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SPECIAL COURT FOR SIERRA LEONE

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IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice George Gelaga King
Justice Emmanuel Ayoola
Justice Raja Fernando

Registrar: Robin Vincent

Date: 25 May 2004

PROSECUTOR Against AUGUSTINE GBAO
(Case No. SCSL-2004-15-AR72(E))

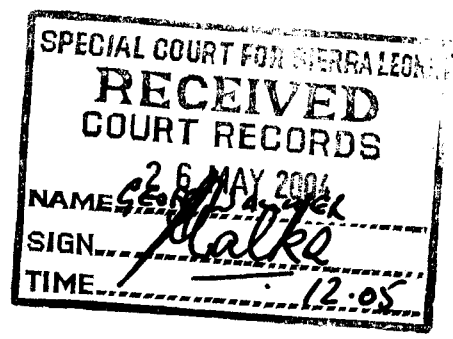
**DECISION ON PRELIMINARY MOTION ON THE INVALIDITY OF THE AGREEMENT
BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF SIERRA LEONE ON
THE ESTABLISHMENT OF THE SPECIAL COURT**

Office of the Prosecutor:

Defence Counsel:

Desmond de Silva QC
Luc Côté
Walter Marcus-Jones
Abdul Tejan-Cole

Girish Thanki
Andreas O'Shea
Kenneth Carr
Glenna Thompson



THE APPEALS CHAMBER OF THE SPECIAL COURT FOR SIERRA LEONE (“Special Court”);

SEIZED of the Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone, filed on behalf of Augustine Gbao on 6 November 2003 (“Preliminary Motion”);¹

NOTING that the Prosecution Response was filed on 17 November 2003 (“Prosecution Response”) and the Defence Reply was filed on 24 November 2003 (“Defence Reply”);

NOTING that the Preliminary Motion was referred to the Appeals Chamber under Rule 72(E) of the Rules of Procedure and Evidence (“Rules”) on 3 December 2003;

HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES;

I. SUBMISSIONS OF THE PARTIES

A. The Defence Preliminary Motion

1. The Preliminary Motion raises four main objections to the validity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court²:
 - 1) That the responsibility for the maintenance of international peace and security falls within the primary responsibility of the Security Council of the United Nations, and that entrusting the Secretary-General to conclude a treaty with the Government of Sierra Leone for the creation of a new international organisation involved an unlawful delegation of responsibility to a body that does not fall under the direct control of the United Nations and does not enjoy the blessing of the international community.

¹ This Preliminary Motion was filed under Case No. SCSL-2003-09-PT. Following the Decision and Order on Prosecution Motions for Joinder of 27 January 2004, and the subsequent Registry Decision for the Assignment of a new Case Number of 3 February 2004, it has been assigned the new case number referred to herein.

² Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (“Special Court Agreement”).

- 2) The United Nations does not have the power to create new international organisations through the conclusion of an agreement and even if it did, such power would not extend to the creation of an organisation exercising criminal jurisdiction since this is within the preserve of a sovereign state unless it has been transferred through the manifestation of a clear intention.
- 3) An international criminal court constitutes the joint and collective exercise of the sovereign jurisdiction that the states creating that court possess individually so the court can only exercise jurisdiction when those states already possess such sovereign power. By agreeing to Article IX of the Lomé Accord, Sierra Leone had voluntarily renounced its right to prosecute international crimes.
- 4) A treaty is invalid if concluded as the result of a fundamental error or by fraud. When the Government of Sierra Leone concluded the Special Court Agreement it failed to give full disclosure to the United Nations that it and the ECOWAS States had continued to represent to the Revolutionary United Front expressly or impliedly that the Lomé Accord was still valid and its members would not be punished for crimes under international law up until the disarmament of the 14 January 2002. The Defence submits:

Had the United Nations been fully apprised of the manner in which the RUF was being tricked into laying down its arms, it is fair to assume that the United Nations would not have been a party to such a trick. The treaty was therefore concluded through a fraud on the United Nations or alternatively through an error for which the United Nations bore no responsibility and the treaty is consequently invalid.³

The Defence further submits that:

the express or implied representations made to the RUF by the government of Sierra Leone itself and through the innocent conduit of ECOWAS states amounted to a fraud or perfidy on the RUF vitiating the treaty establishing the Special Court for Sierra Leone.⁴

³ Preliminary Motion, para. 9.

⁴ Preliminary Motion, para. 10.

