

SCSL-2003-13-PT
(1298 - 1302)

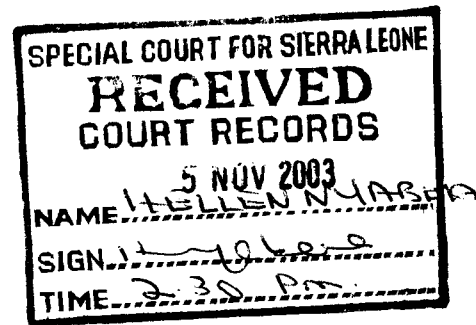
**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2003-13-PT

Before: Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: November 5, 2003



THE PROSECUTOR

against

SANTIGIE BORBOR KANU, also known as 55 also known as FIVE-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S.B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

**DEFENSE REPLY TO PROSECUTION RESPONSE TO THE DEFENCE MOTION
ON ABUSE OF PROCESS DUE TO INFRINGEMENT OF THE
PRINCIPLE OF *NULLUM CRIMEN SINE LEGE***

Office of the Prosecutor:

Mr. Luc Coté
Mr. Robert Petit
Mr. Christopher Santora

Defense Counsel:

Mr. Geert-Jan Alexander Knoops

I INTRODUCTION

1. The Defense herewith files its Reply to the Prosecution Response to the Defence Motion on Abuse of Process Due to Infringement of the Principle of *Nullum Crimen Sine Lege*, which was filed by the Office of the Prosecutor (hereafter referred to as the “Prosecution”) on October 30, 2003 (hereafter referred to as the “Prosecution Motion”).

II RETROACTIVITY: CONTRAVENTION WITH SIERRA LEONE CONSTITUTION AND INTERNATIONAL LAW

2. Para. 3 of the Prosecution Response disputes the existence of the doctrine of abuse of process under international criminal law. This doctrine emerges in, *inter alia*, the ICTY Decision on the Motion for Release in *Prosecutor v. Dokmanovic*¹ and was also discussed by the ICTY Trial Chamber in its decision on Preliminary Motions in *Prosecutor v. Milosevic* with regard to the argument of the *amicus curiae* that the transfer of the Accused amounted to an abuse of process.² This doctrine has no limitations as to the extent of the legal principles it may apply to. Therefore, also the principle of *nullum crimen sine lege* can be subjected to the concept of abuse of process.
3. The Prosecution submits in para. 5 of the Prosecution Response that there has been no violation of the principle of *nullum crimen sine lege*. The Defense argument as to the non-existence of the crime of “crimes against humanity” within Sierra Leonean national law at the time of the crimes set forth in the indictment is as such not disputed by the Prosecution.
4. Subsequently, the Prosecution refers to its arguments as set out in the “Prosecution Response to the Defence Motion Challenging Jurisdiction of the Court” dated October 30, 2003. These arguments are refuted by Section II of the Defense Reply to

¹ See ICTY Case. No. IT-95-13-A-PT, 22 October 1997.

² See *Prosecutor v. Milosevic*, Decision on Preliminary Motions of 8 November 2001, Case No. IT-99-37-PT, *inter alia*, paras. 43, 44.

Prosecution Response to the Defence Motion Challenging Jurisdiction of the Court. In this section it is argued that the Special Court is not to be seen as a separate legal entity totally abstracted from the Sierra Leonean Constitution.

5. In para. 7 of the Prosecution Response, it is asserted that the principle of *nullum crimen sine lege* only requires that the relevant acts were unlawful at the time of their commission as a matter of international law. However, the Prosecution does not provide decisive authorities in this respect, other than reference to the *Delalic* Appeals Judgment.³ However, as the Defense understands this judgment, it does not support the Prosecution's argument that the principle of *nullum crimen sine lege* only requires unlawfulness at the time of commission. To the contrary, Article 22 (1) of the ICC Statute clearly provides that "*a person shall not be criminal responsible (...) unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction (...).*" This provision, in addition to the principle of non-retroactivity as enshrined by Article 24 (1) of the ICC Statute, represents the view of contemporary international criminal law. Furthermore, according to scholarly opinion this principle must be complied with also at the international level as fundamental part of a set of basic human rights of individuals.⁴ The latter notion already denotes a strict interpretation of this principle namely that a person may only be held criminally liable and be punished if at the moment when he performed a certain act, that act was considered as a criminal offence by the relevant legal order. Therefore the alleged criterion of "unlawful" forms no part of this principle according to customary international law.
6. The Prosecution's argument in para. 7 that, if the Defense argument were correct any State could avoid jurisdiction of an international Court, is merely a policy argument and negates the *rationale* of the principle of *nullum crimen sine lege* as being meant to protect basic human rights of individuals (see ad 5 above).⁵
7. Para. 8 of the Prosecution Response refers to violations of common Article 3 to the Geneva Conventions, Additional Protocol II and other serious violations of

