 2001, paras. 1-3.

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge Mohamed Fassi Fihri

Registrar:
Mr. Hans Holthuis

Decision of:
8 November 2001

PROSECUTOR

v.

SLOBODAN MILOSEVIC

DECISION ON PRELIMINARY MOTIONS

The Office of the Prosecutor:
Ms. Carla Del Ponte
Mr. Daniel Saxon
Mr. Dirk Ryneveld
Ms. Julia Baly
Ms. Cristina Romano
Mr. Daryl A. Mundis
Mr. Milbert Shin

The Accused:
Slobodan Milosevic

Amici Curiae:
Mr. Steven Kay
Mr. Branislav Tapuskovic
Mr. Michaïl Wladimiroff

I. INTRODUCTION

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (...) Both parties and the *amici curiae* were heard by the Trial Chamber on 29 October 2001.

(...)

3.This Decision deals with all the arguments, written and oral, raised by the accused , the Prosecution, and the *amici curiae*. Although some of the arguments have been dealt with before in the International Tribunal, the Chamber has considered all of them very carefully. Indeed, any judicial body is bound to take seriously a challenge to the legality of its foundation.

Trial Chamber 2

OR: ENG

Before:
Judge William H. Sekule, Presiding Judge
Judge Tafazzal H. Khan
Judge Navanethem Pillay

Registrar:
Mr. Frederik Harhoff
Decision of:
18 June 1997

THE PROSECUTOR

versus

JOSEPH KANYABASHI

Case No. ICTR-96-15-T

DECISION ON THE DEFENCE MOTION ON JURISDICTION

Office of the Prosecutor:
Mr. Yacob Haile-Mariam

Counsel for the Defence:
Mr. Evans Monari
Mr. Michel Marchand

THE TRIBUNAL,

SITTING AS Trial Chamber 2 of the International Criminal Tribunal for Rwanda ("the Tribunal"), composed of Judge William H. Sekule as Presiding Judge, Judge Tafazzal H. Khan and Judge Navanethem Pillay;

(...)

6. Notwithstanding the fact that some of the questions raised by the Defence Counsel have already been addressed in the decision rendered on 2 October 1995 by the Appeals Chamber for the Former Yugoslavia, the Trial Chamber finds that, in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence and in the interests of justice, that the Defence Counsel's motion deserves a hearing and full consideration. The Trial Chamber, therefore, grants relief from the waiver *suo motu* and will thus proceed with the examination of the Defence Counsel's preliminary motion.

(...)

8. The Prosecutor responded that the basic arguments in the Defence Counsel's motion were addressed by the Trial Chamber and, in particular, by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the Tadic´-case. The Trial Chamber notes that, in terms of Article 12(2) of the Statute, the two Tribunals share the same

Judges of their Appeals Chambers and have adopted largely similar Rules of Procedure and Evidence for the purpose of providing uniformity in the jurisprudence of the two Tribunals.

The Trial Chamber, respects the persuasive authority of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia and has taken careful note of the decision rendered by the Appeals Chamber in the Tadic case.

[BUT NEVERTHELESS PROCEEDS WITH EXAMINING THE MERITS OF THE PRELIMINARY DEFENCE MOTION]

(...)

Arusha, 18 June 1997.

William H. Sekule T.H. Khan Navanethem Pillay
Presiding Judge Judge Judge

Pronounced in open Court on the 3rd of July 1997

WH Sekule
Presiding Judge