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SCSL-2003-12-PT
(1551-1553)

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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 8th day of December 2003

The Prosecutor against

Allieu Kondewa
(Case No.SCSL-2003-12-PT)

ORDER PURSUANT TO RULE 72 (E)

**DEFENCE MOTION BASED ON LACK OF JURISDICTION/ABUSE OF PROCESS:
AMNESTY PROVIDED BY LOME ACCORD**

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions
James C. Johnson, Senior Trial Counsel
Mohamed A. Bangora, Associate Trial Counsel

Defence Counsel
James MacGuill, Lead Counsel
James Evans, Co-Counsel
Charles Margai, Co-Counsel

SPECIAL COURT FOR SIERRA LEONE	
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COURT RECORDS	
08 DEC 2003	
NAME	NEIL GIBSON
SIGN	<i>[Signature]</i>
TIME	16:08

THE SPECIAL COURT FOR SIERRA LEONE (“the Special Court”)

SITTING as the Trial Chamber (“the Chamber”), composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet, and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided for by Lomé Accord, filed on the 7th day of November 2003 (“the Motion”), in relation to the criminal suit against **Allieu Kondewa** (“the Accused”);

CONSIDERING the Prosecution’s Response to the Motion filed on the 14th day of November 2003 (“the Response”);

NOTING the Defence Preliminary Motion Based on Lack of Jurisdiction: Establishment of the Special Court Violates the Constitution of Sierra Leone, filed on the 7 November 2003 and the Order Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence (“the Rules”) in relation thereto rendered on the 4th day of December 2003;

CONSIDERING the entire provisions of Rule 72 of the Rules;

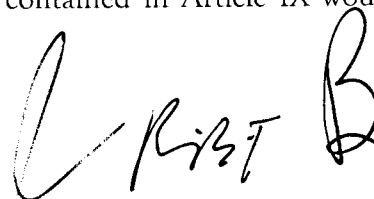
CONSIDERING in particular Rule 72(D) of the Rules which provides specifically that the Trial Chamber shall dispose of preliminary motions notwithstanding that the Motion was filed before Judge Pierre Boutet as Designated Judge;

CONSIDERING further the provisions of Rule 72(E) of the Rules which state that the Chamber shall refer to the Appeals Chamber for a determination as soon as practicable any preliminary motion which raises a serious issue relating to jurisdiction;

CONSIDERING that the Indictment charges the Accused on several counts of Crimes Against Humanity, punishable under Article 2 of the Statute of the Special Court (“the Statute”), Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3 of the Statute, and of Other Serious Violations of International Humanitarian Law, punishable under Article 4 of the Statute;

CONSIDERING that pursuant to Rule 72(B) (i) and (v) of the Rules the Defence raises preliminary motions on objections on lack of jurisdiction and objections based on abuse of process on the following grounds:

1. The Government of Sierra Leone is duty bound to honour the undertaking made in agreeing to and signing the Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of the 7th July 1999 (“the Lomé Accord”), including the amnesty provisions contained in Article IX of the said Accord. Moreover, while the Special Representative of the Secretary-General of the United Nations appended to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in Article IX would not apply to



crimes against humanity, war crimes or other serious violations of international humanitarian law, no such similar reservation was appended by President Kabbah on behalf of the Government of Sierra Leone. Consequently, on the part of the Government of Sierra Leone the amnesty provision was accepted, valid and effective and additionally no steps have been taken by the Government of Sierra Leone to remove the legal and/or constitutional provisions referred to in Part X of the Lomé Accord preventing implementation of the Lomé Accord.

2. The Special Court was established pursuant to an Agreement between the United Nations and the Government of Sierra Leone of the 16th day of January 2002. Indeed, the Special Court could only have been established with the agreement of the Government of Sierra Leone and its participation and role was vital and central. As a Government creation, the jurisdiction of the Special Court should not include acts for which the Government has already granted amnesty, therefore, all allegations of crimes pre-dating the 7th day of July 1999 should be removed from the Indictment. Moreover, the burden is on the Prosecution and/or Government of Sierra Leone to demonstrate why the amnesty granted in the Lomé Accord should not be respected by the Special Court as it was a creation of the very same Government of Sierra Leone.

