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SCSL-2003-13-PT
(1303-1312)

**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**

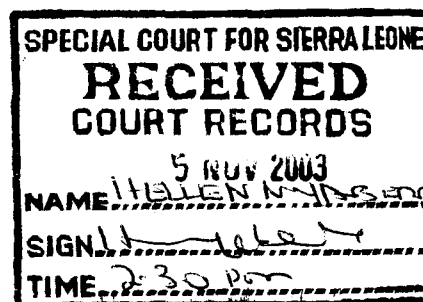
**DEFENSE REPLY TO PROSECUTION RESPONSE TO THE DEFENCE MOTION
CHALLENGING JURISDICTION OF THE COURT**

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 Challenging the Jurisdiction of the Court, 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 DEFECTS AS TO THE INTERNATIONAL LEGAL FOUNDATION OF THE SPECIAL COURT

2. In para. 4 of the Prosecution Motion, the Prosecution indicates that the Defense did not provide any arguments or authorities for the statement that a bilateral treaty, as opposed to a multilateral treaty, cannot set aside certain constitutional rights and provisions.
3. As will be set out below, the Lomé Peace Agreement may be considered as a treaty according to the doctrinal definition of the term “treaty”. On occasion the predecessor of the ICJ has referred to sovereign rights as a basis for a restrictive interpretation of treaty obligations, albeit that this depends on the context and intentions of the parties.¹ According to doctrinal view, constitutional limitations determine validity on the international plane with respect to treaties.² This approach is therefore supportive for the notion that, at least *a contrario*, a treaty as such cannot set aside basic constitutional rights such as those mentioned in the Defense Motion and considering the context and intentions of the parties with respect to the conclusion of the Lomé Peace Agreement (see further para. III below).

No Different Judicial Powers

4. The Defense interprets the Prosecution Motion in para. 5 as implying that the judicial power exercised by the Special Court is different from the powers of the national judiciary of Sierra Leone, and therefore any possible inconsistencies between the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, dated January 16, 2002 (hereafter

¹ See the *Wimbledon* case of the Permanent Court of International Justice, Series A, no.1, 1923, at 24; see also the *Free Zones* cases of this Court of 1930, Series A no. 24, at 12; see for this subject also Ian Brownlie, *Principles of Public International Law* (1990) at 288-289, 631; see also Lauterpacht, 26 BY (1949) at 48-85.

² This was the position of the International Law Commission in 1951, Yearbook 1951 at 73; see also Brownlie, *supra* note 1 at 613.

referred to as the “**Special Court Agreement**”) and the Constitution of Sierra Leone does not affect the validity, operation or exercise of jurisdiction by the Special Court.

5. Moreover, the Prosecution argues that “*the arguments in paragraphs 8 – 9 of the Defence Motion that international law is not a source under the Constitution of Sierra Leone is immaterial to the existence and operation of the Special Court, which exists and operates in the sphere of international law and not municipal law.*” The question is whether the functioning of the Special Court should be seen as independent from Sierra Leonean national laws, including the 1991 Constitution.
6. However, if the arguments of the “Motion Challenging the Jurisdiction of the Special Court, Raising Serious Issues Relating to Jurisdiction on Various Grounds and Objections Based on Abuse of Process” dated October 20, 2003 (hereafter referred to as the “**Defense Motion**”), were to be followed, the Special Court Agreement and the Constitution of Sierra Leone must be seen as inconsistent with each other. As a consequence, this would affect the validity of the Special Court. The latter situation is the case. As evidenced by Article 5 of the Statute of the Special Court, the national law of Sierra Leone and international law, as embedded in Articles 2 – 4 of the Statute, are intertwined in the Statute. Therefore the assumption of the Prosecution that the Special Court is merely governed by international law is therefore not correct. Article 5 of the Statute clearly shows that the Special Court-System is (also) governed by national Sierra Leonean law. Hence, this invalidates both the assumption that the Special Court and Sierra Leone are two separate judicial powers and the assumption that the Special Court Statute can set aside the Sierra Leonean Constitution.

