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SCSL-2003-11-PT  
(3008-3011)

3008



**SPECIAL COURT FOR SIERRA LEONE**

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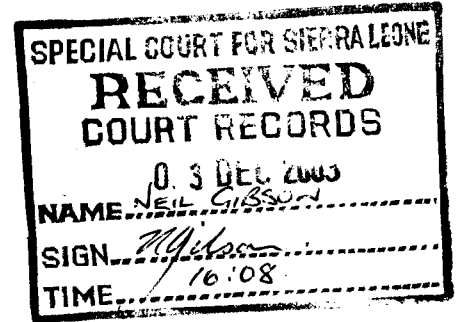
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**THE TRIAL CHAMBER**

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

Registrar: Robin Vincent

Date: 3<sup>rd</sup> day of December 2003



The Prosecutor against

Moinina Fofana  
(Case No.SCSL-2003-11-PT)

**ORDER PURSUANT TO RULE 72 (E)**

**PRELIMINARY DEFENCE MOTION ON THE LACK OF JURISDICTION:  
ILLEGAL DELEGATION OF POWERS BY THE UNITED NATIONS**

**Office of the Prosecutor:**

Desmond De Silva, Q.C, Deputy Prosecutor  
 Luc Côté, Chief of Prosecutions  
 Walter Marcus-Jones, Senior Appellant Counsel  
 Christopher Staker, Senior Appellant Counsel  
 Abdul Tejan-Cole, Appellate Counsel

**Defence Counsel**

Michiel Pestman, Lead Counsel  
 Victor Koppe, Co-Counsel  
 Arrow John Bockarie, Co-Counsel  
 André Nollkaemper, Co-Counsel  
 Liesbeth Zegveld, Co-Counsel

**THE SPECIAL COURT FOR SIERRA LEONE (“the Special Court”)**

**SITTING** as the Trial Chamber (“the Chamber”), composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet, and Judge Benjamin Mutanga Itoe;

**BEING SEIZED** of the Preliminary Defence Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, filed on the 14<sup>th</sup> day of November 2003 (“the Motion”), in relation to the criminal suit against **Moinina Fofana** (“the Accused”);

**CONSIDERING** the Prosecution’s Response to the Motion filed on the 21<sup>st</sup> day of November 2003 (“the Response”);

**CONSIDERING** the Reply of the Defence thereto, filed on the 1<sup>st</sup> day of December 2003 (“the Reply”).

**CONSIDERING** the entire provisions of Rule 72 of the Rules of Procedure and Evidence (“the Rules”);

**CONSIDERING**, in particular, the provisions of Rule 72 (E) of the Rules which state that the Chamber shall refer to the Appeals Chamber for a determination as soon as practicable any preliminary motion which raises a serious issue relating to jurisdiction;

**CONSIDERING** that the Indictment charges the Accused on several counts of Crimes Against Humanity, punishable under Article 2 of the Statute of the Special Court (“the Statute”), Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3 of the Statute, and of Other Serious Violations of International Humanitarian Law, punishable under Article 4 of the Statute;

**CONSIDERING** that the Defence makes the following submissions in support of its objection that the Special Court lacks jurisdiction over the Accused, namely,

1. That the conclusion by the United Nations’ Secretary-General of the Agreement between the United Nations and the Republic of Sierra Leone on the Establishment of the Special Court for Sierra Leone (“the Special Court Agreement”) was either an exercise of his own powers or an exercise of authority delegated by the Security Council to protect international peace and security. However, in both these interpretations, the powers of the Secretary-General are limited. While the Secretary-General may have independent powers to deal with international peace and security, these do not extend to the establishment of an International Tribunal. While the Security Council may delegate under Article 39 of the Charter of the United Nations its primary responsibility for the maintenance of peace and security, as it did when it established the International Criminal Tribunals for the former Yugoslavia and for Rwanda, nevertheless, this delegation is

subject to certain conditions: it must “exercise effective authority and control over the way in which the delegated powers are being exercised.”<sup>1</sup>

2. That as a result, the Security Council must remain empowered to terminate the operation of a Tribunal or amend the terms of the Statute if its power is to be legitimately delegated but since the Special Court was established by bilateral treaty, the Security Council cannot now unilaterally re-assume its powers, and consequently therefore, that the delegation of powers in regard to the maintenance of peace and security to the Special Court is illegal.
3. That “in the absence of another State, the United Nations was essential for transferring the jurisdiction of Sierra Leone to an international court and that the indispensable role of the United Nations makes it imperative that it acts within its powers.”<sup>2</sup> Consequently, in light of the foregoing the Accused argues that the Special Court is an unlawful exercise of powers by the United Nations and that the Agreement is therefore invalid.

**NOW THEREFORE,**

**THE CHAMBER,**

**PURSUANT TO RULE 72 (B) (i) and 72 (E) OF THE RULES,**

**FINDS** that the foregoing submissions relate to an objection based on lack of jurisdiction which raises a serious issue relating to the jurisdiction of the Special Court to try the Accused.

**REFERS** this Motion, the Response and the Reply to the Appeals Chamber of the Special Court for determination pursuant to Rule 72 (E) of the Rules;

**ORDERS**

1. That the Defence file with the Appeals Chamber additional written submissions within 14 days of the receipt of this Order;
2. That any response to submissions filed under paragraph 1 above be filed with the Appeals Chamber within 14 days thereof;
3. That any reply thereto be filed with the Appeals Chamber within 7 days; and
4. That the reference of this Motion to the Appeals Chamber shall not operate as a stay of the trial of the Accused;

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<sup>1</sup> Paragraph 10 of the Motion

<sup>2</sup> Paragraph 15 of the Motion

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Done in Freetown, this 3<sup>rd</sup> day of December 2003

The Trial Chamber

Judge Bankole Thompson,  
Presiding Judge

Judge Pierre Boutet

Judge Benjamin Mutanga Iroe

