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SCSL-2003-11-PT
(1312-1318)

1312

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 PERSONAL
JURISDICTION: ILLEGAL DELEGATION OF JURISDICTION BY SIERRA
LEONE**

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions

Defence Office:

Mr. Sylvain Roy, Acting Chief

Mr. Ibrahim Yillah

Defence Counsel:

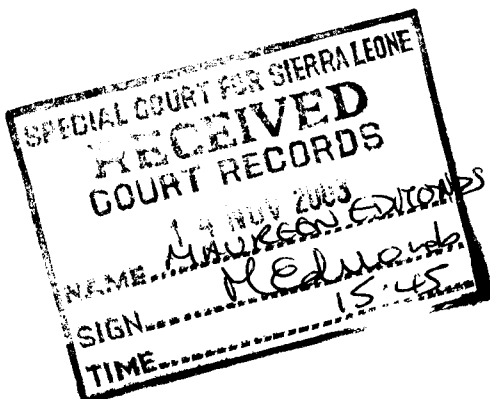
Mr. Michiel Pestman

Mr. Victor Koppe

Mr. Arrow John Bockarie

Prof. André Nollkaemper

Dr. Liesbeth Zegveld



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 jurisdiction of the Special Court over the defendant. It will argue that the jurisdiction of the Special Court over the defendant is unlawfully transferred to the Special Court by Sierra Leone. Since Sierra Leone no longer had the right to try the defendant due to the amnesty granted to him by the Lomé Agreement, Sierra Leone could not transfer jurisdiction over the defendant to the Special Court. Consequently, the Special Court lacks personal jurisdiction over the defendant. These arguments will be explained below.

The Special Court is allowed to determine the validity of the delegation of jurisdiction

3. As an international court, the Special Court is empowered to determine its own jurisdiction, including the legality of its establishment. It thus has the power to determine the legality of the transfer of powers by the states and/or international organisations that have established it. It was on this basis that the ICTY in the Tadic Case and the ICTR in the Kanyabashi Case reviewed the legality of their establishment by the Security Council. It is in on this basis that the Special Court has the power to review the legality of the transfer of powers by Sierra Leone and the United Nations.

The jurisdiction of the Special Court is based on a delegation of jurisdiction by Sierra Leone

4. The Special Court was established by a treaty between Sierra Leone and the United Nations. By this treaty, Sierra Leone and the United Nations delegated their own

power to prosecute the defendant to the Special Court. The defendant will challenge in a separate motion the delegation of power by the United Nations to the Special Court and limits this motion to the delegation of power by Sierra Leone.

5. By transferring power to the Special Court, Sierra Leone and the United Nations followed well-established precedents. The establishment of the Nuremberg Tribunal was based on the transfer of powers that each of the individual states possessed. The Tribunal stated that:

“The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.”¹

Similarly, Bassiouni states

“Sovereignty does not limit the exercise of criminal jurisdiction to single states; rather, it can be extended to collective state action. This concept was applied in connection with the establishment by the WWII Allies of the IMT in 1945 and the International Military Tribunal for the Far East sitting at Tokyo (IMTFE) in 1946. The power that the Allies exercised collectively was based on the power they could have exercised singularly.”²

6. Also the International Criminal Court (hereafter “ICC”), established by a treaty, derives its jurisdiction from the states that have ratified the Statute on the International Criminal Court. The authoritative commentary on the ICC writes:

“Even if the ICC has legal personality distinct from its creators its legal powers are derived from State Parties of the Statute. Those State Parties, if they so

¹ See *Trial of the Major War Criminals*, Vol. 22, p. 461, retrieved on 12 November 2003, from <http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm>.

² M.C. Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, Vol. 42 *Virginia Journal of International Law Association* (2001), pp. 81- 162 at p. 92.

wish, can confer on the Court they are founding together the authority and rights to exercise jurisdiction they themselves have under international law. This last aspect is the decisive criterion.”³

The states that established the ICC transferred the jurisdiction they possessed on the basis of the principle of territoriality and nationality and it is these principles that constitute the jurisdictional powers of the ICC under article 12 of the Statute⁴.

States cannot delegate powers that they do not possess

7. It follows that an international court that is established by treaty does not acquire new rights or powers – rather it is an institution that exercises rights and powers that already were possessed by the states that created it. A treaty that establishes an international court “does no more than to set up a new mechanism to (collectively) exercise already existing rights.”⁵

8. The point is illustrated by the discussions on the application of the universality principles by the ICC. Although eventually no universal jurisdiction was granted to the ICC, there is consensus in literature that since states possess universal jurisdiction, they could have transferred that power to the ICC. Since they have not done so, the ICC is not allowed to exercise universal jurisdiction.⁶

³ H-P. Kaul, "Preconditions to the Exercise of Jurisdiction," in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002), p. 591.

