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SCSL-2004-15-AR72(E)
(1209-1235)

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SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE APPEALS CHAMBER

Before:	Justice Renate Winter, Presiding Justice George Gelaga King Justice Emmanuel Ayoola
Registrar:	Robin Vincent
Date:	13 March 2004

PROSECUTOR	**Against**	**Morris Kallon** (Case No. SCSL-2004-15-AR72(E)) **Sam Hinga Norman** (Case No. SCSL-2004-14- AR72(E)) **Brima Bazzy Kamara** (Case No. SCSL-2004-16- AR72(E))

DECISION ON CONSTITUTIONALITY AND LACK OF JURISDICTION

Office of the Prosecutor:

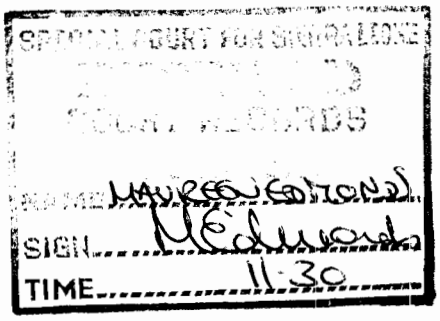
Desmond de Silva, Q.C
Walter Marcus-Jones
Christopher Staker

Defence Counsel for Sam Hinga Norman:
Timothy Owen
Quincy Whitaker
Sulaiman Banja Tejan-Sie III

Defence Counsel for Morris Kallon:
Stephen Powles
James Oury

Defence Counsel for Brima Bazzy Kamara:
Ken Fleming, Q.C.

Defence Counsel for Moinina Fofana (Intervening):
Michiel Pestman
Arrow John Bokarie



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THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court");

SITTING as the Appeals Chamber ("the Chamber") of the Special Court for Sierra Leone, composed of Justice Renate Winter, Presiding, Justice George Gelaga King, and Justice Emmanuel Ayoola;

I, JUSTICE GEORGE GELAGA KING, HEREBY DECIDE AS FOLLOWS:

CONSIDERING THE SUBMISSIONS OF THE PARTIES:

I. THE MOTIONS

1. The three cases before the Chamber – *Prosecutor v Morris Kallon*[1], *Prosecutor v Sam Hinga Norman*[2] and *Prosecutor v Brima Bazzy Kamara*[3], all raise issues of constitutionality and lack of jurisdiction of the Special Court for Sierra Leone. The arguments put forward by Counsel for each of the accused persons are either identical or overlap with one another. It is, in the circumstances, both logical and convenient to deliver one comprehensive decision in respect of all the three Accused. In those instances where new and distinct arguments have been put forward by one or other counsel in respect of any of the Accused the Chamber will consider them and adjudicate on them in its decision which will be the overall ruling on the three cases before us.

A. The Motion on behalf of Morris Kallon

2. The first Preliminary Motion filed challenging the constitutionality and lack of jurisdiction of the Special Court is that of Morris Kallon. The Chamber's decision in that case will apply, of course, to the other two.

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[1] Prior to the Decision and Order on Prosecution Motions for Joinder, 27 January 2004, and the subsequent Registry Decision for the Assignment of a new Case Number, 3 February 2004, the case number was Case No. SCSL-2003-07-PT.

[2] See *supra* note 1: former Case No. SCSL-2003-08-PT.

[3] See *supra* note 1: former Case No. SCSL-2003-10-PT.

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3. On 16 June 2003, Morris Kallon ("the Accused Kallon") filed a preliminary motion[4] in the Registry of the Special Court for Sierra Leone ("the Special Court") pursuant to Rule 72 of the Court's Rules of Procedure and Evidence ("the Rules") concerning the constitutionality of the Special Court and seeking a declaration that:

   a) the Government of Sierra Leone acted unconstitutionally in establishing the Special Court;

   b) the Special Court is an illegal and *ultra vires* institution;

   c) the Accused Kallon be released from the custody of the Special Court immediately; and in the alternative,

   d) a postponement of all operations of the Special Court until such time as the Sierra Leone Government is able to organise and conduct a referendum in accordance with section 108 of the Sierra Leone Constitution[5] ("the Constitution").[6]

4. The Accused Kallon further applied for an oral hearing of his motion.

5. On 23 June 2003 the Prosecution filed its Response seeking a dismissal of the preliminary motion in its entirety.[7]

6. On 30 June 2003 a Defence Reply was filed urging oral argument on the grounds that the issues raised in the preliminary motion "go to the heart of the legality of establishment of the Special Court."[8]

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[4] *Prosecutor v. Morris Kallon*, Case No. SCSL-2003-07-PT, 'Preliminary Motion based on lack of Jurisdiction: Establishment of Special Court violates Constitution of Sierra Leone', 16 June 2003 ("*Kallon*, Preliminary Motion").
[5] Act No. 6 of 1991.
[6] *Kallon*, Preliminary Motion, para 23.
[7] *Prosecutor v. Morris Kallon*, Case No. SCSL-2003-07-PT, 'Prosecution Response to the Second Defence Preliminary Motion (Constitution of Sierra Leone)', 23 June 2003 ("*Kallon*, Prosecution Response"), para 27.
[8] *Prosecutor v. Morris Kallon*, Case No. SCSL-2003-07-PT, 'Reply to Prosecution Response to Preliminary Motion based on lack of Jurisdiction: Establishment of Special Court violates Constitution of Sierra Leone', 30 June 2003 ("*Kallon*, Defence Reply").

