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SCSL-2003-07-059

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(1016 - 1027)

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER

Before: Judge Thompson, Presiding Judge
Judge Itoe
Judge Boutet

Registrar: Robin Vincent

Date: 30 June 2003

The Prosecutor Against: **Morris Kallon**

(Case No. SCSL-2003-07-PT)

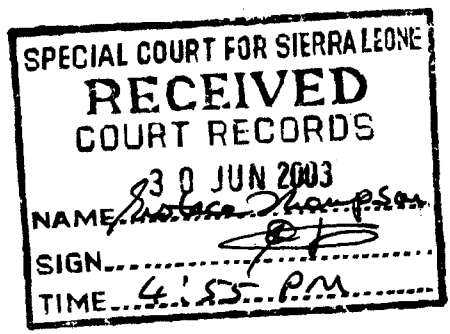
**REPLY TO PROSECUTION RESPONSE TO PRELIMINARY MOTION
BASED ON LACK OF JURISDICTION: ESTABLISHMENT OF
SPECIAL COURT VIOLATES CONSTITUTION OF SIERRA LEONE**

Office of the Prosecutor:

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Introduction

1. The Defence filed 'Preliminary Motion Based on Lack of Jurisdiction: Establishment of the Special Court Violates the Constitution of Sierra Leone' ("Preliminary Motion") on 16 June 2003. The Prosecution filed 'Prosecution Reponse to the Second Defence Motion (Constitution of Sierra Leone)' (*sic*) ("Response" or "Prosecution Response") on 24 June 2003.¹ The Defence were granted an extension of time (30 June 2003) to file its Reply to the Prosecution Response.

Defence Argument

2. The Prosecution Response correctly concedes that the Special Court for Sierra Leone has not been incorporated into the judicial system of Sierra Leone and is not part of the judiciary of Sierra Leone with the Chief Justice at the Head.² Moreover, the Prosecution Response refers to the Government of Sierra Leone's attempt to vitiate this error by *ex post facto* declaring, in the Special Court Agreement, 2002 (Ratification) Act 2002, that the Special Court does "not form part of the Judiciary of Sierra Leone".³
3. The attempt to effectively amend the Sierra Leone Constitution by creating a new court outside of the established judiciary of Sierra Leone as envisioned in the Constitution of Sierra Leone amounts to clear violation of the Constitution. This is the very essence of the Defence complaint in the Preliminary Motion.
4. It is clear that the Special Court is a court:
 - (i) sitting in Sierra Leone,
 - (ii) with the authority to preside over offences allegedly committed by Sierra Leone nationals on the territory of Sierra Leone,
 - (iii) with the power to deprive such individuals of their liberty.

¹ Note: The Response was received by the Defence, via the Court Registry, on 26 June 2003.

² Prosecution Response para 5.

³ Prosecution Response para 6.

5. The Special Court is not, however, an institution envisioned in Chapter 7 of the Constitution, and nor is it a 'court' as defined by section 30(1) of the Constitution which sets out those courts which may order the deprivation of liberty in Sierra Leone. The Government of Sierra Leone, being bound by the Constitution of Sierra Leone have therefore acted in breach of the Constitution by being party to an agreement establishing the Special Court in contravention of the Constitution.
6. The only means by which the Government of Sierra Leone could have acted lawfully pursuant to the Constitution of Sierra Leone would have been by allowing the voice of the people of Sierra Leone to be heard on the issue by way of referendum as required by section 108 of the Constitution. No such referendum was held by the Government and the creation of the Special Court in the absence of amendment of the Constitution pursuant to such referendum amounts to a clear breach of the Constitution. The creation of the Special Court with the agreement of the President pursuant to section 40(4) of the Constitution was, it is submitted, an attempt to deny the people of Sierra Leone an opportunity to be heard on the creation of the Special Court. Such a course possibly being adopted due to concern that a mandate from the people of Sierra Leone to amend the Constitution by establishing such a Court may not have been forthcoming.
7. It would undoubtedly be unconstitutional for the President of Sierra Leone to abolish the judiciary of Sierra Leone. Moreover, it would be unconstitutional of the President of Sierra Leone to enter into an international agreement that effectively abolished the judiciary of Sierra Leone by, for example, suspending all judicial functions of the courts of Sierra Leone. If the President of Sierra Leone entered into an international agreement with the Government of, say, the United States of America, to the effect that all Sierra Leone courts were to be abolished and replaced with courts made up of judges from the United States there is no doubt that such a development would be held unconstitutional unless endorsed by the people of Sierra Leone following a referendum as provided by the Constitution of Sierra Leone.

