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SCSL-2004-14-PT

6836

(6836-6854)



SPECIAL COURT FOR SIERRA LEONE

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THE APPEALS CHAMBER

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

Registrar: Robin Vincent

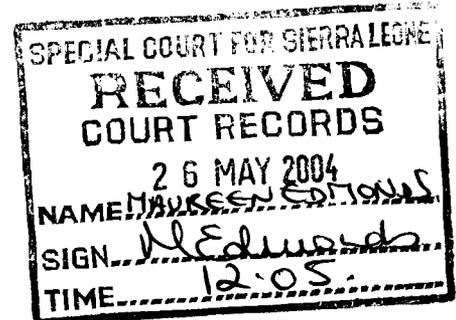
Date: 25 May 2004

PROSECUTOR **Against** **MOININA 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**

Office of the Prosecutor:
Desmond de Silva QC
Luc Côté
Walter Marcus-Jones
Abdul Tejan-Cole

Defence Counsel:
Michiel Pestman
Victor Koppe
Arrow John Bockarie
André Nollkaemper
Liesbeth Zegveld



THE APPEALS CHAMBER of the Special Court for Sierra Leone (“Special Court”);

SEIZED of the Preliminary Motion on the Lack of Jurisdiction *Materiae*: Illegal Delegation of Powers by the United Nations, (“Preliminary Motion”) filed on behalf of Moinina Fofana (“Accused”) on 14 November 2003;

NOTING that the Prosecution filed its Response to the Defence Preliminary Motion on Lack of Jurisdiction *Materiae*: Illegal Delegation of Powers by the United Nations on 21 November 2003¹; and that the Defence filed its Reply to the Prosecution Response on 30 November 2003²;

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 2003³;

NOTING that the Defence filed Additional Submissions pertaining to the Preliminary Motion based on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations on 6 January 2004⁴; that the Prosecution filed its Response to the Additional Submissions on 20 January 2004⁵; and that the Defence filed its Reply to the Prosecution Response on 26 January 2004⁶;

¹ Prosecution Response to the Preliminary Defence Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 21 November 2003 (“Prosecution Response”).

² Defence Reply – Preliminary Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 30 November 2003 (“Defence Reply”).

³ Order Pursuant to Rule 72 (E): Defence Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 3 December 2003.

⁴ Additional Defence Submission Pertaining to the Preliminary Motion Based on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 6 January 2004.

⁵ Prosecution Rule 72(G)(ii) Response to the Defence Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 20 January 2004.

⁶ 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, 26 January 2004.

HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES:**The Defence Preliminary Motion**

1. The Defence argues that the Security Council either delegated its powers in the field of international peace and security to the Secretary-General, or the Secretary-General used his own powers when concluding the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (“Agreement”). It is submitted that in both interpretations the powers of the United Nations (“UN”) were exceeded. In the first interpretation, it is argued that the delegation of powers to the Special Court is illegal because the Security Council did not remain empowered to terminate the operation of a tribunal or amend the terms of the statute. As to the second interpretation, the Defence contends that while the Secretary-General may have independent powers to deal with peace and security, these do not extend to the establishment of an international tribunal. It is argued that within the UN, only the Security Council has the authority, under Article 39 of the UN Charter (“Charter”), to maintain international peace and security and, therefore, to conclude an agreement to establish the Special Court. The Defence emphasizes that the indispensable role of the UN makes it imperative that it acts within its powers. It is argued that the consent of Sierra Leone is not enough to remedy the illegal exercise of powers of the UN. It is submitted that the establishment of the Special Court was an illegal delegation of powers; the Special Court is without jurisdiction to try the defendant.

The Prosecution Response

2. The Prosecution contends that the capacity of international organizations and specifically of the UN to enter into international treaties is well-established. It is argued that according to the UN Charter, the Secretary-General “represents the UN in the negotiation and conclusion of agreements with governments and other inter-governmental organisations. He directs the negotiation and conclusion of agreements, either at the request of an organ of the UN, with the approval of the General Assembly, or within the framework of the implied powers of the