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7. In accordance with Rule 72(E) of the Rules the Trial Chamber referred the preliminary motion to the Appeals Chamber which heard oral arguments on the motion on 5 November 2003.[9]

The Motion

8. The submissions in support of the Accused Kallon's motion may be summarised as follows:

   a) The Special Court was created by an Agreement dated 16 January 2002 ("the Special Court Agreement") between the United Nations ("UN")and the Government of Sierra Leone ("the Government") and the latter was duty bound to abide by and honour the Constitution. The Government failed to comply with the Constitution in the establishment of the Special Court and consequently the Special Court is unconstitutional and has no jurisdiction to prosecute persons before it since it has not been established by law.[10]

   b) While accepting that the Special Court Agreement 2002 (Ratification) Act 2002 ("the Ratification Act") asserts that the Special Court Agreement was, for the part of the Government, signed under the authority of the President pursuant to section 40(4) of the Constitution,[11] the creation of the Special Court clearly amends the judicial framework and court structure in Sierra Leone. According to the provisions of section 108(4) of the Constitution such amendments cannot be made without a referendum of the people of Sierra Leone and no such referendum has been held.[12]

   c) The Government, in creating the Special Court, as a court sitting in Sierra Leone, presiding over crimes committed in Sierra Leone, by nationals of Sierra Leone,

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[9] Order pursuant to Rule 72(E): Defence Preliminary Motion based on Lack of Jurisdiction: Establishment of Special Court violates Constitution of Sierra Leone, Case No SCSL-2003-07-PT, 17 September 2003; Order pursuant to Rule 72(E): Defence Preliminary Motion on Lack of Jurisdiction: Lawfulness of the Court's Establishment, Case No. SCSL-2003-08-PT, 26 June 2003; Order pursuant to Rule 72(E): Application by Brima Bazzy Kamara in Respect of Jurisdiction and Defects in Indictment, Case No. SCSL-2003-10-PT, 22 September 2003.

[10] *Kallon*, Preliminary Motion, para 2.

[11] *Ibid.*, para 14.

[12] *Ibid.*, paras 5 -7.

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"with a view to potentially imprisoning persons convicted by the Special Court in Sierra Leone, acted unconstitutionally in bypassing the views and wishes of the people of Sierra Leone in relying on section 40(4) of the Constitution instead of section 108 of the Constitution in the creation of the Special Court."[13]

d) The Special Court is not a 'court' as envisaged under sub-sections 17(1) and 30(1) of the Constitution and is, therefore, not empowered to order the deprivation of liberty of persons brought before it, nor is it a 'court' empowered to hear criminal cases under sub-sections 23(1) and 30(1) of the Constitution.[14]

The Response

9. In its Response, the Prosecution refutes these submissions and postulates as follows:

a) Section 11(2) of the Ratification Act expressly states that the Special Court does "not form part of the Judiciary of Sierra Leone." The Special Court does not exist or operate at all within the sphere of the municipal law of Sierra Leone and is not a national court of Sierra Leone. The Defence in conceiving it to be part of the judicial structure of the Sierra Leone Judiciary are, therefore, in error.[15]

b) The Constitution is only capable of regulating the judicial power of the Republic of Sierra Leone within the municipal law of Sierra Leone. Section 120(1) of the Constitution which is the first provision in Chapter 7 deals with the Judiciary of Sierra Leone and provides that "the judicial power in Sierra Leone shall be vested in the Judiciary of which the Chief Justice shall be the Head." The Prosecution stresses that the Defence itself, in its paragraph 7 of the preliminary motion expressly acknowledges that Chapter 7 of the Constitution "is concerned with the judiciary of Sierra Leone."[16]

[13] *Kallon*, Preliminary Motion, para 18.
[14] *Ibid.*, paras 8 - 11.
[15] *Kallon*, Prosecution Response, para 6.
[16] *Ibid.*, para 5.

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c) The Report of the UN-Secretary-General[17] establishes that the Special Court Agreement is a treaty under international law and is binding on both parties even if (which the Prosecution denies) it is in conflict with domestic law. The Special Court exists and functions in the sphere of international law and the judicial power it exercises "is not the judicial power of the Republic of Sierra Leone."[18]

d) The creation of the Special Court is analogous to the creation of the International Criminal Court ("the ICC"), another treaty-based international criminal court, whose Statute Sierra Leone signed on 19 October 1998 and ratified on 15 September 2000.[19] The ICC has been adopted by other States such as Australia and South Africa, which have similar provisions to those of Sierra Leone, without first amending their Constitutions.[20]

e) Article 27 of the 1969 Vienna Convention on the Law of Treaties read in conjunction with Article 46 thereof[21], together with similar provisions in the 1986 Vienna Convention[22] provide that a party may not invoke provisions of internal law as justification for its failure to perform a treaty "unless that violation was manifest and concerned a rule of its internal law of fundamental importance."[23] Even it is assumed that the conclusion of the Special Court Agreement breached the Constitution, any breach would not be 'manifest' within the meaning of Article 46 of the Vienna Conventions.[24]

f) Given there has been no manifest violation of the Constitution, it is immaterial to the validity of the Special Court Agreement and to Sierra Leone's obligations under that Agreement whether the conclusion of the Agreement by the

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[17] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone 4 October, 2000, S/2000/915, para 9 ("Report of the Secretary-General").
[18] *Kallon*, Prosecution Response, para 7.
[19] *Ibid.*, para 8.
[20] *Kallon*, Prosecution Response, para 13.
[21] Vienna Convention on the Law of Treaties, adopted on 22 May 1969 in Vienna, entered into force 27 January 1980; United Nations, Treaty Series, vol. 1155, p.331.
[22] See Articles 27(1) and (3), and Article 46(1) and (3) of the Vienna Convention on the Law of Treaties, *ibid.*
[23] Article 46 of the Vienna Convention on the Law of Treaties, *ibid.*
[24] *Kallon*, Prosecution Response, paras 10 - 13.

