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SCSL-2003-12-PT  
(1128-1134A)

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**SPECIAL COURT FOR SIERRA LEONE  
TRIAL CHAMBER**

**Before:** Judge Boutet

**Registrar:** Robin Vincent

**Date:** 7 November 2003

**The Prosecutor Against:** Allieu Kondewa

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

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**PRELIMINARY MOTION BASED ON LACK OF JURISDICTION  
ESTABLISHMENT OF SPECIAL COURT VIOLATES CONSTITUTION OF  
SIERRA LEONE**

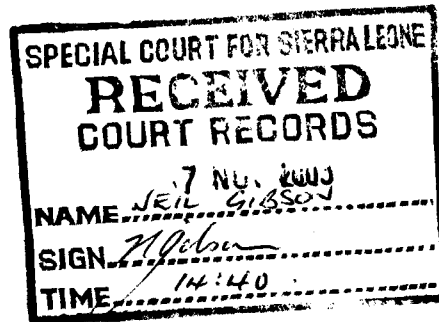
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**Office of the Prosecutor:**

Luc Cote, Chief of Prosecution

**Defence Counsel:**

James MacGuill, MacGuill & Company  
James Evans, MacGuill & Company  
Charles Margai, Banta Chambers



### **Introduction**

1. Rule 72 of the Rules of Procedure and Evidence provides that preliminary motions by the accused include *inter alia* objections based on lack of jurisdiction.
2. This Motion is filed without prejudice to the Accused's right to challenge the jurisdiction and legitimacy of the Special Court either before this Court or otherwise.
3. It is submitted that in creating the Special Court by agreement between the United Nations and the Government of Sierra Leone (Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone – 16 January 2002), the Government of Sierra Leone was bound to abide by and honour the Constitution of Sierra Leone. Failure to comply with the Constitution of Sierra Leone in establishing the Special Court renders the Court unconstitutional and thereby lacking in jurisdiction to prosecute persons before it.
4. The 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone' (UN Doc. S2000/915 – 4 October 2000), states that:
 

*“The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. **Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements.**”*  
(Report para 9) (Emphasis added)
4. It is submitted that in establishing the Special Court, the Government of Sierra Leone have acted in contravention of the Constitution of Sierra Leone.

### **The Constitution of Sierra Leone**

5. Section 108 of the Constitution of Sierra Leone provides that various sections of the Constitution may not be amended without first holding a referendum. Sub-section (4) provides that one half of all eligible voters must take part in the referendum and a minimum of two-thirds of the electorate must vote in favour of the amendment sought.

6. Section 108 provides as follows:

- (1) Subject to the provisions of this section, Parliament may alter this Constitution.
- (2) A Bill for an Act of Parliament under this section shall not be passed by Parliament unless –
  - a. before the first reading of the Bill in Parliament the text of the Bill is published in at least two issues of the *Gazette*:

Provided that not less than nine days shall elapse between the first publication of the Bill in the *Gazette* and the second publication ; and

  - b. the Bill is supported on the second and third readings by the votes of not less than two-thirds of the Members of Parliament.
- (3) A Bill for an Act of Parliament enacting a new Constitution or altering any of the following provisions of this Constitution, that is to say –
  - a. this section
  - b. Chapter III,
  - c. Sections 46, 56, 72, 73, 74(2), 74(3), 84(2), 85, 87, 105, 110-119, 120, 121, 122, 123, 124, 128, 129, 131, 132, 133, 135, 136, 137, 140, 151, 156, 167

Shall not be submitted to the President for his assent and shall not become law unless the Bill, after it has been passed by Parliament and in the form in which it was so passed, has, in accordance with the provisions of any law in that behalf, been submitted to and been approved at a referendum.

- (4) Every person who is entitled to vote in the elections of Members of Parliament shall be entitled to vote at a referendum held for the purposes of subsection (3) and no other person may so vote; and the Bill shall not be regarded as having been approved at the referendum unless it was so approved by the votes of not less than one-half of all such persons and by not less than two-thirds of all the votes validly cast at the referendum:

Provided that in calculating the total number of persons entitled to vote at such referendum, the names of deceased persons, of persons disqualified as electors, and of person duplicated in the register of electors and so certified by the Electoral Commission, shall not be taken into account.