Secretary-General.” The Prosecution submits that the Agreement was clearly negotiated and concluded by the Secretary-General at the request of the Security Council. It is argued it fell within the powers of the Security Council to request the negotiation and conclusion of the Agreement. Article 24(1) may be invoked as the direct basis for action of the United Nations. Article 24(2), which refers to the specific powers granted to the Security Council is not exhaustive and must be read as fulfilling the function of closing the gaps. It is argued that if the Security Council can establish an international tribunal under Article 41, there is no reason why it could not take the same action under Article 24 of the Charter when the state affected has consented. The Prosecution submits that the types of powers that may be conferred on a subsidiary organ of the UN may instead be conferred on an entity external to the UN itself. It is thus argued that it was within the discretion of the Security Council to determine that the establishment of the Special Court was an appropriate measure for addressing the threat to international peace and security. The Prosecution submits that the Security Council has not delegated any of its substantive powers to the Special Court, but rather, has created a new body exercising certain powers which the Security Council itself is unable to exercise; the Special Court thus does not detract from the powers of the Security Council, but rather complements them.

The Defence Reply

3. The Defence concurs with the Prosecution that the UN can enter into agreements, that the Secretary-General can represent the UN and conclude agreements and that, in general, Article 24(1) of the Charter can provide a direct basis for action. It is also agreed that the Security Council has wide discretionary powers to determine how to respond to threats to the peace and security and that the power may be conferred on entities external to the UN itself.
4. The Defence argues, however, that the Prosecution does not address the central proposition of the Preliminary Motion that the powers of the Security Council to delegate powers that aim to restore international peace and security are limited and that the establishment of an international legal person by treaty with Sierra Leone to contribute to the restoration of the

peace and security exceeds those limits. The Defence submits that delegation of powers must remain under the control of the Security Council. Without such control, the entity to which the powers are delegated may use these powers to attain national ends that are not necessarily similar to the purposes of the United Nations.

Additional Defence Submissions

5. The Defence argues that the conclusion by the Secretary-General of the Agreement was not an act within the Secretary-General's own powers, but it is to be considered as the exercise of authority that was delegated to him by Security Council resolution S/RES/1315(2000). It is argued that the Security Council has set up an independent legal person over which it exercises no control and that the delegation of the power to conclude the Agreement is thus outside the competence of the Security Council.
6. The Defence argues that Prosecutor and Defence disagree on the following issues:
 - a) Whether the Agreement was established under Article 24(1) or under Chapter VII of the Charter. Nevertheless, the Defence concludes that the question of the exact legal basis for the establishment of the Special Court is of no relevance for the point before the Appeals Chamber.
 - b) Whether there is a distinction between the powers and responsibilities of the Security Council with regard to subsidiary organs on the one hand, and entities external to the UN on the other and whether consent by Sierra Leone can remove the limitations on the delegation of powers by the Security Council.
 - c) Whether the Security Council can still exercise its primary responsibility for the maintenance of peace and security in Sierra Leone

Prosecution Response

7. The Prosecution agrees it is not necessary to address the issue whether the Security Council was acting under Chapter VII or not. The Prosecution identifies a narrow point on which the

Defence and the Prosecution disagree, namely that the Security Council was required under the Charter to retain the power to terminate or amend the Agreement unilaterally. The Prosecution argues that even if the Defence argument were to succeed, the appropriate remedy would be to declare only Articles 22 and 23 invalid and sever them from the Agreement.

8. Nevertheless, the Prosecution argues that the Security Council has wide discretionary powers to determine how to respond to threats to peace and security. It is submitted that there is no reason in principle why, in the exercise of that discretion, the Security Council cannot call for the UN to enter into an agreement for the implementation of certain measures, and to agree that these measures cannot be unilaterally terminated by the UN without the consent of the other parties to the treaty. It is argued that is not true that the Security Council has either relinquished the ability to amend or terminate the Agreement. Furthermore, the Prosecution submits that the UN retains a panoply of other mechanisms of oversight and control of the non-judicial functioning of the Special Court.