B. The Prosecution Response

2. The Prosecution Response to the Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone consists of almost identical submissions put forward in its Response to the Preliminary Motion in the case of Moinina Fofana⁵ on “Lack of Jurisdiction *Materiae*: Illegal Delegation of Power by the United Nations”, filed on 14 November 2003, (“*Fofana* Preliminary Motion”) as far as the first two issues raised by the Defence are concerned. As this Chamber has referred to them in detail in its Decision on the *Fofana* Preliminary Motion, delivered on 25 May 2004 (“*Fofana* Decision”)⁶ there is no need for repetition here. With regard to the third issue raised by the Defence, the Prosecution’s Response is put forward in three main arguments:

- 1) The Lomé Agreement is not an international agreement and domestic law cannot be invoked to invalidate a properly concluded international treaty such as the Special Court Agreement;
- 2) Article IX of the Lomé Accord of 1999 was not intended to cover crimes under Articles 2-4 of the Special Court Statute and consequently the Sierra Leone Government could not have renounced its right to prosecute international crimes under international law.
- 3) There is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law.⁷ The Report of the Secretary-General on the establishment of a Special Court for Sierra Leone also expressed the view that to the extent that the Lomé Agreement purported to confer an amnesty for serious violations of international humanitarian law, it would be illegal under international law.⁸

As regards the fraud and perfidy submissions of the Defence, the Prosecution disputes “the Defence’s unsubstantiated statements that the treaty was concluded through fraud on the

⁵ Prior to the Decision and Order on Prosecution Motions for Joinder, 27 January 2004, and the subsequent Registry Decision for the Assignment of a new Case Number, 3 February 2004, the case number was Case No. SCSL-2003-11-PT.

⁶ *Prosecutor v Fofana*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction *Materiae*: Illegal Delegation of Powers by the United Nations, 25 May 2004, para. 2.

⁷ See Brownlie, *Principles of Public International Law*, (5th Edition, 1998) pp. 514-515.

⁸ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 4 October 2000, para. 24.

United Nations or alternatively through error.”⁹ The Prosecution submits that since 1998 the UN has maintained a mission in Sierra Leone and has had a Special Representative present in Sierra Leone at all times material to the Defence allegation and it is reasonable to infer that the UN was fully apprised of the prevailing circumstances existing in Sierra Leone.

C. The Defence Reply

3. The Defence maintains that a State can voluntarily renounce its sovereign power even if by so doing it violates international obligations.¹⁰ It repeats the allegations of fraud and perfidy on the part of the Sierra Leone Government.

II. DISCUSSION

A. The Four Issues for Determination

4. This Preliminary Motion was referred to the Appeals Chamber under Rule 72(E) of the Rules of Procedure and Evidence which envisages a preliminary motion that raises ‘a serious issue relating to jurisdiction’. It is clear from the submissions of the parties that there are four issues to be determined. The first two are also the subject of the *Fofana* Preliminary Motion of 14 November 2003. The *Fofana* Decision was delivered on 25 May 2004 and as far as the first two issues are concerned will apply in the instant Preliminary Motion. The third and fourth issues relate to the amnesty provision of the Lomé Accord which was the subject of extensive argument, including argument by counsel for this applicant as an intervener, at an oral hearing on 3 and 4 November 2003. The Decision on Challenge to Jurisdiction: Lomé Accord Amnesty was rendered on 13 March 2004 (“Lomé Amnesty Decision”).
5. In the *Fofana* Decision, the Appeals Chamber held that the Secretary-General did not need a delegation of power in order to execute the orders given by the Security Council and that the collective measures that may be taken by the Security Council in removing a threat to

⁹ Prosecution Response, para. 25.

¹⁰ See Defence Reply, para. 4.

the peace included the establishment of an international court. The Appeals Chamber held further that in creating the Special Court by a bilateral agreement, the Security Council had not abandoned its primary responsibility for the maintenance of international peace and security, but rather, had created a *sui generis* organ to exercise judicial functions that the Security Council could not exercise itself. We came to the conclusion that the Security Council retained sufficient control over its *sui generis* organ and was not prevented from acting within its powers under the United Nations Charter if it believed that international peace and security were in any way threatened. The reasoning and findings in the *Fofana* Decision dispose of the first two issues raised in the Preliminary Motion currently under consideration.

B. Did the establishment of the Special Court involve a transfer of jurisdiction or sovereignty by Sierra Leone?

6. The Chamber finds that the establishment of the Special Court did not involve a transfer of jurisdiction or sovereignty by Sierra Leone. The Special Court is a completely new organisation established by an international treaty between Sierra Leone and the United Nations and functioning under its own Statute with an independent Prosecutor. It does not operate on the basis of transferred jurisdiction but is a new jurisdiction operating in the sphere of international law. As stated in the *Lomé Amnesty Decision*, the establishment of the Special Court was an implementation of the determination of the Security Council expressed in its resolution 1315 (2000) to bring those responsible for serious violations of international humanitarian law to justice. This Chamber made the same point in its *Decision on Constitutionality and Lack of Jurisdiction* of 13 March 2004 in determining how the Special Court came about.¹¹ Further support is found in a statement by the Australian Parliamentary Committee when Australia went through the process of ratifying the Statute of the International Criminal Court and enacting implementing legislation:

the ICC will not exercise the judicial power of the Commonwealth [of Australia], even if it were to hear a case relating to acts committed on Australian territory by

¹¹ *Prosecutor v Kallon* (Case No. SCSL-2004-15AR72(E)), *Norman* (Case No. SCSL-2004-14AR72(E)) and *Kamara* (Case No. SCSL-2004-16AR72(E)), *Decision on Constitutionality and Lack of Jurisdiction*, 13 March 2004, para. 40.