Special Court is not an International Criminal Court

7. Unlike the Prosecution’s argument in para. 6 of the Prosecution Motion, the Special Court for Sierra Leone is not an international criminal court equivalent to the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court. The Special Court is a so-called *internationalized* or *hybrid* court, which means that it is partly national, partly international. This national component forms an additional argument that the validity of the Sierra Leone Constitution can not be excluded on this level. Hence, the Prosecution’s argument that

the subject-matter jurisdiction of the ICC is the same as the Special Court insofar as violations of international criminal law are concerned bears therefore no merit.

8. Should the reasoning in para. 8 of the Prosecution response to be followed, implementing legislation may not contradict existing constitutional provisions such as the one mentioned in the Defense Motion.
9. The comparison in the Prosecution Response between the ICC and the Special Court bears no merit. The ICC is, as its name already suggests, an *international* criminal court, while the Special Court is partly national, partly international (see ad 7 above). Comparing the creation of the Special Court with the situation of ratifying the ICC Statute and the compatibility thereof with national constitutions is therefore not a sound comparison. As the Special Court has partly a national component (see also Article 5 of its Statute), it has thus to meet international as well as national standards.
10. As a consequence the reference in the Prosecution Response in para. 10 to the situation of Australia and South Africa in ratifying the ICC Statute, saying there was no “*manifest*” violation of their constitutions, is likewise far from a valid comparison as these situations do not relate to a mixed tribunal.

The Special Court Is Bound by Constitution

11. Thus, the Special Court is not empowered to negate the Sierra Leonean Constitution, and consequently the jurisdiction of the Special Court can therefore not be exercised in violation of this Constitution.

Violation of the Constitution is “manifest”

12. However, in case the Special Court would reject the Defense argument in this respect, the Defense argues that the violation of the Constitution is “*manifest*” in terms of Article 46 of the 1969 Vienna Convention on the Law of Treaties. Clearly, and for instance, the principle of *nullum crimen sine lege*, relates to a principle of “*fundamental importance*” as enshrined by Article 46 (1) of the Vienna Convention. Violation of this principles may also be considered as “*manifest*” as defined in Article 46 (2) of this Convention. The Constitution sets out in Article 171(15) of Chapter XIII that this legal instrument is to be qualified as “*the supreme law of Sierra Leone*” and

that “any other law found to be inconsistent with any provision of this Constitution shall (...) be void and of no effect.” The Defense therefore concludes that in this event, the violation of the Constitution, which concerns a rule of its internal law of fundamental importance, is *manifest* within the purview of Article 46 of the Vienna Convention.

13. Para. 10 of the Prosecution’s Response, referring to the fact that both the Government and the Parliament of Sierra Leone apparently did not consider that they were acting unconstitutionally, leaves untouched the argument ad 12, as Article 46 of the Vienna Convention does not entail this criterion the Prosecution refers to.

Conclusion

14. In view of abovementioned arguments, in relation to the arguments mentioned in the Defense Motion, the Special Court may be considered to be bound by the provisions of the Sierra Leonean Constitution, as a result of which the Special Court Agreement is null and void. Accordingly the Special Court fails to have jurisdiction to try the Accused.

III LACK OF JURISDICTION DUE TO THE AMNESTY CLAUSE IN THE LOMÉ PEACE AGREEMENT

Lomé Peace Agreement Has Priority over Statute

15. Alternatively, when the arguments of the Prosecution in para. 13 were to be followed (i.e., the Special Court must comply with its Statute, even if that would violate the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone dated July 7, 1999 (hereafter referred to as the “**Lomé Peace Agreement**”)), this would imply that a treaty could be set aside by a later Agreement and Statute of a Special Court.
16. The Defense concludes, referring to Article 46 (2) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,³ holds that the Lomé Peace Agreement takes precedence over the Statute of the Special Court. Consequently, the Statute cannot bar

³ Also referred to by the Prosecution in footnote 5 of the Prosecution Motion.

applicability of the Lomé Peace Agreement, as a result of which Article IX thereof is applicable to Mr. Kanu, the Accused.

Lomé Peace Agreement Is a Treaty

17. The Defense in the **first place** holds that the Lomé Peace Agreement is governed by international law, as is evidenced by several provisions in the Agreement itself. In the Preamble to the Agreement, it is stated that “[r]ecognising the imperative that the children of Sierra Leone, (...) are entitled to special care and the protection of their inherent right to life, survival and development, in accordance with the provisions of the International Convention on the Rights of the Child.” In addition to this, Article XXIV reads as follows: “[t]he basic civil and political liberties recognized by the Sierra Leone legal system and contained in the declarations and principles of Human Rights adopted by the UN and OAU, especially the Universal Declaration of Human Rights and the African Charter on Human and Peoples’ Rights, shall be fully protected and promoted within Sierra Leonean society.” The Agreement should therefore be considered a ‘treaty’ under international law.