Defence Reply

9. The Defence identifies the basis of its argument to be that there are limits to the power of the 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.
10. The Defence emphasizes that the act of delegation that is at issue in the establishment of the Special Court is primarily the delegation of the implied power from the Security Council to the Secretary-General. The Defence contends that the Prosecution overlooks 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 UN. It is argued that 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 is the crucial question. The Defence argues that the Prosecution attaches undue weight to Articles 22 and 23. According to the Defence, what counts is that the UN and Sierra Leone

have created a new and independent international legal person that is beyond the control of the UN. Even if Article 22 and 23 were not included, the legal situation would be identical because of Article 54 of the Vienna Convention of 1986⁷ - consent of the Sierra Leone government would still be needed to amend the Agreement. It is argued that none of the forms of control over the Special Court allows the United Nations to change the Statute or terminate the existence of the Special Court if that were necessary for maintaining peace and security. The Defence argues that forms of control cited by the Prosecution are insufficient to respect the limitations that the law of the United Nations imposes.

11. The Defence urges the Appeals Chamber to hold an oral hearing before determining the matter.

DISCUSSION

12. The focus of argument shifted throughout the submissions. The matters addressed in the Preliminary Defence Motion, the Prosecution Response, the Defence Reply, the Additional Defence Submissions, the Prosecution Response to it and the Defence Reply boil down to four questions to be answered.
 - a) Does the Security Council have the power to delegate its powers to the Secretary-General to conclude an agreement between the United Nations and the Government of Sierra Leone?
 - b) Does the Secretary-General have powers to conclude such an agreement on his own?
 - c) Does the Security Council have the power to establish an international tribunal such as the Special Court for Sierra Leone through an agreement?
 - d) Did the Security Council act *ultra vires* in creating a *sui generis* organ such as the Special Court for Sierra Leone in regard to lack of control?

⁷ The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986, UN Doc. A/Conf. 129/15 (1986), article 54.

13. To find an answer to the above mentioned questions one has to look first and foremost to the Charter of the United Nations itself and the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.

a) **Does the Security Council have the power to delegate its powers to the Secretary-General to conclude an agreement between the United Nations and the Government of Sierra Leone?**

14. According to Article 24(1) of the Charter the primary responsibility for the maintenance of international peace and security lies with the Security Council⁸. In its Resolution 1315, the Security Council stated in accordance with Article 39 of the UN Charter:⁹ that such a situation, namely a threat to international peace and security, had arisen in Sierra Leone.¹⁰

15. The Defence argues that the Security Council either delegated its powers to the Secretary-General or that the Secretary-General used his own powers to conclude the Agreement. The Defence further argues that the Security Council has no power to delegate its primary responsibility to the Secretary-General. Articles 97 - 100 of the UN Charter read as follows:

Article 97:

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98:

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, [...], and shall perform such other functions as are entrusted to

⁸ U.N. Charter, article 24(1): "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

⁹ U.N. Charter, article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

¹⁰ U.N. Security Council Resolution 1315, 14 August 2000, p. 13.

him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99:

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100(1):

In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. [...].

16. These articles clearly state that the Secretary-General as head of the Secretariat is an executive organ (Article 97 states that “*He shall be the chief administrative officer[...]*”; Article 98 states “[...] *and shall perform such other functions as are entrusted to him [...]*”; Article 100(1) states “[...] *shall not seek or receive instructions from any government or from any other authority external to the Organization.*”). As an executive organ the Secretary-General has to fulfil the orders of the Security Council and does therefore not need a delegation of power to become active as his mandate consists in executing the orders given by the power-bearer, in this case the Security Council. The question whether the Security Council has the power to delegate its powers to the Secretary-General is thus not in issue.

b.) **Does the Secretary-General have powers to conclude such an agreement on his own?**

17. The question whether the Secretary-General has power on his own to conclude an agreement between the United Nations and the Government of Sierra Leone as mentioned above is also of no consequence, as the Secretary-General acted at the request of the Security Council in his capacity as executive organ.

c.) Does the Security-Council have the power to establish an international tribunal such as the Special Court for Sierra Leone through an agreement?

18. The Defence and the Prosecution agree that it is well established that the United Nations can conclude treaties with a government¹¹ and that it is not necessary to address the issue of the precise legal basis on which the Security Council acted in this regard.¹²

19. It is indeed irrelevant which article of the Charter was the basis for the above-mentioned Agreement as the Charter does not limit the power of the Security Council to find means and measures to end a situation of threat to international peace and security beyond the prohibition of using arms¹³, the mandate of Article 42 of the Charter and the obligation to act within the purposes and principles of the UN Charter.

