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SCSL-2003-08-PT.
(2639-2646)

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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: 15th of October 2003

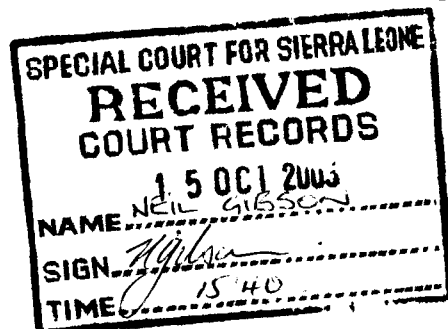
The Prosecutor against

Samuel Hinga Norman
(Case No.SCSL-2003-08-PT)

**DECISION ON THE DEFENCE PRELIMINARY MOTION ON LACK OF
JURISDICTION: COMMAND RESPONSIBILITY**

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions

Defence Counsel:
Mr. James Blyden Jenkins-Johnston
Mr. Sulaiman Banja Tejan-Sie



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 Lack of Jurisdiction: Command Responsibility of the 26th day of June 2003 (“the Preliminary Motion”), in relation to the criminal suit against **Samuel Hinga Norman** (“the Accused”);

CONSIDERING the Prosecution’s Response to the Preliminary Motion dated the 7th day of July, 2003 (“the Response”);

CONSIDERING the Order on the Defence Request for Extension of Time within which to File Defence Reply to Prosecutor’s Response to Defence Preliminary Motions of the 16th day of September, 2003;

CONSIDERING the Defence Reply to the Preliminary Motion of the 14th day of July, 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 provide that “the Chamber” shall refer to the Appeals Chamber of “the Special Court” (“the Appeals Chamber”) for a determination as soon as practicable any preliminary motion which raises a **serious issue** relating to jurisdiction;

CONSIDERING the Statute of the Special Court of Sierra Leone (“the Statute”) and in particular Article 6.3 thereto;

NOTING THE SUBMISSIONS OF THE PARTIES*The Defence Motion*

1. In its “Motion”, the Defence asserts lack of jurisdiction of “the Special Court” to try “the Accused” on all the counts contained into the Indictment on the ground that the principle of command responsibility is not a basis for liability in internal armed conflicts and was not part of international humanitarian law at the time relevant to the Indictment;
2. The submission put forward by the Defence is essentially that in the case of the *Prosecutor v. Hadzihasanovic, Alacic and Kubura*, IT-01-47, before the International Criminal Tribunal for the former Yugoslavia (“the ICTY”), the defence contested the jurisdiction of “the ICTY” on the basis that command responsibility for crimes committed in the course

of an internal armed conflict did not exist in international humanitarian law in 1993 and consequently sought all the counts relating to such command responsibility to be struck from the relevant indictment.

3. Although this argument was rejected by the Trial Chamber II of "the ICTY"¹, the matter was appealed by both parties and, at the time of filing of "the Motion", interlocutory appeal was pending before the Appeals Chamber of "the ICTY".

4. Should the Appeals Chamber of "the ICTY" rule in favour of the defence argument, the Defence consequently intends to reserve the right to raise the same argument as a bar to jurisdiction in the case against "the Accused" for all crimes contained in the Indictment which charge him with command responsibility in relation to internal armed conflict.

The Prosecution Response

5. In its "Response", the Prosecution submits that "the Motion" should be dismissed in that the Defence virtually sets no arguments in support of its contention, merely seeking to reserve its right to raise an argument at a later stage depending on the decision of the Appeals Chamber of "the ICTY" in the case cited by the Defence.

6. "The Special Court", continues the Prosecution, is not bound by decision of the Trial Chamber of "the ICTY", and therefore there is not reason why the Defence could not fully argue this issue before "the Chamber" at this stage. The Prosecution further argues that the Defence does not have a right to unilaterally extend the time limit set for the filing of preliminary motion provided for in Rule 72 of "the Rules".

7. Alternatively, should "the Chamber" decide to rule on the substantive arguments of "the Motion", the Prosecution further argues that the doctrine of command responsibility was part of customary international law at the times relevant of the Indictment against "the Accused". In particular, the Prosecution cites the application of the doctrine of command responsibility during the Second World War criminal trials and its subsequent codification in the Additional Protocol I of the Geneva Conventions and in the Statute of "the ICTY", the International Criminal Tribunal for Rwanda ("the ICTR") and the International Criminal Court.