- (5) The conduct of any referendum for the purposes of subsection (3) of this section shall be under the general supervision of the Electoral

Commission and the provisions of subsections (4), (5) and (6) of section 38 of this Constitution shall apply in relation to the exercise by the Electoral Commission of its functions with respect to a referendum as they apply in relation to the exercise of its functions with respect to a referendum as they apply in relation to the exercise of its functions with respect to elections of Members of Parliament.

- (6) A Bill for an Act of Parliament under this section shall not be submitted to the President for his signature unless it is accompanied by a certificate under the hand of the Speaker of Parliament (or, if the Speaker is for any reason unable to exercise the functions of his office, the Deputy Speaker) that the provisions of subsection (3) and (4) of this section have been complied with, and every such certificate shall be conclusive for all purposes and shall not be inquired in any court.
- (7) No Act of Parliament shall be deemed to amend, add to or repeal or in any way alter any of the provisions of this Constitution unless it does so in express terms.
- (8) Any suspension, alteration, or repeal of this Constitution other than on the authority of Parliament shall be deemed to be an act of Treason.
- (9) In this section –
  - a. references to this Constitution include references to any law that amends or replaces any of the provisions of this Constitution; and
  - b. references to the alteration of this Constitution of of any Chapter or section of this Constitution include references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision for the time being contained in this Constitution or Chapter or section thereof, the suspension or repeal of any such provisions, the making of different provisions in lieu of such provision and the addition of new provisions to this Constitution or Chapter or section thereof, and references to the alteration of any particular provision of this Constitution shall be construed likewise.

The creation of the Special Court by the Government of Sierra Leone in agreement with the United Nations has the effect of amending fundamental aspects of the Constitution of Sierra Leone for which no referendum has been held.

- 7. Chapter 7 of the Constitution (sections 120 to 145) is concerned with the Judiciary of Sierra Leone. The creation of the Special Court clearly amends the judicial framework and court structure in Sierra Leone. As can be seen from Section 108(4) above, the majority of sections pertaining to the judiciary in Chapter 7 of the Constitution cannot be amended without a referendum of the people of Sierra Leone.

8. Section 17(1) in Chapter 3 of the Constitution provides:

- (1) No person shall be deprived of his personal liberty except as may be authorised by law in any one of the following cases, that is to say –
  - a. in consequence of his unfitness to plead to a criminal charge; or
  - b. in the execution of a sentence or order of a Court whether in Sierra Leone or elsewhere in respect of a criminal offence of which he has been convicted; or
  - c. in the execution of an order of the High Court or Court of Appeal or the Supreme Court or such other courts as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court or tribunal or commission of inquiry as the case may be; or
  - d. in the execution of an Order of a court made in order to secure the fulfilment of any obligation imposed on him by law; or
  - e. for the purpose of bringing him before a court or tribunal, as the case may be, in execution of the order of a court; or
  - f. upon reasonable suspicion of his having committed or of being about to commit a criminal offence; or
  - g. in the case of a person who has not attained the age of twenty-one years, for the purpose of his education or welfare; or
  - h. for the purpose of preventing the spread of an infectious or contagious disease; or
  - i. in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community; or
  - j. for the purpose of preventing the unlawful entry of that person into Sierra Leone, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Sierra Leone or the taking of proceedings thereto.

9. Section 30(1) of Chapter 3 of the Constitution provides:

- (1) In this Chapter, unless the context otherwise requires, the following expressions have the following meanings respectively, that is to say –

“contravention” in relation to any requirement includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

“court” means any court of law in Sierra Leone other than a local court or a court constituted by or under service law and –

- a. in section 16, section 17, section 18, section 19, subsections (3), (5), (6) (9) (but not the proviso thereto) and (11) of Section 23, subsection (2) of section 25, subsection 8 of section 27, subsection (3) of section 28 and subsection (4) of section 29 includes, in relation to an offence against service law, a court so constituted; and

in sections 17 and 19, and subsection (8) of section 27, includes, in relation to an offence against service law, an officer of a defence force or of the Sierra Leone Police Force.

