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SCSL-2003-08-PT-040

(417-420)

THE SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBERS

Before: Judge Thompson, Presiding Judge  
Judge Itoe  
Judge Boutet

Registrar: Robin Vincent

Date: 26<sup>th</sup> June 2003

The Prosecutor

v.

Sam Hinga Norman

SCSL-2003-08-PT

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PRELIMINARY MOTION BASED ON LACK OF JURISDICTION:  
COMMAND RESPONSIBILITY

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Office of the Prosecutor:

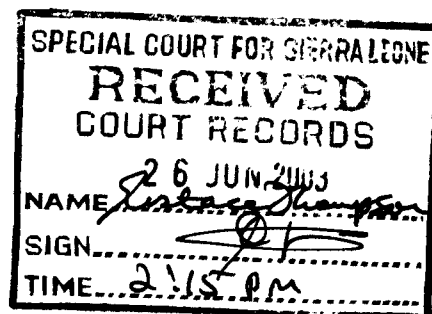
David Crane

Luc Cote

Defence Counsel

James Blyden Jenkins-Johnston

Sulaiman Banja Tejan-Sie



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2003

**I. INTRODUCTION**

1. The accused is charged on an indictment with the following crimes under the *Statute of the Special Court for Sierra Leone* (the *Statute*):

**COUNTS 1-2: UNLAWFUL KILLINGS**

**Count 1:** Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute of the Court;

**Count 2:** Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute.

**Count 3-4: PHYSICAL VIOLENCE AND MENTAL SUFFERING**

**Count 3:** Inhumane Acts, a **CRIME AGAINST HUMANITY**, punishable under Article 2.i. of the Statute;

**Count 4:** Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of Statute.

**Count 5: LOOTING AND BURNING**

**Count 5:** Pillage, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.f. of the Statute.

**COUNTS 6-7: TERRORIZING THE CIVILIAN POPULATION and COLLECTIVE PUNISHMENTS**

**COUNT 6:** Acts of Terrorism, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.d. of the Statute.

**Count 7:** Collective Punishments, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.b. of the Statute.

**COUNT 8: USE OF CHILD SOLDIERS**

**Count 8:** Conscripting or enlisting children under the age of 15 years into armed force or groups or using them to participate actively in hostilities, an **OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW**, punishable under Article 4.c. of the Statute.

2. Pursuant to Rule 72 of the *Rules of Procedure and Evidence* (the *Rules*) the accused objects to the jurisdiction of the Special Court for Sierra Leone (the Court) on the ground that command responsibility is not a basis for liability in internal armed conflicts.

## II. ARGUMENT

3. The indictment against the accused is premised on an internal armed conflict. This is apparent from paragraphs 3 and 4 of the Indictment, which refer to a conflict occurring within Sierra Leone's borders between Sierra Leonean groups, as well as on the fact that the violations of international humanitarian law that have been charged are those applicable in internal conflict, namely violations of common article 3 and Additional Protocol II.
4. As a matter of individual criminal responsibility, the indictment against the accused charges him "in addition or alternatively" with "command responsibility" under Article 6(3) of the Statute of the Special Court.<sup>1</sup>
5. In a case before the International Criminal Tribunal for the former Yugoslavia (the "ICTY"), *Prosecutor v. Hadžihasanović et al.* (IT-01-47-PT), Defence Counsel raised a challenge on jurisdiction based on the assertion that:
- [...] command responsibility for crimes committed in the course of an internal armed conflict did not exist in international humanitarian law in 1993, the law which the Tribunal has to apply. [The Defence] consequently seeks to have the charges under Article 3 of the Statute based on common Article 3 struck from the indictment, because, it is submitted, those charges relate only to an internal armed conflict. [...]*<sup>2</sup>
6. The argument, in summary, was set out in the *Submissions of Alagić* filed on 10 May 2002:
- (1) The Statute [of the ICTY – but the same applies to the SCSL Statute] does not create new law, the Tribunal has to apply existing international humanitarian law;
  - (2) The principle of legality requires a written text (a conventional source) and a customary source;
  - (3) the only sources for Article 7(3) Command Responsibility [Article 6(3) of the SCSL Statute] are Additional Protocol I and post-World War II cases; these apply only to *international* armed conflicts;
  - (4) there are *no* conventional or customary sources for Command Responsibility in *internal* armed conflicts;
  - (5) there is a difference, recognised by the ICTY Appeals Chamber, between the law applicable to international, and the law applicable to internal, armed conflicts;
  - (6) the principle of legality prohibits reasoning by analogy from the position in international conflicts to the position in internal conflicts.
  - (7) if there is any doubt or ambiguity, it must be resolved in favour of the Accused.

<sup>1</sup> See paragraph 14 of the Indictment and each of the Counts of the Indictment.

<sup>2</sup> *Decision on Challenge to Jurisdiction*, Trial Chamber II, *Hadžihasanović et al.*, 7 December 2001.

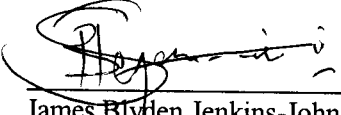
7. While this argument was rejected by the Trial Chamber in its *Decision on Joint Challenge to Jurisdiction* dated 12 November 2002, the matter was appealed by the Parties and is currently pending before the ICTY Appeals Chamber.

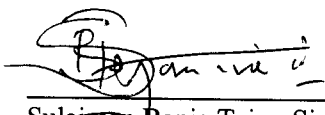
8. Should the ICTY Appeals Chamber rule in favour of the defence argument in *Hadžihasanović et al.* that the principle of command responsibility did *not* apply to internal armed conflicts at the relevant time, the Defence reserves the right to raise the argument as a bar to jurisdiction in this case over all counts of the indictment which charge command responsibility in respect of violations of the law applicable to *internal* conflicts.

**III. REMEDY**

9. The accused requests this Court declare it lacks jurisdiction to try him on the basis of command responsibility.

Dated at Freetown this 26<sup>th</sup> day of June 2003

*for*  
  
James Blyden Jenkins-Johnston  
Counsel for Sam Hinga Norman

  
Sulaiman Banja Tejan-Sie