³ *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber Judgment, Case No. IT-96-21-A, February 20, 2001, para. 178 (see Prosecution Motion para. 7, footnote 5 and Annex 2 to the Prosecution Motion).

⁴ See Antonio Cassese, *International Criminal* (2003) at 144, 145.

⁵ See also Article 15 of the ICCPR, Article 7 of the ECHR and Article 9 of the ACHR.

international humanitarian law. It asserts that, at the times material to the Indictment in this case, violations of common Article 3 to the Geneva Conventions entailed individual criminal responsibility under international law. However, Chapter XII of the Constitution of Sierra Leone of 1991 provides in Article 1 that the laws of Sierra Leone shall comprise the Constitution, national laws, orders, rules, regulations, or other statutory instruments made by any person or pursuant to a power conferred in that behalf by the Constitution or any other law, the existing law and common law. This definition exhaustively enumerates the sources of national law without mentioning international law as such, more specifically bilateral agreements to be entered into between the Government of Sierra Leone and an international organization such as the UN. Similarly, Articles 2 – 7 of Chapter XII of the Constitution abstain from including these arguments as part of the laws of Sierra Leone. Given these constitutional provisions, irrespective of whether or not common Article 3 was part of international law at the time of commission, the principle of *nullum crimen sine lege* is infringed with respect to (also) common Article 3 *et al.* as this provision/these provisions was/were not embedded in the national laws of Sierra Leone at the time of the alleged commission.

8. In addition, the same principle was implemented in both the Third and Fourth Geneva Convention of 1949, namely Article 99 (1) of the Third and Article 67 of the Fourth Convention.⁶ This implementation emphasises the fundamental importance of this notion.
9. This argument, in conjunction with the argument referred to in ad 4 above (i.e., the Special Court is bound by the national Constitution), inherently leads to the conclusion that the Indictment of the Accused, where it refers to crimes which did not form part of the Sierra Leonean national laws at the time of their alleged commission, should be dismissed on the basis of violation of the principle of *nullum crimen sine lege*. The Articles 22 and 24 of the ICC Statute underscore this conclusion.

III CONCLUSION

⁶ See also Article 75 (4) (c) of the 1977 First Additional Protocol.

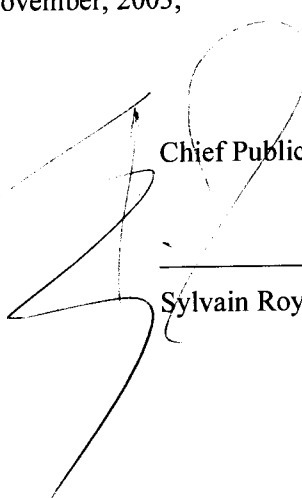
10. For these reasons, the Defense respectfully persists in praying that this Special Court will order that the charges against the Accused, as envisioned in Counts 3, 4, 6, 7, 10, 12, and 15 insofar as they entail the concept of crimes against humanity, be dismissed primarily by virtue of the principle of non-retroactivity and *nullum crimen sine lege*, and in the alternative, by virtue of Article 23(7) and Article 171(5) of the Sierra Leonean Constitution.

11. In furtherance, the Defense respectfully prays that Counts 1, 2, 5, 8, 9, 11, 13, 14, 16, and 17 be dismissed, insofar as, at the time these alleged crimes were committed, the abovementioned laws and customs of war as envisioned by Article 3 common to the Geneva Conventions and/or Additional Protocol II and other “*serious violations of international humanitarian law*,” were not implemented in the national legislation of the Republic of Sierra Leone.

Done in Freetown on this 5th day of November, 2003,

For the Defense

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Geert-Jan Alexander Knoops

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Chief Public Defense Office

Sylvain Roy