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SCSL-2003-09-PT
(1511 - 1514)



SPECIAL COURT FOR SIERRA LEONE

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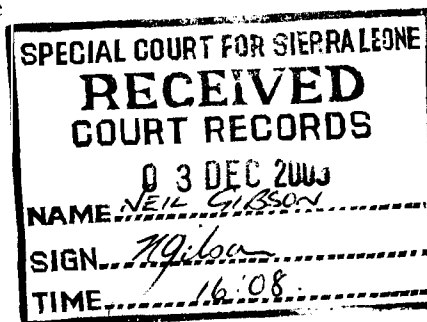
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 3rd day of December 2003



The Prosecutor against

Augustine Gbao
(Case No.SCSL-2003-09-PT)

ORDER PURSUANT TO RULE 72 (E)

**DEFENCE PRELIMINARY MOTION ON THE INVALIDITY OF THE
AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT
OF SIERRA LEONE ON THE ESTABLISHMENT OF THE SPECIAL COURT OF
SIERRA LEONE**

Office of the Prosecutor:

David Crane, Prosecutor
Desmond de Silva Q.C, Deputy Prosecutor
Walter Marcus-Jones, Senior Appellate Counsel
Christopher Staker, Senior Appellate Counsel
Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:

Girish Thanki, Lead Counsel
Andreas O'Shea, Co-Counsel
Kenneth Carr, 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 Defence Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court of Sierra Leone, filed on the 6th day of November 2003 (“the Motion”), in relation to the criminal suit against **Augustine Gbao** (“the Accused”);

CONSIDERING the Prosecution’s Response to the Motion filed on the 17th day of November 2003 (“the Response”);

CONSIDERING the Defence Reply thereto filed on the 24th day of November 2003 (“the Reply”).

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 makes the following objections to the validity of the Agreement between the United Nations and the Government of Sierra Leone establishing the Special Court namely,

1. That the responsibility for the maintenance of international peace and security falls within the primary responsibility of the Security Council of the United Nations. When the latter, through the Secretary-General, concluded a treaty with the Government of Sierra Leone, the Agreement on the Establishment of the Special Court for Sierra Leone (“the Special Court Agreement”) to create a new international organisation with a separate legal personality, it unlawfully delegated and transferred the responsibility of the United Nations as guardians of international peace to another body that is not under the direct control of the United Nations. Furthermore, unlike the United Nations or its subsidiaries this new body does not enjoy the blessing of the international community of States as a whole.

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2. That in so far as international organisations have the power to create new international organisations by treaties, it is nevertheless clear that such power would not extend to the exercise of criminal jurisdiction which falls within the preserve of the sovereign States unless States have manifested a very clear intention to transfer that power to a particular international organisation.
3. That the prosecution of international crimes is a customary right which can be voluntarily renounced - as was done by Sierra Leone in Article IX of the Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of the 7th July 1999 ("the Lomé Accord"). Sierra Leone thereby lost its capacity to conclude a treaty to exercise this sovereign power which it no longer possessed, and lastly,
4. That according to the law, if a treaty concluded as the result of a fundamental error, either by fraud of one party or where there has been no negligence on the part of the other, then that treaty is invalid. That when the Government of Sierra Leone concluded the Special Court Agreement they failed to give full disclosure to the United Nations that it and the ECOWAS States had continued to represent to the Revolutionary United Front expressly or impliedly that the Lomé Accord continued to apply and its members would not be punished for crimes under international law up until the disarmament of the 14th January 2002. Consequently, had the United Nations known of this deception, they would not have been party to the Special Court Agreement and therefore the Special Court Agreement was concluded through a fraud against the United Nations or by error for which the United Nations is not responsible. As a result of the foregoing, the Defence contends that the Special Court Agreement is invalid.

MINDFUL of the Response by the Prosecution to these objections by the Defence;

NOW THEREFORE,

THE CHAMBER,

PURSUANT TO RULE 72 (E) OF THE RULES,

FINDS that the foregoing submissions and the arguments in rebuttal advanced by the Prosecution 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;

ACCORDINGLY REFERS this Motion, Response and Reply 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 in Freetown, this 3rd day of December 2003

The Trial Chamber

Judge Bankole Thompson,
Presiding Judge

Judge Pierre Boutet

Judge Benjamin Mutanga Itoe