20. As stated in Article 1(1) of the Charter, the Purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; [...]

21. "Effective collective measures for [...] removal of threats to the peace" can therefore be taken. Based on the systematic interpretation of the Charter, the establishment of an international court is part of such collective measures. Therefore, there is no reason why the Security Council could not have established an international criminal tribunal in a non-coercive way.

¹¹ Prosecution Response, para. 6; Defence Reply, para. 2.

¹² Additional Defence Submission Pertaining to the Preliminary Motion Based on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 6 January 2004, para.12; Prosecution Response to the Additional Defence Submission Pertaining to the Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 20 January 2004, para. 7.

¹³ Article 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

The only question remaining to be dealt with is the question whether the Special Court as a *sui generis* organ¹⁴ is under the control of the Security Council and if so, under what conditions.

- d.) Did the Security Council act *ultra vires* in creating a *sui generis* organ such as the Special Court for Sierra Leone with regard to lack of control?
22. The UN as a party to the Agreement acts under the umbrella of the UN Charter. Under the Charter, the primary responsibility for the maintenance of international peace and security is conferred on the Security Council¹⁵, which has to act according to the Charter. The Security Council can establish any organ to fulfil duties in exercise of its powers pursuant to Article 39 of the Charter. Therefore, control over the *sui generis* organ should be exercised by analogy to Security Council's control over a subsidiary organ. It follows that a *sui generis* organ created by the UN under the request of the Security Council, must stay within its control. The Defence submitted that subsidiary organs as may be found necessary may be established in accordance with the Charter only if the Security Council "can exercise effective authority and control over the way in which the delegated powers are being exercised"¹⁶. Although the Defence agrees that this does not mean that the Council can interfere with the judicial functions of the tribunal, it argues that the Council must remain empowered to terminate the operation of a tribunal or amend the terms of the statute¹⁷. The argumentation continues, stating, that such control is not possible due to the bilateral agreement between the United Nations and the Government of Sierra Leone which states under Article 22 and Article 23 that an amendment or termination of the treaty must be agreed upon by the parties.
23. In creating the Special Court for Sierra Leone by a bilateral agreement the Security Council has not abandoned its primary responsibility for the maintenance of international peace and security. The Special Court has been created as a *sui generis* organ, because the Security Council

¹⁴ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, para. 9, S/2000/915, 4 October 2000.

¹⁵ Article 24(1) of the U.N. Charter.

¹⁶ Preliminary Motion, para. 10, quoting D. Sarooshi, *The United Nations and the Deployment of Collective Security*, p.41 and p.159 (1999).

¹⁷ Preliminary Motion, para. 10.

is not a judicial organ and therefore is not able to exercise judicial functions for itself. As a judicial organ (due to its independence) the Court cannot be controlled otherwise than in administrative matters, meaning advice and policy direction.

24. As an example, this control is provided by article 7 of the Agreement.¹⁸ The Management Committee has been established in such a way as to meet all necessary requirements. It provides “advice and policy direction” in non-judicial matters, thus not interfering with the independence of the judiciary, as this Chamber held in its decision in *Norman* on Independence of the Judiciary.¹⁹ The Secretary-General represents the Security Council in the Management Committee, thereby ensuring the internal administrative control of the Security Council over the Court²⁰. It follows that the Security Council upholds its general power to control the performance of a *sui generis* organ established by the Security Council as a consequence of its mandate from the international community.
25. The Prosecution is correct in stating that the Special Court has no responsibility for the maintenance of international peace and security.²¹ The Special Court constitutes only one of the measures available to the Security Council in fulfilling this aim. Therefore, the Security Council could not have delegated its power to the Special Court.
26. The question of the sufficiency of control of the Security Council over the Special Court therefore does not arise.
27. The power and responsibility of the Security Council under the Charter to maintain international peace and security is preserved. Entering an agreement which states that the Statute can be amended only by consent does not impact on the primary responsibility of the

¹⁸ Article 7 “It is the understanding of the Parties that interested States will establish a management committee to assist the Secretary General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary General will also participate in the management committee.”

¹⁹ *Prosecutor v Sam Hinga Norman*, Case Number SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence), 13 March 2004.

²⁰ *Ibid.*

²¹ Prosecution Response, para. 17.

