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1543

SCSL-2003-12-PT
(1543-1546)



SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 4th day of December 2003

The Prosecutor against

Allieu Kondewa
(Case No.SCSL-2003-12-PT)

ORDER PURSUANT TO RULE 72 (E)

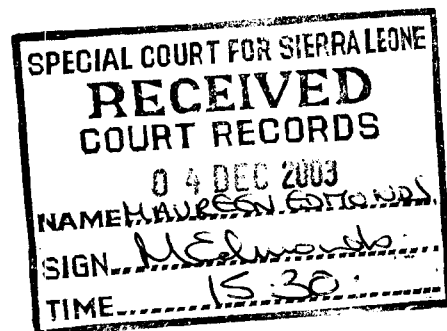
**DEFENCE MOTION BASED ON LACK OF JURISDICTION ESTABLISHMENT OF
SPECIAL COURT VIOLATES CONSTITUTION OF SIERRA LEONE**

Office of the Prosecutor:

Luc Côté, Chief of Prosecutions
James C. Johnson, Senior Trial Counsel
Mohamed A. Bangora, Associate Trial Counsel

Defence Counsel

James MacGuill, Lead Counsel
James Evans, Co-Counsel
Charles Margai, Co-Counsel



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

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

BEING SEIZED of the Preliminary Motion Based on Lack of Jurisdiction Establishment of Special Court Violates Constitution of Sierra Leone, filed on the 7th day of November 2003 (“the Motion”), in relation to the criminal suit against **Allieu Kondewa** (“the Accused”);

CONSIDERING the Prosecution’s Response to the Motion filed on the 14th day of November 2003 (“the Response”);

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

CONSIDERING in particular Rule 72(D) of the Rules which specifies that the Trial Chamber shall dispose of preliminary motions notwithstanding that the Motion was filed before Judge Pierre Boutet as Designated Judge;

CONSIDERING further the provisions of Rule 72(E) of the Rules which state 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 makes the following submissions in support of its objection that the Special Court lacks jurisdiction over the Accused:

1. In establishing the Special Court the Government of Sierra Leone has acted in contravention of the Constitution of Sierra Leone.
2. The Government of Sierra Leone was bound to respect the Constitution of Sierra Leone (“the Constitution”) when it created the Special Court in an Agreement with the United Nations. The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone¹ stated *inter alia*, that: “Its [the Special Court’s] implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements”.

¹ UN Doc. S/2000/915, 4 October 2000, paragraph 9.

- 3. Section 108 of the Constitution prescribes that various Sections of the Constitution may not be amended without first having been approved by referendum and the necessary process that must be followed in order for this to be valid. Failure to comply with the Constitution renders the Special Court unconstitutional and thereby lacking the jurisdiction to prosecute persons before it.
- 4. The creation of the Special Court clearly amends the judicial framework and court structure in Sierra Leone without complying with fundamental aspects of the Constitution of Sierra Leone for which no referendum has been held.
- 5. Further, the only courts empowered to order the deprivation of liberty (as envisaged by Section 17 (1) of the Constitution) are those provided for in Section 30 (1) of the Constitution. The Defence avers that the Special Court is not one of those courts and subsequently cannot detain persons in accordance with the Constitution. Neither is the Special Court a court as envisaged by Section 30 (1) of the Constitution able to determine the charges against someone within the terms of Section 23 (1) of the Constitution.

AND

GIVEN that the Defence concludes that only after amendment of the Constitution pursuant to Section 108 would the Special Court be able to operate within the jurisdiction of Sierra Leone and in the absence thereof, the establishment of the Special Court is unconstitutional.

FURTHERMORE that the Government of Sierra Leone acted unconstitutionally in bypassing the views and wishes of the people of Sierra Leone in relying on Section 40 (4) instead of Section 108 of the Constitution.

NOW THEREFORE,

THE CHAMBER,

PURSUANT TO RULE 72 (B) (i) and 72 (E) OF THE RULES,

FINDS that the foregoing submissions relate to an objection based on lack of jurisdiction which raises a serious issue relating to the jurisdiction of the Special Court to try the Accused.

REFERS this Motion and Response to the Appeals Chamber of the Special Court for determination pursuant to Rules 72 (E) of the Rules;

ACCORDINGLY ORDERS:

That the reference of this Motion to the Appeals Chamber shall not operate as a stay of the trial of the Accused.

Done in Freetown, this 4th day of December 2003

The Trial Chamber

Judge Bankole Thompson
Presiding Judge



Judge Pierre Boutet

Judge Benjamin Mutanga Itoe