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Government of Sierra Leone was not in fact in conformity with the Constitution. The Special Court has no jurisdiction to decide this question.[25]

g) Since the Defence accepts that it is asserted by the Government that the Ratification Act amounts to ratification of the Special Court Agreement by the Parliament for the purposes of section 40(4) of the Constitution, *prima facie* the constitutional requirements for the conclusion of the Special Court Agreement have been satisfied.[26]

h) The question whether there has been any violation of the Constitution is one which could only be determined by the national courts of Sierra Leone.[27]

The Reply

10. In Reply the Defence maintains its original submissions and stresses as follows:

a.) The creation of the Special Court is a clear attempt to amend the Constitution without first following the correct safeguards and procedures. The fact that the international agreement is with the United Nations and not another sovereign State is immaterial: it would still amount to a violation of the Constitution.[28]

b.) The Prosecution's submission that the Special Court has no jurisdiction to decide the question of conformity with the Constitution is incorrect and misconceived. Similar arguments were advanced by the Prosecutor at the International Criminal Tribunal for the former Yugoslavia ("the ICTY") in response to the Defence motion on jurisdiction in the case of *Prosecutor v Dusko Tadic*. In its decision, the Chamber flatly rejected the Prosecutor's arguments.[29]

c.) In that *Tadic* case the Defence had questioned the illegal foundation of the ICTY. The Prosecutor had argued that the legality and primacy of the Tribunal could not

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[25] *Ibid.*, para 15.
[26] *Ibid.*, para 14.
[27] *Ibid.*, para 16.
[28] *Kallon*, Defence Reply, para 8.
[29] *Prosecutor v Dusko Tadic a/k/a "Dule"*, Case No. IT-94-I–AR72, App. Ch. 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995 ("*Tadic*, 2 Oct 1995").

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be challenged and considered by the Appeals Chamber. The Appeals Chamber rejected that argument and held:

> "All the grounds of contestation relied upon by the Appellant result, in the final analysis in an assessment of the legal capability of the International Tribunal to try the case. What is this, if not in the end a question of jurisdiction? And what body is legally authorised to pass on that issue if not the Appeals Chamber of the International Tribunal?.... After all, in a court of law, common sense ought to be honoured not only when the facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of the Appellant's interlocutory appeal is indisputable."[30]

d.) In the *Tadic* case the Appeals Chamber held that "the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council".[31] The Appeals Chamber considered "The Issue of Constitutionality" of the Security Council's action in establishing the ICTY pursuant to a Security Council Resolution.[32] As in the *Tadic* case, it is submitted that the Trial Chamber (in this instance the Appeals Chamber) is able and indeed now obliged, to consider the constitutionality of the Government's actions in establishing the Special Court pursuant to an international agreement with the UN and its failure to hold a referendum as required by the Constitution of Sierra Leone.[33]

e.) Sierra Leone's ratification of the ICC has not yet been challenged and thus its validity has not been tested. Further, the ICC is not comparable to the Special Court because the former was established pursuant to a multi-lateral treaty as distinct from the present case where the treaty is between the UN and one Government. In any event, several States have found it necessary to amend their Constitutions in order to ratify the ICC Statute.[34]

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[30] *Tadic*, 2 Oct 1995, para 6.
[31] *Ibid.* para 22.
[32] U.N. Security Council Resolution 827, 25 May 1993.
[33] *Kallon*, Defence Reply, para 16.
[34] *Kallon*, Defence Reply, para 18, 24.

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B. The Motion on behalf of Samuel Hinga Norman

11. On 26 June 2003, Samuel Hinga Norman (the Accused Hinga Norman) filed a preliminary motion concerning the constitutionality of the Special Court.[35] The Prosecution filed its Response on 7 July 2003[36] and the Defence filed its Reply on 14 July 2003[37]. Oral arguments were heard by the Appeals Chamber on 5 November 2003.

The Motion

12. The Accused Hinga Norman's motion is almost identical to that for Kallon except for the following additional submissions:

    a) The concurrent jurisdiction and primacy granted the Special Court under Article 8(1) and (2) of the Statute of the Special Court for Sierra Leone ("the Statute of the Court") contravene section 122 and section 125 of the Constitution.[38]

    b) In May 2000 when the Special Court Agreement was concluded the Government controlled only one-third of Sierra Leone territory. It therefore lacked "effective control" and the habitual obedience of the majority of the population and was consequently not in a position to negotiate an agreement, thereby rendering the Special Court Agreement nugatory.[39]

The Response

13. The Prosecution's Response is identical to its Response to the Accused Kallon's motion. It, however, further asserts that where it is established that a State exists, it is not necessary that its legitimate government be in control of the greater part of its territory.[40]

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[35] *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, 'Preliminary Motion based on Lack of Jurisdiction: Lawfulness of the Court's Establishment', 26 June 2003 ("*Norman*, Preliminary Motion").
[36] *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, 'Prosecution Response to the First Defence Preliminary Motion (Lawfulness of the Court's Establishment)', 7 July 2003. ("*Norman*, Prosecution Response").
[37] *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, 'Reply - Preliminary Motion based on Lack of Jurisdiction: Lawfulness of the Court's Establishment', 14 July 2003 ("*Norman*, Defence Reply").
[38] *Norman*, Defence Motion, paras 9 - 13.
[39] *Norman*, Defence Motion, paras 21 - 25.
[40] *Norman*, Prosecution Response, para 13.

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The Reply

14. The Ratification Act was a necessary legal requirement for the Special Court Agreement to enter into force. There was a manifest breach of an internal law of fundamental importance by the Government in implementing the Special Court Agreement. The analogy with the ICC is untenable given the Court's hybrid nature.