Security Council to maintain international peace and security. The fact that the Security Council entered into an agreement in order to exercise its power in terms of maintenance of international peace and security does not mean that the Security Council cannot act within its powers under the Charter if it believes that international peace and security are in any way threatened, even if this threat arose as a consequence of the Government of Sierra Leone not consenting to the amendment of the Statute of the Special Court or to the Special Court's termination.

28. On the other hand, at the time when the Agreement was concluded, the Government of Sierra Leone, as member state to the UN must have known the Security Council's mandate in relation to the maintenance of international peace and security. Therefore, a unilateral redress by the Security Council would not constitute a breach of "good faith" in relation to the Agreement. In case of threat to the maintenance of international peace and security, the Security Council would act in the fulfilment of a higher-ranking obligation under the Charter of the United Nations.
29. No agreement can influence the duties of the Security Council within the framework of the Charter of the United Nations. In this regard the Agreement cannot override the mandate of the Security Council as stated in the Charter nor can it bar the Security Council in the fulfilment of the above mentioned duties, as the primary responsibility for maintenance of international peace and security of the Security Council cannot be challenged.

REQUEST FOR ORAL HEARING

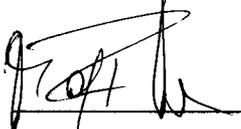
30. In its Reply during the 'additional submissions' phase following the referral of the Preliminary Motion to the Appeals Chamber, the Defence urged the Appeals Chamber to hold an oral

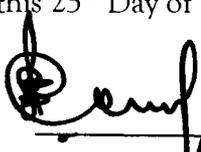
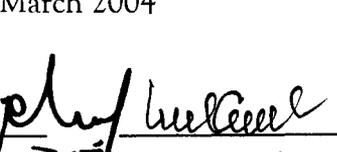
hearing. The Appeals Chamber has not found it necessary to hear oral arguments on issues that have been addressed exhaustively during two rounds of written argument.

DISPOSITION

31. For all the above-mentioned reasons and the reasons to be given by Justice Robertson, the Preliminary Defence Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations is dismissed in its entirety.

Done at Freetown this 25th Day of March 2004


Justice Winter

 
Justice King Justice Ayoola


Justice Fernando

Presiding



A separate opinion of Justice Robertson to this Decision is appended.

SEPARATE OPINION OF JUSTICE ROBERTSON:

1. After a series of exchanges between the parties in respect to international law issues which were raised and then either abandoned or agreed to be irrelevant, we find a final expostulation by the applicant:

“What counts is the fact that the UN and Sierra Leone have created a new and independent international legal person that is beyond the control of the United Nations.”¹

Since that new and independent legal person is an international criminal court, the first and perhaps determinative question is whether there is anything at all wrong with it being beyond the control of the United Nations (“UN”). For all the legal learning that has gone into this Motion and its contest, this essential issue may be answered quite shortly.

2. After the breakdown of the Abidjan and then the Lomé Peace Agreements, the Security Council determined that it was necessary to set up a Special Court and directed the Secretary-General by Resolution 1315 to report on how that resolve could be implemented. He did so, and the work of his office in concluding the Special Court Agreement and Statute in January 2002, and its work in implementing that Agreement has at all times been kept under review by the Security Council, which always retains the power to direct the Secretary-General’s actions since he is “the chief administrative officer of the organization”.² The consequence has been the establishment of this Court, comprising judges who in their judicial work are independent of any organ of the UN or any one or anything else. Their Court functions by virtue of an administration which in non-judicial matters is controlled by a Management Committee on which sit representatives of the Secretary-General (namely the UN legal officers) together with representatives of interested state parties. Any recommendation

¹ Para 10, 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, 26 January 2004.

² Charter of the United Nations, Article 97.

by that committee to terminate the operation of the tribunal or to amend the terms of its statute would need the agreement of Sierra Leone, but that would (in reality) follow from any such decision by the Security Council itself.

3. The applicant's first proposition is that in exercising its powers to maintain international peace and security the Security Council may delegate to the Secretary-General, but must exercise effective continuing authority and control over the way in which the delegated powers are being exercised. No doubt that is true, in a general sense, but it does not follow (as the applicant contends) that as a matter of law the Security Council must retain *unilateral* power over any institution that it has authorized the Secretary-General to establish by agreement with another state. It may well be appropriate for the Security Council - a political body - to establish a judicial or arbitral institution over which it has no direct control, or which functions by agreements between the Council and other states or organizations. There is nothing in the UN Charter which precludes such arrangements, if they are genuinely conducive to the maintenance or restoration of peace and security.
4. The applicant accepts that the Security Council had power to establish the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). As the ICTY Appeals Chamber pointed out in its decision on jurisdiction *Tadic*, the Security Council did not thereby delegate its own functions to the Court: it set up an independent judicial power in the course of carrying out its Charter duty to assist the restoration of the peace:

"Plainly the Security Council is not a judicial organ and it is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.

