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SCSL-2003-11-PT
(3016-3032)

3016

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr. Robin Vincent
Date: 8 December 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

**REPLY TO THE PROSECUTION RESPONSE TO THE PRELIMINARY DEFENCE
MOTION ON LACK OF PERSONAL JURISDICTION**

Office of the Prosecutor:

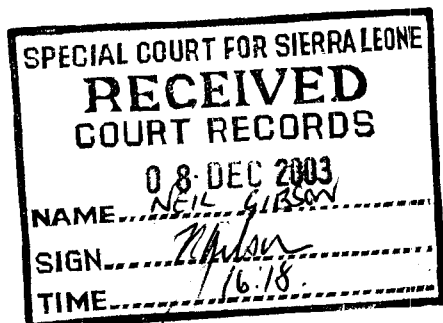
Mr. Desmond de Silva
Mr. Luc Côté
Mr. Walter Marcus-Jones
Mr. Christopher Staker
Mr. Abdul Tejan-Cole

Defence Office:

Mr. Sylvain Roy
Ms. Phoebe Knowles

For Mr. Fofana:

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



1. In the Preliminary Defence Motion of 17 November 2003 the Defence for Mr. Fofana filed a preliminary motion alleging a lack of personal jurisdiction of the Special Court over the defendant. It argued that the Special Court only has jurisdiction over persons who bear the greatest responsibility for the serious violations of international law that are within the subject-matter jurisdiction of the Court. Mr. Fofana does not belong to that category of persons and the Special Court thus cannot exercise jurisdiction over him.

2. In its response to this Preliminary Defence Motion, the argues that the question of whether a person is one of the persons who bear the greatest responsibility for the purposes of Article 1(1) of the Statute is to be decided purely as a matter of prosecutorial discretion¹.

3. For the reasons given below, the Prosecution response should be dismissed in its entirety.

The Vienna Convention on the Law of Treaties

4. The Prosecutor submits that it is “clear from the documents leading to the establishment of the Special Court that it was intended that the question whether a person is one of the ‘persons who bear the greatest responsibility’ ... is to be decided as a matter of prosecutorial discretion”². In determining what was ‘intended’, the Prosecutor relies on the proposal for the Special Court of the Secretary-General and the subsequent documents from the Security Council.

5. Article 1 of the Statute should be interpreted on the basis of the customary international principles of treaty interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties³.

¹ Prosecutions Response to the Defence Preliminary Motion on Lack of Personal Jurisdiction, 26 November 2003, para. 6.

² *Ibidem*, para. 6.

³ Article 31 of the Vienna Convention of Treaties :

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

6. Under Article 31 of the Convention, the primary way to determine the intention of the parties is to look at the “ordinary meaning to be given to the terms of the treaty”. The ordinary meaning of Article 1 of the Statute is that the reference to “persons who bear the greatest responsibility” refers to the personal jurisdiction of the court rather than to prosecutorial strategy. That meaning is confirmed if one takes into account the context of the term, as required by Article 31 of the Vienna Convention. The reference to “persons who bear the greatest responsibility” appears in Article 1(1) of the Statute. Other elements of Article 1, such as the confinement of the competence of the Special Court to “serious violations of international humanitarian law” in Article 1(1), and the allocation of primary jurisdiction to the sending state for transgressions by peacekeepers and related personnel in Article 1(2), are all jurisdictional requirements. In this context, it would be odd if one element of Article 1 referred not to jurisdiction, but to prosecutorial discretion.

7. The interpretation that the determination of whether a person belongs to the “persons who bear the greatest responsibility” is a jurisdictional requirement is further supported when the words “persons who bear the greatest responsibility” are considered in the light of the object and purpose of the treaty, as also required by Article 31 of the Vienna Convention. The object and purpose of the Special Court Agreement clearly are to create a court for the prosecution of persons suspected of crimes connected to the armed conflict in Sierra Leone. However, it is also clear that the Security Council intended the role of the Court to be limited to a narrow category of suspects: only those “who bear the greatest responsibility”.

The intention of the Parties to the Statute

8. The Defence submits that the Prosecutor presents a rather misleading account of the preparatory documents in as far as they are relevant to the determination of the intent of the parties and of the object and purpose of the Agreement⁴.