C. The Motion on behalf of Brima Bazzy Kamara

The Motion[41]

15. Here the Defence submits that the Ratification Act is a Sierra Leonean Statute creating Sierra Leonean law and creating crimes of Sierra Leone. As such the Act must be interpreted pursuant to the Constitution. Any exercise of judicial power is invalid. Articles 2, 3 and 4 of the Statute of the Special Court create crimes unknown to Sierra Leonean domestic law prior to the passing of the Ratification Act. The Act therefore offends the Constitution insofar as it purports to create a liability for punishment prior to the passing of the Act.[42]

The Response[43]

16. The Prosecution submits that the Constitution is only capable of regulating and only purports to regulate the judicial power of the Republic of Sierra Leone within the sphere of the domestic law. It maintains that as is expressly stated in section 11(2) of the Ratification Act, the Special Court does "not form part of the Judiciary of Sierra Leone". It does not exist or operate at all within the sphere of the domestic law of Sierra Leone.[44]

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[41] *Prosecutor v. Brima Bazzy Kamara*, Case No. SCSL-2003-10-PT, 'Application by Brima Bazzy Kamara in Respect of Jurisdiction and Defects in Indictment', 22 September 2003 ("*Kamara*, Preliminary Motion").
[42] *Kamara*, Preliminary Motion, para 1.10-1.11, 1.21, 2.3.
[43] *Prosecutor v. Brima Bazzy Kamara*, Case No. SCSL-2003-10-PT, 'Prosecution Response to the Defence Application in Respect of Jurisdiction and Defects in Indictment', 30 September 2003 ("*Kamara*, Prosecution Response").
[44] *Kamara*, Prosecution Response, para 6.

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17. As a creature of an international treaty, the Special Court exists and functions in the sphere of international law. The judicial power that it exercises is not the judicial power of the Republic of Sierra Leone.[45]

18. A treaty is a valid basis for the creation of an international criminal court, in accordance with the Vienna Conventions. Any breach of the Constitution would not be "manifest" within the meaning of Article 6 of the Vienna Conventions.[46]

19. The principle of *nullum crimen sine lege* requires only that the relevant acts were unlawful at the time of their commission as a matter of international law because the Special Court only functions in this sphere. Therefore the Constitution is inapplicable.[47]

20. The Defence filed no Reply within the required time.

D. Oral Submissions on the behalf of all Parties

21. At the oral hearing on 5 November 2003 oral submissions on the issue of Constitutionality were made in the manner hereinafter appearing:

22. Mr Ken Fleming Q.C. for the Accused Brima Bazzy Kamara submitted that the Special Court derives its jurisdiction from the Government and the Ratification Act. There is a great interlinking of the Special Court with the domestic jurisdiction unlike the ICTY and the International Criminal Tribunal for Rwanda ("the ICTR"). The Government brought the Special Court within the domestic jurisdiction by that ratification. Ratification introduced rights and obligations for the citizens of Sierra Leone. In answer to a question from the Bench he conceded that if the Appeals Chamber were to hold that the Special Court was established by treaty, then the Defence would lose. He submitted that the Special Court is not an international court, but a domestic court. Under section 66 of the Constitution Chief Prosecutor David Crane is not to prosecute, but instead the Attorney General of Sierra Leone or the Director of Public Prosecutions.The test to determine the Special Court's power to review its constitutive documents comes from the *Tadic* case, *supra*.

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[45] *Ibid.*, para 7.
[46] *Ibid.*, para 8 - 13.
[47] *Ibid.*, para 14.

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23. Mr Tejan-Sie for the Accused Samuel Hinga Norman, also relying upon *Tadic*, *supra*, posited that the Special Court has jurisdiction to examine whether the Special Court itself was properly established. The Special Court originated from an Agreement between the UN and the Government and its implementation at the national level would require that the Special Court Agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements.[48] Section 40(4) of the Constitution gives the President the power to sign treaties, but there is a proviso regarding matters within the legislative competence of the Sierra Leone Parliament. Articles 8(1) and (2) of the Statute of the Special Court alter the Constitution where section 122 states that the Sierra Leone Supreme Court shall be the final court of appeal. The Ratification Act therefore breached section 120(2) of the Constitution since any bill altering any of the provisions referred to in section 108(3) must be submitted to and approved by referendum. Further, the Special Court should take judicial notice that the Government at all material times did not have effective control of Sierra Leone as two-thirds of the country was under the effective control of the Revolutionary United Front ("RUF").

24. Mr Stephen Powles for the Accused Morris Kallon also relied on *Tadic* paragraph 20 and submitted that the Appeals Chamber has jurisdiction to examine the legality of its establishment. Section 40(4) of the Constitution was an inappropriate way of going about a treaty with the UN. The President in acting under section 40(4) of the Constitution was amending it.

25. Mr Christopher Staker for the Prosecution made the following comprehensive submissions, citing a plethora of authorities:

    a) The terms of the Special Court Agreement make clear that it establishes the Special Court itself. The terms of the Ratification Act makes clear that this Act does not establish the Court but ratifies and implements the Agreement in municipal law, as evident from the title, preamble and memorandum.

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[48] Archbold *International Criminal Courts, Practice, Procedure and Evidence*, London 2003, para E2-002.

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b) The Special Court Agreement is an international treaty in accordance with Article 2 of the Vienna Conventions, as indicated by the Secretary-General, and evident in the Articles of the Agreement itself.

c) The Special Court Agreement entered into force by virtue of mutual notification and was in no way dependent upon the enactment of valid implementing legislation by Sierra Leone.

d) The Special Court is an international organisation and an international court.

e) The Special Court exists and functions in the sphere of international law, not municipal law.

f) The validity of the Special Court Agreement and existence and functioning of the Court in the sphere of international law are not affected by provisions of the Constitution.