...The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own

functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e. as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.”³

5. It cannot in my judgement make any meaningful difference (in the context of the Motion) that the Security Council has chosen to authorise the Secretary-General to establish a court with a similar purpose by agreement with a single state (the state where peace needs to be restored) rather than by unilateral action or by action in agreement with many states. Indeed, the problem with the applicant’s argument is demonstrated by its conclusion that “the situation may have been different if the Special Court had been set up by agreement involving a wide group of concerned states”⁴ But a multilateral agreement would presumably make it more difficult for the Security Council to terminate the court, since it would need the agreement of a number of states rather than one. In any event, it is a mistake to object that by making the agreement the UN has transferred the responsibility for matters of concern to the international community as a whole to a court beyond its influence or control.⁵ Judicial independence requires courts to be “beyond the influence or control” of any political body in their judicial functioning. There is no illegality attending the Security Council decision that the non-judicial functions of the Special Court for Sierra Leone should be the responsibility of a management committee on which the Secretary-General is represented (rather than the responsibility of the Secretary-General himself),

³ Paras 37 - 38, *Prosecutor v Dusko Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

⁴ Para 7, Defence Reply to the Prosecution Response to the Preliminary Defence Motion on the Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 30 November 2003.

⁵ Para 10 of 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, 26 January 2004.

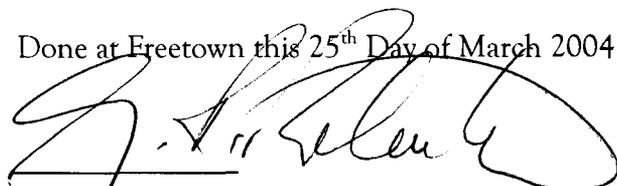
or that any changes to the Court's Agreement or Statute should be made with the consent of the state where the Court exercises its jurisdiction.

6. The applicant raises the "what if..." spectre of the Government of Sierra Leone refusing to agree to an amendment of the Statute or a termination or expansion of the Court if this is considered necessary by the Security Council to maintain international peace and security. But the answer in that event would be found in Article 25 of the Charter, by which all UN members (i.e. including Sierra Leone, however reluctantly on this hypothesis) agree to accept and carry out the decisions of the Security Council. Furthermore, Chapter VII of the Charter provides ample power for the Security Council to override any state's obstruction of measures to maintain international peace and security, and that would enable it to terminate the Court, were such a step necessary for that purpose, without Sierra Leonean Government agreement.
7. The Prosecution has explained how the UN retains "a panoply of other mechanisms of oversight and control of the non-judicial functioning of the Special Court" ranging from its role in the Management Committee and in appointing the Registrar and senior staff to securing resources and funding for the Court's operations. I am entirely satisfied that, by entering into the Agreement with all these powers and safeguards, the UN did not put beyond its powers the right to take whatever action may in the future be necessary to ensure peace and security in the region, notwithstanding that decisions about the structure or constitution of the Court may require the agreement of the state with the greatest interest in that peace and security.
8. None of the arguments made in four substantial written submissions could create any doubt about the validity of the agreement or the consequent jurisdiction of the Court. The applicant seeks an oral hearing on the ground that its arguments are novel (which is true) and important, but the precondition for such a hearing is that the Court has been satisfied, having considered the written submissions of both parties, that there is firstly an issue of real juristic doubt and difficulty (novelty and importance are not

sufficient) and secondly that an oral hearing would be likely to assist the Court to make up its mind on that issue. Neither precondition is satisfied in this case. These observations should be borne in mind by counsel before deciding to request an oral hearing.

9. For those reasons and for those given by Justice Winter, I would dismiss the Motion.

Done at Freetown this 25th Day of March 2004



Justice Robertson

[Seal of the Special Court for Sierra Leone]