8. For the President of Sierra Leone to surrender the sovereignty and governance of Sierra Leone to another country pursuant to an international agreement without first holding a referendum pursuant to section 108 of the Constitution would be unconstitutional. Any amendment to the Constitution “by the back door” would be untenable. The position with regards the creation of the Special Court is no different. It is a clear attempt to amend the Constitution of Sierra Leone without first following to correct safeguards and procedures. The fact that the international agreement is with the United Nations and not another sovereign state is immaterial. In both cases it would amount to a violation of the Constitution.

9. The place guaranteed for the judiciary of Sierra Leone by the Constitution of Sierra Leone has been usurped, not by amendment of the Constitution and with the endorsement of the people, but by international agreement. This is both unconstitutional and unlawful. Accordingly, the Special Court is unconstitutional and an unlawful creation.

Trial Chamber can and must review legality of establishment of Special Court by Government of Sierra Leone

10. The Prosecution assert in the Prosecution Response that because the Special Court is created pursuant to a valid treaty, namely the Special Court Agreement, that any potential inconsistencies with the Sierra Leone Constitution are irrelevant. They assert that “[a] treaty is valid in international law even if it is in conflict with domestic law”.⁴

11. The Prosecution further assert that as a matter of international law the validity of the Special Court Agreement and the obligations of Sierra Leone under international law arising out of that agreement are not affected by the Constitution of Sierra Leone.⁵ Moreover, the Response asserts that the Special

⁴ Prosecution Response para 7.

⁵ Prosecution Response para 9.

Court has no jurisdiction to decide the question of conformity with the Constitution.⁶

12. These arguments are incorrect and misconceived. Similar arguments were advanced by the Prosecution at the ICTY in response to the Defence motion on jurisdiction in the *Tadic* case at the ICTY. Such arguments by the Prosecution were flatly rejected by the ICTY Appeals Chamber in the “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”.⁷

13. In *Tadic* the Defence questioned the illegal foundation of the ICTY. The Prosecution argued that the legality and primacy of the Tribunal could not be challenged and considered by the Appeals Chamber.⁸ The Appeals Chamber rejected this argument. The Appeals Chamber held:

“All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal?
...

After all, in a court of law, common sense ought to be honoured not only when the facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of the Appellant’s interlocutory appeal is indisputable.”⁹

14. In considering whether the Appeals Chamber could consider and rule upon whether it had been validly established, the Appeals Chamber held:

“In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any

⁶ Prosecution Response para 15.

⁷ *Tadic* ‘Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction’ 2 October 1995.

⁸ *Ibid* para 5.

⁹ *Ibid* para 6.

person or subject-matter. The plea based on the invalidity of constitution on the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.”¹⁰

15. The ICTY was established by the Security Council pursuant to a Chapter 7 UN Security Council Resolution.¹¹ Thus, the Defence challenged and the Appeals Chamber considered the legal validity of creating an International Tribunal pursuant to such resolution. The Appeals Chamber in *Tadic* considered whether the Security Council had the power to act in the manner that it did. The Special Court for Sierra Leone is established pursuant to an agreement between the UN and the Government of Sierra Leone, thus the Trial Chamber is entitled to consider and review the validity of action of both the United Nations and the Government of Sierra Leone. In considering the validity of the actions of the Government of Sierra Leone, the Trial Chamber is bound to and must consider the legality of its actions pursuant to the Constitution of Sierra Leone.

16. In *Tadic* the Appeals Chamber held that “the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.”¹² In *Tadic* the Appeals Chamber considered “The Issue of Constitutionality” of the Security Council’s action in establishing the ICTY pursuant to a Security Council Resolution.¹³ In the same way it is submitted that the Trial Chamber is able, and indeed now obliged, to consider the constitutionality of the Government of Sierra Leone’s actions in establishing the Special Court for Sierra Leone pursuant to an international agreement with the United Nations and its failure to hold a referendum as required by the Constitution of Sierra Leone.

¹⁰ *Ibid* para 12.

