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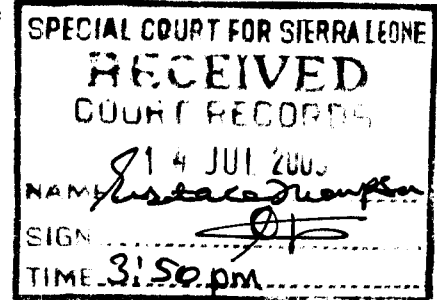
THE SPECIAL COURT FOR SIERRA LEONE

IN THE TRIAL CHAMBER

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

Registrar: Mr. Robin Vincent

Date filed: 14th July 2003



THE PROSECUTOR

Against

SAM HINGA NORMAN

CASE NO SCSL-2003-08-PT

**REPLY - PRELIMINARY MOTION BASED ON LACK OF JURISDICTION:
LAWFULNESS OF THE COURT'S ESTABLISHMENT**

OFFICE OF THE PROSECUTOR:

Mr. Desmond de Silva, Chief of Prosecution
Mr. Luc Cote, Chief of prosecutions
Mr. Walter Marcus-Jones, Senior Appellate Counsel
Mr. Abdul Tejan-Cole, Appellate Counsel
Mr. Tom Perriello, Appellate Advisor

Defence Counsel:

Mr. James Blyden Jenkins-Johntson
Mr. Sulaiman Banja Tejan-Sie II

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REPLY - PRELIMINARY MOTION BASED ON LACK OF

JURISDICTION: LAWFULNESS OF THE COURT'S ESTABLISHMENT

I. INTRODUCTION

- 1. The defence files this reply to the response of the Prosecution to the first defence preliminary motion based on lack of jurisdiction: lawfulness of Court's establishment.

- 2. The response argues essentially that the Special Court does not form part of the Judiciary of Sierra Leone. That indeed, it does not exist or operate at all within the sphere of the Municipal law of Sierra Leone. That it is not a National Court and the Defence were in error in conceiving it to be part of the architecture of the Sierra Leonean Court Structure

- 3. For the reasons given below the response to the first Preliminary Motion is untenable and should be dismissed in its entirety.

II. ARGUMENT

THE SPECIAL COURT IS UNLAWFULLY ESTABLISHED

- 1. The Memorandum of the Objects and Reasons of the Special Court Agreement, 2002 (Ratification) Act, 2002 states among other things that:

“The Object of this Bill is to make provision for the ratification and implementation of the Agreement between the Government of Sierra Leone and the United Nations Signed 16th January 2002, for the establishment of the Special Court for Sierra Leone”.

Also article 21 of the Special Court Agreement between the government of Sierra Leone and the United Nations under the caption "Entry into force" states that:

“The Pursuant Agreement shall enter into force on the day after both parties have notified each other in writing that the legal requirement for entry into force have been complied with”.

The accused therefore, submits that the Special Court Agreement, 2002 (Ratification) Act 2002 (the “Implementing Legislation”) ratifies and by virtue of article 21 was a necessary legal requirement for its entry into force and, the creation of the Court as part of the laws of Sierra Leone gives it the force of law

2. The accused further contends that the Special Court is a hybrid court with Jurisdiction to try crimes under both international and domestic law and as such operates within the spheres of both International and the Municipal Law of Sierra Leone and is therefore not strictu sensu an International Court akin to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the

International Criminal Tribunal for Rwanda (ICTR) as contended by the Prosecutor. The accused further argues that the Special Court could not have come into existence solely on the basis of the agreement between the government of Sierra Leone and the United Nations. It needed an implementing statute for it to come into existence. Also the fact that the enactment of the implementing Statute was unconstitutional deprives the agreement of the legal requirement for its entry into force provided in article 21 above.

3. Also, the Special Court was established under both International law and the domestic laws of Sierra Leone by virtue of both its agreement and its Implementing Statute. It therefore exists and functions in the spheres of both international law and the domestic laws of Sierra Leone as a hybrid court, a unique phenomenon that can be clearly distinguished from all former ad hoc international tribunals since the Second World War. Further, the court claims concurrent jurisdiction and primacy over competent domestic courts which fundamentally alters the judicial framework created by the constitution and as such required the consent of the people in a national plebiscite, which was none existent in this case.

TREATY AS A VALID BASIS FOR CREATING INTERNATIONAL COURTS

While the accused accepts that a treaty is a valid basis for the creation of an International Criminal Court, he will argue that like the International Criminal Court,

the Special Court for Sierra Leone which are both sui generic treaty based need the ratification of the parties for them to have the force of law in those countries. Ratification of both treaties is a pre-requisite for their creation. They must therefore be subject to the constitution. The Accused relies on Article 21 of the Special Court Agreement as stated above in support of his contention.

4. Further, the accused contends that the government of Sierra Leone as one of two parties to the Special Court Agreement can only legally act within the framework and powers of the constitution and as such by analogy any institution it creates or seeks to create must conform to that very constitution for it to legally come into force.
5. The accused also argues that the manifest breach by the government of section 108 of the Constitution of Sierra Leone which deals with entrenched clauses in the Constitution was "a rule of Sierra Leone's ... internal law of fundamental importance." And this is pursuant to Article 46 of the 1969 Vienna Convention on the Law of Treaties quoted and relied upon by the prosecution in its response.
6. The prosecution's analogy between the Special Court for Sierra Leone and the International Criminal Court is rather untenable as the two institutions are distinguishable in many respects and the latter is yet to either make its first arrests or have its jurisdiction challenged by any accused person. The accused will

further assert that the position in Sierra Leone is completely different from what obtains in the Constitutions of Australia, the United States of America, or South Africa.

