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SCSL-2004-16-PT
(5454 - 5457)

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SPECIAL COURT FOR SIERRA LEONE

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IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice George Gelaga King
Justice Emmanuel Ayoola
Justice Geoffrey Robertson
Justice Raja Fernando

Registrar: Robin Vincent

Date: 25 May 2004

PROSECUTOR **Against** **SANTIGIE BORBOR KANU**
(Case No. SCSL-2004-16-AR72(E))

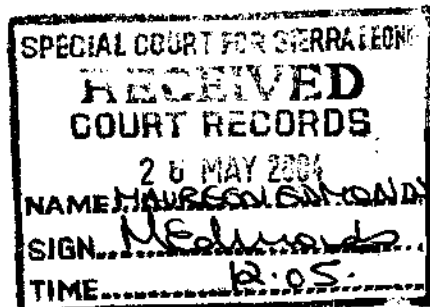
**DECISION ON MOTION CHALLENGING JURISDICTION AND RAISING
OBJECTIONS BASED ON ABUSE OF PROCESS**

Office of the Prosecutor:

Desmond de Silva QC
Luc Côté
Walter Marcus-Jones
Abdul Tejan-Cole

Defence Counsel:

Geert-Jan Alexander Knoops
Joseph Cole



THE APPEALS CHAMBER of the Special Court for Sierra Leone ("Special Court" or "Court");

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 behalf of Santigie Borbor Kanu on 20 October 2003 ("Preliminary Motion");

NOTING that the Prosecution Response was filed on 30 October 2003 and that the Defence Reply was filed on 5 November 2003;

NOTING that the Preliminary Motion was referred to the Appeals Chamber under Rule 72(E) of the Rules of Procedure and Evidence ("Rules") on 22 January 2004;

NOTING that Additional Submissions pursuant to Rule 72(G) were filed by the Defence on 29 January 2004 in accordance with an Order on Expedited Filing of Additional Submissions dated 27 January 2004, and that the Prosecution did not file a Response;

NOTING the Decision of the Appeals Chamber (composed of Justice Winter, Justice King and Justice Ayoola) on Constitutionality and Lack of Jurisdiction of 13 March 2004 in the Kallon, Norman and Kamara cases ("Decision on Constitutionality");

NOTING the Decision of the Appeals Chamber (composed of Justice Winter, Justice King and Justice Ayoola) on Decision on Challenge to Jurisdiction: Lomé Accord Amnesty of 13 March 2004 in the Kallon and Kamara cases ("Lomé Amnesty Decision");

HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES;

HEREBY DECIDES:

1. Although this Preliminary Motion was filed on 20 October 2003, it was not referred to this Chamber until 22 January 2003. The Decisions on Constitutionality and the Lomé Amnesty, which were rendered on 13 March 2004, have effectively disposed of much of the arguments made by this Applicant in relation to the unlawfulness of the Court's establishment and the continuing validity of the amnesty provided in Article IX of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7 July 1999 ("Lomé Accord"). No more need be

said about those aspects of the Applicant's submissions. The rest of the submission can be disposed of shortly.

2. The Applicant labours under some misconception when he argues that the Agreement between the United Nations and the Sierra Leone Government had no 'direct effect within the domestic legal system of Sierra Leone'¹ and, therefore, the Special Court has no jurisdiction to try him. The Special Court is vested with its own specific jurisdiction and competence by the constitutive documents establishing it. As a treaty based institution it operates outside the legal system of Sierra Leone and does not derive its jurisdiction from or within that system.
3. It was argued that 'the entering of a bilateral agreement which established the Special court, may be [...] unconstitutional as it infringes the mentioned sovereign rights of the people of Sierra Leone.'² The said 'mentioned sovereign rights' were said to derive from the constitutional declaration that 'sovereignty belongs to the people of Sierra Leone from whom Government derives all its power, authority and legislative legitimacy'.³ This, clearly, is a declaration of the basic norm of the Sierra Leone constitutional and legal order. Rather than having the consequence which the Applicant sought to attribute to it, it has the effect of enabling the Government validly to exercise those powers vested in it by the Constitution, of which the treating making power is one.
4. The further and fresh point was made by the Applicant that as a member of the Sierra Leone army he is entitled to be tried by fellow officers in a court-martial for any crime alleged to have been committed during his military service. This right is said to derive from Articles 169(3)(e) and 171(13) of the Constitution. As this Chamber had stated in the Decision on Constitutionality, the provisions of the national Constitution do not affect the jurisdiction of the Special Court. It is perhaps worth emphasizing that military personnel of any state may be subject to a system of internal discipline which may replace or oust the jurisdiction of national criminal courts in respect of serious crime. But the existence of such a domestic system of internal discipline cannot have

¹ Preliminary Motion, para. 8.

² Preliminary Motion, para. 10.

³ Article 5(2)(a) of Chapter XII of the Constitution of Sierra Leone, 1991.

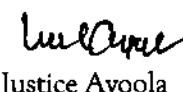
the effect of ousting the jurisdiction of an international court which operates outside the national judicial system

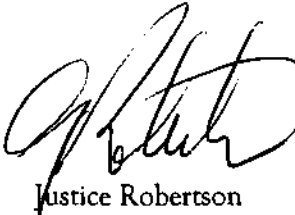
5. The arguments raised relating to constitutional validity of the provisions of the Agreement establishing the Special Court as regards transfer of a Sierra Leonean national to the custody of the Special Court does not raise a question relating to jurisdiction and can rightly be ignored.
6. Finally, the Applicant argued that 'the Special Court cannot assume jurisdiction for crimes which allegedly should have been committed prior to assuming command or allegedly taking the position of a superior'.⁴ It is evident that this line of argument does not raise a jurisdictional issue or, for that matter, one that can be treated as a threshold issue. Rather, the submission relates to matters that may be appropriate as issues of defence.
7. It is evident that the Preliminary Motion is without merit. It is, accordingly, dismissed.

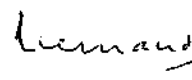
Done at Freetown this twenty-fifth day of May 2004


Justice Winter
Presiding


Justice King


Justice Ayoola


Justice Robertson


Justice Fernando



⁴ Preliminary Motion, para. 29.