9. It is correct that the Secretary-General of the United Nations at one point in the drafting process of the Special Court Statute suggested changing Article 1 of the Statute in such a way that it would no longer limit the jurisdiction of the Court to “persons who bear the

⁴ Prosecution Response, paras. 5 and 6.

greatest responsibility". In his Report on the establishment of the Special Court the Secretary-General stated the following:

"C. Personal jurisdiction

1. Persons 'most responsible'

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court."⁵.

The suggestion of the Secretary-General was to replace "persons who bear the greatest responsibility" with "persons most responsible". The purpose of this amendment to the Statute

⁵ Report of the Secretary-General on the establishment of the Special Court for Sierra Leone, United Nations, S/2000/915, 4 October 2000, paras. 29-31.

was simply to remove the “persons who bear the greatest responsibility” as a jurisdictional threshold to the Court. This suggestion of the Secretary-General was, however, not accepted by the Security Council. On 22 December 2000, the President of the Security Council responded as follows:

“The members of the Security Council have carefully reviewed your report of 4 October 2000 on the establishment of a Special Court for Sierra Leone (S/2000/915). The Council members wish to convey their deep appreciation for the observations and recommendations set forth in your report. The members of the Security Council reaffirm their support for resolution 1315 (2000) and its reiteration that the situation in Sierra Leone constitutes a threat to international peace and security. With the objective of conforming to resolution 1315 (2000) and related concerns, and subject to the agreement of the Government of Sierra Leone as necessary and appropriate, the members of the Council suggest that the draft Agreement between the United Nations and the Government of Sierra Leone and the proposed Statute of the Court be amended to incorporate the views set forth below.

1. *Personal jurisdiction.* The members of the Security Council continue to hold the view, as expressed in resolution 1315 (2000), that the Special Court for Sierra Leone should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes, including crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. The members of the Security Council believe that, by thus limiting the focus of the Special Court to those who played a leadership role, the simpler and more general formulations suggested in the appended draft will be appropriate. It is the view of the members of the Council that the Truth and Reconciliation Commission will have a major role to play in the case of juvenile offenders, and the members of the Security Council encourage the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end. The members of the Security Council believe that it is the responsibility of Member States who have sent peacekeepers to Sierra Leone to investigate and prosecute any crimes they may have allegedly committed. Given the circumstances of the situation in Sierra Leone, the Special Court would have jurisdiction over those crimes only if the Security

Council considers that the Member State is not discharging that responsibility. Therefore, Council members propose the inclusion of language in the Agreement to be concluded between the United Nations and the Government of Sierra Leone and in the Statute of the Special Court to that effect.

(...)

Annex

(...)

Statute

Preamble

No change.

Article 1

Competence of the Special Court

(a) The Special Court shall, except as provided in subparagraph (b), 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 committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”⁶

The Security Council not only rejected the proposed amendment of the Statute. It also expressly stated that the “persons who bear the greatest responsibility” should be seen as a jurisdictional threshold to the competence of the Court. It is thus incorrect and even misleading to state, as the Prosecutor does in his response, that the “Security Council expressed no disagreement with the opinion of the Secretary-General that the relevant wording must be seen ‘not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor’”⁷.

⁶ Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234, 22 December 2000, *emphasis added*.

⁷ Prosecution Response, para. 6.

Factual questions are no bar to jurisdictional decisions

10. After having given his, in the view of the Defence, erroneous account of the intent of the parties to the Statute, the Prosecutor submits that it is “self-evident” that the question of whether a person is one of the persons with the greatest responsibility for the purposes of Article 1(1) of the Statute is to be decided as a matter of prosecutorial discretion⁸. The Prosecutor essentially argues that because the question of whether a person is one of the persons with the greatest responsibility for the purposes of Article 1(1) of the Statute involves a matter of fact, and that it would require complex factual determinations, it cannot be determined at the pre-trial stage.

11. As a general proposition, this argument is difficult to follow. First, of all, neither Article 31 nor Article 32 of the Vienna Convention, that in this respect represent customary international law, suggests that practical problems involved in the application of a treaty provision are a relevant factor in the interpretation of treaties. Application of Article 1 may be time consuming, but one should not confuse treaty interpretation with problems of treaty implementation.