AND additionally or in the alternative:

It would be an abuse of process of the Special Court to permit the prosecution of Allieu Kondewa for alleged crimes pre-dating the 7th day of July 1999. After granting an amnesty or undertaking not to prosecute, *inter alia*, members of the Civil Defence Forces ("the CDF") at Lomé, it would be an abuse of process of the Special Court to permit the prosecution of such persons for conduct pre-dating this Agreement. This is particularly true of members of the CDF who are "particularly prejudiced" by prosecution given the "special relationship" of trust between the CDF and the Government of Sierra Leone.

NOTING FURTHER THAT the Defence filed the Motion as falling within the concepts of both lack of jurisdiction and abuse of process which is not instructive and can lead to confusion. The Trial Chamber, having authority pursuant to Rule 72 (D) to dispose of motions based on abuse of process and not motions raising a serious issue relating to jurisdiction which must be referred to the Appeals Chamber. In combining these two motions together the Trial Chamber has therefore no option but to refer the whole motion to the Appeals Chamber for their determination as the issue about jurisdiction is serious one. The process is however depriving the applicant of obtaining a decision by the Trial Chamber on the abuse of process with a possibility of an appeal pursuant to Rules 72 (F). This approach is even more with regards to the Defence Preliminary Motion Based on Lack of Jurisdiction: Establishment of the Special Court Violates the Constitution of Sierra Leone, also filed on the 7th November 2003 and noted above, the Chamber is of the

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opinion that it would have been much preferable for the Defence to combine the two motions with the result that all the aspects of lack of jurisdiction are in one motion and all the aspects relating to abuse of process are filed in a separate motion rather than filing multiple motions on the same basis.

NOW THEREFORE,

THE CHAMBER,

NOTING that the Defence states in paragraph 16 of the Motion that: "It is recognised that there may be pressure on the Trial Chamber, as a constituent element of the Special Court, in part established by the United Nations, to follow the opinion of the Secretary-General of the United Nations as expressed in his report and find that the amnesty granted at Lomé has no application before the Special Court" and that "the Trial Chamber must conduct an impartial and fair assessment of the law and facts presented and determine the extent of application of the Lomé Accord and the amnesty contained therein in its own right and independently of the opinion already expressed by the Secretary-General and the United Nations." Unless there is evidence offered to support such an assertion the Trial Chamber would like to state unequivocally that assertions or comments of that nature are highly objectionable and unacceptable and are not conducive to proper conduct of a trial.

AND

PURSUANT TO RULE 72 (B) (i) and (v) and 72 (E) OF THE RULES,

FINDS that the foregoing submissions relate to objections based on lack of jurisdiction which raises a serious issue relating to the jurisdiction of the Special Court to try the Accused.

REFERS this Motion and Response to the Appeals Chamber of the Special Court for determination pursuant to Rules 72 (E) of the Rules;

ORDERS

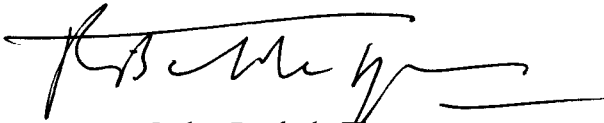
That the reference of this Motion to the Appeals Chamber shall not operate as a stay of the trial of the Accused;

Done in Freetown, this 8th day of December 2003

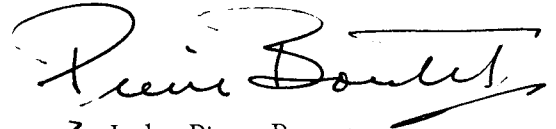
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The Trial Chamber



Judge Bankole Thompson
Presiding Judge



Judge Pierre Boutet



Judge Benjamin Mutanga Itoe