THE SPECIAL COURT IS NOT PART OF THE JUDICIARY OF SIERRA LEONE

7. The prosecution's assertion that the Special Court is not part of the judiciary of Sierra Leone is erroneous and misconceived. The defence never contended that the Special Court forms part of the judiciary of Sierra Leone, but rather that the implementing Statute to the Special Court Agreement alters the Constitution in a material respect both by its creation on the one hand and its concurrent jurisdiction and primacy over competent domestic courts established by the constitution on the other. Further, that because of this material alteration to the judicial framework set out in the constitution; the constitution further demands that the criteria set out in section 108 (3) be met which the government of Sierra Leone as an implementing partner to the Special Court Agreement failed to do in this case.

8. Reference to chapter VII of the Constitution by the accused in his first preliminary motion on jurisdiction was to demonstrate how the implementing statute and the Special Court Agreement alters the judicial framework established by the Constitution and why it needed to satisfy section 108 of the Constitution of Sierra Leone to come into force within the territory of Sierra Leone. The accused

never intended nor argued that such reference could be discerned as an assertion that the Special Court for Sierra Leone formed part of the Judiciary of Sierra Leone.

9. The accused further re-asserts that the statement to the effect that the " implementation at the national level (of the Special Court Agreement) would require that the agreement) is incorporated in the national law of Sierra Leone in accordance with constitutional requirements" as part of the statement of the report of the United Nations (U.N.) Secretary General to the Security Council was intended to refer to the legality of the Special Court more so its coming into force as being dependent on its proper incorporation into the laws of Sierra Leone.
10. It is therefore necessary for the Special Court to decide whether its creation, a unique feature of International Criminal Tribunals is free from defect. As a part - international tribunal there is judicial precedent in the seminal judgement on jurisdiction in the Prosecutor against Dusko Tadic a k a "DULE" where the Appeals Chamber concluded that "... the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council."
11. The accused therefore by analogy submit that the Court because of its international character does have jurisdiction to examine any plea including the Defence first preliminary motion against its jurisdiction based on the invalidity of

its establishment by both an agreement and its implementing Statute.

12. The accused further contends that even where the issue is political and alleged to be non-justiciable the international Court in Tadic' "...rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty- bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue". This statement of the law in Tadic' should literally apply to the instant case. In this regard the accused submit that the Court cannot consider itself barred from an examination of the Defence jurisdictional plea by any so called "political" or "non-justiciable" nature of the constitutional issues it raises

LEGALITY OF THE AGREEMENT- EFFECTIVE CONTROL

13. The argument is not that Sierra Leone is or was not a State but that the government was not in effective control of the State. The government was therefore not in a position to negotiate such an agreement. The Montevideo Convention of 1933 in referring to the criteria of statehood speaks of effective control as a basis for the legitimacy of agreements negotiated on behalf of states. The accused reiterates the argument in his first preliminary motion on effective control that the government of Sierra Leone was not in control of over two thirds of the territory of Sierra Leone and "therefore did not enjoy the obedience of the

majority of the people of the country". The prosecution's argument about Sierra Leone being a state under international law is therefore misplaced and erroneous as the defence never challenged the statehood of Sierra Leone but rather mounted a challenge on the authority of the Government of Sierra Leone to negotiate on behalf of the state at that material time.

III MISCELLANEOUS MATTERS

14. The accused notes the concern of the Prosecution in paragraph 14 of their response and will argue the same at the appropriate time. The accused insists and reiterates his submission in paragraph 29 of the defence first preliminary motion (lawfulness of the Court's establishment) in reserving "...the rights to amend their argument after further consultation....and to fully associate with the arguments...of other defence counsel (in other cases). The accused further submit that the accused should be able to reserve the right to revisit this issue notwithstanding the fact that the time set out for preliminary motion would have expired. While the accused accepts that a reply should only address new matters arising out of the response; the accused submit that an amendment does not deprive the prosecution of its right to be heard as it is within the Court's inherent jurisdiction to always ensure the principle of "auld alteram partem" (the other side must be heard) as a fundamental rule of natural justice. With respect to the prosecution's reference to the defence averment that they need further consultation with their client and their contention that , that is irrelevant as the matters alleged are solely

matters of law is unfortunate as the conduct of the case for the defence is the sole prerogative of the defence.

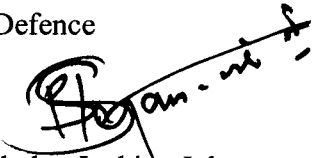
15. The accused refute any suggestion that the filing of four separate motions was in an effort to circumvent Article 8.3 (c) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone.

16. In conclusion the accused maintains that the implementing statute which fundamentally alters the judicial framework does not satisfy section 108 (3) of the constitution. The issue of whether the government has the power to sign the Special Court agreement under section 40 of the constitution or whether the special court forms part of the judiciary of Sierra Leone was never the thrust of the argument on behalf of the accused. The Special Court derives its power to enter into force in Sierra Leone from the implementing statute and not the agreement. The Court should therefore dismiss the prosecution response to the First Preliminary Motion in its entirety.

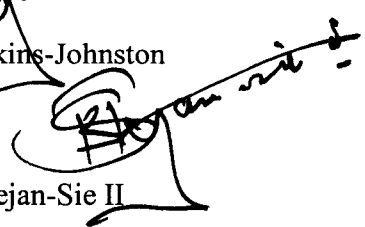
Freetown, 14th July 2003.

For the Defence

for



James Blyden Jenkins-Johnston



Sulaiman Banja Tejan-Sie II

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SPECIAL COURT FOR SIERRA LEONE

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Dated: 14 July 2003

Defence Reply to Prosecution Response to the First Preliminary Motion: Lawfulness of the Court Establishment

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