E. Additional Post-Hearing Written Submissions of the Prosecution

26. On 24 November 2003 the Prosecution filed additional submissions in answer to all three Accused bringing motions in one integrated document.[49]

27. The Prosecution divided argument into six propositions. The arguments put forward were broadly the same as those presented in the Prosecutor's oral submissions, with some additional explication:

a) Although no instance has arisen, the Prosecution finds no reason why an international court should not be able to try crimes under the municipal law of a State, should all relevant states agree. Accordingly Article 5 of the Special Court Agreement is valid.[50]

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[49] *Prosecutor v. Morris Kallon*, Case No. SCSL-2003-07-PT, *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, *Prosecutor v. Brima Bazzy Kamara*, Case No. SCSL-2003-10-PT, 'Additional Written Submissions of the Prosecution – Legality of the Establishment o the Court', 24 November 2003 ("Prosecution Additional Submissions").

[50] Prosecution Additional Submissions, paras 16 – 18.

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b) Although it has been described as a hybrid tribunal, the Special Court exists and functions in the sphere of international law, and not domestic law. The reference to a '*sui generis*' court in the Report of the Secretary-General is merely an observation that the Special Court is the first international criminal court to have been created by Treaty between the UN and a State. The mere fact that the Secretary-General describes the Special Court as one of "mixed...composition" means only that the staff of the Court is to be composed of a mixture of international and Sierra Leonean individuals, and does not mean that the Special Court functions in the sphere of domestic Sierra Leonean law.[51]

c) Of those 29 States ratifying the ICC Statute, only two or three indicated constitutional concerns regarding similar issues to those in the current motion, and those countries with more similar constitutional traditions to Sierra Leone did not. Therefore there can have been no 'manifest' violation.[52]

28. The Prosecution then reiterated its arguments on the 'effective control' issue and the principle against retroactive criminal legislation.[53]

II. THE PRINCIPAL ISSUES AND THEIR DETERMINATION

29. The arguments and submissions of the Defence and Prosecution which have purposely been set out *in extensu* show quite clearly that the principal questions which arise for determination in the three preliminary motions are:

a) Whether the Special Court has the competence and jurisdiction to determine the lawfulness and the validity of its own creation; and

b) If the Special Court has such competence and jurisdiction, was it lawfully and validly established?

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[51] Prosecution Additional Submissions para 27.
[52] Prosecution Additional Submissions para 49.
[53] Prosecution Additional Submissions para 54-57.

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A. Jurisdiction of the Special Court

30. In resolving the first question, the Agreement between the UN and the Government of Sierra Leone which may be termed the primordial constitutive document, must necessarily be our starting point, together with the Statute of the Special Court.

31. Article 1 of the Special Court Agreement is captioned "Establishment of the Special Court" and it states:

> "1. There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 December 1996.
>
> 2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to the Agreement and forms an integral part thereof."

32. The conduct of legal proceedings in the Special Court is governed by Article 14 of the Statute, which empowers the Special Court to apply the Rules of Procedure and Evidence of the ICTR, obtaining at the time of the establishment of the Special Court, the necessary changes to be made (Article 14(1)). Furthermore, the Special Court is mandated to amend the Rules or adopt additional Rules where the applicable Rules do not, or do not adequately, provide for a specific situation (Article 14(2)).

33. A perusal of the Rules reveals that the Appeals Chamber of the Special Court is clothed with the exclusive power to determine, as soon as practicable, issues relating to jurisdiction. In the words of Rule 72(E):

> "Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which raise a serious issue relating to jurisdiction shall be referred to the Appeals Chamber, where they will proceed to a determination as soon as practicable."

34. It is beyond argument, therefore, that the Appeals Chamber of the Special Court has the competence to determine whether or not the Special Court has jurisdiction to decide on the lawfulness and validity of its creation.

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35. All Defence Counsel and the Prosecution have called in aid the case of *Tadic* on the question whether the Special Court has jurisdiction to decide the issue of conformity with the Constitution. The Defence Reply by Counsel for the Accused Kallon in which it is stated that the Prosecution submitted that the Special Court has no jurisdiction to decide the question of conformity with the Constitution[54] seems to be citing the Prosecution a little out of context.

36. The Prosecution's position is that there has been no manifest violation of the Constitution and therefore it is immaterial to the validity of the Special Court Agreement whether the conclusion of the Agreement was not in fact in conformity with the Constitution. It is in this context that they submit that the Special Court has no jurisdiction to decide the question, on the ground that only national courts of Sierra Leone could.[55]

37. In fact, the Prosecution says it does not deny that the Special Court has the jurisdiction to determine the legality of its own creation for the purpose of deciding its own jurisdiction.[56] In this regard they are echoing the Appeals Chamber in the *Tadic Jurisdiction Appeal Decision*. This Appeals Chamber, as that in *Tadic*, is of the view that common sense dictates that for the several issues raised in the respective preliminary motions to be adjudicated upon, the Chamber must first and foremost determine if it has jurisdiction to decide whether the Special Court has been lawfully established. As has already been stated, the Special Court Agreement and the Rules provide that basic and indispensable mandate and it is, therefore, indisputable that the Chamber has jurisdiction.

B. Constitutionality of the Special Court

38. Many arguments and submissions hereinbefore referred to have been put forward by Defence Counsel in support of their contention that the Special Court is unconstitutional, that the Government acted unconstitutionally in establishing it and that the Special Court is, therefore an *ultra vires* and unconstitutional institution.

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[54] *Prosecutor v. Morris Kallon*, Case No. SCSL-2003-07-PT, Reply to Prosecution Response, 30 June 2003, para 11.
[55] *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, Prosecution Response, 7 July 2003, para 10-12.
[56] *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, *Prosecutor v. Morris Kallon*, Case No. SCSL-2003-07-PT, *Prosecutor v. Brima Bazzy Kamara*, Case No. SCSL-2003-10-PT, 'Additional Written Submissions of the Prosecution – Legality of the Establishment of the Court', para 3.