12. Second, and in contrast to that submitted by the Prosecutor, it is not necessary to determine “whether at the end of the trial the Accused will be convicted on all counts with which he has been charged”⁹ or at the pre-trial stage “whether or not the Accused is guilty”¹⁰ in order to determine personal jurisdiction. That is to confuse matters of jurisdiction and criminal responsibility. The test to be applied at this stage is necessarily a *prima facie* one, as explained further below.

13. Thirdly, it is not at all uncommon that jurisdictional limitations involve factual determinations. Normally, the jurisdiction of (international) criminal courts is limited to particular persons (personal jurisdiction), subject-matter (subject-matter jurisdiction) and time (temporal jurisdiction). The determination of each of these forms can involve factual questions.

⁸ *Ibidem*, para. 7.

⁹ *Ibidem*, para. 8

¹⁰ *Ibidem*, para. 10

14. It is conceded that the determination of whether a person is one of the persons with the greatest responsibility for the purposes of Article 1(1) of the Statute can be a complex factual question. However, that is, as shown above, what was intended by the Security Council, who wished to limit the activities of the Special Court to this category of persons. The fact that a particular jurisdictional determination is a complex one cannot justify an abdication of the judicial task to determine its jurisdiction.

15. It is common that international courts in determining their jurisdiction need to make determinations of factual matters that are also relevant for the eventual (criminal) responsibility.

16. For instance, in the case *Yugoslavia v. the Netherlands*, the International Court of Justice noted that

“38. Whereas, in order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and whereas in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX.”

The Court concluded that is was

“... not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention.”¹¹

Whereas this concerned a jurisdictional determination in the stage of provisional measures, there can be no doubt that also in the jurisdictional phase of the main proceedings the International Court of Justice will have to make a *prima facie* determination as to whether the

¹¹ International Court of Justice, Case Concerning Legality of Use of Force (*Yugoslavia v. The Netherlands*), Request for the Indication of Provisional Measures, Order, 2 June 1999, paras. 38 and 41.

acts contested by the Netherlands are capable of being qualified as Genocide. In its Judgment on Jurisdiction in the *Oil Platforms (Islamic Republic of Iran v. United States of America)*, the Court noted:

“the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute "as to the interpretation or application" of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2.”¹²

Article 1 of the ICTY Statute

17. In support of his position that Article 1 of the Statute is not a jurisdictional matter, the Prosecutor also refers to Article 1 of the Statutes of the ICTR and the ICTY¹³. In his Response the Prosecutor seems to make the argument that the words “persons who bear the greatest responsibility” cannot be seen as a jurisdictional threshold, as this would otherwise mean that the words “persons responsible” in Article 1 of the ICTY Statute should also be considered to be such a jurisdictional requirement. The Defence is unable to follow this line of reasoning. Of course, the words “persons responsible” are not a jurisdictional requirement, but they are part of one. The correct jurisdictional ‘element’ of the Article 1 of the ICTY Statute is “persons responsible for serious violations of international humanitarian law”. As was established by the Appeals Chamber of the ICTY in the Tadic case, the ICTY only has jurisdiction over persons who have committed *serious* crimes, not over persons who have committed ‘minor’ violations of international humanitarian law¹⁴. The Defence analogously submits that the Special Court only has jurisdiction over persons bearing the *greatest*

¹² International Court of Justice, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 810, para. 16.

¹³ Prosecution Response, para. 10.

¹⁴ ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal of Jurisdiction, 2 October 1995, p. 52, para. 94 (iii).

responsibility, and not over persons bearing 'simple' responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone.

Conclusion: *prima facie* jurisdiction?

18. In the view of all the above, the Defence for Mr. Fofana submits that the question of whether the accused bears the greatest responsibility is a jurisdictional matter, and not a matter of prosecutorial discretion. The question is therefore *not* whether the Prosecutor had "a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute the Accused"¹⁵, but simply whether the Court has the power to prosecute the accused at all.

19. The Defence for Mr. Fofana further submits that this challenge to the personal jurisdiction to the Court should be dealt with in the pre-trial phase, and not at trial. Why this is the only option, was already explained in the preliminary motion¹⁶. The Defence would just add that Rule 72 of the Rules of Procedure and Evidence does not allow for the determination of jurisdiction at any other stage of the proceedings.