18. **Secondly**, the provisional draft of the International Law Commission defined a “treaty” as: “any international agreement in written form ...concluded between two or more States or other subjects of international law (emphasis added; GJK) and governed by international law.”⁴ The reference to “other subjects” was designed to provide for treaties concluded by, *inter alia*, international entities such as insurgents.⁵ This approach is therefore supportive of the acceptance that the Lomé agreement, concluded by the government and the RUF (the “insurgents”) falls within the ambit of the definition of a “treaty.”

19. Moreover, in the **third place**, the Defense holds that, as opposed to para. 14 of the Prosecution’s Response, the presence in the Agreement of the moral guarantors and international support mentioned in Articles XXXIV and XXXV, elevates the Agreement to the level of an international treaty, as these guarantors are “*facilitating and supporting the conclusion of this Agreement.*”

⁴ See Yearbook ILC, 1962, at 161.

⁵ See Brownlie, *o.c.* at 605.

20. The element of ratification and implementation of the Lomé Peace Agreement does not alter the international features of this Agreement. For, depending on the domestic legal system, States often have to implement international legislation in their domestic legal system. This does not affect the qualification of this instrument as a treaty, as evidenced by Article 46 of the 1969 Vienna Convention on the Law of Treaties.
21. Above all, the 1999 Lomé Peace Agreement (Ratification) Act⁶ is signed under the auspices of the Chairman of ECOWAS President Gnassingbé Eyadéma, and moreover “*in accordance with the provisions of the International Convention on the Rights of the Child.*” Therefore the fact that the Ratification Act is influenced by international law, is indicative for the said qualification of the Agreement itself.
22. In the **fourth place**, as the international community was involved in the aftermath of the underlying conflict, this international involvement is supportive as to the acceptance of the Agreement as being an international agreement with international implications. In the Preamble, the Agreement reads as follows: “[g]uided by the Declaration in the Final Communiqué of the Meeting in Lomé of the Ministers of Foreign Affairs of ECOWAS of 25 May 1999, in which they stressed the importance of democracy as a factor of regional peace and security, and as essential to the socio-economic development of democracy and respect of human rights while reaffirming the need for all Member States to consolidate their democratic base, observe the principles of good governance and good economic management in order to ensure the emergence and development of a democratic culture which takes into account the interests of the peoples of West Africa.” On more than one occasion, the Agreement speaks of the involvement of ECOWAS, which is an international organization. Moreover, the fact that the Agreement was signed in Lomé, Togo, and not in Sierra Leone, provides evidence of the fact that the Agreement, as well as the underlying preceding conflict, has an international character, and should therefore be considered an international treaty.
23. In para. 15 of the Prosecution Motion, the Prosecution puts forward the argument that the Lomé Peace Agreement was repealed by national law on March 7, 2002 by the

⁶ See Annex 14 to the Prosecution Motion, p. 1129 – 1170 of the Registry case file.

enactment of the Implementing Legislation. However, an international treaty cannot be repealed merely by enacting a national law and leaves untouched the qualification of the preceding Agreement as being international.

Lomé Peace Agreement Takes Precedence over Statute

24. Alternatively, should the peace agreement not be considered as an international treaty, but rather a national instrument, it may be argued that this instrument in this particular case prevails over the Statute of the Special Court. If the Lomé Peace Agreement is not considered a treaty in the alleged absence of an agreement between two or more States or international organizations, the Statute of the Special Court may neither be seen as a treaty based on similar argument. In the event of two conflicting national instruments, the Lomé Peace Agreement takes precedence over the Statute of the Special Court, as the Statute itself (other than the Special Court Agreement) is not part of the national laws of Sierra Leone, contrary to the Lomé Peace Agreement to which the Special Court is bound.