⁴ M. Morris, 'The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States', Vol. 64 *Law and Contemporary Problems* (2001), pp. 13-67. G. Hafner et al., 'A Response to the American View as Presented by Ruth Wedgwood', Vol. 10 *European Journal of International Law* (1999), pp. 108-123 at p. 117.

⁵ H-P. Kaul, "Preconditions to the Exercise of Jurisdiction," in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002), p. 608.

⁶ H-P. Kaul, "Preconditions to the Exercise of Jurisdiction," in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002), p. 587.; H.P. Kaul and C. Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', Vol. 2 *YIHL* (1999), p. 145; A. Zimmermann, 'The Creation of a Permanent International Criminal Court', Vol. 2 *Max Planck Yearbook of United Nations Law* (1998), p. 206.

9. The other side of the fact that the jurisdiction of a treaty-based court is derived from the transfer of powers by the states that establish the court, is that states cannot transfer powers that they do not possess. It is a well-established principle of international law that states can only transfer powers they possess. In the *Island of Palmas Case: The Netherlands v United States of America (1928)*, the tribunal held: “It is evident that Spain could not transfer more rights than she self possessed”.⁷
10. This principle applies equally to the transfer of criminal jurisdiction. For example, a state does not possess universal jurisdiction over an non-national who commits an ordinary crime against a non-national in another state. Two states that both lack jurisdiction over a non-national who commits an ordinary crime abroad, cannot by treaty create an international court to prosecute the individual concerned.
11. An international court established by treaty thus can never acquire more powers than the states that established it possessed (leaving aside possible extension of competences through principles of implied or customary powers that do not apply to the present case).

Due to the Lomé Agreement, Sierra Leone lacked personal jurisdiction over the defendant

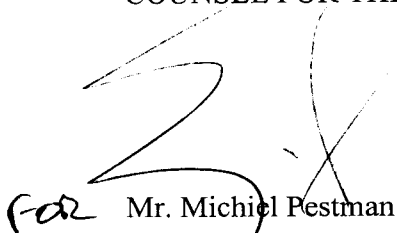
12. By signing the Lomé Agreement, Sierra Leone granted absolute and free pardon and reprieve to “all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement” (Article IX(2)). As a consequence, Sierra Leone gave up its right to exercise its jurisdiction over the persons covered by Article IX(2). Given the broad notion of jurisdiction that international criminal tribunals have employed, the lack of power of a state to prosecute a particular defendant can be qualified in terms of a loss of jurisdiction over that person.

⁷ *Island of Palmas Case: The Netherlands v United States of America (1928)* 2 RIAA 829 Permanent Court of Arbitration (Sole Arbitrator, Max Huber).

The Special Court lacks personal jurisdiction over the defendant

13. Sierra Leone - through the Lomé Agreement - gave up its right to prosecute the defendant, who is covered by Article IX of this Agreement, and thereby disabled itself to transfer the right to prosecute these persons to the Special Court. The Special Court therefore lacks jurisdiction over the defendant.

14. As a court established under international law, the Special Court is empowered and obliged to examine whether the transfer of jurisdiction is in accordance with international law. Any (international) legal limitations on the powers of the states or organizations that have created the Special Court are to be upheld and applied. Just as the Special Court could not accept a transfer by Sierra Leone of jurisdiction over a Dutch national who commits an ordinary crime in the Netherlands (a jurisdiction that Sierra Leone does not possess under international law), it can not accept a transfer by Sierra Leone of jurisdiction over persons over who - under international law - Sierra Leone has given up its right to exercise jurisdiction.

COUNSEL FOR THE ACCUSED

For Mr. Michiel Pestman

Prof. Dr. P. André Nollkaemper

Dr. Liesbeth Zegveld

Defence List of Authorities

1. *Trial of the Major War Criminals*, Vol. 22, p. 461, retrieved on 12 November 2003, from <http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm>.
2. M.C. Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', Vol. 42 *Virginia Journal of International Law Association* (2001), pp. 81- 162, p. 92.
3. H-P. Kaul, "Preconditions to the Exercise of Jurisdiction," in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002).
4. M. Morris, 'The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States', Vol. 64 *Law and Contemporary Problems* (2001), pp. 13-67.
5. G. Hafner et al., 'A Response to the American View as Presented by Ruth Wedgwood', Vol. 10 *European Journal of International Law* (1999), pp. 108-123.
6. H.P. Kaul and C. Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', Vol. 2 *YIHL* (1999), p. 145.
7. A. Zimmermann, 'The Creation of a Permanent International Criminal Court', Vol. 2 *Max Planck Yearbook of United Nations Law* (1998), p. 206.
8. Island of Palmas Case: *The Netherlands v United States of America* (1928) 2 RIAA 829 Permanent Court of Arbitration (Sole Arbitrator, Max Huber) (extract).