8. Furthermore, the Prosecution assert that the conflict classification is irrelevant to the applicability of command responsibility being the distinction of conflict of an international or internal nature progressively lessening in international law.

9. Lastly, the Prosecution also submits that the Defence should be precluded to advance further and new arguments and authorities in its reply to "the Response", having

¹ *The Prosecutor v. Hadzihasanovic, Alagic and Kubura*, IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, Trial Chamber II, 12th November 2003.

failed to advance argument directly in "the Motion" and lacking good cause for being granted leave to do so in such reply.

The Defence Reply

10. The Defence "Reply" reiterates the arguments expressed in its "Motion" on the importance to await the decision of the Appeals Chamber of "the ICTY". A possible decision in favour of the defence arguments should allow the Defence to revisit the issue at matter notwithstanding the expiration of the time limits provided for in Rule 72 of "the Rules".

11. In rebut of the Prosecution "Response", the Defence further contends that the doctrine of command responsibility cannot be conceived to be part of customary international law. The inclusion of the doctrine in the Additional Protocol I and its exclusion from the Additional Protocol II [of the Geneva Conventions of the 12th day of August 2003] was deliberate.

NOTING THE DECISION OF THE APPEALS CHAMBER OF "THE ICTY"

12. On the 16th day of July 2003, the Appeals Chamber of "the ICTY" rendered its Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, in the case of the *Prosecutor v. Hadzihasanovic, Alagic and Kubura*.²

13. The interlocutory appeal before the Appeals Chamber of "the ICTY" dealt, in particular, with a challenge by the defence about the responsibility of a superior for the acts of his subordinates in the course of an armed conflict which was not international in character.³

14. In its Decision, the Appeals Chambers of "the ICTY" found the following:

*26. The applicability of command responsibility to internal armed conflicts is not disputed in the cases of the tribunal established for Rwanda, Sierra Leone and East Timor. It is said that these tribunals were established after the ICTY. However, in the view of the Appeals Chamber, the establishment of these bodies was consistent with the proposition that customary international law previously included the principle that command responsibility applied in respect of an internal armed conflict.*⁴

And, in particular:

² *The Prosecutor v. Hadzihasanovic, Alagic and Kubura*, IT-01-47-1AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16th July 2003.

³ *Id.*, para. 3.

⁴ *Id.*, para. 26.

31. *In the opinion of the Appeals Chamber, the Trial Chamber was correct in holding, after a thorough examination of the matter, that command responsibility was at all times material to this case a part of customary international law in its application to war crimes committed in the course of an internal armed conflict.*⁵

Accordingly, the Appeals Chamber of “the ICTY” unanimously dismissed this ground of appeal.⁶

AFTER HAVING DELIBERATED:

Applicable law

15. The Indictment preferred against “the Accused” charges him with several counts for Crimes Against Humanity, punishable under Article 2 of “the Statute”, Violation 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”;

16. Pursuant to Article 6.3 of “the Statute”:

3. *The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*

This provision plainly mirrors the provision of Article 7.3 of the Statute of “the ICTY” and Article 6.3 of the Statute of “the ICTR” in setting forth the criteria for the individual criminal responsibility of a superior for acts committed by a subordinate thereof. The Accused is accordingly indicted for his superior individual criminal responsibility for crimes falling within the mandate of “the Special Court”.

17. Rule 72 of “the Rules”, applicable to the instant “Motion”, reads as follows:

(A) *Preliminary motions by either party shall be brought within 21 days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i).*

(B) *Preliminary motions by the accused are:*

(i) *Objections based on lack of jurisdiction;*

⁵ Id., para. 31.

⁶ Id., para. 57.

(ii) *Objections based on defects in the form of the indictment;*

(iii) *Applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82 (B);*

(iv) *Objections based on the denial of request for assignment of counsel; or*

(v) *Objections based on abuse of process.*

(C) *Objections to the form of the indictment, including an amended indictment, shall be raised by a party in one motion only, unless otherwise allowed by the Trial Chamber.*

(D) *The Trial Chamber shall, except as provided by Sub-Rules (E) and (F) below, dispose of preliminary motions before the trial, and its decisions thereon shall not be subject to interlocutory appeal.*

(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.*

(F) *Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which, in the opinion of the Trial Chamber, raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial shall be referred to the Appeals Chamber, where they will proceed to a determination as soon as practicable.*

(G) *Where the Trial Chamber refers a motion to the Appeals Chamber pursuant to Sub-Rules (E) or (F) above,*

(i) *the party who filed the motion shall file any additional written submission within 14 days of the date of the reference to the Appeals Chamber;*

(ii) *any response to submissions filed under Sub-Paragraph (i) above shall be filed within 14 days;*

(iii) *any reply to the response shall be filed within 7 days.*

Any extension of time may be granted by the Appeals Chamber.

