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SCSL-2003-13-PT
(777-781)

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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: October 20, 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

**MOTION ON ABUSE OF PROCESS DUE TO INFRINGEMENT OF PRINCIPLES OF NULLUM
CRIMEN SINE LEGE AND NON-RETROACTIVITY AS TO SEVERAL COUNTS**

Office of the Prosecutor:

Mr. Luc Coté
Ms. Brenda J. Hollis
Mr. Robert Petit

Defense Counsel:

Mr. Geert-Jan Alexander Knoops

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I INTRODUCTION

1. The Defense herewith seeks relief pursuant to Rule 72(B)(v) and addresses the Special Court with this motion pertaining to a (potential) form of abuse of process.
2. The common law doctrine of abuse of process may entail a wide scale of governmental (mis)conduct, originating from the infringement of fundamental principles of international criminal law, which infringement is beneficial to both the national and international prosecutorial authorities and goes to the detriment of the fair trial rights of the accused.
3. One of the main fundamental principles of international criminal law, which is of a protective nature as regards the position of the accused, is without doubt the principle of *nullum crimen sine lege*. This basic principle is not only part of several international conventions, such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights, but is also included in Article 22 of the ICC Statute. Bearing in mind this strict formulation of the *nullem crimen sine lege* in the latter Article, it may be said that this principle thus has attained the status of a norm of customary international law.¹

II RETROACTIVITY: CONTRAVENTION WITH SIERRA LEONE CONSTITUTION

A Supreme Law of the Land

4. According to Article 23(7) of Chapter III of the 1991 Sierra Leone Constitution (hereafter referred to as the “**Constitution**”), “*No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence.*”
5. By virtue of Article 171(15) of Chapter XIII of the Constitution, this legal instrument is to be qualified as “*the supreme law of Sierra Leone*” and sets forth

¹ See for this principle also Geert-Jan Alexander Knoops, Introduction to the Law of International Criminal Tribunals, Transnational Publishers Inc. New York, 2003 at 105.

the notion that “*any other law found to be inconsistent with any provision of this Constitution shall, (...) be void and of no effect*”. This notion therefore also counts for Article 23(7) of the Constitution.

6. The Sierra Leone Constitution thus reaffirms the fundamental character of the principle of non-retroactivity as regards to the punishability of crimes and principle of *nullum crimen sine lege*.
7. The Indictment against Mr. Kanu (hereafter referred to as the “**Accused**”) includes charges based on:
 - crimes against humanity;
 - violations of Article 3 common to the Geneva Conventions and of Additional Protocol II;
 - other serious violations of international humanitarian law.
8. The Republic of Sierra Leone acceded to the Geneva Conventions and Additional Protocol II to the Geneva Conventions on 21 October 1986. However, the laws embedded therein were not fully implemented within the Sierra Leone (criminal) law system.

B Crimes Against Humanity: No Part of The Sierra Leone Criminal Law System

9. In addition, the concept of crimes against humanity is unfamiliar to the national criminal law system of Sierra Leone, and is as such not defined as a criminal offence within the Sierra Leone criminal law.² Yet, the Accused, Mr. Kanu, is charged with several counts of crimes against humanity, such as Counts 3, 4, 6, 7, 10,12 and 15. It should be emphasized that these crimes allegedly took place before the entering into force of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone in January 2002.

² See B, Thompson, *The Criminal Law of Sierra Leone*, Lanham: University Press of America 1999, p. 57 – 92.

10. Accordingly, the crimes of which Mr. Kanu stands accused, in any event those enshrined in Counts 3, 4, 6, 7, 10, 12 and 15, were not regarded as crimes when they were allegedly committed. The framing of these charges may therefore be deemed to be an infringement of the abovementioned principles of non-retroactivity and *nullum crimen sine lege*. Moreover, the framing of the indictment in this way violates the mentioned constitutional Article 23(7) and renders the Indictment, in accordance with this constitutional principle, “*void and of no effect*”.
11. The result of this observation is therefore that prosecuting the Accused for said Counts 3, 4, 6, 7, 10, 12 and 15 of the Indictment amounts to a form of abuse of process, namely abuse of the two principles as mentioned in Section II above, as well as to abusive application of Article 23(7) of the Constitution.
12. In view of these observations, it is also questionable whether prosecuting the Accused under the laws and customs of war pursuant to the mentioned Article 3 Common to the Geneva Conventions, Additional Protocol II and other serious violations of international humanitarian law, complies with these principles.

C Abuse of Process of Sierra Leone Constitution: Attribution to the Prosecution

13. In case these Counts were to be upheld, the Prosecution before the Special Court would effectively be enabled to unjustly benefit (by means of allowing him/her to prosecute these crimes) from this breach of both a norm of customary international law and constitutional principle, which principle – as observed – is part of the supreme law of the land. Such a situation may fall within the ambit of the doctrine of abuse of process.
14. Bridging the gap between national and international institutions and processes in the field of international criminal law cannot be conducted to the detriment of an individual, accused of serious crimes. At the time of (some of) the alleged facts, delineated in the Counts 3, 4, 10 and 12, there was still no agreed international

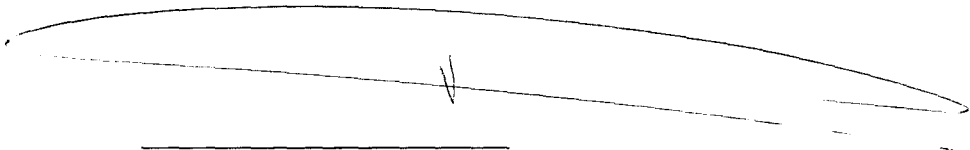
definition of the concept of crimes against humanity.³ Above all, how can an international or internationalized criminal court be “*established by law*” when it “*would lack many features of national criminal justice systems?*”⁴ As observed, the principle as set forth by Article 23(7) of the Constitution, is strongly entrenched within the Sierra Leone criminal law system.

III CONCLUSION AND PRAYER

15. International criminal justice, how understandable this perhaps may be from the victim perspective, may never be administered in a retrospective way.
16. Hence, the Defense prays that the Special Court will order that the charges against the Accused, as envisioned in Counts 3, 4, 6, 7, 10, 12 and 15 in so far 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 way, by virtue of Article 23(7) j° Article 171(15) of the Constitution.
17. 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 above mentioned 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, this 20th day of October 2003

Defense Counsel



Geert-Jan Alexander Knoops

³ See James Crawford, *The Drafting of the Rome Statute*, in: *From Nuremberg to The Hague* (ed. Philippe Sands), Cambridge University Press, 2003 at 124.

⁴ See Crawford, *supra* note 2, at 127.