Australian citizens. The judicial power to be exercised by the ICC will be that of the international community, not of the Commonwealth of Australia.¹²

The judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community. This Chamber emphasised in the Lomé Amnesty Decision that:

The Special Court, though established by an agreement between the United Nations and the Government of Sierra Leone, is an autonomous and independent institution vested with juridical capacity by Article 11 of the Agreement. The involvement of the Government of Sierra Leone in the Special Court after its establishment is defined by the Agreement.¹³

7. The Chamber explained at length in the Lomé Amnesty Decision why the Lomé Agreement “cannot be characterised as an international instrument”.¹⁴ Indeed, the Lomé Agreement “is neither a treaty nor an agreement in the nature of a treaty”¹⁵ and as a consequence, “it does not create an obligation in international law”.¹⁶
8. In the Lomé Amnesty Decision, we opined, with reference to the principle of universal jurisdiction, that: “A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember”.¹⁷ The crimes mentioned in Articles 2–4 of the Statute of the Special Court (crimes against humanity; violations of Article 3 common to the Geneva Conventions and Additional Protocol II, and other serious violations of international humanitarian law) are international crimes entailing universal jurisdiction. Article IX of the Lomé Agreement cannot constitute a legal bar to the exercise of jurisdiction over international crimes by an international court or a state asserting universal jurisdiction. Equally, it does not constitute a legal bar to the establishment of an international court to try crimes against humanity.

¹² Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, The Statute of the International Criminal Court (May 2002), para. 3.46.

¹³ Lomé Amnesty Decision, para. 14.

¹⁴ Lomé Amnesty Decision, para. 42.

¹⁵ Lomé Amnesty Decision, para. 49.

¹⁶ Ibid.

¹⁷ Lomé Amnesty Decision, para. 67.

9. In *Prosecutor v. Furundzija*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia was of the opinion that the proscription of torture had reached the status of *jus cogens*, that is to say a mandatory norm of general international law from which there can be no derogation in the absence of another rule of similar status to the contrary.¹⁸ Earlier, the International Court of Justice in the *Barcelona Traction* case, without expressly using the notion of *jus cogens*, implied its existence when it referred to obligations *erga omnes* in its judgment of 5 February 1970.¹⁹ The Court was of the opinion that the “obligations of a state towards the international community as a whole” were “the concern of all states” and for whose protection all states could be held to have “legal interest.”²⁰ According to H. Mosler and as he stresses with justification, there is a close connection between *jus cogens* and the recognition of a “public order of the international community.”²¹ There is, therefore, support for the statement that there is a crystallised international norm to the effect that a government cannot grant amnesty for serious crimes under international law.
10. Under international law, states are under a duty to prosecute crimes whose prohibition has the status of *jus cogens*. It is for this reason that the Special Representative of the United Nations Secretary-General asserted the UN’s understanding of Article IX of the Lomé Agreement as excluding the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. Furthermore, at the time of the Special Court Agreement, Sierra Leone concurred with the position of the UN that the amnesty was not applicable to international crimes.²² Consequently, the third objection raised by the Defence is untenable.
11. The fourth issue relates to alleged fraud or fundamental error. In most national systems it is considered improper and disingenuous to make a charge of fraud without evidence. Yet the allegation is made without providing any factual basis whatsoever. On that account alone it does not properly raise a serious issue and has no merit. Moreover, there has been no case cited in which a treaty has been invalidated by fraud. Any such conclusion would require the clearest possible evidence. Even if there were representations of the kind alleged, (and none has been cited) there is no evidence that they were dishonestly withheld

¹⁸ *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgement, 10 December 1998, para. 153; (1999) 38 ILM 317 at 349.

¹⁹ (1970) ICJ Reports 3.

²⁰ *Ibid.*, at 32.

²¹ H. Mosler, *The International Society as a Legal Community* (Kluwer, 1980) p. 19.


²² Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, para. 24.

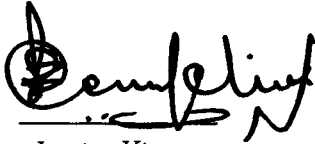
during negotiations with the United Nations. Finally, it is speculative to suggest that the UN would not have concluded the Special Court Agreement had it known of such alleged representations. It is far-fetched speculation, given that the UN was well aware of the amnesty and expressed its understanding that it did not apply to international crimes.

III. DISPOSITION


12. For the reasons set out, and those given in the *Fofana* Decision and the Lomé Amnesty Decision, this Preliminary Motion is dismissed.

Done at Freetown this 25th day of May 2004


Justice Winter
Presiding


Justice King


Justice Ayoola


Justice Fernando



[Seal of the Special Court for Sierra Leone]