(H) *References by the Trial Chamber pursuant to Sub-Rules (E) and (F) above shall not operate as a stay of proceedings. Such references shall not operate as a stay of the trial itself unless the Trial or Appeal Chamber so orders.*

(I) *This Rule shall be deemed to have entered into force on the 7th of March, 2003.*

18. "The Chamber" would like to draw the parties' attention to the provisions of Sub-Rule 72 (E) above. In particular, this Sub-Rule provides for the reference of preliminary motions to "the Appeals Chamber" in cases where the preliminary motion raises a "serious issue of jurisdiction". It is therefore within the inherent power of "the Chamber", in order to provide for the reference of a preliminary motion to "the Appeals Chamber", to assess whether such preliminary motion objects to lack of jurisdiction and, more particularly, if the substance of such objection is verified, whether such objection could be deemed as "serious".

On the merits of "the Motion"

19. In its "Motion", the Defence relies essentially on the then coming decision of the Appeals Chamber of "the ICTY" in order to reserve itself the right to file arguments in support of its asserted lack of jurisdiction of "the Special Court" to try "the Accused" on the basis of his individual criminal responsibility during an internal armed conflict .

20. "The Chambers" concurs with the relevance cast by the Defence on the outcome of the decision of the Appeals Chamber of "the ICTY" for the furtherance of the doctrine of command responsibility with respect to an internal armed conflict. In addition, "the Chamber" accepts that relevant jurisprudence such as decisions and judgements from the common Appeals Chamber of "the ICTY" and "ICTR" can provide important guidance, *mutatis mutandis*, to the implementation of the mandate of "the Special Court".⁷

21. However, "the Chamber" views the Defence submissions as solely relying on such possible findings of the Appeals Chamber of "the ICTY" in the case before it. As correctly submitted by the Prosecution, "the Chambers" finds that the Defence failed in its "Motion" to provide "the Chamber" with any valid or substantial argument or submissions in support of its general allegation of lack of jurisdiction. "The Motion" also failed to provide "the Chamber" with authorities or other supportive jurisprudence.

22. "The Chamber" is of the opinion that the "Motion" is fundamentally an application to reserve the right to raise an issue at a later stage rather than one who was intending to seriously challenge the jurisdiction of "the Special Court" with reference to internal armed conflicts.

23. It has also to be noted that the Defence, together with its "Motion", simultaneously filed three other preliminary motions objecting on lack of jurisdiction, namely on "Lawfulness of the Court Establishment", "Child Recruitment" and "Judicial

⁷ Article 20 of the Statute, on the Appellate Proceedings, reads as follows:

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Independence". These preliminary motions have been referred by means of order to "the Appeals Chamber" for determination pursuant to Rule 72 (E) of "the Rules" with the finding that these motions raised a "serious issue of jurisdiction"⁸.

24. The doctrine of command responsibility as element of the individual criminal responsibility of "the Accused" is very important and its application as part of customary international law to an internal armed conflict is undoubtedly an issue that could involve jurisdiction. However, in consideration of the aforementioned, "the Chamber" concludes that "the Motion" introduced by the Defence was both in form and substance not an objection to the jurisdiction of "the Special Court".

AND THEREFORE, PURSUANT TO RULE 72 OF THE RULES,

THE CHAMBER

HEREBY DISMISSES "the Motion".

Done in Freetown, this 15th day of October 2003

The Trial Chamber



Judge Pierre Boutet



⁸ *The Prosecutor against Norman*, SCSL-2003-08-PT, Order pursuant to Rule 72 (E) - Defence Preliminary Motion on Lack of Jurisdiction: Lawfulness of the Court's Establishment, Trial Chamber, 17th September, 2003; *Id.*, Order pursuant to Rule 72 (E) - Defence Preliminary Motion on Lack of Jurisdiction: Child Recruitment, Trial Chamber, 17th September 2003; *Id.*, Order pursuant to Rule 72 (E) - Defence Preliminary Motion on Lack of Jurisdiction: Judicial Independence, Trial Chamber, 17th September, 2003.