Article IX of the Lomé Peace Agreement

25. Para. 16 of the Prosecution Motion refers to the Articles 2 to 4 of the Statute, and holds that Article IX of the Lomé Peace Agreement was not intended to cover the crimes laid down in those Articles. However, the reading of the text of Article IX of the Lomé Peace Agreement is unambiguous, “*the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement. (...) the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, exx-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement.*” Indeed, the Special Representative of the Secretary-General for Sierra Leone gave a different interpretation of this provision. As the Prosecution indicated, nobody objected to the Special Representative having a different interpretation, but the text of the Agreement was not altered as a consequence thereof.

26. Furthermore, Article 31(1) of the Vienna Convention on the Law of Treaties provides that “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*” The ordinary meaning to be given to the terms of the treaty is obvious in this case. The fact that the Special Representative made a disclaimer – which was not signed by the parties – only refers to *his* interpretation of the Agreement. It can thus be referred to as a declaration made to a treaty wherein one of the parties explains how they interpret a certain provision in the treaty. However, given the clear wordings of the Agreement, the literal interpretation thereof should prevail, and thus the amnesty provided for in Article IX of the Lomé Peace Agreement does cover the acts of “*combatants and collaborators in respect of anything done by them.*”⁷ The amnesty therefore covers all charges against the Accused, which should as a consequence of the above be dismissed.

27. In the third place, according to customary international law, there is not yet a general obligation for States to refrain from enacting amnesty laws on international crimes, albeit that other States are not barred from prosecuting individuals for such crimes, when these individuals could benefit in their national State from an Amnesty Law.⁸ Several commentators argue that one should distinguish between amnesties granted as a result of a process of national reconciliation and blanket amnesties.⁹ The former principle could therefore only apply to the second category and as a consequence, amnesties stemming from national reconciliation (such as envisioned by the Lomé Peace Agreement) should be respected.¹⁰

28. Finally, the Defense interprets the Prosecution’s Response as indicating that the interpretation of the Lomé Peace Agreement by the Special Representative of the UN, i.e., an international organization, is decisive in interpreting this Agreement. On the other hand, the Prosecution seeks to indicate that the only parties to this Agreement are the Government of Sierra Leone and the RUF, and that therefore the Agreement is not an international treaty. These two arguments seem contradictory.

⁷ Restrictive interpretation prevails due to the authorities set forth in footnote 1.

⁸ See Antonio Cassese, *International Criminal Law*, (2003) at 315.

⁹ See Cassese, *supra* note 8 at 315-316.

¹⁰ *Ibid.*

29. In conclusion, Article IX of the Lomé Peace Agreement takes precedence Article 10 of the Special Court's Statute.

Amnesty Only for National Crimes

30. If the Special Court does not accept the above argument, the Lomé Peace Agreement should at least apply to domestic crimes as envisioned by the Articles 2 to 4 of the Statute. Several charges against the Accused relate to national crimes as well as international crimes. Consequently, the alleged facts in the indictment which are to be qualified as (also) national crimes are covered by the amnesty provision.¹¹

IV LACK OF JURISDICTION WITH REGARD TO SUPERIOR RESPONSIBILITY PRIOR TO ASSUMING COMMAND

31. The argument developed in para.19 of the Prosecution's Response (i.e., the argument that the Accused is also charged as being part of a joint criminal enterprise) leaves untouched the argument that the Special Court bears no jurisdiction for that part of the indictment that relates to the concept of superior responsibility for the alleged facts which took place before allegedly assuming command by the Accused.

V CONCLUSION

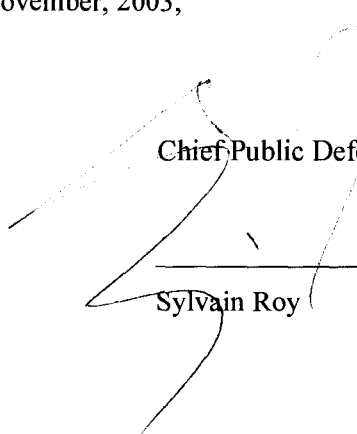
32. For these reasons, the Defense respectfully persists in praying that this Special Court, while declaring that it fails to have jurisdiction to try the Accused, dismisses the charges against the Accused (i) in its entirety, or (ii) partly.

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

For the Defense



Geert-Jan Alexander Knoops



Sylvain Roy

Chief Public Defense Office

¹¹ See para. 27 of the Defense Motion.