10. It is submitted that the only Courts empowered to order the deprivation of liberty as envisaged by Section 17(1) of the Constitution are those set out in Section 30(1). The Special Court is clearly not mentioned as one of those courts with such powers as mentioned in Section 30(1) and therefore cannot be entitled to detain persons in accordance with the Constitution.

11. Section 23(1) of the Sierra Leone Constitution provides:

Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Special Court is not a “court” envisaged by Section 30(1) of the Constitution to determine the charges against someone within the terms of Section 23(1) of the Constitution.

12. It is submitted that only after amendment of the Constitution pursuant to Section 108 of the Constitution would the Special Court be able to operate within the jurisdiction of Sierra Leone.
13. In the absence of such amendment, the establishment of the Special Court is unconstitutional.

***Incorrect Framework Used to Create Special Court***

14. It is noted that the *Special Court Agreement, 2002 (Ratification) Act 2002* asserts that the Agreement for the Special Court was, for the part of the Government of Sierra Leone, purports to be signed under the authority of the President pursuant to Section 40(4) of the Constitution.

15. Section 40(4) of the Constitution provides:

*Notwithstanding any provisions of this Constitution or any other law to the contrary, the President shall, without prejudice to any such law as many for the time being be adopted by Parliament, be responsible, in addition to the functions conferred upon him in the Constitution, for –*

- a. *all constitutional matters concerning legislation;*
- b. *relations with Foreign States;*
- c. *the reception of envoys accredited to Sierra Leone and the appointment of principal representatives of Sierra Leone abroad;*
- d. *the execution of treaties, agreements or conventions in the name of Sierra Leone;*
- e. *the exercise of the Prerogative of Mercy;*
- f. *the grant of Honours and Awards;*
- g. *the declaration of war; and*
- h. *such other matters as may be referred to the President by Parliament;*

*Provided that any Treaty, Agreement or Convention executed by or under the authority of the President which relates to any matter within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorises any expenditure out of, the Consolidated Fund or any other fund of Sierra Leone, and any declaration of war made by the President shall be subject to ratification by Parliament –*

- i. *by an enactment of Parliament; or*
- ii. *by a resolution supported by the votes of not less than one-half of the Members of Parliament.*

16. It is asserted by the Government of Sierra Leone that the *Special Court Agreement, 2002 (Ratification) Act, 2002* amounts to ratification by Parliament for the purposes of Section 40(4) of the Constitution.

17. Section 11(2) of the *Special Court Agreement, 2002 (Ratification) Act, 2002*, states that:

*“The Special Court shall not form part of the Judiciary of Sierra Leone”.*

18. It is submitted that the Government of Sierra Leone, in creating the Special Court, as a Court sitting in Sierra Leone, presiding over crimes committed in Sierra Leone, by nationals of Sierra Leone, with a view to potentially imprisoning persons convicted by the Court in Sierra Leone, acted unconstitutionally in bypassing the views and wishes of the people of Sierra Leone in relying on Section 40(4) of the Constitution instead of Section 108 of the Constitution in the creation of the Special Court.

**Conclusion**

19. A measure as radical as the establishment of a new court dealing with conduct potentially within the jurisdiction of the courts of Sierra Leone amounts to an effective amendment of the Constitution and one for which the consent of the people of Sierra Leone should have been sought.
20. By virtue of the Government acting unconstitutionally in establishing the Special Court is that the Special Court is unconstitutional and therefore illegal with the effect that it has no lawful jurisdiction over anyone brought before it.
21. It is therefore submitted that the Special Court for Sierra Leone is an illegal creation of both the United Nations and the Government of Sierra Leone and has no lawful authority to detain and try Allieu Kondewa.

**Orders Sought**

22. A declaration that:
  - (i) the Government of Sierra Leone acted unconstitutionally in establishing the Special Court.
  - (ii) the Special Court is therefore an illegal and ultra vires institution.
  - (iii) Allieu Kondewa should be released from the custody of the Special Court immediately.
23. An oral hearing on this matter.

PP: 