20. The Defence admits that the test the Court will now have to apply in this case will necessarily be of a *prima facie* nature. The Court will have to establish whether the accused appears at this stage to be one of the persons bearing the greatest responsibility for the purposes of Article 1(1) of the Statute. It will have to do so not only on the basis of the current Indictment. The jurisdictional criterion of bearing the greatest responsibility is by its nature a relative one, which cannot be looked at in complete isolation and cannot be answered without taking all the other indictments into account, as well as the general background of the conflict. There is no doubt, the Defence acknowledges, that the allegations in the indictment of the accused are serious, and that if all charges were proved he would be responsible for some serious crimes. This alone, however, does not make him one of the persons who bear the *greatest* responsibility for the violations of international humanitarian law in Sierra Leone. That question depends, as mentioned above, on the context of the allegations.

¹⁵ Prosecution Response, para. 20.

¹⁶ Preliminary Motion, paras. 9-12.

COUNSEL FOR THE ACCUSED

Mr. Michiel Pestman

Prof. Dr. P. André Nollkaemper

Dr. Liesbeth Zegveld

Defence List of Authorities

1. International Court of Justice, Case Concerning Legality of Use of Force (Yugoslavia v. Netherlands), Request for the Indication of Provisional Measures, Order, 2 June 1999, paras. 38 and 41.
2. International Court of Justice, Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, 12 December 1996, para. 16.

INTERNATIONAL COURT OF JUSTICE

YEAR 1999

1999
2 June
General List
No. 110

2 June 1999

**CASE CONCERNING LEGALITY OF USE OF FORCE
(YUGOSLAVIA v. NETHERLANDS)**

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca; Registrar Valencia-Ospina.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73 and 74 of the Rules of Court,

Having regard to the Application by the Federal Republic of Yugoslavia (hereinafter "Yugoslavia") filed in the Registry of the Court on 29 April 1999, instituting proceedings against the Kingdom of the Netherlands (hereinafter "the Netherlands") "for violation of the obligation not to use force",

Makes the following Order:

1. Whereas in that Application Yugoslavia defines the subject of the dispute as follows:

"The subject-matter of the dispute are acts of the Kingdom of the Netherlands by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to

violation of Article II of the Genocide Convention"; whereas it argues that "the pollution of soil, air and water, destroying the economy of the country, contaminating the environment with depleted uranium, inflicts conditions of life on the Yugoslav nation calculated to bring about its physical destruction"; whereas it asserts that it is the Yugoslav nation as a whole and as such that is targeted; and whereas it stresses that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part, the Yugoslav national group as such;

36. Whereas for its part the Netherlands contends that the Court could have *prima facie* jurisdiction on the basis of Article IX of the Convention, if the party invoking such jurisdiction were in a position to produce "at least *some* evidence that a question relating to the interpretation, application or fulfilment of the 1948 Genocide Convention has arisen"; whereas according to the Netherlands, Yugoslavia's Application fails to refer to the conditions that form the core of the crime of genocide under the Convention, namely the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", and whereas, in the view of the Netherlands, the Court accordingly lacks jurisdiction *ratione materiae* on the basis of Article IX;

37. Whereas it is not disputed that both Yugoslavia and the Netherlands are parties to the Genocide Convention without reservation; and whereas Article IX of the Convention accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfilment" of the Convention, including disputes "relating to the responsibility of a state for genocide or for any of the other acts enumerated in article III" of the said Convention;

38. Whereas, in order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and whereas in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX (cf. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16);

39. Whereas the definition of genocide set out in Article II of the Genocide Convention reads as follows:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group";

40. Whereas it appears to the Court, from this definition, "that [the] essential characteristic [of genocide] is the intended destruction of 'a national, ethnical, racial or religious group'" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 345, para. 42); whereas the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and whereas, in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision quoted above" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 26);

41. Whereas the Court is therefore not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention; and whereas Article IX of the Convention, invoked by Yugoslavia, cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case;

* *

42. Whereas after it had filed its Application Yugoslavia further invoked, as basis for the Court's jurisdiction in this case, Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Netherlands and the Kingdom of Yugoslavia, signed in The Hague on 11 March 1931; whereas Yugoslavia's "Supplement to the Application", in which it invoked this new basis of jurisdiction, was presented to the Court in the second round of oral argument (see paragraph 14 above); whereas Yugoslavia gave no explanation of its reasons for filing this document at this stage of the proceedings; and whereas Yugoslavia argues that, although the procedure provided for in Article 4 of the 1931 Treaty has not been strictly followed, "the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the Applicant could easily remedy";

