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THE SPECIAL COURT FOR SIERRA LEONE (“the Special Court”)

SITTING as the Trial Chamber (“the Chamber”), composed of Judge Bankole Thompson, Presiding Judge, Judge Benjamin Mutanga Itoe and Judge Pierre Boutet;

BEING SEIZED 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, filed on the 20th of October 2003 (“the Motion”), in relation to the criminal suit against **Santigie Borbor Kanu** (“the Accused”);

CONSIDERING the Prosecution’s Response to the Motion filed on the 30th of October 2003 (“the Response”);

CONSIDERING the Defence Reply thereto filed on the 5th of November 2003 (“the Reply”).

NOTING the Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, filed by the Defence on the 20th of October 2003;

CONSIDERING the entire provisions of Rule 72 of the Rules of Procedure and Evidence (“the Rules”);

CONSIDERING, in particular, the provisions of Rule 72(E) of the Rules which states that the Chamber shall refer to the Appeals Chamber for a determination as soon as practicable any preliminary motion which raises a serious issue relating to jurisdiction;

CONSIDERING that the Indictment charges the Accused on several counts of Crimes Against Humanity, punishable under Article 2 of the Statute of the Special Court (“the Statute”), Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3 of the Statute, and of Other Serious Violations of International Humanitarian Law, punishable under Article 4 of the Statute;

CONSIDERING that the Defence seeks relief pursuant to Rule 72(B) and (E) of the Rules for the following reasons:

1. There are defects as to the international legal foundation of the Special Court on the grounds that:
 - a. The Agreement between the United Nations and the Republic of Sierra Leone on the Establishment of the Special Court for Sierra Leone (“the Special Court Agreement”) of the 16th of January 2002 is a bilateral treaty between an international organisation and a State and as such cannot judicially amount to an international instrument which can set aside certain constitutional rights and provision. Consequently, Article IX of the Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of the 7th of July

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- 1999 (“the Lomé Peace Agreement”) ought to be considered taking precedence over, *inter alia*, Article 1 of the Special Court Agreement;
- b. Chapter XII of the Constitution exhaustively enumerates the sources of law in Sierra Leone without mentioning international law as such or bilateral agreements between the Government of Sierra Leone and international organizations. Therefore, without further national legislative measures the Special Court Agreement does not have direct effect within the domestic legal system of Sierra Leone;
 - c. The entering of a bilateral agreement which established the Special Court may be deemed to be unconstitutional as it infringes the sovereign rights of the people of Sierra Leone bestowed upon them by Article 5(2)(a) of Chapter XII of the Constitution;
 - d. According to Article 120(2) of Chapter VII, Part I of the Constitution the people of Sierra Leone can, in principle, only be tried by their national courts. Furthermore, any law that is inconsistent with the Constitution shall be void and have no effect pursuant to Article 171(15) of the Constitution. The Special Court Agreement cannot supersede the Constitution as the “Supreme Law” of the land;
 - e. Pursuant to Article 169(3)(e) of Chapter XI of the Constitution, military courts martial, not the Special Court, have exclusive jurisdiction over Sierra Leonean servicemen such as the Accused;
 - f. The transfer of nationals is an unconstitutional phenomenon resulting in lack of jurisdiction. The Constitution does not specifically refer to the eligibility of its nationals as to extradition to foreign courts. According to Sierra Leonean domestic law such extradition may be possible presupposed the existence of an extradition treaty. However, the “transfer” of nationals to the Special Court prescribed in Article 17(2)(d) of the Statute is not within the contemplation of “extradition” under the domestic law provisions nor does it comply with the aforesaid Article and, therefore, the “transfer” of the Accused to the Special Court is deemed to be unconstitutional.
2. The amnesty clause in the Lomé Peace Agreement clearly affects the jurisdiction of the Special Court:
- a. The Accused is covered by the judicial and factual scope of the amnesty provisions of Article IX of the Lomé Peace Agreement;
 - b. It is an abuse of process, as enshrined in Rule 72(B)(v) of the Rules, for the Government of Sierra Leone to enter a bilateral agreement to establish the Special Court to prosecute persons to whom the Government has already granted amnesty;

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- c. The Special Court lacks jurisdiction for the crimes set forth in the Indictment, insofar as these are punishable under the Sierra Leonean domestic laws.
3. The Special Court cannot assume jurisdiction with regard to Superior Responsibility for crimes which were allegedly committed prior to assuming command or allegedly taking the position of a superior and, consequently, the Special Court cannot hear charges allegedly committed by the Accused prior to February 1998.

AND

GIVEN that the Defence submits that in light of the foregoing arguments, taken individually or in combination, the Special Court fails to have jurisdiction to try the case against the Accused;

AND

PRAYS the Special Court to dismiss the charges against the Accused in its entirety or partly with reference to the charges launched against the Accused insofar as related to the concept of superior responsibility for crimes allegedly committed before February 1998;

NOTING FURTHER THAT

1. The Defence has also raised in the Motion objections based on both lack of jurisdiction and abuse of process. Considering that the procedure followed for a motion based on lack of jurisdiction differs from the procedure for a motion related to abuse of process, this practice is not instructive and can certainly lead to some confusion.
2. The Trial Chamber has authority pursuant to Rule 72(D) of the Rules to dispose of motions based on abuse of process, but not motions raising a serious issue relating to jurisdiction which must be in essence referred to the Appeals Chamber for determination pursuant to Rule 72(E). In combining these two grounds together in one motion the Trial Chamber has therefore no option but to refer the whole motion to the Appeals Chamber for its determination, if this Chamber finds that the issue about jurisdiction is a serious one. This process, however, deprives the Applicant of obtaining a separate decision by the Trial Chamber on the abuse of process objection, including the possibility of a referral pursuant to Rule 72(F).
3. This approach is even more regrettable given the concurrent filing of the Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, also filed on the 20th of October 2003 and noted above. The Chamber is of the view that it would have been more appropriate and much preferable for the Defence to combine all objections relating to abuse of process in one motion and all

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objections relating to lack of jurisdiction in a separate motion, rather than filing multiple motions that raise over-lapping issues.

NOW THEREFORE,

THE CHAMBER,

PURSUANT TO RULE 72(E) OF THE RULES,

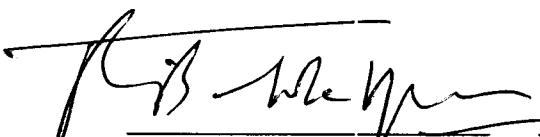
FINDS that the foregoing submissions raise a serious issue relating to the jurisdiction of the Special Court to try the Accused on all the counts of the Indictment that have been issued against him;

REFERS this Application to the Appeals Chamber of the Special Court for determination;

ORDERS

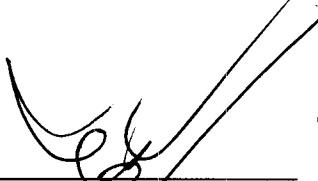
1. That the Defence file with the Appeals Chamber additional written submissions within 14 days of the receipt of this Order;
2. That any response to submissions filed under paragraph 1 above be filed with the Appeals Chamber within 14 days thereof;
3. That any reply thereto be filed with the Appeals Chamber within 7 days; and
4. That the reference of this Motion to the Appeals Chamber shall not operate as a stay of the trial of the Accused.

Done at Freetown this 22nd day of January 2004



Judge Bankole Thompson

Presiding Judge,
Trial Chamber



Judge Benjamin Mutanga Itoe



Judge Pierre Boutet

