

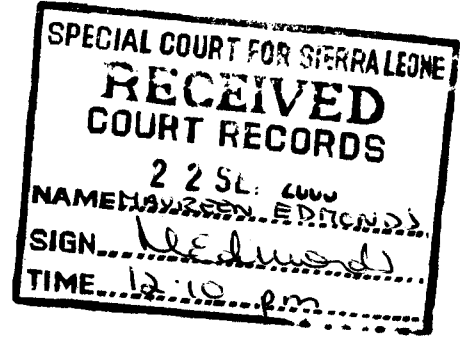
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SCSL-2003-10-PT-
(325-331)

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THE SPECIAL COURT FOR SIERRA LEONE

Before: The Trial Chamber
Registrar: Robin Vincent
Date Filed: 22 September 2003



THE PROSECUTOR

V.


BRIMA BAZZY KAMARA also known as
IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA

Case No. SCSL-2003-10-PT

Application by Brima Bazy Kamara in respect of Jurisdiction and
Defects in Indictment

Brima Bazy Kamara (the Applicant) moves the learned Trial Chamber for the following orders:

1. The indictment be discharged and the applicant be released forthwith.
2. In the alternative all charges, other than charges pursuant to Sierra Leonean law be struck out.
3. Further or in the alternative, all charges predating 7 July 1999 be struck out.
4. Leave be granted to bring any further Application in respect of objections to the form of indictment after disclosure by the Prosecutor pursuant to Rule 66(4)(i)


Edward Roy for
K.C. FLEMING Q.C.

THE SPECIAL COURT FOR SIERRA LEONE**Before:****Registrar:** Robin Vincent**Date Filed:****THE PROSECUTOR****V.****BRIMA BAZZY KAMARA also known as
IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA****Case No. SCSL-2003-10-PT**

ARGUMENT IN SUPPORT OF APPLICATION

1. The Indictment to be Discharged

- 1.1. The Constitution of Sierra Leone, 1991, (the Constitution), is the declaration as to the manner in which the Rule of Law will be applied in Sierra Leone.
- 1.2. By Special Court Agreement (the Agreement), signed 16 January 2002 by the Government of Sierra Leone and the United Nations, it was agreed between the parties that a special court would be established in Sierra Leone to hear charges against "those most responsible" for certain atrocities in Sierra Leone from the year 1996 through until the present.
- 1.3. Effect was given to this agreement by the passing of the *Special Court Agreement 2002 (Ratification) Act 2002* (the Act of 2002). That Act of 2002, by Section 10, says –

"The Special Court shall exercise the jurisdiction and powers conferred upon it by the Agreement in the manner provided in the Rules of Procedure and Evidence ..."

- 1.4. The Agreement, by Article 1, purports to "establish a special court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law

and Sierra Leonean law committed within the territory of Sierra Leone since 30 November 1996.”

- 1.5. The Special Court was then required to function in accordance with the Statute of the Special Court (the Statute), which was annexed to the Agreement.
- 1.6. By Article 1 of the Statute, it was provided that –

“The Special Court shall ... have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996 ...”
- 1.7. By Articles 2, 3 and 4 of the Statute the crimes are defined as Crimes against Humanity, Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, and Other Serious Violations of International Humanitarian Law. Article 5 then incorporates specific crimes already in existence pursuant to Sierra Leonean law.
- 1.8. Prior to the passing of the Act of 2002 the crimes set out in Articles 2, 3 and 4 of the statute were unknown to the Sierra Leonean domestic law.
- 1.9. The indictment against Brima Bazzy Kamara (Case No. SCSL-03-10-1) was signed 26 day of May 2003 by Desmond de Silva QC, Deputy Prosecutor, for David M Crane, the Prosecutor. It was confirmed by Judge Pierre Boutet on the 28 May 2003. In addition, Judge Boutet granted the Prosecutor’s request that a Warrant of Arrest and Order for Transfer and Detention be issued against Mr Kamara.
- 1.10. The Act of 2002 is a Sierra Leonean Statute creating Sierra Leonean law. No longer are the crimes alleged in articles 2, 3 and 4 in the international arena, but they are created crimes of Sierra Leone.
- 1.11. The Act of 2002, a Sierra Leonean Act, must therefore be interpreted pursuant to the Sierra Leonean Constitution.
- 1.12. First, the Prosecutor, Mr David Crane, is not a prosecutor pursuant to Sierra Leonean law. Nor can he be such a prosecutor, because the exclusive right and obligation to prosecute crime in Sierra Leone pursuant to the Constitution belongs to the Director of Public Prosecutions. (Constitution Section 66(7)).
- 1.13. Accordingly, the indictment is not an indictment known to Sierra Leonean law and should be discharged.
- 1.14. Second, the hearing at which the indictment was confirmed or approved in the proceedings of the Special Court replaces the Committal or Preliminary Hearing in traditional procedure. Traditionally, the Preliminary Hearing or Committal Proceeding are

held in public and in the presence of an accused. That traditional view that proceedings should be held in public is established in the Constitution by Sections 23(3) and 120(6).

- 1.15. The hearing to confirm or approve the indictment, being in private, is contrary to the Constitution, and the resulting indictment is not a document known to Sierra Leonean law. Accordingly, it should be discharged.
- 1.16. His Honour, Judge Boutet is a judge whose appointment is, purportedly, pursuant to the Act of 2002.
- 1.17. The Constitution provides that the Judicial Power of Sierra Leone will be exercised by judges appointed in a Constitutional manner (Section 120).
- 1.18. There can be no doubt that His Honour purported to exercise a jurisdiction in Sierra Leone in respect of purported crimes committed in Sierra Leone by, allegedly, a Sierra Leonean citizen. Accordingly, His Honour exercised the judicial power of Sierra Leone.
- 1.19. His Honour was not appointed pursuant to the Constitution, and therefore his exercise of judicial power was invalid in Sierra Leone, despite Section 11(2) of the Act of 2002 declaring him not to be part of the judiciary of Sierra Leone.
- 1.20. Accordingly, the purported confirmation or approval of any indictment was invalid and consequently the indictment must be discharged.
- 1.21. As a consequence of the three propositions set out in this section, the indictment is invalid, the arrest and transfer of Mr Kamara is invalid. The indictment must be set aside and Mr Kamara must be released forthwith.