43. Whereas the Netherlands objects to the late presentation by Yugoslavia of this basis of jurisdiction; whereas the Netherlands argues that the Treaty of Judicial Settlement, Arbitration and Conciliation of 11 March 1931 is no longer in force between the Netherlands and Yugoslavia; whereas the Netherlands observes that it is not a party to the 1978 Vienna Convention on the Succession of States in respect of Treaties and that, in contrast with a number of other bilateral treaties concluded with the former Socialist Federal Republic of Yugoslavia, no provisional mutual agreement has been reached on the continued validity of the 1931 Treaty; whereas the Netherlands further argues that Yugoslavia has not complied

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INTERNATIONAL COURT OF JUSTICE

YEAR 1996

1996
12 December
General List
No. 90

12 December 1996

CASE CONCERNING OIL PLATFORMS
(ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA)

PRELIMINARY OBJECTION

Jurisdiction of the Court - Treaty of Amity, Economic Relations and Consular Rights of 15 August 1955 - Treaty in force.

Article XXI, paragraph 2 - Dispute not satisfactorily adjusted by diplomacy - Lack of agreement to settle it by "other pacific means" - Dispute "as to the interpretation or application" of the Treaty.

Contention that the Treaty cannot apply to questions concerning the use of force - Lack of any provision expressly excluding certain matters from the jurisdiction of the Court - Article XX, paragraph 1 (d), as a defence on the merits - Unlawfulness of actions incompatible with the obligations flowing from the Treaty, whatever the means employed.

Contention that the claims of Iran cannot be founded on Article I of the Treaty - Interpretation in the light of the object and purpose of the Treaty - Object and purpose not concerned with the general regulation of peaceful and friendly relations between the parties - Documents produced and practice followed by the Parties - Provision not without legal significance for the interpretation of the other provisions but unable, taken in isolation, to be a basis for the jurisdiction of the Court.

Contention that the claims of Iran cannot be founded on Article IV, paragraph 1, of the Treaty - Provision not including any territorial limitation - Provision aimed at the treatment by each of the parties of the nationals and companies of the other - Inapplicability of Article IV, paragraph 1, to the particular case.

Contention that the claims of Iran cannot be founded on Article X, paragraph 1, of the Treaty - Meaning of the word "commerce" in that provision - Scope not limited to maritime commerce - Scope not limited to activities of purchase and sale - Provision protecting "freedom of commerce" - Freedom that might in fact be impeded by acts entailing the destruction of goods destined to be exported or capable of affecting their transport and storage with a view to export - Destruction capable of having an effect upon the export trade in Iranian oil and of having an adverse effect upon freedom of commerce as guaranteed by the provision in question - Lawfulness can be evaluated in relation to that provision.

Subsidiary submissions no longer having any object.

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thus brought into being is said to fall within the jurisdiction of the Court pursuant to Article XXI, paragraph 2, of the same Treaty.

14. The United States for its part maintains that the Application of Iran bears no relation to the Treaty of 1955. It stresses that, as a consequence, the dispute that has arisen between itself and Iran does not fall within the provisions of Article XXI, paragraph 2, of the Treaty and deduces from this that the Court must find that it lacks jurisdiction to deal with it.

*

* *

15. The Court points out, to begin with, that the Parties do not contest that the Treaty of 1955 was in force at the date of the filing of the Application of Iran and is moreover still in force. The Court recalls that it had decided in 1980 that the Treaty of 1955 was applicable at that time (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 28, para. 54); none of the circumstances brought to its knowledge in the present case would cause it now to depart from that view.

By the terms of Article XXI, paragraph 2, of that Treaty:

"Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

16. It is not contested that several of the conditions laid down by this text have been met in the present case: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy and the two States have not agreed "to settlement by some other pacific means" as contemplated by Article XXI. On the other hand, the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute "as to the interpretation or application" of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2.

*

* *

17. The objection to jurisdiction raised by the United States comprises two facets. One concerns the applicability of the Treaty of 1955 in the event of the use of force; the other relates to the scope of various articles of that Treaty.

* *

18. The Court will deal initially with the Respondent's argument that the Treaty of 1955 does not apply to questions concerning the use of force. In this perspective, the United States contends that the attack and destruction of the oil platforms

"occurred . . . in the context of a long series of attacks by Iranian military and