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39. It is, therefore, necessary to examine the means by which the Special Court was established with a view to determining whether the appropriate procedures were followed and relevant legal requirements fulfilled.

(a) How Did the Special Court Come About?

40. The Report of the Secretary-General states that the Security Council by its Resolution 1315 (2000) of 14 August 2000, requested the Secretary-General to negotiate an agreement with the Sierra Leone Government to create an independent Special Court to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes committed under relevant Sierra Leonean law committed within the territory of Sierra Leone. [57]

41. As stated in the Report,

> "[t]he subject-matter jurisdiction of the Special Court ... covers the most egregious practices of mass killings, extra-judicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege* and the prohibition on retroactive criminal legislation, the international crimes enumerated are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime."[58]

(b) The Special Court is Treaty-Based and Sui Generis:

42. The Secretary-General's Report examines and analyses the nature and specificity of the Special Court emphasising that, unlike the ICTY and ICTR which were established by resolution of the Security Council, the Special Court,

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[57] Report of the Secretary-General, above note 16.
[58] *Ibid*, para 12.

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"is established by an agreement between the United Nations and the Government of Sierra Leone and is therefore *a treaty-based sui generis court of mixed jurisdiction and composition*. Its implementation at the national level would require that the Special Court Agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements."[59] [Emphasis supplied.]

43. The assertion that the Special Court is treaty-based is justified on a perusal of the Vienna Convention on the Law of Treaties between States and International Organisations ("the 1986 Vienna Convention"). Article 2(1)(a) defines "treaty" as,

> "an international agreement governed by international law and concluded in written form... between one or more States (in this instance Sierra Leone) and one or more international organisations (the United Nations)..."

And in the words of Article 31(1) of the 1986 Vienna Convention,

> "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."

(c) Was the Special Court Agreement Incorporated in the National Law of Sierra Leone in Accordance with Constitutional Requirements?

44. The Special Court Agreement was signed on 16 January 2002 by the duly authorised representatives of the UN and the Government, namely, Hans Correll, Assistant Secretary-General for Legal Affairs, and Soloman Berewa, Attorney-General and Minister of Justice, respectively. In Article 21 it is provided that "the Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with."

45. The Ratification Act was enacted in March 2002. In its Memorandum of Objects and Reasons it is stated that the object of the Bill is to make provision for the ratification and implementation of the Agreement between the Government and the UN signed on 16 January 2002, for the establishment of the Special Court.

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[59] *Ibid*, para 9.

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46. In the preamble to the Ratification Act it is also stated that the Special Court Agreement was signed under the authority of the President and that by the proviso to section 40(4) of the Constitution it is required to be ratified by an Act of Parliament.

47. Counsel for the Accused Hinga Norman, however, contends that the creation of the Special Court by the Government "in agreement with the United Nations by virtue of the Special Court Agreement 2000 (Ratification) Act 2000 in effect amends fundamental aspects of the Constitution of Sierra Leone for which no referendum was held."[60] Counsel for the Accused Hinga Norman goes on to argue that the establishment of the Special Court clearly amends the judicial framework and Court structure in Sierra Leone and cites section 120(1) of the Constitution which states:

> "The judicial power of Sierra Leone shall be vested in the Judiciary of which the Chief Justice shall be the head."[61]

48. Those arguments and submissions are erroneous, if not fallacious, for four main reasons.

49. First, the Special Court is *not* part of the Judiciary of Sierra Leone and this fact is explicitly stated in section 11(2) of the Ratification Act:

> "The Special Court shall not form part of the Judiciary of Sierra Leone."

50. Secondly, under Article 11(d) of the Special Court Agreement, unlike the Judiciary of Sierra Leone, the Special Court possesses the judicial capacity necessary to "(e)nter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Special Court." This means in effect that the Special Court has the power to conclude treaties, which power the national courts do not have.

51. Thirdly, as a treaty-based organ the Special Court, "is not anchored in any existing system (i.e. United Nations administrative law or the national law of the State of the seat.)"[62]

52. Fourthly "the Special Court for Sierra Leone is established *outside* the national court system."[63] [Emphasis supplied.]

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[60] *Prosecutor v. Samuel Hinga Norman*, Case No.SCSL-2003-08-PT, Defence Motion, 26 June 2003, para 9.
[61] *Ibid.* para 9.
[62] Report of the Secretary-General, para 9.

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53. For these reasons and having regard to the provisions of section 40(4) of the Constitution, the argument that the creation of the Special Court in effect amends the Constitution and that consequently a referendum should have been held is without substance. The establishment of the Special Court under Article 1 of the Special Court Agreement fulfils the relevant constitutional requirements and the appropriate procedures were certainly followed.

(d) 'Does the Special Court provide for Fair Trial Safeguards as Required for it to be Established by Law?

54. Having fulfilled the conditions as to its establishment, the next question to be considered is whether the Special Court provides the necessary and fundamental safeguards for a fair trial. This is the necessary criterion which will enable this Chamber to determine whether the Special Court has been "established by law."

55. As was stated earlier, the Special Court Agreement is an international agreement governed by international law. The Special Court is accordingly an international tribunal and it is a norm of international law that for it to be "established by law", its establishment must accord with the rule of law. This means that it must be established according to proper international criteria; it must have the mechanisms and facilities to dispense even-handed justice, providing at the same time all the guarantees of fairness and it must be in tune with international human rights instruments.

56. A perusal of the Statute of the Special Court and the Rules bears witness that the various criteria mentioned have been observed and that the Special Court has been established according to the rule of law.

57. For instance, Article 17 of the Statute, dealing with Rights of the Accused, provides:

> "1. All accused shall be equal before the Special Court.
>
> 2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

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[63] *Ibid*, para 39.

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3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute..."

