

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO.: SCSL- 2004 – 14 - PT  
APPEALS CHAMBER

THE PROSECUTOR  
OF THE SPECIAL COURT  
v.  
SAM HINGA NORMAN  
MOININA FOFANA  
ALLIEU KONDEWA

25 MAY 2004  
17 31H  
DECISION

Before the Judges:

Renate Winter, Presiding  
George Gelega King  
Emmanuel Ayoola  
Geoffrey Robertson  
A. Raja N. Fernando

For the Registry:

Mr. Geoff Walker  
Ms. Maureen Edmonds

For the Prosecution:

Mr. Desmond De Silva, QC  
Dr. Walter Marcus Jones

For the Accused Sam Hinga Norman:

Mr. James Blyden Jenkins-Johnson  
Mr. Sulaiman Banja Tejan-Sie

For the Accused Moinina Fofana:

Mr. Ibrahim Yilla

For the Accused Allieu Kondewa:

*(Absent)*

Court Reporter:

Mr. Momodou Jallow

## P R O C E E D I N G S

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MR. WALKER:

Case No. SCSL-04-14-PT, The Prosecutor against Moinina Fofana: Rendering of decision on the preliminary Defence motion on the lack of jurisdiction: Illegal delegation of jurisdiction by Sierra Leone.

MR. DE SILVA:

I appear for the Prosecutor and with me is my learned friend, Walter Marcus-Jones. Mr. Ibrahim Yillah appears for the defendant.

MADAM PRESIDENT:

Thank you. May I please ask Justice King to read the Decision.

JUDGE KING:

Thank you. This is just a short decision and most of what I have just said in the Gbao case will apply here.

The Defence frames its submissions around the following main points: (a) An international Court that is established by treaty does not acquire new rights and powers, but is rather an institution that exercises rights and powers that were already possessed by the states that created it; (b) It is a well-established principle of International law that states can only offer powers they actually possess. By agreeing to Article IX of the Lomé Accord, Sierra Leone granted absolute and free pardon to the Accused and as a consequence, Sierra Leone gave up its right to exercise its personal jurisdiction over the Accused. The jurisdiction of Sierra Leone over the defendant was thus unlawfully transferred to the Special Court by Sierra Leone; (c) The Lomé Accord is a treaty under international law.

In its reply during the additional submissions phase, following the referral of the preliminary motion to the Appeals Chamber, the Defence urges the Appeals Chamber to hold an oral hearing.

The Prosecution submits that the Lomé Accord could not have deprived Sierra Leone of its capacity to enter into agreement -- into an agreement for the establishment of an international criminal court. According to the Prosecution the Lomé Accord is not a treaty under international law, but an agreement signed between two national bodies, and there is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law.

The issue raised by the Defence has already been decided upon by this Chamber. In our Decision on the invalidity of the Agreement on the establishment of the Special Court in the Gbao case, we found that, and I quote: "The establishment of the Special Court did not involve a transfer of jurisdiction or sovereignty by Sierra Leone." We also found that, and I quote again: "The judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself, reflecting the interests

1 of the international community."

2 We reasoned further that, and I quote: "Article IX of the Lomé Accord cannot constitute a legal bar to  
3 the exercise of jurisdiction over international crimes by an international court or by a state asserting  
4 universal jurisdiction. Equally, it does not constitute a legal bar to the establishment of an  
5 international court to try crimes against humanity."

6  
7 We found support for the statement that it is a crystallised norm of international law that a government  
8 cannot grant amnesty for serious crimes under international law. In our Lomé Amnesty Decision, we  
9 explained at length why the Lomé Accord and I quote: "cannot be characterised as an international  
10 instrument".

11  
12 For the reasons given in the Lomé Amnesty Decision and the decision on the invalidity of the  
13 Agreement on the establishment of the Special Court, the arguments raised by the Defence are  
14 rejected.

15  
16 The Appeals Chamber has not found it necessary to hear oral arguments on issues that repeat those  
17 decided upon in the Lomé Amnesty Decision and on the decision on the invalidity of the Agreement  
18 on the establishment of the Special Court.

19  
20 For the above-mentioned reasons, the preliminary motion is dismissed in its entirety.

21 MADAM PRESIDENT:

22 Thank you. Do you agree?

23 JUDGE AYOOLA:

24 I agree.

25 JUDGE ROBERTSON:

26 I agree.

27 JUDGE FERNANDO:

28 I agree.

29 MADAM PRESIDENT:

30 I agree. May we please ask for the next?

31 MR. WALKER:

32 Case No. SCSL-04-14-PT, The Prosecutor against Moinina Fafana: Rendering of decision on  
33 preliminary Defence motion on the lack of jurisdiction: Nature of the armed conflict.

34 MR. DE SILVA:

35 Representation is the same.

36 MADAM PRESIDENT:

37 Thank you. May I ask Justice Ayoola please to read out the decision.

1 JUDGE AYOOLA:

2 This is a preliminary motion on the lack of jurisdiction: Nature of the armed conflict.

3  
4 The Defence argues that although the Special Court is empowered to adjudicate violations of  
5 international humanitarian law, Article 3 and 4 of the Statute of the Special Court dealing with  
6 violations of Articles 3 common to the Geneva Conventions and of Additional Protocol II and other  
7 serious violations of international humanitarian law respectively, limit the jurisdiction of the Court to  
8 internal armed conflict only. The Defence argues that Article 3 of the Geneva Convention, taken  
9 together with Article 1 of the Additional Protocol II and Article 8(2)(e) of the Statute of the International  
10 Criminal Court, upon which Articles 3 and 4 respectively are based, applies exclusively to international  
11 armed conflicts.