¹¹ UN Security Council Resolution 827 – 25 May 1993.

¹² *Tadic* – *ibid* para 22.

¹³ *Ibid* paras 26 to 48.

Special Court distinct from ICC

17. In an attempt to demonstrate that the establishment of the Special Court is not unconstitutional the Prosecution Response makes reference to the establishment of the International Criminal Court (ICC) and the fact that it has “never been questioned that a treaty is a valid basis for the creation of an international criminal court”.¹⁴ Sierra Leone ratified the Statute for the ICC in 2000. The Prosecution Response asserts that “[i]n the selfsame way that the ICC is not perceived to violate the constitutional or other municipal law of Sierra Leone, nor does the Special Court”.¹⁵

18. This argument is misconceived. Firstly, just because the validity and constitutionality of Sierra Leone’s ratification of the ICC Statute has never been challenged does not mean to say that the Government acted in conformity with the Constitution. In due course it may be so challenged. The basis of any such challenge is beyond the scope of this Reply. Secondly, the ICC is clearly a very different court to the Special Court for Sierra Leone. The ICC has been established pursuant to a multinational agreement entered into by in excess of sixty states. The Special Court has been established pursuant to a bilateral agreement between one state, Sierra Leone, and the United Nations. In the event that the Government of Sierra Leone has acted unconstitutionally in establishing the Special Court, this amounts to a clear basis to hold the creation of the Court illegal.

Constitutional Issues arising out of ratification of ICC Statute

19. In an attempt to demonstrate that Sierra Leone did not act unconstitutionally in becoming a party to the ICC Statute, the Prosecution Response refers to three States which, the Response asserts, have “similar” (though not identical)

¹⁴ Prosecution Response para 8.

¹⁵ Prosecution Response paras 8 and 13.

constitutional provisions to Sierra Leone. The Response refers to the United States, Australia and South Africa.¹⁶

20. The Response asserts that US “commentators” have concluded that there is no constitutional objection to ratification of the ICC Statute by the USA. The Prosecution Response, however, only refers to one such “commentator”. The majority of US opinion, it seems, is of the view that it would be unconstitutional for the US to ratify the Rome Statute. In Congressional Debates on the ICC Mr Henry Hyde (Republican) stated:

“The court [ICC] is a threat to the sovereignty of our Nation. Its claim of criminal jurisdiction over our citizens directly conflicts with the supremacy of our Constitution, and any Americans prosecuted by this court will be without the protections guaranteed them by our Bill of Rights, beginning with the right to trial by jury. For those of us who are committed to protecting our Constitution, and we have heard many such voices during our debate on the terrorism bill just a few weeks ago, the first place to begin is with the International Criminal Court. ... Mr Chairman, the Constitution protects Americans. To put Americans outside the protection of the Constitution in a court that does not permit jury trials is an abandonment of one of the core indicia of citizenship.”¹⁷

Another Congressman, Mr Cunningham, put his objections to the ICC thus:

“I do not think that any of us wants our men and women that we ask to go into harm’s way in our military, or our intelligence agencies and their members, to be tried in a kangaroo court without the proper jurisdiction, I rise in strong support of the Hyde statement.”¹⁸

¹⁶ Prosecution Response para 13.

¹⁷ Congressional Record of Debate on Department of Defense Appropriations Act 28 November 2001.

¹⁸ *ibid*

21. In the same way that it would be unconstitutional for the Government of the USA to ratify the ICC Statute without making amendments to the Constitution, it was unconstitutional of the Government of Sierra Leone to effectively amend the Constitution of Sierra Leone by creating the Special Court without first seeking the views of the people of Sierra Leone. It appears that the US Congress is perhaps more inclined to protect its citizens than the Government of Sierra Leone.
22. The Prosecution Response selectively refers to two States that have not had constitutional issues arising out of ratification of the ICC Statute. There are now over 80 states that have ratified the ICC Statute. In the time available it has been possible to review some, but by no means all, of those States. It is abundantly clear that many of them had profound constitutional concerns surrounding ratification of the ICC Statute. What is clear is that the situation is certainly not as straightforward as the Prosecution contend in their Response.
23. It is not suggested that the Prosecution has deliberately tried to mislead the Trial Chamber by citing only Australia and South Africa in its review of states and the constitutional implications of ratifying the ICC statute. It may be that due to limited research facilities in Sierra Leone the Office of the Prosecutor has not been able to conduct as thorough a review as it might.¹⁹
24. Below is a list of some of the States that have experienced constitutional concerns arising from ratification of the ICC Statute:

Ireland: In order to ratify the ICC Statute it was necessary for Ireland to amend its Constitution as a result of concerns that certain provisions of the Constitution would conflict with its duties arising under the ICC Statute. Accordingly, in spring 2001 a Bill to amend the Constitution of Ireland was passed by both Houses of Parliament. On 7 June 2001, in compliance with the requirements of the Constitution, the proposal to amend the Constitution was

¹⁹ It is noted, however, that the Prosecution had no less than five highly qualified lawyers working on its Response – significantly more than the facilities afforded to the Defence, a point that the Trial Chamber may wish to note in the event of any subsequent Defence motion on the equality of arms.

submitted by referendum to the decision of the people of Ireland. It was approved by a majority of voters.

The Netherlands: According to the Dutch Constitution, the ratification of a treaty with provisions conflicting with the Constitution is possible without amending the Constitution under the condition that both houses of parliament accept the Bill of approval with a qualified two-third majority. The Netherlands had a number of constitutional concerns arising out of ratification of the ICC Statute. To resolve these concerns the Government of The Netherlands, in accordance with the Constitution, submitted a Bill for approval by a qualified majority to both the House of Representatives and the Senate. The Bill was accepted by the required majority in both Houses in 2001.

Czech Republic: In order to ratify the ICC Statute the Government of the Czech Republic submitted an amendment to the Constitution of the Czech Republic on 3 January 2001.

Azerbaijan: The Government of Azerbaijan has indicated that problems of a constitutional character have impeded ratification of the ICC Statute.

Moldova: Moldova indicated that it would be unable to ratify the ICC Statute without first amending its Constitution. It was anticipated that this would be a lengthy and complex process.

Portugal: In order to ratify the ICC Statute Portugal proposed amending its Constitution by adding an article to the effect that Portugal recognised the jurisdiction of the ICC.

Slovenia: Before ratification of the ICC Statute, the Government of Slovenia recognised that legal changes were required, including amendment of Slovenia's Constitution.

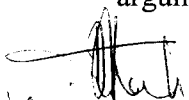
France: The French Constitutional Council held that France would have to amend its Constitution before ratifying the ICC Statute. Accordingly, Constitutional amendment was approved in June 1999.

25. This short review indicates that for those States for which amendment of the Constitution was required before ratification of the ICC Statute could be effected, such amendments were carried out. No attempt was made by such States to side step the requirements of the Constitution to perhaps avoid anticipated opposition to ratification of the ICC Statute.

Conclusion

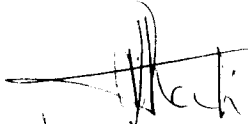
26. There is no excuse for the Government of Sierra Leone's failure to hold a referendum and carry out the necessary amendments to the Constitution of Sierra Leone before establishment of the Special Court. Failure to hold such a referendum renders the actions of the Government of Sierra Leone unconstitutional and unlawful. Accordingly, the Special Court has been unlawfully created and may not proceed to try any of those accused before it.

27. It is submitted that the Preliminary Motion, despite raising matters that maybe appear "straightforward" to the Prosecution,²⁰ raises issues that go to the heart of the legality of establishment of the Special Court.²¹ Such matters require detailed and careful consideration by the Trial Chamber and it is submitted that the Trial Chamber maybe assisted by oral argument on this issue. The Trial Chamber is assured that the Defence stand ready to present oral argument on this core issue if so required.


James Oury

²⁰ Prosecution Response para 17.

²¹ The Prosecution Response at para 17 selectively refers to the *Krnjelac* 'Decision on the Defence Preliminary Motion on the Form of the Indictment' 24 February 1999. It is noted that this was a Decision on the Form of the Indictment rather than jurisdiction. The Trial Chamber should note that on almost every Motion on Jurisdiction heard by the ICTY and ICTR oral argument was heard by the Trial Chamber concerned – see for example (i) *Tadic*(ICTY) (ii) *Hadzihasnovic et al* (ICTY) (iii) *Kanyabashi* (ICTR) (iv) *Milosevic* (ICTY)



Steven Powles

London, 30 June 2003.