58. The Statute then goes on to produce the fair trial guarantees to be found in Article 14 of the ICCPR[64]. Other fair trial guarantees are stipulated in Article 13 of the Statute. This states that the Judges shall be persons of high moral character, impartiality and integrity who shall be independent in the performance of their functions. Similar provisions can be found in the Rules, all aimed at ensuring equality of arms and a fair trial.[65] The establishment of the Special Court, therefore, accords with the rule of law.

(e). Act of Formal Confirmation of the Special Court Agreement

59. As pointed out in paragraph 44, *supra*, the Special Court Agreement was to enter into force on the day after both parties had notified each other in writing that the legal requirements for entry had been complied with.[66]

60. On 11 April 2002, Dr Ahmed Ramadan Dumbuya, who was then Minister of Foreign Affairs for Sierra Leone wrote to the UN Secretary-General as follows:

> "I write to inform you that the Act incorporating the Agreement for the establishment of the Special Court between the Government of Sierra Leone and the United Nations into the laws of Sierra Leone re. Implementing Act, was given Presidential assent on the 29th March 2002.
>
> Consequently, Sierra Leone has now complied with the legal requirements for entry into force of the Agreement pursuant to Article 21 thereof."[67]

61. On the same day, Hans Corell, Legal Counsel of the United Nations, on behalf of the UN, signed the instrument which "constitutes the Act of Formal Confirmation by the

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[64] International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Suppl. (No. 16) at 52, entered into force 23 March 1976.
[65] See for example Rule 14, 'Solemn Declaration'; Rule 15, 'Disqualification of Judges'; Rule 42, 'Rights of Suspects during Investigation'; Rule 43, 'Recording Questioning of Suspects'; Rule 45, 'Defence Office'; Rule 63, 'Questioning of the Accused'; Rule 66, 'Disclosure of materials by the Prosecutor'; Rule 67, 'Reciprocal Disclosure of Evidence'; Rule 68, 'Disclosure of Exculpatory Evidence'.
[66] Article 21 of the Special Court Agreement.
[67] Letter of 11 April 2002 from Dr Ahmed Ramadan Dumbuya to His Excellency Kofi Annan UN/COURT/601/71.

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United Nations that the legal requirements for entry into force of the Agreement... have been met."[68]

62. The conclusion that must necessarily be drawn from those two documents is that both parties, fully aware of their obligations under the Special Court Agreement (Treaty), were quite satisfied that the legal requirements for the establishment of the Special Court had been fulfilled. The Special Court Agreement accordingly entered into force on 12 April 2002. In all the circumstances, therefore, and having regard to the earlier findings, the conclusion follows that the Special Court was lawfully and validly established.

D. Concurrent Jurisdiction and Primacy

63. We now turn to the questions of concurrency and primacy and that of effective control raised, as separate issues, by Counsel for the Accused Hinga Norman.

64. Article 8 of the Statute of the Special Court states:

> "1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.
>
> 2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of procedure and Evidence."

65. Counsel for the Accused Hinga Norman complains that Article 8 contravenes sections 122 and 125 of the Constitution. It is further submitted that the granting of concurrent jurisdiction and primacy to the Special Court of Sierra Leone is *ultra vires* the Constitution since the Special Court is not mentioned in Chapter VII of the Constitution which creates and grants supervisory role and primacy to the Supreme Court of Sierra Leone as the final Court of adjudication. It is contended that the Judicial Framework and Court Structure is thereby amended.[69]

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[68] 'Act of Formal Confirmation', by Hans Corell, 11 April 2002.
[69] *Prosecutor v. Samuel Hinga Norman*, Case No.SCSL-2003-08-PT, Defence Motion, 26 June 2003, paras 11 - 13.

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66. It is obvious that the Special Court could not have been mentioned in Chapter VII of the Constitution for the simple reason that the Special Court did not exist when the Constitution was promulgated.

67. As we have already held, the Special Court is not part of the Judiciary of Sierra Leone. It is the product of a treaty agreement between the Government and the UN. The Statute of the Court is annexed to the Special Court Agreement and forms an "integral part" of it.[70] Concurrent jurisdiction with the Sierra Leone national courts and primacy over them emanate from that Agreement of which Article 8 of the Statute of the Court is a part. The Special Court Agreement has been ratified according to law thereby incorporating it into the Laws of Sierra Leone.

68. Although Article 8 may appear repugnant when viewed in light of sections 122 and 125 of the Constitution, it does not, in our judgment, amend the judicial framework or court structure of Sierra Leone because the Special Court is not part of the Sierra Leone Judiciary and is outside the structure of the national courts.

69. It is instructive to note that the Statutes of the ICTY and the ICTR have similar provisions.[71] Each of those International Tribunals has concurrent jurisdiction with national courts to prosecute persons for serious violations of international humanitarian law and each has primacy over national courts. Each of those Tribunals, at any stage of the procedure may formally request national courts to defer to the competence of the Tribunal in accordance with their respective Statutes and Rules of procedure. While acknowledging that the ICTY and ICTR have Chapter VII powers of the UN Charter ensuring that there is an obligation on all UN members to co-operate, in the case of the Special Court, as the Agreement is between the UN and Sierra Leone, its primacy is limited to Sierra Leone alone, as also the obligation to co-operate with the Special Court.

70. Article 8 is intended to ensure that for offences other than those committed by "peacekeepers and related personnel",[72] the Special Court will have primacy over the national courts of Sierra Leone. This is consistent with the Special Court's mandate to

[70] See Article 1(2) of the Special Court Agreement.
[71] See Article 9 of the Statute of the ICTY and 8 of the Statute of the ICTR.
[72] Article 1(2) of the Statute of the Special Court.

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prosecute "those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996..."[73]

71. In our judgement, Article 8 does not contravene the Constitution as alleged or at all particularly having regard to our finding that the Special Court is an international tribunal.