12  
13 According to the Defence, the fact that the Government of Sierra Leone was the only state to become  
14 a signatory to the agreement establishing the Special Court suggests that both the government and  
15 the United Nations considered the conflict to be an internal one.

16  
17 We considered the Prosecution's response, the Defence reply and the additional submission by the  
18 Defence and the additional Prosecution's response. And having considered all the submissions, we  
19 considered the text of Articles 3 and 4 and considered the drafting history of the Statute of this Court.  
20 We then proceeded to consider the scope of applicability of Article 3 and Article 4 which is at the  
21 centre of this decision.

22  
23 Article 3 of the Statute is explicitly taken from Article -- common Article 3 to the Geneva Conventions  
24 and Additional Protocol II, both of which apply to internal armed conflict. The question is whether the  
25 reference to these two instruments imports a jurisdictional criterion relating to the nature of the conflict  
26 into Article 3 of the Statute. The Statute makes no specific reference to the nature of the conflict.

27  
28 However, given the express reference to Common Article 3 of the Geneva Conventions and Additional  
29 Protocol II, on its face it would seem that Article 3 must be construed as being applicable to internal  
30 armed conflict. As argued by the Defence, the substantive norms cannot be divorced from the criteria  
31 essential to their applicability even if those criteria are not specifically incorporated into the Statute.  
32 The International Criminal Tribunal for Rwanda (ICTR), for example, in interpreting its own status, has  
33 found that the material requirements of applicability of Additional Protocol II must be satisfied where a  
34 specific reference has been made to Additional Protocol II in counts against an accused.

35  
36 Notably, Article 3 of the Statute of the Special Court is taken verbatim from Article 4 of the ICTR  
37 Statute.

1 We proceeded to consider the *Akayesu* case in which the ICTR Trial Chamber summarised its  
2 position as follows: The four 1949 Geneva Conventions and 1977 Additional Protocol I thereto,  
3 generally applied to international armed conflicts only, whereas Article 3 common to the Geneva  
4 Conventions extends a minimum, and we emphasise this, minimum threshold of humanitarian  
5 protection as well to all persons affected by a non-international conflict, a protection which was further  
6 developed and enhanced in the 1977 Additional Protocol II. In the field of international humanitarian  
7 law, a clear distinction as to the threshold of application has been made between situations of  
8 international armed conflicts, in which the law of armed conflicts is applicable as a whole situation of  
9 non-international internal armed conflict where common Article 3 and Additional Protocol II are  
10 applicable, and non-international armed conflicts where only common Article 3 is applicable.

11  
12 We considered the *Nicaragua* case where the International Court of Justice found that Common  
13 Article 3, quote: "Defined certain rules to be applied in the armed conflict of a non-international  
14 character". And proceeded to say, "There is no doubt that, in the event of international armed conflict,  
15 these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also  
16 to apply to International armed conflicts;" and they are rules which, in the Court's opinion, reflects  
17 what the Court in 1949 called "elementary considerations of humanity".

18  
19 After considering the *Nicaragua* case and several cases from ICTY, particularly the Prosecutor  
20 against *Delalic*, the ICTY -- in which the ICTY Appeals Chamber addressed directly the question  
21 whether Article -- Common Article 3 is applicable to international armed conflicts, the Appeals  
22 Chamber explained as follows: Common Article 3 of the Geneva Conventions may be considered as  
23 the minimum yardstick of rules of international humanitarian law of similar substance applicable to  
24 both internal and international conflicts. It is both legally and morally untenable that the rules  
25 contained in Common Article 3, which constitute mandatory minimum rules applicable to internal  
26 conflicts, in which rules are less developed than in respect of international conflicts, would not be  
27 applicable to conflicts of an international character. The rules of Common Article 3 are encompassed  
28 and further developed in the body of rules applicable to international conflicts. It is logical that this  
29 minimum be applicable to international conflict as a substance of these core rules is identical.

30  
31 Having considered all these numerous divisions -- decisions, we come to the conclusion that the  
32 distinction between internal and international armed conflicts may become blurred but the baseline  
33 protections in Common Article 3 and Additional Protocol II, nevertheless apply. We considered  
34 Article 4 and came to the conclusion that there is no merit to the argument of the Defence, that  
35 because the Statutes may have been drafted with reference to an internal armed conflict, and  
36 because Article 4 most likely was borrowed from Article 8 ((2)(c) -- (2)(e) of the ICC Statutes dealing  
37 with internal conflicts, the Court's jurisdiction to apply Article 4 is restricted to internal armed conflict.

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And we concluded that in the circumstances, the question whether the conflict in Sierra Leone is of an internal or international character and at which point, if any, became -- it became internationalised, does not have any bearing on the applicability of Article 3 and Article 4 of the Statute and, therefore, need not be considered by the Appeals Chamber.

We made comments on the request for oral hearing and we concluded that oral arguments would have been necessary had the Chamber felt compelled to determine the actual nature of the conflict as a question of fact, and we concluded that this question does not arise. In the result, the preliminary motion is dismissed.

MADAM PRESIDENT:

We will now rise briefly again to allow for the next detainee to be brought in.

*(Court recessed at 1747H)*

*(Pages 1 to 5 by Momodou Jallow)*

## CERTIFICATE

I, Momodou Jallow, Official Court Reporter for the Special Court for Sierra Leone, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (*machine writer*) and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of my ability and understanding.

I further certify that I am not of counsel nor related to any of the parties to this cause and that I am in nowise interested in the result of said cause.

\_\_\_\_\_  
Momodou Jallow