2. Charges Be Struck Out

- 2.1. It is trite that no liability for punishment can be created retrospectively. It is foreign to any notion of fairness. Such a proposition is enshrined in the Constitution, Section 23(7).
- 2.2. Articles 2, 3 and 4 of the Statute, adopted into Sierra Leonean law by the Act of 2002, create crimes unknown to Sierra Leonean domestic law prior to the passing of the Act of 2002.
- 2.3. The passing of the Act of 2002 therefore offends the Constitution in so far as it purports to create a liability for punishment prior to the passing of the Act. It does so by purporting to give jurisdiction to the Special Court to hear and determine allegations in respect of those offences from 1996 until the passing of the Act of 2002.

2.4. Consequently, any allegation in the indictment prior to the passing of the Act of 2002 is invalid and should be struck out. The Special Court has no jurisdiction to hear such matters.

3. The Amnesty

3.1. Received wisdom, not judicially determined, is that there can be no amnesty or indemnity from prosecution given in respect of breaches of international criminal law.

3.2. However, that proposition has no relevance in respect of the charges pursuant to the indictment against Mr Kamara.

3.3. The Act of 2002 creates Sierra Leonean crimes pursuant to Articles 2, 3 and 4 of the Statute, and creates a Sierra Leonean jurisdiction in which allegations in respect of those crimes will be heard. The crimes are within the domestic jurisdiction of Sierra Leone and are determined pursuant to domestic law.

3.4. By Article IX of the Lomé Peace Agreement of 7 July 1999, a general amnesty was granted in respect of crimes committed in Sierra Leone pre-dating 7 July 1999.

3.5. The Lomé Peace Agreement was adopted by the Lomé Peace Agreement (Ratification) Act, 1999 (the Act of 1999). The Schedule to that Act contains the Peace Agreement. In the recitals to that Peace Agreement there is an acknowledgement of the “earlier initiatives undertaken by the countries of the sub-region and the international community, in bringing about a negotiated settlement of the conflict in Sierra Leone ...”, and, further, -

“Determined to establish sustainable peace and security; to pledge forthwith, to settle all past, present and future differences and grievances by peaceful means; ...”

3.6. By reference to the Act of 1999, it is clear that, first, the influences of the international community led to the Lomé Peace Agreement, second, the sovereignty of the Sierra Leonean people was acknowledged, and, third, their right to determine a sustainable peace was restated. In that context it was decided that all “past, present and future differences and grievances” would be dealt with.

3.7. It is true that the representative of the United Nations present on the signing of that Agreement included a disclaimer to the effect that, so far as the United Nations was concerned, there could be no amnesty in respect of international criminal law.

3.8. Such a disclaimer does not create law, and, if adopted in any way, it is simply a statement of somebody’s understanding of the received wisdom. There is no adoption of such a statement by any of the parties to the Lomé Peace Agreement in any event.

- 3.9. According to that received wisdom, there is a vital conflict created with enormous practical difficulties. On the one hand it is the international community who is interested in peace in the region, and an amnesty is a long accepted method by which peace can be achieved. The parties themselves have made an agreement that such a peace process as laid out in the Agreement will be put into effect. That includes, in the present case, the amnesty.
- 3.10. It is not for one of those parties (in this case the Government of Sierra Leone) to ignore its own obligations under the Agreement and put in place a regime which is contrary to its own undertaking in the matter. It is inappropriate to use a trick or a device to impose a liability that did not exist, either as a result of the amnesty, or as a result of some narrow definition of "law" in Section 3 of the Act of 1999.
- 3.11. Finally, the Peace Agreement was retroactive and proactive in its effect, creating an indemnity for acts which were committed between 1991 and 7 July 1999, rather than legal classifications which might be given to those acts.
- 3.12. Accordingly, the Lomē Peace Agreement has full force and effect in respect of the present indictment, and any acts alleged to have occurred prior to the 7 July 1999 are covered by that amnesty.
- 3.13. There is therefore no jurisdiction in the Special Court to hear and determine matters in respect of that period of time. Any such charges should be struck out of the indictment.

4. Further Objection

- 4.1. Because disclosure has not yet been given pursuant to Rule 66A(i), it is not possible to complete an analysis of the indictment, either as to jurisdiction or adequacy.
- 4.2. We would ask for leave to be given to bring a further application because of the operation of, and pursuant to, Rule 72(C).

K C FLEMING QC

Stewart Roy
For K. Fleming



Sylvain Roy
09/22/2003 09:38 AM

To: Ibrahim S Yillah/SCSL@SCSL
cc:
Subject: Filing - Kamara

Hi Ibrahim,

Can you verify format and file these documents on behalf of Ken Fleming.

Cheers

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----- Forwarded by Sylvain Roy/SCSL on 22/09/2003 09:36 -----



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22/09/2003 01:36

To: <roy@un.org>
cc:
Subject:

Dear Sylvain

Please find attached Motion and Supporting Argument.

Would you be so kind as to file them on my behalf.

Thanks

Ken Fleming QC



(per Christine Leonard, secretary to Mr Fleming QC) Application BBK.doc Argument BBKamara.doc