E. Is Effective Control of Territory a *Sine Qua Non* for the legality of the Special Court Agreement?

72. Mr Tejan-Sie for the Accused Hinga Norman argued that in May 2000 when the Government requested the United Nations to set up a Special Court to try perpetrators of war crimes and crimes against humanity which had taken place in the territory of Sierra Leone, the Revolutionary United Front ("RUF") and the Armed Forces Revolutionary Council ("AFRC") were in control and effective occupation of two-thirds of Sierra Leone's territory.[74] When asked at the oral hearing for evidence Counsel asked the Chamber to take judicial notice of his opinion. Of course it is trite to say that "Judges are not entitled nor bound to take judicial notice of that which is not common knowledge of the great majority of mankind and of the greater majority of men of business."[75] Counsel did not attempt to satisfy that criterion.

73. Counsel did, however, refer to the concept of the "State" as described in the Montevideo Convention 1933, which provides that

> "the State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States." [76]

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[73] Article 1(1) of the Statute of the Special Court.
[74] See also *Prosecutor v. Samuel Hinga Norman*, Case No.SCSL-2003-08-PT Defence Motion, 26 June 2003, paras 21-25.
[75] *R v Aspinall* (1976) 3 Q.B. D. 48 at 61.
[76] Montevideo Convention on the Rights and Duties of States, signed in Montevideo 26 December 1933, entered into force, 26 December 1934.

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74. Counsel for the Accused Hinga Norman's sheet-anchor is that the Government did not enjoy the obedience of the majority of the people of Sierra Leone because, they contend, the Government did not have effective control over the territory of Sierra Leone.

75. Even if, for the purpose of legal argument, the Chamber accepts that two-thirds of the territory of Sierra Leone was in the control of the RUF and the AFRC, it is a basic, fundamental and over-riding principle of International Law that "(t)he occupation and acquisition of territory through the use of force is illegal and territory gained in this manner does not belong to the conqueror."[77]

76. It was on that basic principle that Creswell J. founded his decision in the case of *Sierra Leone Telecommunications Co. Ltd. v. Barclays Bank Plc*[78] which the Prosecution cites in support. A coup had taken place in Sierra Leone on 25 May 1997. A military junta was thereafter set up and on 22 December 1997 a letter purporting to come from the plaintiff was sent to the defendant Bank suspending, with immediate effect, three signatories to the plaintiff's account and informing the Bank that the plaintiff's board of directors had been dissolved and a new board appointed. The bank later refused to honour several payment requests on the ground that it had reasonable grounds for believing they were made without authority.

77. In the ensuing court action Cresswell J. held that the military junta were not the Government of Sierra Leone. Moreover, the U.K. Government had continued to deal with the democratically elected government and had no dealings with the military junta whose coup had been condemned by the Commonwealth, the Organisation of African Unity and the European Community. The letter of 22 December 1997 from those associated with the junta was, therefore, of no effect and the new directors were not validly appointed. [79]

78. One vital conclusion that can be drawn from that decision is that whether or not an illegal regime is in effective control of a large part of a State's territory, it will not be recognised under International Law so long as the democratically elected Government exists and "so long as it is capable of controlling the affairs of the 'State' in the international

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[77] Dixon, *Textbook on International Law*, 4th ed. 2000, para 5.2.1.7.
[78] [1998] 2 All ER 821, U.K. QB Division
[79] *Ibid.* Decision by Cresswell J, final para.

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community."[80] Accordingly, the Government of Sierra Leone did have authority to enter into an International Agreement, regardless of whether or not it was in 'effective control' of the majority of the territory of Sierra Leone.

79. It follows from all this that the submissions of the Defence on effective control are misconceived and without merit.

F. Alleged violation of the *Nullum Crimen Sine Lege*/Non-Retroactivity Principle

80. Since this Chamber holds that the Special Court is an international tribunal exercising its jurisdiction in an entirely international sphere and not within the system of the national courts of Sierra Leone, in adjudicating on the Defence contention that the crimes enumerated in Articles 2-4 of the Statute were not crimes under Sierra Leone law until the enactment of the Ratification Act, we must determine whether the crimes existed under international law. It is sufficient that the crimes existed under international law, for in that case it becomes irrelevant whether they were offences under the domestic law of Sierra Leone at the time of their alleged commission.

81. In relation to crimes against humanity, violations of Common Article 3 of the Geneva Conventions and Additional Protocol II and other serious violations of international law, as contained in Articles 2-4 of the Statute, the ICTY Appeals Chamber in *Prosecutor v. Delalic et al.*[81] gave their support to the Secretary-General's statement that violations of Common Article 3 had been criminalised for the first time with the establishment of the ICTR. This Chamber also endorses that statement of the Secretary-General.

82. Furthermore, we accept, as a correct statement of the law, the statement in Archbold's *International Criminal Courts*, that "[t]he fact that no court exists with jurisdiction to adjudicate crimes proscribed by international law at the time the offences were committed is not a bar to prosecution and not a violation of the principle *nullum crimen sine lege.*"[82]

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[80] Dixon, *supra* note 77, para 5.2.1.3.
[81] *Prosecutor v Delalic et al.* ("Celebici Case"), ICTY Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para 178.
[82] Archbold, *supra* note 48 para. 17-29.

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We, therefore, reject the submission that the Special Court has no jurisdiction to hear such matters.

HEREBY DECIDE

83. For all the reasons given, I have come to the conclusion that each of these Preliminary Motions ought to be dismissed and they are hereby dismissed.

JUSTICE WINTER

For the above reasons, I agree.

JUSTICE AYOOLA

For the above reasons, I agree.

Done at Freetown this 13th Day of March 2004.

Justice Winter
Presiding

Justice King

Justice Ayoola

[Seal of the Special Court for Sierra Leone]

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